

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

STATE OF NORTH CAROLINA,

Plaintiff,

v.

MICHAEL MAYO MACKE,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NOS. 15 CRS 432-433



**DEFENDANT'S MOTION TO DISMISS
No Mens Rea as a Matter of Law
and Entrapment by Estoppel**

NOW COMES the defendant, Michael Mayo Macke, and respectfully moves to dismiss the criminal charges brought against him in these matters on the ground that it is manifest as a matter of law, based on the allegations and dates set forth in the indictments and matters subject to judicial notice that Defendant could not have possessed the requisite intent to violate the laws identified in the indictments, and, in support, would show unto the Court the following:

I. DEFENDANT WAS NOT ACTING WITH THE REQUISITE *MENS REA*, AS A MATTER OF LAW, UNDER THESE CIRCUMSTANCES

1. The State has charged the defendant with: "knowingly operat[ing], allow[ing] to be operated, plac[ing] into operation, or keep[ing] in his possession for the purpose of operation, five or more video gaming machines," in alleged violation of G.S. § 14-306.1A(a); and with "knowingly . . . operat[ing], open[ing], set[ting] on foot, carry[ing] on, promot[ing], mak[ing] or draw[ing], a lottery," in alleged violation of G.S. § 14-290. The charge of engaging in a continuing criminal enterprise by violating G.S. § 14-306.1A(a) as part of a continuing series of violations, in alleged violation of G.S. 14-7.20, also requires knowing violations of G.S. § 14-306.1A(a).
2. In addition, the conspiracy charge against the defendant requires a showing that his alleged co-conspirator, Mr. Lennox, knowingly violated § 14-306.1A(a), and that the defendant acted in concert with Mr. Lennox in pursuit of a common purpose. *See, e.g., State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010) (affirming conviction for conspiracy to commit a crime based on co-conspirator's intent).
3. The defendant agrees with the State that there is a *mens rea* requirement for proof of violation of G.S. § 14-306.1A(a), G.S. § 14-309, G.S. § 14-290, and G.S. § 14-7.20, and that a showing of "knowingly" is required for each offense. "[O]ffenses that require no *mens rea* generally are disfavored." *State v. Bowman*, 188 N.C. App. 635, 656 S.E.2d 638 (2008) (quoting *Staples v. United States*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608, 616 (1994)). "[T]he common-law rule requiring *mens rea* has been 'followed in regard to statutory crimes even where the

statutory definition did not in terms include it.” *Staples*, 511 U.S. at 606 (quoting *United States v. Balint*, 258 U.S. 250, 251-251, 66 L. Ed. 604, 42 S. Ct. 301 (1922)).

4. The United States Supreme Court has recently spoken again on this issue. In *Elonis v. United States*, No. 13-983, 135 S.Ct. 2001, 2009 (June 1, 2015), Chief Justice John G. Roberts, writing for the Court (in a 7-2 decision) said: “The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’ *Morissette v. United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952). This rule of construction reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’ *Id.*, at 252, 72 S.Ct. 240. . . . We therefore generally ‘interpret [] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.’ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).”
5. There exist multiple grounds to show the defendant did not have the requisite *mens rea*, or scienter, to have committed the offenses alleged:

FIRST GROUND:
PRELIMINARY INJUNCTION ENTERED BY A SUPERIOR COURT JUDGE
IN ONSLOW COUNTY CIVIL ACTION

- A) Gift Surplus, LLC is a party to a civil action pending in Onslow County Superior Court, styled, *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, File No. 13 CVS 3705 (Onslow County Superior Court) (hereinafter, the “Onslow Civil Action”).
- B) On October 11, 2013, Special Superior Court Judge Jack Jenkins conducted a hearing upon a motion for preliminary injunction filed by the plaintiffs with their complaint in the Onslow Civil Action, and also heard a motion to dismiss filed by the defendant, the Sheriff of Onslow County.
- C) In that case, the plaintiffs had filed a complaint seeking injunctive relief from law enforcement action in Onslow County and declaratory judgment that the sweepstakes promotion of Gift Surplus, LLC, was in compliance with all applicable North Carolina laws, including N.C. Gen. Stat. § 14-306.1A.
- D) The Gift Surplus sweepstakes promotion that is the subject of the Onslow Civil Action is the same promotion at issue in this criminal proceeding.
- E) After hearing evidence presented by the parties at the motions hearing, Judge Jenkins took the matter under advisement, and, on November 4, 2013, entered an Order denying the defendant sheriff’s motion to dismiss and granting the plaintiffs’ motion for preliminary injunction in the

Onslow Civil Action. A copy of that Order is attached hereto and marked "Exhibit A."

- F) In his Order granting temporary injunctive relief to the plaintiffs (the "Onslow Order"), Judge Jenkins found, in Finding of Fact No. 24, that: "The evidence shows that the Plaintiffs are more likely to prevail because they are selling valid products in e-commerce and promoting the sale of said products via a sweepstakes. The use of the games on the Gift Surplus Kiosk are dependent on skill or dexterity to reveal a prize in the Gift Surplus promotional sweepstakes."
- G) Judge Jenkins concluded, in Conclusion of Law No. 6, that: "The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law."
- H) Judge Jenkins also concluded, in Conclusion of Law No. 8, that:

"There is a likelihood that the Plaintiffs will prevail in that:
 - a. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
 - b. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
 - c. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes."

The Onslow Order, p. 5.

SECOND GROUND:
THE COURT OF APPEALS' DECISION UPHOLDS THE TRIAL COURT'S
PRELIMINARY INJUNCTION IN ONSLOW COUNSY

- A) The defendant Sheriff of Onslow County filed a Notice of Appeal to the North Carolina Court of Appeals from Judge Jenkins' Order granting temporary injunctive relief to the plaintiffs and denying the sheriff's motion to dismiss.
- B) On September 5, 2014, the Court of Appeals affirmed, in a 2-1 decision, most of Judge Jenkins' Order in the Onslow Civil Action, and exercised

limited jurisdiction over the appeal to hold that that Judge Jenkins' use of the words "validly" and "lawful" in certain parts of the Onslow Order was premature in ruling on a motion for preliminary injunction, which should not determine the merits of the plaintiffs' claims in the action. A copy of the Court of Appeals' published decision in the Onslow case is attached hereto and marked "Exhibit B."

C) The North Carolina Court of Appeals ruled as follows:

"As these portions of the preliminary injunction go beyond maintaining the status quo by declaring that Plaintiffs' conduct was *lawful* or *valid*, these portions affect Sheriff Brown's substantial right to enforce the laws of North Carolina. Thus, we exercise jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the third item in the decretal section of the preliminary injunction.

The remainder of the preliminary injunction does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits."

Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al., 72 S.E.2d 666, 676, 2014 N.C. App. LEXIS 982 (Sept. 5, 2014).

D) Significantly, the Court of Appeals' decision filed on September 5, 2014, did not disturb Conclusion of Law No. 8 from the Onslow Order, which concluded:

"There is a likelihood that the Plaintiffs will prevail in that:

- a. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
- b. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
- c. Gift Surplus System v1-01.1 and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes."

The Onslow Order, p. 5.

- E) The Court of Appeals' decision also did not disturb Section 2(a) of the decretal portion of the Onslow Order, in which Judge Jenkins ruled:

"That Plaintiff's Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:

- a. Restrained and enjoined from using North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com [sic] website and gift cards[.]
- b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and
- c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County."

The Onslow Order, p. 6 (Emphasis added).

- F) The Court of Appeals' decision also did not disturb the following findings of fact made by Judge Jenkins in the Onslow Order:

"19. Nick Farley (hereafter, "Farley") testified on behalf of the Plaintiffs. He was proffered and accepted an expert witness in the field of gaming machines and software.

20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v. 1-01.1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received in evidence).

21. Farley testified that, based on his expertise honed through years of experience and his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words 'skill' and 'dexterity' as used by the industry in North Carolina and many other jurisdictions.

22. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v. 1-01.1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.

23. The Plaintiffs have suffered and will continue to suffer significant and irreparable harm if the Defendants are not enjoined from enforcing NCGS 14-292, NCGS 14-293, NCGS 14-301, and NCGS 14-306.1a [sic] and NCGS 14-306.4"

The Onslow Order, p. 4.

G) On May 11, 2015, the State of North Carolina, acting through its agent the District Attorney of the 28th Prosecutorial District (Buncombe County), obtained two indictments against the defendant herein, Michael Mayo Macke, charging him (in Case Nos. 15 CRS 432-433) with four separate criminal offenses:

(1) "Conspir[ing] with Allister "Lenny" Lennox in an ongoing and open-ended conspiracy to operate force or more video gaming machines in violation of NCGS 14-306.1A and NCGS 14-309(b)." [In alleged violation of "G.S. No. 14-2.4(a)"].

(2) "Engag[ing] in a continuing criminal enterprise by violating the felony provisions of N.C.G.S. 14-306.1A and NCGS 14-309(b). This enterprise was a continuing series of violations of the aforesaid felony provisions, and was undertaken in concert with five or more other persons to whom the defendant occupied a position as organizer, supervisor, and manager, and from which the defendant obtained substantial income or resources." [In alleged violation of "G.S. No. 14-7.20"].

(3) "Knowingly operate, allow to be operated, place into operation, or keep in his possession for the purpose of operation, five or more video gaming machines." [In alleged violation of "G.S. No. 14-306.1A(a)"].

(4) "And knowingly did operate, open, set on foot, carry on, promote, make or draw, a lottery." [In alleged violation of "G.S. No. 14-290"].

H) On the date these charges were issued against the defendant, on May 11, 2015, the Court of Appeals' decision in *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, 72 S.E.2d 666, 2014 N.C. App. LEXIS 982 (Sept. 5, 2014), affirming substantial portions of

the Onslow Order – including all of those portions quoted above – was still in effect.

THIRD GROUND:

ACQUITTLAS AND DISMISSALS IN EACH AND EVERY STATE DISTRICT COURT CASE INVOLVING THE GIFT SURPLUS SYSTEM BEGINNING IN APRIL 2013

- A) In addition, the undersigned counsel for the defendant, George B. Hyler, Jr., has defended various operators of the Gift Surplus promotional sweepstakes against criminal charges over the past two years in 20 different criminal cases in nine different counties in the State of North Carolina and obtained “not guilty” verdicts or dismissals in each and every one of those cases. Copies of not guilty verdicts, dismissals, and/or orders to return seized equipment/property from each of those cases are attached hereto and marked “Exhibit C-1” through “Exhibit C-10”; and an index to these records is marked “Exhibit C”.
- B) The defendant, Mr. Macke, was and at all relevant times has been aware of the disposition of all of these North Carolina cases, the first of which was decided by verdict of “not guilty” on April 18, 2013, after a trial that occurred on that date in Macon County, which he attended and witnessed, being the matter of *State v. Berry*, File Nos. 13-CR-218 - 221, Macon County District Court.

FOURTH GROUND:

VOLUNTARY DISMISSAL OF CRIMINAL CHARGES BY THE STATE IN BUNCOMBE COUNTY DISTRICT COURT IN AUGUST 2014

- A) One of those cases was disposed of in Buncombe County by a voluntary dismissal entered by the State on August 21, 2014, in the matter of *State v. Ammar*, File Nos. 14-CR-01932, 50712, Buncombe County District Court.
- B) In *State v. Ammar*, the City of Asheville Police Department had seized four Gift Surplus machines, and the State had charged Khaled Abed Ammar with a violation of N.C.G.S. § 14-306.4 for allegedly “possess[ing] and/or operat[ing] three (3) electronic machines for the purpose of a sweepstakes.” Detective Brian Hogan of the Asheville Police Department was involved in the investigation and seizure of Gift Surplus equipment in the matter of *State v. Ammar*.
- C) On the date of the call of trial in *State v. Ammar*, the undersigned counsel was prepared to defend the case with several witnesses who were present in the courtroom and were prepared to testify, including Nick Farley, who testified as an expert in the Onslow Civil Action, and Mark Nizdil, who testified in both the Onslow Civil Action and in the matter of *State v. Berry*, File Nos. 13-CR-218-221, Macon County District Court.

- D) In *State v. Ammar*, the undersigned counsel had filed a motion to dismiss the charges against Mr. Ammar. A copy of that motion is attached hereby and marked "Exhibit D-1." The Honorable Julie M. Kepple took the Motion to Dismiss under advisement and review during a brief adjournment of court after the call of the case for trial.
- E) When the court reconvened, Assistant District Attorney Jeremy Ingle announced a voluntary dismissal of the charges against Mr. Ammar in open court, and Judge Kepple entered an Order on Motion for Return of Equipment later that same day. Records of the dispositions of those cases are attached hereto and marked "Exhibit D-2" and "Exhibit D-3".

FIFTH GROUND:
EQUIPMENT SIEZED BY WEAVERVILLE POLICE DEPARTMENT
ORDERED TO BE RETURNED AND NO CRIMINAL CHARGES FILED

- A) On September 10, 2014, agents of the City of Weaverville Police Department, in Buncombe County, seized two Gift Surplus machines that had been operating at a Mountain Energy store in Weaverville since about September 5, 2014.
- B) On September 19, 2014, the defendant, Mr. Macke, and his alleged co-conspirator, Mr. Lennox, met with Weaverville Police Detective Allan Wyatt about the Gift Surplus machines that had been seized.
- C) After that meeting and after further discussions with the undersigned counsel about the Gift Surplus sweepstakes promotion and the recent ruling of the North Carolina Court of Appeals in the Onslow Civil Action, Weaverville Police Detective Allan Wyatt agreed to return, and did return, the seized Gift Surplus machines. A Consent Order was entered on October 21, 2014, by the Honorable Steven D. Cogburn, Clerk of Superior Court, in Case No. 14 CVD 4325, a copy of which is attached hereto and marked "Exhibit E."
- D) No criminal charges were filed against anyone related to the seizure of the two Gift Surplus machines from the Mountain Energy store in Weaverville on September 10, 2014.

SIXTH GROUND:
STATEMENT BY BUNCOMBE COUNTY SHERIFF'S SPOKESPERSON
THAT THE GIFT SURPLUS SYSTEM IS LAWFUL

- A) On January 8, 2015, a news report was published in the on-line edition of the *Asheville Citizen-Times*, in which Buncombe County Sheriff's Office Spokewoman, Natalie Bailey, is reported to have said that "the department has essentially adhered to a policy of enforcement against the games that

do not operate the Gift Surplus system.” A copy of that news report is attached hereto and marked “Exhibit F.”

- B) On April 10, 2015, Buncombe County Sheriff Van Duncan, District Attorney Todd Williams, and Assistant District Attorney Alex Bass held a press conference about law enforcement against video gaming machines in the district and county, which the undersigned counsel for the defendant attended. At that press conference, Sheriff Duncan said that he would let the stores know they have a certain amount of time to get rid of these machines and that letters would be sent to the offending businesses within the next few weeks. No letters were ever sent to this defendant by the Sheriff prior to his indictment and arrest.

**DEFENDANT HAD NO *MENS REA* AS A MATTER OF LAW
DURING THE TIME PERIOD STATED IN THE INDICTMENTS**

6. The indictments state that the alleged offenses occurred during the time period between June 24, 2013 and May 10, 2015.
7. As set forth above, from November 4, 2013 until May 10, 2015, there was an Order of a Superior Court Judge in effect enjoining the Sheriff of Onslow County from enforcing various North Carolina statutes, including G.S. § 14-306.1A, against Gift Surplus and one of its distributors, which was affirmed by the Court of Appeals on September 5, 2014. Both the defendant and Mr. Lennox were well aware of these rulings regarding the Gift Surplus system in the Onslow County civil case.
8. During the time period from April 18, 2013 until November 4, 2013, the undersigned counsel, George Hyler, had obtained “not guilty” verdicts on behalf of two different operators of the Gift Surplus kiosks, in *State v. Berry*, File Nos. 13-CR-218 - 221, Macon County District Court (on April 18, 2013), and in *State v. Hildebrandt*, File No. 13-CR-233, Jackson County District Court (on July 9, 2013), and had obtained a court order dismissing similar charges in *State v. Britt*, File Nos. 13-CR-2731-2732, Robeson County District Court (entered on October 7, 2013).
9. The defendant, Mr. Macke, has been physically present in the state district court cases that were dismissed or where verdicts of “not guilty” were entered, and Mr. Lennox has been present at many of those cases as well. Mr. Macke has been in regular contact with the undersigned counsel and has always been aware that there have been no convictions of any person for promoting or operating the Gift Surplus system in the State of North Carolina since they first began operating in early 2013.
10. In Buncombe County, criminal charges filed against one operator of Gift Surplus machines were voluntarily dismissed by the State on August 21, 2014, after a motion to dismiss had been filed by the undersigned counsel. Mr. Macke and Mr. Lennox were aware of the State’s voluntary dismissal in that case.

11. Gift Surplus machines that had been seized from another location in Buncombe County, by agents of the Weaverville Police Department, were returned without charges being filed, after a Consent Order was entered on October 21, 2014. Both the defendant and Mr. Lennox were well aware of this seizure of machines.
12. Explicit statements made by agents of the Buncombe County Sheriff's Office made in January and April 2015 led both the defendant and Mr. Lennox to believe that the Gift Surplus system was not considered to be illegal by Sheriff Van Duncan and any of his agent deputies.
13. Under these facts, the defendant would submit that he did not have the requisite *mens rea*, as a matter of law, to violate or to engage in an enterprise by violating any North Carolina statute, including G.S. § 14-306.1A(a) and G.S. § 14-290.
14. The defendant would also submit that his alleged co-conspirator, Mr. Lennox, did not have the requisite *mens rea*, as a matter of law, to support a finding of criminal culpability against the defendant for conspiracy.

II. THE DOCTRINE OF ENTRAPMENT BY ESTOPPEL REQUIRES THAT THE CHARGES BE DISMISSED

1. Defendant also moves that the charges brought against him be dismissed based on the doctrine of entrapment by estoppel, and re-alleges and incorporates by reference all of the allegations set forth above in support of Section I of this motion.
2. Under North Carolina law, "In order to assert an entrapment-by-estoppel defense, [the defendant] must do more than merely show the government made 'vague or even contradictory' statements. Rather, he must demonstrate that there was 'active misleading' in the sense that the government actually told him that the proscribed conduct was permissible." *State v. Pope*, 713 S.E.2d 537 (N.C. App. 2011) (quoting *United States v. Aquino-Chacon*, 109 F.3d 936, 939 (4th Cir. 1997), *cert. denied* 522 U.S. 931, 118 S.Ct. 335, 139 L.Ed.2d 260 (1997)); *State v. Barr*, 721 S.E.2d 395 (N.C. App. 2012). "In an entrapment-by-estoppel defense, the burden is on the defendant to offer evidence showing that he reasonably relied on explicit assurances by government officials of the legality of his actions." *Id.* A government official includes "... a judge, a prosecuting attorney, an ATF official, or a probation officer[.]" *Barr*, at 344-345.
3. The United States Supreme Court has explained the doctrine of entrapment by estoppel as follows: "[C]itizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *United States v. Laub*, 385 U.S. 475, 487, 87 S.Ct. 574, 581, 17 L.Ed.2d 526, 534 (1967) (quoted in *State v. Barr*, 721 S.E.2d 395, 404 (N.C. App. 2012)). A jury may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438, 79 S.Ct. 1257, 1266, 3 L.Ed.2d 1344, 1355 (1959).

4. Here, the statements of the Buncombe County Sheriff's agent were not vague. They were explicit. One statement was made by the designated spokesperson for the Sheriff, who told a newspaper reporter that "the department has essentially adhered to a policy of enforcement against the games that do not operate the Gift Surplus system," which was published in the *Asheville Citizen-Times*. Another statement was made to the press by Sheriff Van Duncan who said that he would let the stores know they have a certain amount of time to get rid of these machines.
5. Defendant was actively misled into believing that the Gift Surplus sweepstakes promotion and machines were considered by the Buncombe County Sheriff and his designated spokesperson to be in compliance with North Carolina law, or, at least, that he would have an opportunity to take them out of operation before criminal charges were filed against him or any of his agents or affiliated operators.
6. The defendant's reliance on these statements, in light of all of the foregoing that has been alleged in this motion, was reasonable. Thus, the charges against the defendant should be dismissed based on the doctrine of entrapment by estoppel.

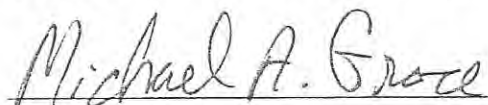
PRAYER FOR RELIEF

WHEREFORE, the defendant makes the following motions to dismiss and prays for the following relief from the Court:

1. Defendant moves that the Court enter an order ruling, as a matter of law, that neither defendant, nor his alleged co-conspirator, Mr. Lennox, had the necessary *mens rea* to commit the offenses that the defendant is alleged to have committed, and that, as a consequence, all of the charges against him be dismissed.
2. The defendant also moves that all of the charges against him be dismissed based on the doctrine of entrapment by estoppel.
3. Defendant prays for such other and further relief as the Court deems just and appropriate.

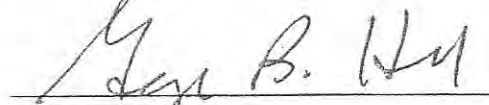
THIS the 10th day of July, 2015.

GRACE, TISDALE, CLIFTON, P.A.



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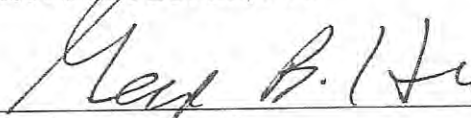
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has on this date served a copy of the foregoing **DEFENDANT'S MOTION TO DISMISS** on counsel for the State of North Carolina by hand delivery to the office of:

Alex Bass
Assistant District Attorney
28th Prosecutorial District
60 Court Plaza
Asheville, NC 28801
(828) 259-3411 - fax

THIS the 10th day of July, 2015.

HYLER & LOPEZ, P.A.


George B. Hyler, Jr.

FILED

STATE OF NORTH CAROLINA

COUNTY OF ONSLOW

2013 NOV -4 PM 3:34
ONSLow COUNTY, C.S.C.IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 13 CVS 3705SANDHILL AMUSEMENTS, INC. AND
GIFT SURPLUS, LLC,

Plaintiffs,

v.

SHERIFF OF ONSLOW COUNTY, NORTH
CAROLINA, ED BROWN, in his official
capacity; and DISTRICT ATTORNEY FOR
THE FOURTH PROSECUTORIAL
DISTRICT OF THE STATE OF NORTH
CAROLINA, ERNIE LEE, in his official
capacity,

Defendants.

ORDERS ON MOTIONS:

- (1) DISMISS**
-
- (2) PRELIMINARY INJUNCTION**

THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the regularly scheduled civil session of Superior Court in Onslow County, North Carolina, on Monday, October 7th, 2013, upon notice to all parties regarding Plaintiffs' Motion for Temporary Restraining Order.

PROCEDURAL BACKGROUND:

Upon the call of the case at the Monday, October 7th regularly scheduled civil session of Superior Court in Onslow County, North Carolina, the Defendants appeared in open Court and, through counsel, indicated that they were not prepared for hearing. By and with the agreement of all counsel and upon stipulation entered with the Court, the matter was continued to Friday, October 11th, 2013. Through stipulation of counsel and with the Court's consent, furthermore, the matter was set to be heard for Preliminary Injunction in lieu of a Temporary Restraining Order.

In the interim between Monday, October 7th and Friday, October 11th, Plaintiffs voluntarily dismissed their claim against the Honorable Ernie Lee, District Attorney for the Fourth Prosecutorial District.

On Wednesday, October 9, 2013, the Defendant filed a Motion to Dismiss.

At the commencement of the proceeding on October 11th (hereinafter, the "hearing"), the Court received evidence and heard arguments on the aforementioned Motion to Dismiss. Thereafter, the Court received evidence and heard arguments on the Motion for Preliminary Injunction.

Post-It® Fax Note 7671

To *George Hyler*

Co./Dept.

Phone #

Fax #

Date

From

Co.

Phone #

Fax #

of pages

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EXHIBIT**A**

All matters were taken under advisement by the Court without objection, with the caveat that the status quo as of October 11, 2013 as to the various issues in controversy would be maintained by the parties hereto pending this Court's ruling.

NOW, THEREFORE, based on the evidence presented at the hearing, matters of record, contentions and briefs of counsel, North Carolina law, and all other matters properly before it, the Court makes the following

FINDINGS OF FACT:

A. Jurisdictional Findings

1. The Plaintiff Sandhill Amusements, Inc. (hereinafter, "Sandhill") appeared at the hearing by and through its President, Richard Frye, was represented by Kelly Daughtry, and presented evidence in this matter.
2. The Plaintiff Gift Surplus, LLC (hereinafter, "Gift Surplus") appeared at the hearing, was represented by George B. Hyler, Jr., and presented evidence in this matter.
3. The Honorable Ed Brown, Sheriff of Onslow County and Defendant herein (hereinafter, "Sheriff" or "Defendant"), appeared at the hearing, was represented by Lesley F. Moxley, Onslow County Attorney, and by S.C. Kitchen, and presented evidence.
4. Plaintiffs Sandhill and Gift Surplus are real parties in interest.
5. This action is not barred by the doctrine of sovereign immunity of the Defendant.
6. This Court has subject matter jurisdiction over this action, the issues presented and the parties hereto and, with the consent of all parties and as allowed by North Carolina law, is authorized to enter these ORDERS ON MOTIONS out of session and out of district.

B. Findings on Motion to Dismiss and Motion for Preliminary Injunction

7. Gift Surplus, LLC is a Georgia corporation, licensed to do business in North Carolina, which promotes various websites and e-commerce businesses. *Inter alia*, Gift Surplus utilizes sweepstakes to promote sales, particularly via e-commerce. Gift Surplus operates www.giftsurplus.com and thirteen other affiliated websites, including but not limited to: www.AmericanGreats.net, www.Great-Goods.com, www.Late-at-Night.com, www.Right2U.net, www.Sweet-Shopping.com, and www.SweetSouthern.net.
8. Plaintiff's Exhibit 1, a stand-alone computer kiosk created by Gift Surplus, was admitted into evidence (hereinafter, a "kiosk" or "machine")¹.
9. Evidence showed that kiosks are sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business.
10. Gift cards can be used to purchase consumer goods through www.giftsurplus.com and its affiliated websites.

¹ The Motions before the Court and these combined ORDERS ON MOTIONS are not related solely to the particular kiosk admitted into evidence but to all identical kiosks which are or may be marketed/promoted by Sandhill and Gift Surplus.

11. The kiosks also feature a promotional sweepstakes function to enhance the sale of e-commerce products.

12. Customers insert money into kiosks in exchange for computer printouts which contain dollar-for-dollar credits.

- a. The credits can be used to purchase products at www.gift-surplus.com.²
- b. The credits cannot be cashed out for money.
- c. Credits also can be used for entry into sweepstakes games.³

13. Customers may obtain free entries into the sweepstakes by various methods described in the rules displayed on each kiosk, including but not limited to free sweepstakes entries available at www.nopurchaseneccessary.co.⁴

14. Uncontroverted evidence offered by Plaintiffs suggests that sweepstakes are one of the best ways to promote products and build websites; provided, however, that sweepstakes promoted via kiosks tend to work better when four or fewer machines are situate at any one locale.

15. Sandhill distributes Gift Surplus machines under contract with Gift Surplus in various local communities, including Onslow County.

16. On September 5th, 2013 Sheriff Ed Brown, Defendant herein, transmitted a letter to the owner of Sandhill, Richard W. Frye, advising that the Onslow County Sheriff's Office had "examined several video gaming machines associated with the website located at www.giftsurplus.com". That letter further stated, "it was determined these machines are in violation of NCGS 14-292, NCGS 14-293, NCGS 14-301 and NCGS 14-306.1a". The letter further advised Frye that "these machines will be seized as evidence and the person in possession will be criminally charged."

17. In direct response to the Sheriff's September 5th letter, Sandhill removed kiosks from two Onslow County locations. Sandhill also opted not to place kiosks in five other Onslow County business establishments where kiosk placement had been prearranged. Out of concern for prosecution, Sandhill has neither placed nor operated any kiosk in Onslow County since receipt of the September 5th correspondence from Sheriff Brown.

18. North Carolina Alcohol Law Enforcement Agent Kenny Simma testified that, in his opinion, the Gift Surplus kiosk is "illegal", apparently basing his opinion on his belief that a kiosk can make a cash payout. Agent Simma testified that he advised Sheriff Brown and District

² The computer printouts provide numbers and electronic ways to scan and purchase products from the www.gift-surplus.com catalog and website. The money inserted into a kiosk purchases an equivalent amount of credit to make purchases on the said Gift Surplus website.

³ A given kiosk features five different games.

⁴ To receive a sweepstakes entry, an entrant must provide some personal information. Such information is a valuable commodity in the e-commerce business. Gift Surplus receives and catalogues that information, which is consistent with other sweepstakes promotions in the State of North Carolina.

Attorney Ernie Lee that these kiosks are illegal. Agent Simma was not proffered as an expert witness, and did not testify as an expert.

19. Nick Farley (hereafter, "Farley") testified on behalf of the Plaintiffs. He was proffered and accepted as an expert witness in the field of gaming machines and software.⁵

20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v1-01.1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received into evidence).

21. In Farley's uncontroverted opinion as evidenced by his report and testimony, the computer software program that operates the distribution of Gift Surplus sweepstakes entries and the video games used to reveal winning sweepstakes entries on the Gift Surplus Kiosk is a sweepstakes which operates in compliance with the generally accepted guidelines for operating sweepstakes in North Carolina and many other jurisdictions in the United States.

22. Farley testified that, based on his expertise honed through years of experience and his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words "skill" and "dexterity" as used by the industry in North Carolina and many other jurisdictions.⁶

23. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v1-01.1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.⁷

23. The Plaintiffs have suffered and will continue to suffer significant and irreparable harm if the Defendants are not enjoined enforcing NCGS 14-292, NCGS 14-293, NCGS 14-301 and NCGS 14-306.1a and NCGS 14-306.4.

24. The evidence shows that the Plaintiffs are more likely to prevail because they are selling valid products in e-commerce and promoting the sale of said products via a sweepstakes. The use of the games on the Gift Surplus Kiosk are dependent on skill or dexterity to reveal a prize in the Gift Surplus promotional sweepstakes.

⁵ Nick Farley is the owner of Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing, based in Salon, Ohio. This is one of three firms in the country that provides technical consulting services for compliance of gaming machines with state and federal regulations. Eclipse Compliance Testing consults with and has been hired by law enforcement, tribal and government regulatory agencies in 245 jurisdictions, as well as by regulated device manufacturers, regarding device classification and regulatory compliance. The firm has been involved solely in the business of compliance and testing from 2000 to present. Mr. Farley has testified as an expert witness in these matters in federal, state and tribal courts both as a witness for the government and for the defense.

⁶ In preparation for his testimony at the hearing, Nick Farley was provided by counsel the definition of "skill or dexterity" in statutes in the United States. As noted in his testimony, Farley's testimony was based partially upon the statutory definitions used around the country.

⁷ Farley's report found that a participant's decision can be viewed as a strategic choice or tactic which will evolve into confidence with practice and experience. Participants familiar with revealing sweepstakes entries through the game theme will develop an aptitude or ability to quickly recognize the correct reel and the correct skill moves to reveal a prize winning sweepstakes entry. Experienced participants will demonstrate fluency in the execution of the learned past of recognizing and selecting the correct reel and making the correct skill move to reveal a potential winning outcome. Further, if the participant takes no action to effectuate the outcome of the game, the participant will not be able to realize any potential prize associated with the sweepstakes entry because these systems will never display a winning sequence on the first sweepstakes entry presented. Therefore, the kiosk games, per Farley, are dependent on skill or dexterity and not the element of chance.

Based on the foregoing Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW:

1. This matter is properly before the jurisdiction of the Court.
2. There is an actual and current controversy between the Plaintiffs and the Defendant.
3. As stated previously herein under "Jurisdictional Findings", this action is not barred by the doctrine of sovereign immunity of the Defendant.
4. Defendant has failed by the greater weight of the evidence to show that Plaintiffs' claim should be dismissed under Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the rules of civil procedure and NCGS 1-57.
5. The motions to dismiss filed by the Defendant on October 9th should be denied.
6. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law.
7. There is no evidence before the Court that Plaintiffs are not in compliance with the Credit Card Accountability Responsibility and Disclosure Act of 2009 regarding the sale of gift cards.
8. There is a likelihood that the Plaintiffs will prevail in that:
 - a. *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
 - b. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
 - c. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.
9. The Plaintiffs will suffer serious, irreparable injury and harm if the Defendant is not restrained and enjoined from interfering with the operation of the kiosks/machines.

Based on the foregoing Findings of Fact and Conclusions of Law, it is now

ORDERED, ADJUDGED AND DECREED:

1. That Defendant's Motions to Dismiss are DENIED.

2. That Plaintiffs' Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:

- a. Restrained and enjoined from using North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and,
- b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and,
- c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.

3. The Preliminary Injunction set out in "2" above is specifically enforceable only in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site.

4. All matters herein, including the Findings of Fact and Conclusions of Law, are limited to this Order and shall have no force or effect beyond Onslow County, on any individuals or entities not a party hereto, or on the parties hereto upon the trial or ultimate disposition of this matter.

5. This matter shall be set for trial as determined in accordance with local rules and procedures in consultation with the Senior Resident Superior Court Judge and Trial Court Administrator in and for Onslow County, North Carolina.

6. The undersigned Special Superior Court judge retains no ongoing oversight of, or jurisdiction over, this case and specifically defers to the aforementioned Senior Resident Superior Court Judge and Trial Court Administrator, as well as the North Carolina Administrative Office of the Courts, for any future judicial commissions/assignments relevant to this case.

THIS the 4th day of November 2013.



Jack Jenkins
Special Superior Court Judge



3 of 100 DOCUMENTS

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC, Plaintiffs, v. SHERIFF OF ONSLOW COUNTY, NORTH CAROLINA, ED BROWN, in his official capacity; and DISTRICT ATTORNEY FOR THE FOURTH PROSECUTORIAL DISTRICT OF THE STATE OF NORTH CAROLINA, ERNIE LEE, in his official capacity, Defendants.

NO. COA14-85

COURT OF APPEALS OF NORTH CAROLINA

762 S.E.2d 666; 2014 N.C. App. LEXIS 982

**May 8, 2014, Heard in the Court of Appeals
September 5, 2014, Filed**

SUBSEQUENT HISTORY: Motion granted by *Sandhill Amusements, Inc. v. Sheriff of Onslow County, 2014 N.C. LEXIS 894 (N.C., Nov. 3, 2014)*
Motion granted by *Sandhill Amusements, Inc. v. Sheriff of Onslow County, 2014 N.C. LEXIS 923 (N.C., Nov. 26, 2014)*

PRIOR HISTORY: [**1] Onslow County. No. 13 CVS 3705.

DISPOSITION: AFFIRMED in part, VACATED in part, and DISMISSED in part.

COUNSEL: Onslow County Attorney, by Lesley F. Moxley; and Turrentine Law Firm, PLLC, by Ms. S.C. Kitchen, for Defendant-Appellant.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. DaughtryMs.; and Hyler & Lopez, P.A., by Stephen P. AganMr. and Mr. AganGeorge B. Hyler, Jr., for Plaintiffs-Appellees.

JUDGES: Robert N. HUNTER, JR., Judge. Judge ELMORE concurs. Judge ERVIN dissents in a separate opinion.

OPINION BY: Robert N. HUNTER, JR.

OPINION

[*669] Appeal by defendant from orders entered on 4 November 2013 by Judge Jack Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 8 May 2014.

HUNTER, JR., Robert N., Judge.

Onslow County Sheriff Ed Brown ("Sheriff Brown") appeals from orders entered on 4 November 2013 denying his motions to dismiss under *Rule 12* as well as granting a preliminary injunction in favor of plaintiffs Sandhill Amusements, LLC ("Sandhill") and Gift Surplus, LLC ("Gift Surplus") (collectively "Plaintiffs").¹

¹ Gift Surplus is a Georgia corporation licensed to do business in North Carolina. Gift Surplus licenses the kiosks at issue in this case. Gift Surplus's kiosks are "sweepstakes promotion devices used to promote the sale of gift cards [*2] and e-commerce business." Sandhill Amusement, Inc. ("Sandhill"), distributes the kiosks in Onslow County and surrounding areas.



We agree with Sheriff Brown that this Court has jurisdiction to determine his interlocutory appeal of the motions to dismiss because his defense of sovereign immunity affects a substantial right warranting immediate review. We vacate certain portions of the preliminary injunction that affect a substantial right and dismiss Sheriff Brown's appeal from the remaining portions of that order. On the merits of the motions to dismiss, we affirm the trial court.

I. Facts & Procedural History

On 2 July 2013, Alcohol Law Enforcement ("ALE") Special Agent Kenny Simma ("Agent Simma"), Assistant Supervisor Keith Quick ("Agent Quick"), and Onslow County Sheriff's Office Sergeant John Matthews ("Sgt. Matthews"), in response to complaints that certain video gaming machines (hereinafter "kiosks") were providing money payouts, visited a business in the Rhodestown area of Onslow County. The business that Sgt. Matthews and the ALE agents visited was located in a building with blacked-out windows lacking any exterior sign displaying the name of the business. Sgt. Matthews and the [**3] ALE agents peered inside through a crack in the tint and knocked on the door. A male unlocked and opened the door and allowed Sgt. Matthews and the ALE agents inside. Agent Simma said that inside

[t]he only things in the business was [sic] a counter with two Megatouch video poker [*670] machines on the counter, a pool table, I think a jukebox. I can't remember if it was three or four of these specific devices we're referring to, and a claw machine that -- like you see at Walmart, you put a quarter in and try to pick up a stuffed animal, and a pool table.

Later the business's proprietor arrived and showed Sgt. Matthews and the ALE agents how the machines worked.

The kiosks each include a 19" touch-screen display, an audio speaker, a control panel with "print ticket and play buttons," a receipt printer, and a currency acceptor. The kiosks allow patrons the opportunity to purchase gift certificates that may be used at Gift Surplus's online store, www.gift-surplus.com. When a patron inserts currency into the kiosk, a receipt is printed with equivalent credits (\$1 is equivalent to 100 sweepstakes entries). The receipts printed also contain a "quick

response code," which users may scan to enter a weekly [**4] drawing on the Gift Surplus website. Patrons may also use the kiosk to request a free entry request code, which allows for 100 free sweepstakes entries.

The kiosks contain five game themes: "Silver Bar Spin," "Truck Stop," "Lucky Shamrock 2," "Magic Tricks," and "Candy Money." Nick Farley ("Mr. Farley"), an expert in gaming machines and software, described these game as follows:

Each of the aforementioned game themes offer several play levels which the participant may choose. A single finite pool is allocated to each play level for each game theme. Game play for these themes may be accomplished one of two ways:

(1) By pressing the "REVEAL" button an entry is drawn from the corresponding theme/play level finite pool. The potential value is shown to the participant, and they are prompted to "Press SKIP or ANIMATE." Pressing either button will reveal a reel outcome. If the entry had no winning prize, a non-winning reel combination is displayed and either the play ends (if the "SKIP" button was pressed), or the participant is given the chance to nudge one of the three reels either up or down to another non-winning outcome (if the "ANIMATE" button was pressed). If the entry has a winning prize, [**5] a non-winning reel outcome is displayed and the participant must make a decision to nudge one of the three reels either up or down to align a winning combination corresponding to the prize value previous shown.

(2) Alternatively, a participant may initiate the play by pressing the "ANIMATE" or "PLAY" button. A game initiated by pressing either the "ANIMATE" or "PLAY" button will not show the potential win value, but rather simply display a non-winning reel outcome which the player must then make a decision to nudge one of the three reels

either up or down to align a winning combination.

Regardless of the method the player uses to initiate play, the potential prize-value is determined by the entry revealed. Whether the potential prize is awarded is dependent upon the participant successfully nudging the correct reel in the correct direction to obtain a winning combination of symbols. Should a player fail to nudge the correct reel in the correct direction to obtain a winning combination, the potential prize is forfeited.

Agent Simma later told his supervisor about his visit and expressed his opinion that the kiosks were illegal video sweepstakes machines. The ALE agents later returned and [**6] took photographs and videos of the kiosks. Agent Simma then sent the videos to Deputy Director Mark Senter at ALE headquarters, who also felt that the kiosks in Rhodestown violated the statutes regulating video sweepstakes machines. After receiving the ALE agents' report, District Attorney Ernie Lee and Sheriff Brown composed a letter to Richard W. Frye ("Mr. Frye"), President of Sandhill (hereinafter "innocent owner letter"). The letter informed Mr. Frye that the kiosks would be seized as evidence and that the person/persons in possession would be criminally charged. Mr. Frye testified that Sandhill removed kiosks from two Onslow County locations and opted not to place kiosks in five other Onslow County locations after receiving the innocent owner letter.

On 27 September 2013, Sandhill and Gift Surplus filed a joint Complaint and Motion [**671] for Preliminary Injunctive Relief against Sheriff Brown in his official capacity. The complaint alleged that Plaintiffs were suffering irreparable injury from the loss of revenues and profits resulting from the innocent owner letter issued by Sheriff Brown stating that the Plaintiffs' kiosks were illegal. Plaintiffs alleged that, since Sheriff Brown [**7] issued this letter, existing retail outlets that used Plaintiffs' products have removed the kiosks, refused to install the kiosks, or gave Plaintiffs notice that they intended to remove the kiosks. Plaintiffs also attached the affidavit and report of Mr. Farley, who opined that the kiosks operated based on skill and dexterity, rather than mere chance.

Plaintiffs' complaint sought the issuance of (i) preliminary and permanent injunctions prohibiting Defendants from removing the kiosks from any establishment in North Carolina and from issuing warnings and citations to such facilities; (ii) preliminary and permanent injunctions prohibiting Defendants from forcing or coercing a North Carolina retailer to remove Plaintiffs' kiosks; (iii) a preliminary injunction prohibiting Defendants from making or issuing statements outside of the litigation stating that the kiosks were illegal; and (iv) a declaratory judgment after a full hearing that declared the kiosks and Plaintiffs' marketing system are "not prohibited gambling, lottery or gaming products."

On 9 October 2013, Sheriff Brown filed motions to dismiss for lack of subject matter jurisdiction under *N.C. R. Civ. P. 12(b)(1)*, lack of personal jurisdiction under *N.C. R. Civ. P. 12(b)(2)* [**8], failure to state a claim upon which relief may be granted under *N.C. R. Civ. P. 12(b)(6)*, and failure to bring suit on behalf of the real party in interest under *N.C. Gen. Stat. § 1-57* (2013).

On 11 October 2013, the trial court held a hearing concerning Sheriff Brown's motion to dismiss and Plaintiffs' motion for injunctive relief. On 4 November 2013, Judge Jenkins entered an order relying in part on the expert witness's opinions that denied Sheriff Brown's motion to dismiss and granted Plaintiffs' motion for a preliminary injunction. In its orders, the trial court held that there was a likelihood that the Plaintiffs would prevail in that:

(a) *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.

(b) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.

(c) The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

The trial court also held that the suit was not barred by the doctrine of sovereign [**9] immunity and that Defendant had failed to show that Plaintiffs' claim should be dismissed under *Rule 12(b)(1)*, *Rule 12(b)(2)*, *Rule 12(b)(6)*, or *N.C. Gen. Stat. § 1-57*. Accordingly, the trial court denied Defendant's motion to dismiss and granted Plaintiffs' request for the issuance of a preliminary injunction. Under the preliminary injunction, Sheriff Brown was:

a. Restrained and enjoined from using *North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A*, and *14-306.4* to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the *www.giftsurplus.com* website and gift cards; and,

b. Restrained and enjoined from compelling or attempting to compel, coerce[,] or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and,

c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation[,] or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions [*672] of the *www.gift-surplus.com* website and gift [**10] cards in Onslow County.

The trial court limited the applicability of the preliminary injunction to "those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks. . . ." Sheriff Brown filed timely written notice of appeal on 13 November 2013.

II. Appellate Jurisdiction

A judicial order is either interlocutory or the final determination of the rights of the parties. *N.C. R. Civ. P. 54(a)*. In *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), our Supreme Court succinctly explained the difference between the two types of orders:

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Id. at 361-62, 57 S.E.2d at 381 (citations omitted); see also *Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty.*, N.C. App. , , 756 S.E.2d 833, 835 (2014) (citations omitted). Final judgments are appealable under *N.C. Gen. Stat. § 7A-27* (2013). "Interlocutory orders may be appealed only where there has been a final determination of at least one claim" and the trial court certifies under *N.C. R. Civ. P. 54(b)* that "there is no just reason to delay the appeal" or, alternatively, [**11] if "delaying the appeal would prejudice a substantial right." *White v. Carver*, 175 N.C. App. 136, 139, 622 S.E.2d 718, 720 (2005) (citations, alterations, and quotation marks omitted) ("The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts."); see also *N.C. Gen. Stat. § 1-277* (2013).

Sheriff Brown's appeal from the order denying the motions to dismiss and granting the preliminary injunction is interlocutory since the trial court's orders did not dispose of the case. Additionally, there was no *Rule 54(b)* certification by the trial court. Accordingly, we consider whether Sheriff Brown's asserted defense of sovereign immunity affects a substantial right.

Whether an interlocutory order affects a substantial right "is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002). The appellant bears the burden of establishing that a substantial right will be affected unless he is allowed an immediate appeal. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001)

(citations omitted). "Our Supreme Court has defined 'substantial right' as a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved [**12] and protected by law: a material right." *Royal Oak*, N.C. App. at , 756 S.E.2d at 835.

"Essentially a two-part test has developed--the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). To prove that a substantial right is affected, an appellant must first prove that the right itself is substantial. *Id.* Second, an appellant "must demonstrate why the order affects a substantial right. . . ." *Hoke Cnty Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original).

Sheriff Brown asserts that the rejection of his defense of sovereign immunity affects a substantial right. Sheriff Brown also argues that the trial court's issuance of the preliminary injunction enjoins him from enforcing criminal laws and also affects a substantial right. We address each in turn.

A. Motions to Dismiss

Sheriff Brown contends that the denial of his 12(b)(1), (2), and (6) motions to dismiss based on sovereign immunity affects a substantial right. We agree.

[*673] "The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant." *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). "The appealing party bears the burden of demonstrating that the order from [**13] which he or she seeks to appeal is appealable despite its interlocutory nature." *Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011).

This Court has "repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). "[W]hen [a] motion is made on the grounds of sovereign and qualified immunity, . . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be

immune would vitiate the doctrine of sovereign immunity." *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994).

Here, we consider the denial of a motion to dismiss based on sovereign immunity and, accordingly, we must review whether Sheriff Brown is entitled to that defense. *Atl. Coast Conference v. Univ. of Maryland*, N.C. App. , 751 S.E.2d 612, 617 (2013) ("Defendants' underlying interest in asserting sovereign immunity is substantial . . . [.]"); *Richmond Cnty. Bd. of Educ. v. Cowell*, N.C. App. , 739 S.E.2d 566, 568 (2013), review denied, 367 N.C. 215, 747 S.E.2d 553 (2013).

However, we note that "a motion to dismiss based on sovereign immunity is a jurisdictional issue [and] whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *Atl. Coast Conference*, N.C. App. at , 751 S.E.2d at 617 (quoting *M Series Rebuild, LLC v. Town of Mount Pleasant*, N.C. App. , 730 S.E.2d 254, 257 (2012) (alterations omitted)). "[B]ecause our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a [**14] litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled." *Id.* As in *Atl. Coast Conference*, "we leave the type of jurisdictional challenge presented by a sovereign immunity claim for resolution by a future court" and accept jurisdiction of Sheriff Brown's appeal pursuant to the authority conferred by N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d). *Id.* Accordingly, we now address whether sovereign immunity barred Plaintiffs' action for declaratory judgment.

i. Standard of Review

The standard of review for the denial of a motion to dismiss on the basis of sovereign immunity is *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013).

"Under *de novo* review, we examine the case with new eyes." *State v. Young*, N.C. App. , 756 S.E.2d 768, 779 (2014) "[D]e novo means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks

and citations omitted).

ii. Merits of Sovereign Immunity Defense

"Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity."² *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Further

when an action is brought against individual officers in their official capacities the action is one against [**15] the state for the [*674] purposes of applying the doctrine of sovereign immunity. . . . [I]f plaintiff's complaint demonstrates that she has sued the defendants only in an official capacity, rather than as individuals, defendants would be potentially shielded from plaintiff's cause of action by governmental immunity.

Whitaker v. Clark, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44 (1993) (citations omitted). Ultimately

[t]he crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer, 347 N.C. at 110, 489 S.E.2d at 887 (quotation marks and citations omitted).

2 Sheriff Brown does not argue that Plaintiffs failed to assert waiver of sovereign immunity in his brief. When considering [**16] a motion to dismiss based on a defense of sovereign immunity, the complaint must allege a waiver,

without which the complaint fails to state a cause of action. *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002). However, Sheriff Brown does not raise this issue on appeal nor does waiver appear to be addressed by either party or considered by the trial court. Accordingly we do not address this issue on appeal. *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 47-48, 627 S.E.2d 482, 484-85 (2006).

"The doctrine of sovereign immunity bars actions against public officials sued in their official capacities. Sheriffs and deputy sheriffs are considered public officials for purposes of sovereign immunity. Thus, sovereign immunity bars plaintiff's claims against defendants in their official capacities." *Phillips v. Gray*, 163 N.C. App. 52, 56-57, 592 S.E.2d 229, 232 (2004) (citations omitted).

Plaintiffs sued Sheriff Brown in his official capacity in accordance with *White*. 366 N.C. at 364, 736 S.E.2d at 169. Additionally, Plaintiffs seek "an injunction requiring the defendant to take an action involving the exercise of a governmental power," which means that "the defendant is named in an official capacity." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887. From the foregoing, it appears that Plaintiffs' claim should be dismissed, since sovereign immunity would typically bar claims against Sheriff Brown in his official capacity.

However, this Court's opinion in *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346 (2005), controls this case. [**17] *Am. Treasures* concerned a seller of long-distance prepaid phone cards that included a free promotional scratch-off game piece. *Id.* at 172-73, 617 S.E.2d at 348. The plaintiff sold these cards through convenience stores and, eventually, ALE agents began "threatening to take action against the convenience stores' licenses to sell beer and alcoholic beverages . . . on the grounds that the sale of plaintiff's phone cards was illegal." *Id.* at 173-74, 617 S.E.2d at 348. The plaintiff brought an action for declaratory judgment and injunctive relief against the State. *Id.* at 174, 617 S.E.2d at 348.

In *Am. Treasures*, this Court discussed *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940). *Am. Treasures*, 173 N.C. App. at 175, 617 S.E.2d at 349-50. Specifically:

In *McCormick*, law enforcement officers interfered with an owner's possession of

certain slot machines on the grounds that such machines were illegal. *Id.*, 217 N.C. at 24, 6 S.E.2d at 871. The trial court declined to restrain the interference on the grounds that the officers were engaged in the enforcement of criminal law and refused to hear evidence or find facts regarding the legality of the machines. *Id.* Citing the above principles, our Supreme Court reversed, holding that *equity may nevertheless be invoked as an exception to those principles and may operate to "interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights [**18] and to prevent irremediable injuries to the rights of persons."* *Id.*, 217 N.C. at 29, 6 S.E.2d at 874.

Id. at 175, 617 S.E.2d at 349 (emphasis added). This Court in *Am. Treasures* also discussed *Animal Protection Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989):

Moreover, this Court has previously reviewed a trial court's consideration of a prayer for declaratory and injunctive relief concerning the applicability of North Carolina's bingo statutes to a charitable sales promotion without indicating the existence of any jurisdictional bar. *Animal Protection [**675] Society v. State*, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Am. Treasures, 173 N.C. App. at 175-76, 617 S.E.2d at 349-50. Ultimately this Court relied on the two cases in holding that:

the trial court's exercise of jurisdiction under the facts of the instant case was proper. First, we find *McCormick* and *Animal Protection Society* are sufficiently similar to the facts of the instant case and are controlling on the issue of the trial court's jurisdiction. Second, the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores.

Accordingly, *without seeking a declaratory judgment, plaintiff would be unable to effectively protect its property rights.* Defendants' jurisdictional argument is overruled.

Id. at 176, 617 S.E.2d at 350 (emphasis added).

Here, as in *Am. Treasures*, Plaintiffs face restrictions on their property rights [**19] resulting from Sheriff Brown's transmission of the innocent owner letter, which effectively barred any future sale and current placement of their kiosks. Additionally, as in *Am. Treasures*, sovereign immunity acts as a bar to Plaintiffs' ability to seek redress through monetary damages. Without such redress, Plaintiffs have no viable option for protecting their property rights during this litigation.

Accordingly, as (i) the facts at present are sufficiently similar to the controlling cases in this area and (ii) the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that the trial court properly exercised jurisdiction and that sovereign immunity did not bar Plaintiffs' claim for injunctive relief. We next address whether Sheriff Brown's challenge to the trial court's decision to issue a preliminary injunction is interlocutory.

B. Preliminary Injunction

The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary [**20] and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and internal quotation marks omitted); see also *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002); *Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) ("For a 'defendant to have a right of appeal from a mandatory preliminary injunction, 'substantial rights' of the appellant must be adversely affected.'" (quoting *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983))).

A substantial right is affected when the trial court's order prohibits the State from enforcing the law. *Beason v. State Dep't of the Sec'y of State*, N.C. App. , 743 S.E.2d 41, 44-45 (2013) ("[T]he trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner's motion to dismiss."); *Johnston v. State*, N.C. App. , 735 S.E.2d 859, 864 (2012), writ allowed, review on additional issues denied, 366 N.C. 562, 738 S.E.2d 360 (2013) and appeal dismissed, 366 N.C. 562, 738 S.E.2d 361 (2013) and *aff'd*, N.C. App. , 749 S.E.2d 278, 367 N.C. 164 (2013).

Sheriff Brown argues that his ability [**21] to enforce the law is impeded by the trial court's grant of a preliminary injunction, and points our attention to *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, N.C. App. , [*676] 749 S.E.2d 469 (2013), which stated that "[w]hen an agent of the State that is charged with enforcing statutes chooses to appeal rulings limiting the enforcement of those statutes, the right to enforce the statute is substantial and the rulings are immediately appealable." *Id.* at , 749 S.E.2d at 471.

Rockford ultimately held that, because the defendant was not a state agency or agent of the State charged with enforcing the statutes, a substantial right was not affected. *Id.* at , 749 S.E.2d at 472. This Court relied on *Johnston* and *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009) for this proposition. This Court in *Johnston* held

that the State has a substantial right to enforce the criminal laws of North Carolina and that this right is affected by a ruling declaring a statute, duly enacted by

the General Assembly, to be unconstitutional. The State has also demonstrated that the deprivation of that substantial right will potentially work injury if not addressed before appeal from a final judgment. The trial court's judgment prohibits the State from prosecuting plaintiff for possession of a firearm. Further, it casts doubt upon every prosecution by the State throughout North Carolina under *Article 54A of Chapter 14 of the General Statutes*.

Johnston, N.C. App. at , 735 S.E.2d at 864.

Here, the trial court's [**22] grant of preliminary injunction violated the substantial right of Sheriff Brown in its sixth conclusion of law:

6. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

In essence, this conclusion of law determines that these particular kiosks fit within the statutory framework and does so unnecessarily at the preliminary injunction stage. In *Beason*, this Court held that "[t]he substantial basis of this appeal involves the trial court's order concluding that the alleged violations respondent fined petitioner for were not actually violations." *Beason*, N.C. App. at , 743 S.E.2d at 45 (emphasis added). Here, the trial court does the same thing, since it declares that Plaintiffs were operating a "lawful sweepstakes" and, thus, finds that the Sheriff threatened to prosecute actions that were not actually violative of the statutes. This broad wording in the sixth conclusion of law goes much further than the equitable consideration of "likely to prevail on the merits." Instead, this conclusion of law makes a declaration concerning the lawfulness of these kiosks and would "cast doubt upon every prosecution by the State throughout North Carolina [**23]" *Johnston*, N.C. App. at , 735 S.E.2d at 864.

Similarly, in the decretal section of the order, the trial court ordered that "[t]he Preliminary Injunction . . . is specifically enforceable in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site." The trial court's use of "validly"

within the preliminary injunction, similar to its use of "lawful" in its sixth conclusion of law, exceeds the scope of a preliminary injunction, as use of the term "valid" may imply within the preliminary injunction that Plaintiff's kiosks are "legally sufficient" within the applicable statutes. Black's Law Dictionary 1690 (9th ed. 2009). Such a conclusion would also cast doubt on prosecutions undertaken by Sheriff Brown and impede his ability to enforce the law.

As these portions of the preliminary injunction go beyond maintaining the status quo by declaring that Plaintiffs' conduct was *lawful* or *valid*, these portions affect Sheriff Brown's substantial right to enforce the laws of North Carolina. Thus, we exercise jurisdiction for the limited purpose of vacating the sixth conclusion of law in its entirety and striking the word "validly" from the [**24] third item in the decretal section of the preliminary injunction.

The remainder of the preliminary injunction does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits. Sheriff Brown was prohibited from enforcing certain statutes listed in the decretal section of the order (*N.C. Gen. Stat. §§ 14-292, [**677] 14-293, 14-301, 14-306.1A, and 14-306.4*). Additionally, the preliminary injunction was limited in its scope: the bar against enforcement extends only to "those Onslow County places which are . . . operating four or less Gift Surplus System v1-01.1/Gift Surplus computer kiosks at one location or on one site." The order also has no effect "on any individuals or entities who are not a party hereto, or on the parties hereto upon the trial or ultimate disposition of this matter." Simply, Sheriff Brown was not enjoined from enforcing the criminal laws of North Carolina by the remainder of the trial court's preliminary injunction; Sheriff Brown was enjoined from enforcing certain criminal laws *against parties to the litigation* until the resolution of this case.³ The remainder of the preliminary injunction preserves the status quo and "all parties remain free to fully litigate [**25] the merits of the case in the correct procedural context before the trial court . . ." *CB & I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 550, 579 S.E.2d 502, 505 (2003). The remainder of the preliminary injunction does not affect a substantial right. As the remainder does not affect a substantial right, we do not have jurisdiction to consider this interlocutory appeal, so the remainder of Sheriff Brown's appeal is dismissed.

3 This Court has found that enforcing the statutes against an *individual* affects a substantial right warranting immediate review, but has done so with permanent injunctions or final orders concerning enforcement of a particular statute or regulation. *See, e.g., Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605 ("Although we express no opinion as to the merits of defendant's *Gilbert III* complaint, we note that the trial court order from which defendant appeals includes a *permanent injunction* enjoining defendant from prosecuting *Gilbert III*." (emphasis added)); *Beason*, N.C. App. at , 743 S.E.2d at 44-45 (considering an order that decided some of the petitioner's claims and made definite statements that the petitioner's actions were not violations of certain lobbying laws that respondent was responsible for enforcing).

We next turn to the justiciability argument advanced by Sheriff Brown in opposition to Plaintiffs' request for a declaratory [**26] judgment.

C. Justiciability of Declaratory Judgment Claim

The North Carolina Declaratory Judgment Act provides that

Any person interested . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2013). Further, *N.C. Gen. Stat. § 1-253* (2013) provides trial courts with the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."

Our Supreme Court has "required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing" in declaratory judgment actions. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986). Without an "actual controversy between the parties," jurisdiction does not attach under the Declaratory Judgment Act. *Fabrikant v. Currituck Cnty.*,

174 N.C. App. 30, 44, 621 S.E.2d 19, 29 (2005). An "actual controversy" must be more than a "mere difference of opinion between the parties" and this Court lacks the authority to render an advisory opinion that "the parties might, so to speak, put on ice to be used if and when occasion might arise." *Id.* (citations [**27] and quotation marks omitted). However,

[a]lthough a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Goldston, 361 N.C. at 33, 637 S.E.2d at 881 (citations, quotation marks, and alterations [**678] omitted); see also *Wake Cares, Inc., et al. v. Wake Cnty Bd of Educ.*, 190 N.C. App. 1, 12, 660 S.E.2d 217, 224 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (holding that an actual controversy existed where plaintiffs, who were not charged with or threatened to be charged with a crime, were affected by several statutes and where a declaratory judgment "would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing"). Ultimately, plaintiffs in declaratory judgment actions are "not required to sustain actual losses in order to make a test case[.]" since that "requirement would thwart the remedial purpose of the Declaratory Judgment Act." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994), *superseded by statute on other grounds as stated in Mehaffey v. Burger King*, 367 N.C. 120, 125, 749 S.E.2d 252, 256 (2013) (quoting [**28] *Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971)).

Plaintiffs seek to determine whether the software and kiosks they operate comply with N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 (2013), which regulate electronic sweepstakes machines. Plaintiffs do not seek to determine the criminal culpability of their potential customers, and the courts

retain the ability to grant a declaratory judgment when a "questioned statute relates to penal matters." *Jernigan v. State*, 279 N.C. 556, 561, 184 S.E.2d 259, 263-64 (1971). Simply put, "[w]hen a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights." *Id.* at 561, 184 S.E.2d at 264; see also *Calcutt v. McGeachy*, 213 N.C. 1, 2, 195 S.E. 49, 49 (1938) (allowing jurisdiction for a declaratory judgment action to test the constitutionality of a criminal statute "prohibiting the manufacture, sale, possession, and use of gambling devices").

The record tends to show a conflict between Sheriff Brown's interpretation and Plaintiffs' interpretation of the relevant statutes. Sheriff Brown sent an innocent owner letter declaring that the machines were illegal, while Plaintiffs countered with expert testimony asserting that the machines complied with the State's recent statutory changes. A declaratory judgment [**29] would help clarify the "legal relations at issue" and would remove uncertainty from Plaintiffs' continuing business interests.

Sheriff Brown argues that "there is no actual controversy existing at the time of the hearing[.]" This argument is premised on (a) Sheriff Brown having seized kiosks at a Rhodestown location rather than where Sandhill's owner believed the machines actually were, which was in the Town of Holly Ridge, and (b) Sheriff Brown having removed the kiosks from the Rhodestown location prior to the hearing on the motion to dismiss. Sheriff Brown cites *Fabrikant* for the proposition that the actual controversy must exist "at the time of the filing of the pleading and at the time of hearing." *Fabrikant*, 174 N.C. App. at 44, 621 S.E.2d at 29.

However, Sheriff Brown's office, through the transmission of the innocent owner letter, expressed doubts about the legality of "several video gaming machines associated with the web-site known as www.gift-Surplus.com." The hearing itself centered on the conflict concerning whether the kiosks at issue were illegal and the uncertainty concerning the legality of these kiosks ultimately impacts Plaintiffs' ability to operate a business going forward. Additionally, Plaintiffs alleged in [**30] their complaint that, since Sheriff Brown issued the innocent owner letter, existing retail outlets that used Plaintiffs' products had removed the kiosks or

chosen not to use the kiosks due to the uncertainty surrounding their legality. From the foregoing, it is clear that a justiciable actual controversy, as required by the Declaratory Judgment Act, exists. Accordingly, the trial court's exercise of jurisdiction over the declaratory judgment claim was proper.

Because we (a) hold that Sheriff Brown is not entitled to the defense of sovereign immunity on the *Rule 12* motions, (b) dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction in part and strike portions of the preliminary injunction [*679] in part, and (c) find an actual case or controversy existed, we do not address Sheriff Brown's remaining arguments on appeal.

III. Conclusion

In conclusion, (i) we hold that the trial court's denial of Sheriff Brown's motion to dismiss affected a substantial right; (ii) we affirm the trial court's order denying Sheriff Brown's motion to dismiss; (iii) we exercise limited jurisdiction to vacate portions of the preliminary injunction which exceed the scope of a preliminary injunction; [*31] and (iv) we dismiss Sheriff Brown's appeal of the trial court's grant of a preliminary injunction as interlocutory and not affecting a substantial right.

AFFIRMED in part, VACATED in part, and DISMISSED in part.

Judge ELMORE concurs.

Judge ERVIN dissents in a separate opinion.

DISSENT BY: ERVIN

DISSENT

ERVIN, Judge, dissenting.

Although I agree with my colleagues concerning the proper resolution of Defendant's challenge to the denial of his motion to dismiss based upon governmental immunity and justiciability grounds, I am unable to agree with their determination that a portion of Defendant's appeal from the issuance of the preliminary injunction did not affect a substantial right and is not subject to immediate appellate review in its entirety. In addition, after evaluating the validity of Defendant's challenge to the preliminary injunction on the merits, I believe that the

trial court erred by issuing the preliminary injunction and that the portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities should be reversed in its entirety. As a result, I concur in the Court's opinion in part and dissent from the Court's opinion in part.

Appealability [*32]

As a general proposition, "there is no right of immediate appeal from interlocutory orders and judgments," *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)), such as the one at issue here. However, immediate appellate review of interlocutory orders is available "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay" pursuant to *N.C. Gen. Stat. § 1A-1, Rule 54(b)*, or when "the [interlocutory] order affects a substantial right under" *N.C. Gen. Stat. § 1-277(a)* and *N.C. Gen. Stat. § 7A-27(b)(3)*. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), and *Oestreicher v. American Nat'l Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976)). In view of the fact that the trial court did not include, and could not properly have included, a certification pursuant to *N.C. Gen. Stat. § 1A-1, Rule 54(b)*, in its order, the only basis upon which this Court might have jurisdiction over Plaintiff's appeal from that portion of the trial court's order preliminarily enjoining Defendant from engaging in certain enforcement-related activities is in the event that that portion of the trial court's order affects a substantial right.

"The 'substantial right' test for appealability is more easily stated than applied." *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). An interlocutory order "affects a substantial right" for purposes of *N.C. Gen. Stat. § 1-277(a)* and *N.C. Gen. Stat. § 7A-27(b)(3)* in the event that it "deprive[s] the appealing party of a substantial right which will be lost if the order is [*33] not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citing *Waters*, 294 N.C. at 207, 240 S.E.2d at 343). "Essentially a two-part test has

developed--the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. A "substantial right" is "'a legal right affecting or involving a matter of substance as distinguished from matters of [*680] form: a right materially affecting those interests which a [litigant] is entitled to have preserved and protected by law: a material right.'" *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805 (quoting *Webster's Third New International Dictionary* 2280 (1971)). "Whether an interlocutory ruling affects a substantial right requires consideration of 'the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.'" *N.C. Dep't. of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters*, 294 N.C. at 208, 240 S.E.2d at 343)).

In the decretal paragraphs contained in its order, the trial court stated, in pertinent part, that:

2. That Plaintiffs' Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:

a. Restrained and enjoined from using [N.C. Gen. Stat. §§] 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or [**34] promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and

b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and

equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and

c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation, or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.

3. The Preliminary Injunction set out in [Paragraph No. 2] above is specifically enforceable only in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site.

In other words, the clear import of the preliminary injunction provisions contained in the trial court's order was to prevent Defendant and his [**35] agents from taking any steps to enforce the provisions of N.C. Gen. Stat. §§ 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 against the display, sale, operation, promotion of the equipment, computer programs, and websites in sites located in Onslow County at which no more than four kiosks were present. As a result, every provision of the preliminary injunction had the effect of prohibiting Defendant from enforcing certain statutory provisions as he understood them against Plaintiffs' equipment and activities as the activities in question occurred at locations in Onslow County at which no more than four kiosks were present.

As I read the relevant decisions, this Court has recognized that the entry of a preliminary injunction precluding a state or local agency from enforcing the law

affects a substantial right and is immediately appealable. *Rockford-Cohen Group, LLC v. N.C. Dep't. of Ins.*, N.C. App. , , 749 S.E.2d 469, 471 (2013) (stating that, "[w]hen an agency of the State that is charged with enforcing statutes chooses to appeal rulings limiting the enforcement of those statutes, the right to enforce the statute is substantial, and the rulings are immediately appealable") (citing *Johnston v. State*, N.C. App. , , 735 S.E.2d 859, 864 (2012) (allowing an immediate appeal from an interlocutory order declaring that a statute, as applied to the plaintiff, was unconstitutional since that decision [*36] had the effect of permanently "enjoin[ing] the State from prosecuting plaintiff for violations of the" relevant statutory provisions), *disc. review concerning additional issues denied*, 366 N.C. 562, 738 S.E.2d 360 (2013), *appeal dismissed*, 366 N.C. 562, 738 S.E.2d 361 (2013), *aff'd*, N.C. App. , 749 S.E.2d 278, 367 N.C. 164 (2013), and *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009) (allowing an immediate appeal [*681] from an interlocutory order that "enjoin[ed] defendant from prosecuting" a related proceeding); *see also Beason v. N.C. Dep't. of Sec'y. of State*, N.C. App. , , 743 S.E.2d 41, 44-45 (2013) (stating that, "since respondent is charged with investigating violations of and enforcing" certain provisions of the lobbying laws, since "respondent's right to carry out these duties is substantial," and since "respondent's ability to carry out its duties requires that it be able to act timely on allegations it believes constitute violations," the respondent's appeal from an interlocutory order enjoining the enforcement of those lobbying laws against the petitioner was subject to immediate appellate review). I find no basis for departing from this well-established line of precedent, as the Court's opinion appears to do, in this case. As a result, given that the preliminary injunction issued by the trial court prohibits Defendants from taking action to enforce the relevant gaming machine statutes as he understands them, I would hold that this Court has [*37] jurisdiction over Defendant's appeal from the issuance of the preliminary injunction and proceed to address the validity of Defendant's challenge to that portion of the trial court's order on the merits.

In its opinion, the Court concludes that a portion of the trial court's preliminary injunction affects a substantial right and should be invalidated and that a portion does not affect a substantial right and should remain undisturbed. More specifically, the Court concludes that the sixth conclusion of law contained in

the trial court's order should be vacated and that "validly" should be stricken from the third decretal paragraph on the grounds that these portions "go beyond maintaining the status quo." In reaching this conclusion, the Court relies on the Supreme Court's statement in *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and quotation marks omitted), to the effect that "[t]he purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits" and concludes that, because the relevant portions of the preliminary injunction order do more than serve the purpose of maintaining the status quo, they "affect Sheriff Brown's substantial right to enforce the laws of North Carolina" and [*38] should be invalidated on appeal. On the other hand, the Court appears to hold that the remainder of the preliminary injunction is so limited in scope and effect that it does not affect a substantial right and is not subject to immediate appellate review. I do not believe that the Court's approach to the resolution of this issue has any support in our "substantial right" jurisprudence as explained in decisions such as *Gilbert*, *Johnston*, and *Beason*.

As an initial matter, the Court's analysis seems to indicate that the extent to which Defendant was entitled to appeal from the issuance of the preliminary injunction hinges upon the validity of the injunction itself.⁴ In other words, the Court seems to conclude that Defendant is entitled to immediate appellate review of the preliminary injunction to the extent, and only to the extent, that the trial court exceeded its authority in issuing the injunction in the first place. I see no basis in our "substantial right" jurisprudence for equating a litigant's ability to appeal from an interlocutory order with the litigant's ability to prevail on the merits in the event that such an appeal was to be entertained. Instead, the extent to which this [*39] Court has jurisdiction to entertain an immediate appeal from an interlocutory order and the extent to which the trial court erred by entering the interlocutory order in question constitute two completely different issues that have little or no relation to each other in the preliminary injunction context.

4 This aspect of the Court's analysis is similar to the argument advanced in Plaintiff Sandhill Amusements' brief, which suggests that the preliminary injunction does not affect a substantial right on the theory that, since Plaintiffs' equipment and activities do not violate the applicable gambling statutes, Defendant has

not been enjoined from properly enforcing the law. However, as is discussed in more detail in the text, the extent to which the substance of a party's position on the merits is correct and the extent to which that party has a right to seek immediate appellate review from an interlocutory order are two separate, and essentially unrelated, questions.

Secondly, the Court's appealability analysis appears to hinge on the assumption that we have jurisdiction over Defendant's appeal [*682] from the trial court's order to the extent, and only to the extent, that the trial court's order [**40] disturbed the status quo. More specifically, the Court states that the portion of the preliminary injunction that it does not believe to be subject to appellate review on an interlocutory basis "does not implicate a substantial right in enforcing the statutes and simply maintained the status quo pending a trial on the merits." Aside from the fact that the extent to which a particular order maintains or disturbs the status quo is not the sum total of the test employed for evaluating the merits of a trial court's decision to issue a preliminary injunction, I am unable to find any support in our "substantial right" jurisprudence for the use of such a standard. Simply put, I am not aware of any decision that finds or declines to find the existence of a "substantial right" sufficient to support the maintenance of an appeal from an interlocutory order based upon the extent to which the underlying order preserves or disturbs the status quo. For that reason, I do not believe that the Court's reference to the impact of the underlying preliminary injunction on the status quo has any bearing on Defendant's right to immediate appellate review of the preliminary injunction.

Finally, the Court appears [**41] to conclude that *Gilbert*, *Johnston*, and *Beason* only authorize interlocutory appeals from orders that permanently, rather than preliminarily, enjoin state or local agencies or officials from enforcing the law against specific litigants.⁵ However, the Court's interpretation of these cases is inconsistent with our statement of the applicable legal principle in *Rockford-Cohen*, a case that involved a challenge to the issuance of a preliminary injunction; has no support in their underlying logic, which assumes that an order precluding a state or local official from enforcing the law affects a substantial right without in any way suggesting the existence of a temporal limitation on the applicability of that principle; and ultimately rests

upon stray references to the permanence of the injunctions at issue in those cases that had no apparent impact upon the reasoning actually employed in holding that the orders challenged in those case were immediately appealable.⁶ As a result, since the preliminary injunction at issue in this case prohibits a state or local official from enforcing the law against Plaintiffs, since our decisions clearly allow immediate appellate review of such orders, and [*683] since [**42] the logic upon which the Court relies in reaching a different conclusion rests upon a misapprehension of our prior decisions concerning appealability issues, I would hold that this Court has jurisdiction over the entirety of Defendant's challenge to the preliminary injunction and will now, in light of that conclusion, address Defendant's challenge to the issuance of the preliminary injunction on the merits.

5 As we have already noted, the Court suggests that the fact that the preliminary injunction merely affects Defendant's ability to enforce a limited number of statutory provisions against a limited number of persons in a limited geographic area militates in favor of a finding that a portion of the preliminary injunction does not affect a substantial right and appears to read *Gilbert* as distinguishing between injunctions that affect a defendant's ability to enforce the laws generally and injunctions that affect a defendant's ability to enforce the laws against specific litigants. A similar argument resting on the scope of the preliminary injunction is advanced in the briefs submitted by Plaintiff Gift Surplus and Plaintiff Sandhill Amusements. However, since the orders at issue in [**43] *Gilbert*, *Beason*, and *Johnston* all precluded the relevant agency or official from enforcing specific statutory provisions against specific litigants in specific contexts, it is clear that such scope-related arguments have no support in our "substantial right" jurisprudence and that the Court's emphasis upon these factors in declining to review a portion of the preliminary injunction rests upon our misapprehension of our "substantial right" jurisprudence.

6 To be sure, *Gilbert* notes that the order from which the defendant appealed permanently enjoined it from prosecuting a separate proceeding. *Id.* at 75, 678 S.E.2d at 605. Similarly, the orders at issue in *Beason*, N.C. App. at , 743 S.E.2d at 44-45, and *Johnston*, N.C. App. at , 735 S.E.2d at 864, involve

permanent orders rather than preliminary injunctions. However, nothing in the opinions in question in any way suggests that the fact that the injunctions or orders at issue in those cases were permanent rather than preliminary had any bearing on the Court's appealability analysis. Instead, the Court simply held that an injunction or order that precluded a state or local official from enforcing the laws affected a substantial right and was immediately appealable without in any way suggesting that a different principle would apply to preliminary, as [**44] compared to permanent, injunctions or orders. As a result, while the Court has correctly identified a factual distinction between the relevant cases and this case, the logic upon which the Court based those decisions applies equally to permanent and preliminary injunctions or orders and nothing in the opinions in those cases in any way suggests that the outcome would have been different in the event that the bar to further enforcement had been preliminary rather than permanent in nature.

Validity of the Preliminary Injunction

"[A preliminary injunction] will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., 308 N.C. at 402, 302 at 754, 760* (citation omitted). Although appellate courts review orders granting or denying preliminary injunctions using [**45] a *de novo* standard of review, we have also noted that "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003) (citation omitted). For purposes of this case, the ultimate issue raised by Defendant's challenge to the validity of the preliminary injunction is whether Plaintiffs have shown a likelihood of success on the merits and whether they are likely to sustain an irreparable injury in the event that

they are deprived of injunctive relief prior to the completion of a trial on the merits.⁷

7 In view of the fact that Defendant has not argued that Plaintiffs have shown the existence of the necessary irreparable injury, we will focus our discussion in the text on the extent to which Plaintiffs have shown that they are likely to succeed on the merits at trial.

According to *N.C. Gen. Stat. § 14-306.4(b)*, "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." An "electronic machine or device" for purposes of *N.C. Gen. Stat. § 14-306.4(b)* is a piece of equipment [**46] "that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism." *N.C. Gen. Stat. § 14-306.4(a)(1)*. Similarly, an "entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," including "[a] video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player" and "[a]ny . . . video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." *N.C. Gen. Stat. § 14-306.4(a)(3)*. Finally, a "sweepstakes" is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." *N.C. Gen. Stat. § 14-306.4(a)(5)*. As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis [**47] upon which Plaintiffs' equipment and activities can avoid running afoul of *N.C. Gen. Stat. § 14-306.4(b)* is in the event that the game or simulated game involved is "dependent on skill or dexterity."

In its order, the trial court found as a fact that:

19. Nick Farley . . . testified on behalf of

the Plaintiffs. He was proffered and accepted as an expert witness in the field of gaming and software.⁸

[*684] 20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v1-01-1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received into evidence).

21. In Farley's uncontroverted opinion as evidenced by his report and testimony, the computer software program that operates the distribution of Gift Surplus sweepstakes entries and the video games used to reveal winning sweepstakes entries on the Gift Surplus Kiosk is a sweepstakes which operates in compliance with the generally accepted guidelines for operating sweepstakes in North Carolina and many other jurisdictions in the United States.

22. Farley testified that, based on his expertise honed through years of experience and [**48] his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words "skill" and "dexterity" as used by the industry in North Carolina and many other jurisdictions.⁹

23. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v1-01-1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.¹⁰

Based upon these and other findings, the trial court concluded as a matter of law that:

6. The *Gift Surplus System v1-01-1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina law.

....

8. There is a likelihood that the Plaintiffs will prevail in that:

a. *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.

b. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.

c. The [**49] *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.

As a result, the trial court determined that Defendant should be enjoined from taking any action against Plaintiffs' equipment and activities based upon a determination that [*685] the extent to which a person received a prize for participating in the sweepstakes hinged upon that person's skill or dexterity.

8 At this point, the trial court stated in Footnote No. 5 to its order that: "Nick Farley is the owner of Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing, based in Salon, Ohio. This is one of three firms in the country that provides technical consulting services for compliance of gaming machines with state and federal regulations. Eclipse Compliance Testing consults with and has been hired by law enforcement,

tribal and government regulatory agencies in 245 jurisdictions, as well as by regulated device manufacturers, regarding device classification and regulatory compliance. The firm has been involved solely in the business of compliance and testing from 2000 to present. [**50] Mr. Farley has testified as an expert witness in these matters in federal, state and tribal courts both as a witness for the government and for the defense."

9 At this point, in Footnote No. 6 to its order, the trial court stated that: "In preparation for his testimony, Nick Farley was provided by counsel the definition of 'skill or dexterity' in statutes in the United States. As noted in his testimony, Farley's testimony was based partially upon the statutory definitions used around the country."

10 At this point, in Footnote No. 7 to its order, the trial court stated that: "Farley's report found that a participant's decision can be viewed as a strategic choice or tactic which will evolve into confidence with practice and experience. Participants familiar with revealing sweepstakes entries through the game theme will develop an aptitude or ability to quickly recognize the correct reel and the correct skill moves to reveal a prize winning sweepstakes entry. Experienced participants will demonstrate fluency in the execution of the learned past of recognizing and selecting the correct reel and making the correct skill move to reveal a potential winning outcome. Further, if the participant takes [**51] no action to effectuate the outcome of the game, the participant will not be able to realize any potential prize associated with the sweepstakes entry because these systems will never display a winning sequence on the first sweepstakes entry presented. Therefore, the kiosk games, per Farley, are dependent on skill or dexterity and not the element of chance."

The trial court's conclusion that Plaintiffs' equipment and activities involved a game whose outcome depended on skill or dexterity rested upon acceptance of Mr. Farley's testimony to the effect that the outcome of the games played utilizing Plaintiffs' equipment depended on the player's skill or dexterity. Although the term "skill or dexterity" as used in *N.C. Gen. Stat. § 14-306.4* has not been statutorily defined, the meaning of the term in question, as used in Article 37 of Chapter 14 of the General Statutes, a set of provisions governing

gambling-related activities that includes *N.C. Gen. Stat. § 14-306.4*, has been addressed by this Court. In light of that fact, the trial court should have determined whether Plaintiffs' equipment and activities facilitated a game of "skill and dexterity" or a game of chance based upon the meaning of that term as used in North Carolina gambling-related cases rather than on the basis of [**52] the meaning of that term as used in other jurisdictions and in the gaming industry, which is the approach that the trial court found to have been adopted in Mr. Farley's testimony. Thus, in order to determine whether the trial court correctly found that Plaintiffs' equipment and activities were lawful, we must first ascertain the difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line Plaintiffs' equipment and activities fall on.

In *Collins Coin Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 408, 451 S.E.2d 306, 308 (1994), *disc. rev. denied*, 340 N.C. 110, 456 S.E.2d 312 (1995), we stated that:

A game of chance is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). "A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." *Id.* at 535, 192 S.E.2d at 615-16 (citation omitted). In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:

It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game [**53] of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the

facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.

Id. at 38, 76 S.E.2d at 316-317.

In light of this understanding of the meaning of the relevant statutory language, this Court considered whether a video poker game was one of skill or of chance, *id.* at 406, 451 S.E.2d at 307, and determined that the game in question was one of chance rather than one of skill because, at least in part, almost all of the skill-related elements in an in-person poker game, including the use of psychological factors such as bluffing to prevail over an opponent, were absent from video poker. *Id.* at 408, 451 S.E.2d at 308. In addition, we stated that:

although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.

Id. at 409, 451 S.E.2d at 308 (internal citation [**54] omitted). As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including *N.C. Gen. Stat. § 14-306.4*, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill.

As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue here only permitted a [**686] predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits.¹¹ In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays.¹² Finally, the extent to which the opportunity arises for the "nudging" activity upon which the trial court's order relies in support of its

determination that the equipment in question facilitated a game of "skill or dexterity" appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs' equipment [**55] and activities depended on skill or dexterity, the only basis for this assertion was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. In light of these inherent limitations on a player's ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to "determine or influence the result over the long haul." *Id.* at 409, 451 S.E.2d at 309 (citation omitted). As a result, for all of these reasons, I am compelled by the undisputed evidence to "conclude that the element of chance dominates the element of skill in the operation" of Plaintiffs' machines, *id.*, a fact that demonstrates that Plaintiff is not likely to succeed on the merits at [**56] trial and that the trial court erred by preliminarily enjoining Defendant from enforcing the strictures of *N.C. Gen. Stat. § 14-306.4(b)* against Plaintiffs. Thus, I believe that the trial court's order should be reversed to the extent that it preliminarily enjoins Defendant from enforcing the provisions of *N.C. Gen. Stat. § 14-306.4* against Plaintiffs.¹³

11 As Mr. Farley indicated, "[s]hould the random distribution of entries cause the payout rate to exceed a predetermined limit, prizes selected for distribution which exceed \$200 will be returned to the pool and another prize will be selected to be revealed."

12 Mr. Farley admitted on cross-examination that a number of screens will offer a "zero value prize" so that the participant cannot win anything of value regardless of his or her actions in the game and that "[w]hich entry is going to come out of the pool is determined by chance."

13 As a result of the fact that our resolution of the "skill or dexterity" issue for purposes of *N.C. Gen. Stat. § 14-306.4* applies equally to the other statutes that Defendant was enjoined from

enforcing against Plaintiffs, we need not separately analyze the validity of the preliminary injunction under these additional statutory provisions.

Conclusion

Thus, while I agree with my colleagues that we have jurisdiction [**57] over Defendant's challenge to the denial of his dismissal motion and that the trial court properly rejected Defendant's governmental immunity and justiciability challenges to Plaintiffs' complaint, I am unable to agree with their decision that only a portion of the trial court's preliminary injunction order is subject to immediate appellate review and would further conclude,

after examining the merits of Defendant's challenge to the preliminary injunction, that, since Plaintiffs did not demonstrate a likelihood of success on the merits at trial, that portion of the trial court's order preliminarily enjoining Defendant from enforcing various statutory provisions against Plaintiffs should be reversed. As a result, I would affirm the trial court's refusal to dismiss Plaintiffs' complaint, reverse the trial court's decision to issue a preliminary injunction against Defendant, and remand this case to the Onslow County Superior Court for further proceedings not inconsistent with this opinion and dissent from the Court's decision to the extent that it reaches a contrary result.

**Index to Recent Criminal Case Dispositions involving
Gift Surplus, LLC Sweepstakes Kiosks**



Not Guilty Judgment & Order Granting Motion to Dismiss entered 04-18-2013,
State v. Berry, File Nos. 13-CR-218 - 221, Macon County District Court C-1

Not Guilty Judgment at close of evidence entered 07-09-2013,
State v. Hildebrandt, File No. 13-CR-233, Jackson County District Court C-2

Order Granting Motions to Dismiss entered 10-07-2013,
State v. Britt, File Nos. 13-CR-2731 - 2732, Robeson County District Court C-3

Order Granting Motion to Dismiss entered 11-05-2013,
State v. Laudecio, File No. 13-CR-428, Cherokee County District Court C-4

Notices of Voluntary Dismissal entered 01-08-2014,
State v. East, File No. 13-CR-1242, Lee County District Court &
State v. Angel, File No. 13-CR-1243, Lee County District Court C-5

Order Granting Motion to Dismiss entered 03-12-2014,
State v. Kelly, File No. 13-CR-440, Cherokee County District Court C-6

Order on Motion for Return of Equipment entered 08-21-2014,
State v. Ammar, File Nos. 14-CR-01932, 50712, Buncombe County Dist. Ct. C-7

Order on Motion for Return of Equipment entered 08-21-2014,
State v. Bridges, File No. 14-CR-051594, Henderson County Dist. Ct. C-8

Records of Voluntary Dismissals entered 11-05-2014,
State v. Amoateng, File No. 14-CR-7211982, Mecklenburg County Dist. Ct.
State v. Mirekuuaa, File No. 14-CR-722422, Mecklenburg County Dist. Ct.
State v. Arellano, File No. 14-CR-025904, Mecklenburg County Dist. Ct.
State v. Frimpong, File Nos. 14-CR-722426 & 14-CR-722436,
Mecklenburg County Dist. Ct. C-9

Order to Return All Seized Property entered 12-10-2014,
State v. Penberthy, File No. 14-CR-5053, New Hanover County Dist. Ct. C-10

STATE OF NORTH CAROLINA

File No.

13CR218219, 220

MACON County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant
 MARK BERRY

Race W Sex M Date Of Birth 11-19-1968 Social Security No.

Attorney For State
 T. JASON ARNOLD

☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant

☐ Appointed ☐ Retained

Offense

OPERATE GAMING MACHINE; CONDUCTING A SWEEPSTAKE; PROMOTION OF A SWEEPSTAKE

NOTE: (For use in recording Misdemeanor conviction levels under S.S.A.)

PLEA

VERDICT

PRIOR CONVICTIONS:

No./Level 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

☐ Guilty/Responsible ☐ No Contest

☐ Guilty/Responsible

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

☐ Guilty/Responsible ☐ No Contest

☐ Guilty/Responsible

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

☒ Not Guilty/Not Responsible

☒ Not Guilty/Not Responsible

EVIDENCE TO BE RETURNED

Date
 04/18/2013

Name Of Presiding Judge (Type Or Print)
 HONORABLE DONNA F. FORGA

Signature Of Presiding Judge

Donna Forga

APPEAL ENTRIES

- ☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

- ☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date

Name Of Presiding Judge (Type Or Print)

Signature Of Presiding Judge

EXHIBIT

C-1

STATE OF NORTH CAROLINA

File No.

13-CR-221

MACON County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

MARK E. BERRY

Race

W

Sex

M

Date Of Birth

11-19-1968

Social Security No.

Attorney For State

T. JASON ARNOLD

☐ Def. Found
Not Indigent

☐ Def. Waived
Attorney

Attorney For Defendant

GEORGE HYLER

☐ Appointed ☐ Retained

Offense

NOTE: (For use in recording
Misdemeanor conviction levels under
S.S.A.)

PLEA

VERDICT

PRIOR CONVICTIONS:

No./Level 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)

☐ Guilty/Responsible ☐ No Contest

☐ Guilty/Responsible

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

☐ Guilty/Responsible ☐ No Contest

☐ Guilty/Responsible

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

☒ Not Guilty/Not Responsible

☐ Not Guilty/Not Responsible

MTION TO DISMISS AT END OF STATE'S EVIDENCE ALLOWED

Date

04/18/2013

Name Of Presiding Judge (Type Or Print)

HONORABLE DONNA F. FORGA

Signature Of Presiding Judge

Donna F. Forga

APPEAL ENTRIES

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.

☐ The current pretrial release order is modified as follows:

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date

Name Of Presiding Judge (Type Or Print)

Signature Of Presiding Judge

STATE OF NORTH CAROLINA

File No.

1302233

Jackson County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

JUDGMENT/ORDER OR
OTHER DISPOSITION

Name Of Defendant

Gregg Alan Hildebrandt

Race

w

Sex

m

Date Of Birth

Social Security No.

Attorney For State

J. Jones

☐ Def. Found
Not Indigent

☐ Def. Waived
Attorney

Attorney For Defendant

George Hiler

☐ Appointed ☒ Retained

Offense

(m) Electronic Sweepstakes

NOTE: (For use in recording
Misdemeanor conviction levels under
S.S.A.)

PLEA

VERDICT

PRIOR CONVICTIONS:

☐ Guilty/Responsible ☐ No Contest

☐ Guilty/Responsible ☐ No Contest

☒ Not Guilty/Not Responsible

☐ Guilty/Responsible

☐ Guilty/Responsible

☒ Not Guilty/Not Responsible

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

at close of evidence

A TRUE COPY
CLERK OF SUPERIOR COURT
JACKSON COUNTY

[Signature]
Assistant Deputy, Clerk of Superior Court

Date 7/9/13

Name Of Presiding Judge (Type Or Print)

Donna Forega

Signature Of Presiding Judge

[Signature] Forega

APPEAL ENTRIES

- ☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

- ☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date

Name Of Presiding Judge (Type Or Print)

Signature Of Presiding Judge

EXHIBIT

C-2

Signature Of Magistrate/Deputy/Assistant/CSC

COURT USE ONLY

District Attorney

Attorney For Defendant At Time Of Pleadings Or Pleas

Wm Hanner David Branch George Tyler

PLEA: ☐ guilty/resp. ☐ no contest
☐ guilty/resp. ☐ no contest
☐ not guilty/resp.

VERDICT: ☐ guilty/resp.
☐ not guilty/resp.

☐ Appointed
☐ Retained
☐ Waived

PRIOR CONVICTIONS:

No./Level: 0 ☐ I (0) ☐ II (1-4) ☐ III (5+)MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3MISD. CLASS: ☐ A1 ☐ 1 ☐ 2 ☐ 3

V/D

JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the above plea; on the above verdict/finding. It is ORDERED that the defendant ☐ pay costs; and a fine/penalty of \$ _____ ☐ be imprisoned for a term of _____ days in custody of the sheriff. Pretrial credit _____ days served. ☐ The Court finds that a longer ☐ shorter period of probation than specified in G.S. 15A-1343.2(d) is necessary. ☐ Execution of sentence is suspended and the defendant is placed on unsupervised probation for _____ months, subject to the regular conditions of probation and the following:
☐ (1) pay costs and a fine/penalty of \$ _____; ☐ (2) not operate a motor vehicle until properly licensed by DMV; ☐ (3) complete _____ hours of community service within _____ days and pay the fee; ☐ (4) other: _____

Motion to Dismiss at Close of States Evidence - Granted - Dismissed

☐ It is ORDERED that this: ☐ Judgment be continued upon payment of costs. ☐ case be consolidated for judgment with _____
☐ sentence is to run at the expiration of the sentence in _____
☐ COMMITMENT: It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff and that the sheriff cause the defendant to be retained in custody to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
☐ The defendant in open court, gives notice of appeal to the Superior Court. ☐ The current pretrial release order is modified as follows: _____

Date 1 2013

Signature Of District Court Judge

I certify that this Judgment is a true copy.

Date 10-7-13

Signature Of Deputy/Assistant/CSC

File No.

C 2193730-4

NORTH CAROLINA UNIFORM CITATION

Defendant is To Appear In District Court

Lumberton

Day Of Week

Month

Day

Year

Time

N.C.

AM

PM

D.L.

D.C.I.

Other

No. Of Charges

1

THE STATE OF NORTH CAROLINA VS.

Name Of Defendant

Address

City

State

Zip

Class

Age

Telephone No.

Vehicle License No.

Vehicle Type

Trailer Type

Hav. Mat.

Year

Name And Telephone No. Of Defendant's Employer

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)

I acknowledge receipt of this Citation and I promise to appear in the named court at the time and place designated herein to answer the charge(s). I understand that my failure to appear or to dispose of this Citation by other acceptable legal means, such as waiver, will result in my operator's license issued by my state of residence being suspended until I have done so. Also, I may go before a magistrate and make bail in lieu of my personal recognizance.

ACKNOWLEDGEMENT/RESIDENT PERSONAL RECOGNIZANCE FOR APPEARANCE

Date

Signature Of Defendant

DEPARTMENTAL USE ONLY

Officer

SHP Code

N.C. Patrol

No.

Troop

District

Area

Web

Vis.

Traffic

Accident

Speed

Police/Sherrif

On Highway No./Street

Injury Or Serious Injury

Passenger(s) Under 18

City/County

Address

City

State

Zip

WIL

Chemical Analysis

AC

Refused

ORIGINAL-COURT COPY

tabbies

EXHIBIT

C-3

Date

Signature Of Officer

tabbies

EXHIBIT

C-3

Date

Signature Of Officer

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EXHIBIT

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Date

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EXHIBIT

C-3

Date

STATE OF NORTH CAROLINA

File No.

13CR 000428 1

CHEROKEE County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

LAUDECIO, MICHAEL

JUDGMENT/ORDER OR
OTHER DISPOSITION

Race

W

Sex

M

Date Of Birth

1/22/1976

Social Security No

122-62-8793

Attorney For State

TEEM, VICKI

☐ Def. Found
Not Indigent☐ Def. Waived
Attorney

Attorney For Defendant

HYLER, GEORGE

☐ Appointed ☒ Retained

Offense

ELECTRONIC SWEEPSTAKES

NOTE: (For use in recording
Misdemeanor conviction levels under
S.S.A.)

PLEA

VERDICT

PRIOR CONVICTIONS:

No./Level ☐ I (0) ☐ II (1-4) ☐ III (5+)☐ Guilty/Responsible ☐ No Contest☐ Guilty/ResponsibleMISD. CLASS: ☐ 1 ☐ 2 ☐ 3☐ Guilty/Responsible ☐ No Contest☐ Guilty/ResponsibleMISD. CLASS: ☐ 1 ☐ 2 ☐ 3☒ Not Guilty/Not Responsible ELECTRONIC SWEEP☐ Not Guilty/Not Responsible

DISMISSED BY COURT AT END OF STATE'S EVIDENCE

Date

11/5/2013

Name Of Presiding Judge (Type Or Print)

HONORABLE RICHLYN D HOLT

Signature Of Presiding Judge

APPEAL ENTRIES

- ☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

- ☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date

Name Of Presiding Judge (Type Or Print)

Signature Of Presiding Judge

EXHIBIT

C-4

STATE OF NORTH CAROLINA

File No.

1362 1242

LEE

County

☒ In The General Court Of Justice
District ☐ Superior Court Division

STATE VERSUS

FILED

Defendant

Tommy Gene East

2014 JAN -8 PM 3:16
LEE COUNTY, C.S.C.

DISMISSAL
NOTICE OF REINSTATEMENT

G.S. 15A-302(e), -931, -932, -1009

File Number

Count No.(s)

Offense(s)

BY

Pos/Keep Illegal Hot Machine

6.5.14-304

☒ DISMISSAL

NOTE: Recall all outstanding Orders For Arrest in a dismissed case.

The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:

☐ 1. No crime is charged.

☒ 2. There is insufficient evidence to warrant prosecution for the following reasons:

Insufficient evidence at this time

☐ 3. Defendant has agreed to plead guilty to the following charges:

in exchange for a dismissal of the following charges:

☐ 4. Other: (specify)

☐ See additional information on reverse.

A jury has not been impaneled nor has evidence been introduced. (If a jury has been impaneled, or if evidence has been introduced, modify this sentence accordingly.)

☐ DISMISSAL WITH LEAVE

The undersigned prosecutor enters a dismissal with leave to the above charge(s) and assigns the following reasons:

☐ 1. The defendant failed to appear for a criminal proceeding at which the defendant's attendance was required and the prosecutor believes that the defendant cannot readily be found.

☐ 2. The defendant has been indicted and cannot readily be found to be served with an Order For Arrest.

☐ 3. The defendant has entered into a deferred prosecution agreement with the prosecutor in accordance with the provisions of Article 82 of G.S. Chapter 15A.

☐ 4. The defendant has been found by a court to be incapable of proceeding pursuant to Article 56 of G.S. Chapter 15A.

☐ 5. Other: (specify) ☐ See additional information on reverse.

NOTE: This form must be completed and signed by the prosecutor when the dismissal occurs out of court. The better practice is for the prosecutor to complete and sign the form when the charges are orally dismissed in open court.

Also, in accordance with G.S. 15A-931(a1), unless the defendant or the defendant's attorney has been otherwise notified by the prosecutor, a written dismissal of the charges against the defendant must be served in the same manner prescribed for motions under G.S. 15A-951. If the record reflects that the defendant is in custody, the written dismissal shall also be served by the prosecutor on the chief officer of the custodial facility where the defendant is in custody.

Date

1-8-14

Name Of Prosecutor (Type Or Print)

M. Beum, per R.K. Pleasant

Signature Of Prosecutor

[Signature] per R.K. Pleasant

☐ REINSTATEMENT

This case, having previously been dismissed with leave as indicated above, is now reinstated for trial.

Date

Name Of Prosecutor (Type Or Print)

Signature Of Prosecutor

EXHIBIT

C-5

STATE OF NORTH CAROLINA

File No.

136K 1243

LEE

County FILED

☒ In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Defendant

Waylon Scott Angel

2014 JAN -8 PM 3:16

DISMISSAL

NOTICE OF REINSTATEMENT

G.S. 15A-302(e), -931, -932, -1009

File Number

Count No.(s)

BY

Offense(s)

Poss / Theft illegal Hot Machine

☒ DISMISSAL

NOTE: Recall all outstanding Orders For Arrest in a dismissed case.

The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:

- ☐ 1. No crime is charged.
- ☒ 2. There is insufficient evidence to warrant prosecution for the following reasons:

Insufficient evidence at this time

- ☐ 3. Defendant has agreed to plead guilty to the following charges:

in exchange for a dismissal of the following charges:

- ☐ 4. Other: (specify) ☐ See additional information on reverse.

A jury has not been impaneled nor has evidence been introduced. (If a jury has been impaneled, or if evidence has been introduced, modify this sentence accordingly.)

☐ DISMISSAL WITH LEAVE

The undersigned prosecutor enters a dismissal with leave to the above charge(s) and assigns the following reasons:

- ☐ 1. The defendant failed to appear for a criminal proceeding at which the defendant's attendance was required and the prosecutor believes that the defendant cannot readily be found.
- ☐ 2. The defendant has been indicted and cannot readily be found to be served with an Order For Arrest.
- ☐ 3. The defendant has entered into a deferred prosecution agreement with the prosecutor in accordance with the provisions of Article 82 of G.S. Chapter 15A.
- ☐ 4. The defendant has been found by a court to be incapable of proceeding pursuant to Article 56 of G.S. Chapter 15A.
- ☐ 5. Other: (specify) ☐ See additional information on reverse.

NOTE: This form must be completed and signed by the prosecutor when the dismissal occurs out of court. The better practice is for the prosecutor to complete and sign the form when the charges are orally dismissed in open court.

Also, in accordance with G.S. 15A-931(a1), unless the defendant or the defendant's attorney has been otherwise notified by the prosecutor, a written dismissal of the charges against the defendant must be served in the same manner prescribed for motions under G.S. 15A-951. If the record reflects that the defendant is in custody, the written dismissal shall also be served by the prosecutor on the chief officer of the custodial facility where the defendant is in custody.

Date

1-8-14

Name Of Prosecutor (Type Or Print)

M. Beam, per R.K. Pleasant

Signature Of Prosecutor

[Signature] per R.K. Pleasant

☐ REINSTATEMENT

This case, having previously been dismissed with leave as indicated above, is now reinstated for trial.

Date

Name Of Prosecutor (Type Or Print)

Signature Of Prosecutor

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
CASE NO. 2013 CR 00440

COUNTY OF CHEROKEE

2014 MAR 13 PM 2:21

CHEROKEE COUNTY, C.S.C.

THE STATE OF NORTH CAROLINA Bq

Plaintiff,

v.

JUDGMENT/ DISMISSAL

TRUMAN FREDRICK KELLY,

Defendant.

THIS CAUSE coming on to be heard before the undersigned Judge presiding, and his Honor, after reviewing the Motion to Dismiss does make the following FINDINGS OF FACT:

1. The Court viewed the Motion to Dismiss and attached documents.
2. The undersigned Judge was the trial Judge in the matter of State v. Laudecio which was tried November 5th, 2013 in Cherokee County District Court.
3. Based upon the statements of counsel for both parties at the hearing of this Motion, the kiosks in this case are identical to the kiosks in the Laudecio matter, and the operating system is the same operating system as in the Laudecio matter.
4. The Court finds that it is in the best interest of justice that these matters be dismissed.

IT IS NOW THEREFORE Ordered, Adjudged, and Decreed:

1. The warrants against Truman Fredrick Kelly be, and they are hereby dismissed.

THIS the 12 day of March, 2014.

RAH

THE HONORABLE RICHLYN D. HOLT
DISTRICT COURT JUDGE PRESIDING
CHEROKEE COUNTY, NORTH CAROLINA

EXHIBIT

C-6

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

FILED
2014 AUG 21 PM 2:07

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
CASE NO. 2014 CR 01932
CASE NO. 2014 CR 50712

THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

KHALED ABED AMMAR,

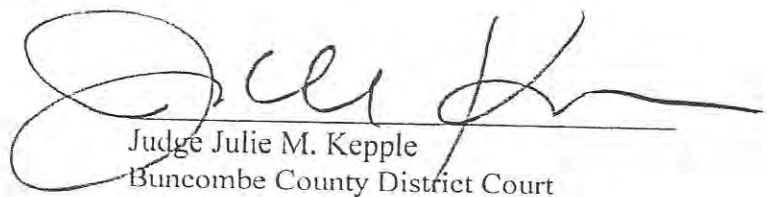
Defendant.

**ORDER ON MOTION FOR
RETURN OF EQUIPMENT**

THIS CAUSE came on to be heard and was heard before the undersigned District Court Judge presiding, and the Court, after considering a motion made by counsel for Defendant for return of certain equipment and personal property seized by the City of Asheville Police Department, which was made after the State took a voluntary dismissal of the charges against the Defendant in this matter, the Court concludes that the four Gift Surplus video machines, the cash and all other property that were seized in connection with this matter should be returned to the Defendant.

IT IS NOW THEREFORE Ordered, Adjudged, and Decreed that the City of Asheville Police Department shall promptly return to the Defendant, or his designated agent, the Gift Surplus video machines, the cash and all other property that were seized in connection with the criminal charges brought against the Defendant in this matter.

THIS the 21st day of August, 2014.


Judge Julie M. Kepple
Buncombe County District Court

CERTIFIED A TRUE COPY

Deputy Clerk of Court



STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE [HENDERSON]

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 2014 CR 051594

THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

SHARON LYNN BRIDGES,

Defendant.

EXHIBIT

C-8

ORDER ON MOTION FOR
RETURN OF EQUIPMENT

THIS CAUSE came on to be heard and was heard before the undersigned District Court Judge presiding, and the Court, after considering an oral motion made by counsel for Defendant at the time of trial for return of certain equipment seized by the sheriff, and after hearing arguments of counsel and considering the applicable law, the undersigned Judge, at the time of entry of plea in open court, makes the following FINDINGS OF FACT:

1. The Henderson County Sheriff seized seven video machines in connection with the charges brought against the Defendant, four of which were Gift Surplus video machines.
2. Defendant's plea was based upon the other three machines that were seized, which were not Gift Surplus machines.
3. Defense counsel requested the return of the four Gift Surplus machines and exhibited to the State's attorney and to the Court a copy of the Order entered on November 4, 2013, by Superior Court Judge Jack Jenkins in *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, File No. 13 CVS 3705 (Onslow County Superior Court), in which Judge Jenkins concluded that the Gift Surplus machines are in compliance with North Carolina law, including N.C.G.S. § 14-306.4.
4. Based upon the findings in *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, File No. 13 CVS 3705 (Onslow County Superior Court), the four Gift Surplus machines should be returned to the Defendant.

WHEREFORE, the Court concludes that the four Gift Surplus video machines that were seized by the Henderson County Sheriff should be returned to the Defendant or her designated agent.

IT IS NOW THEREFORE Ordered, Adjudged, and Decreed that the Henderson County Sheriff shall return to the Defendant, or her designated agent, the four Gift Surplus video machines that were seized by the Henderson County Sheriff's Office in connection with the criminal charges brought against the Defendant.

BY

THIS the 21st day of August, 2014.



Judge Thomas M. Brittain, Jr.
Henderson County District Court

Criminal Records.txt

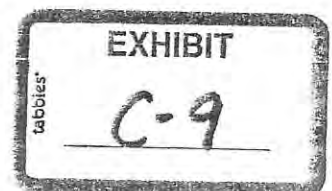
ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
 590 MECKLENBURG ICA INQUIRY 01 14CR 722414 FILM:
 DISPOSED R S DOB/AGE CR FILING DATE: 060414
 CITATION B F 07211982 DL#: 32867004 NC
 AMOATENG, MERCY, TREBEA CIT#: 249F667 TRIAL DATE: 110514
 8335 KINGS CREEK DR CSLR: CSLRC: PM
 CHARLOTTE NC 28273 DEF ATTY: TYP: VRA:
 CHG/ARRN OFFN: M SLOT MACHINE AGREEMENT (M) 14-305
 COMPLAINANT: GULKA, E, M CPD ISSUED: 060414 SERVED: 060414
 OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
 CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA VER MOD FINE COSTS WCC REST JUDGE PAID TO-BE-PAID
 VD \$ \$ \$
 CONV OFFN:
 SENT LEN: - SENT TYPE: CONS F/JGMT: CAB:
 PROB: WITHDRAWN: APPEALED TO SUPERIOR:
 AREA CD: ACCD: N HWY: OT V LIC: U TRANS TO SUPERIOR:
 CDL: N CMV: N HAZ: N TRP/DIST: S V ST: U V TYP: U APPELLATE:
 STATE'S MOTION TO CONTINUE DENIED

ARREST DATE:
 NEXT#:

CHECK DIGIT: SID:
 PF2 - NAME INQUIRY

LID:
 ADDL CHARGES:



Criminal Records.txt

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
 590 MECKLENBURG ICA INQUIRY 01 14CR 722422 FILM:
 DISPOSED R S DOB/AGE CR FILING DATE: 060414
 CITATION B F 05041964 DL#: CIT#: 478F008 TRIAL DATE: 110514
 MIREKUAA,ADWOA,GHANAIAAN CSLR: CSLRC: PM
 8224 CARROLWOOD DL CHARLOTTE NC 28217 DEF ATTY: TYP: VRA:
 CHG/ARRN OFFN: M SLOT MACHINE AGREEMENT (M) 14-305
 COMPLAINANT: GULKA,E,M CPD ISSUED: 060414 SERVED: 060414
 OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
 CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA VER MOD FINE COSTS WCC REST JUDGE PAID TO-BE-PAID
 VD \$ \$ \$
 CONV OFFN: CAB:
 SENT LEN: - SENT TYPE: CONS F/JGMT:
 PROB: WITHDRAWN: APPEALED TO SUPERIOR:
 AREA CD: ACCD: N HWY: OT V LIC: U TRANS TO SUPERIOR:
 CDL: N CMV: N HAZ: N TRP/DIST: S V ST: U V TYP: U APPELLATE:
 STATE'S MOTION TO CONTINUE DENIED

ARREST DATE: CHECK DIGIT: SID: LID:
 NEXT#: PF2 - NAME INQUIRY ADDL CHARGES: Y

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
 590 MECKLENBURG ICA INQUIRY 02 14CR 722422 FILM:
 DISPOSED R S DOB/AGE CR FILING DATE: 060414
 CITATION B F 05041964 DL#: CIT#: 478F008 TRIAL DATE: 110514
 MIREKUAA,ADWOA,GHANAIAAN CSLR: CSLRC: PM
 8224 CARROLWOOD DL CHARLOTTE NC 28217 DEF ATTY: TYP: VRA:
 CHG/ARRN OFFN: M RESISTING PUBLIC OFFICER 14-223
 COMPLAINANT: GULKA,E,M CPD ISSUED: 060414 SERVED: 060414
 OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
 CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA VER MOD FINE COSTS WCC REST JUDGE PAID TO-BE-PAID
 VD \$ \$ \$
 CONV OFFN: CAB:
 SENT LEN: - SENT TYPE: CONS F/JGMT:
 PROB: WITHDRAWN: APPEALED TO SUPERIOR:
 AREA CD: ACCD: N HWY: OT V LIC: U TRANS TO SUPERIOR:
 CDL: N CMV: N HAZ: N TRP/DIST: S V ST: U V TYP: U APPELLATE:
 STATE'S MOTION TO CONTINUE DENIED

ARREST DATE: CHECK DIGIT: SID: LID:
 NEXT#: PF2 - NAME INQUIRY ADDL CHARGES:

Criminal Records.txt

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
 590 MECKLENBURG ICA INQUIRY 01 14CR 025904 FILM:
 DISPOSED R S DOB/AGE CR FILING DATE: 070714
 CITATION H M 05111969 DL#: 9777507 NC
 ARELLANO, ANDRES CIT#: A0613975 TRIAL DATE: 110514
 3441 SAVANNAH HILLS CSLR: CSLRC: PM
 MATTHEWS NC 28105 DEF ATTY: TYP: VRA:
 CHG/ARRN OFFN: M OPERATE VIDEO GAMING MACHINE 14-306.1A(A)
 COMPLAINANT: MACE, L CPD ISSUED: 070114 SERVED: 070114
 OFFN DATE: 070114 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
 CONT. D: S: C: NR: INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA	VER	MOD	FINE	COSTS	WCC	REST	JUDGE	PAID	TO-BE-PAID
	VD	\$	\$		\$				

CONV OFFN:
 SENT LEN: - SENT TYPE: CONS F/JGMT:
 PROB: WITHDRAWN: APPEALED TO SUPERIOR:
 AREA CD: ACCD: N HWY: V LIC: U TRANS TO SUPERIOR:
 CDL: N CMV: N HAZ: N TRP/DIST: V ST: U V TYP: U APPELLATE:
 STATE'S MOTION TO CONTINUE DENIED

ARREST DATE:
NEXT#:

CHECK DIGIT: SID:
PF2 - NAME INQUIRY

LID:
ADDL CHARGES:

Criminal Records.txt

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
590 MECKLENBURG ICA INQUIRY 01 14CR 722426 FILM:
DISPOSED R S DOB/AGE CR FILING DATE: 060514
CITATION B M 04121960 DL#: 07654132 NC
FRIMPONG, OSEI, TUTU CIT#: 479F449 TRIAL DATE: 110514
8335 KINGS CREEK DR CSLR: CSLRC: PM
CHARLOTTE NC 28273 DEF ATTY: TYP: VRA:
CHG/ARRN OFFN: M ALLOW GAMBLING IN PUBLIC HOUSE 14-293
COMPLAINANT: GULKA, E, M CPD ISSUED: 060414 SERVED: 060414
OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA	VER	MOD	FINE	COSTS	WCC	REST	JUDGE	PAID	TO-BE-PAID
	VD	\$	\$		\$				
CONV OFFN:									CAB:
SENT LEN:	-			SENT TYPE:			CONS F/JGMT:		
PROB:				WITHDRAWN:			APPEALED TO SUPERIOR:		
AREA CD:	ACCD: N	HWY: OT		V LIC: U			TRANS TO SUPERIOR:		
CDL: N	CMV: N	HAZ: N	TRP/DIST:	S V	ST: U	V TYP: U	APPELLATE:		
STATE'S MOTION TO CONTINUE DENIED									

ARREST DATE: CHECK DIGIT: SID: LID:
NEXT#: PF2 - NAME INQUIRY ADDL CHARGES: Y

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
 590 MECKLENBURG ICA INQUIRY 02 14CR 722426 FILM:
 DISPOSED R S DOB/AGE CR FILING DATE: 060514
 CITATION B M 04121960 DL#: 07654132 NC
 FRIMPONG, OSEI, TUTU CIT#: 479F449 TRIAL DATE: 110514
 8335 KINGS CREEK DR CSLR: CSLRC: PM
 CHARLOTTE NC 28273 DEF ATTY: TYP: VRA:
 CHG/ARRN OFFN: M OPERATE/POSSESS SLOT MACHINE 14-301
 COMPLAINANT: GULKA, E, M CPD ISSUED: 060414 SERVED: 060414
 OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
 CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N

PLEA	VER	MOD	VD	\$	FINE	\$	COSTS	WCC	\$	REST	JUDGE	PAID	TO-BE-PAID
CONV OFFN:													CAB:
SENT LEN: -													SENT TYPE:
PROB:													WITHDRAWN:
AREA CD:													ACCD: N HWY: OT
CDL: N CMV: N HAZ: N													Y LIC: U
STATE'S MOTION TO CONTINUE DENIED													TRP/DIST: S V ST: U
													CONS F/JGMT:
													APPEALED TO SUPERIOR:
													TRANS TO SUPERIOR:
													V TYP: U
													APPELLATE:

ARREST DATE: CHECK DIGIT: SID: LID:
NEXT#: PF2 - NAME INQUIRY ADDL CHARGES:

Criminal Records.txt

ADDITIONAL SPECIAL CONDITIONS EXIST. PRESS PF4 FOR DETAILS
590 MECKLENBURG ICA INQUIRY 01 14CR 722436 FILM:
DISPOSED R S DOB/AGE CR FILING DATE: 060514 NC
CITATION B M 04121960 DL#: 07654132
FRIMPONG, OSEI, TUTU CIT#: 479F451 TRIAL DATE: 110514
8335 KINGS CREEK DR CSLR: CSLRC: PM
CHARLOTTE NC 28273 DEF ATTY: TYP: VRA:
CHG/ARRN OFFN: M FELONY OR MISDEMEANOR FREE TEXT - MAKE \$ 18B-1005
COMPLAINANT: GULKA, E, M CPD ISSUED: 060414 SERVED: 060414
OFFN DATE: 060414 ARRN DATE: MOTIONS DATE: DISP DATE: 110514
CONT. D: 00 S: 00 C: 00 NR: 00 INT?: FRM: RSONCO: GANG REL: DV CV: N
PLEA VER MOD FINE COSTS WCC REST JUDGE PAID TO-BE-PAID
VD \$ \$ \$ CAB:
CONV OFFN: SENT TYPE: CONS F/JGMT:
SENT LEN: - WITHDRAWN: APPEALED TO SUPERIOR:
PROB: AREA CD: ACCD: N HWY: OT V LIC: U TRANS TO SUPERIOR:
CDL: N CMV: N HAZ: N TRP/DIST: S V ST: U V TYP: U APPELLATE:
STATE'S MOTION TO CONTINUE DENIED

ARREST DATE:
NEXT#:

CHECK DIGIT: SID:
PF2 - NAME INQUIRY

LID:
ADDL CHARGES:

STATE OF NORTH CAROLINA

File No.

14CR 3063

In The General Court Of Justice

☒ District ☐ Superior Court Division

NEW HAMPSHIRE County

STATE VERSUS

Name Of Defendant

JOHN NEWTON PENBERTH

Race

W

Sex

M

Date Of Birth

Attorney For State

Con: Law, D

☐ Def. Found
Not Indigent

☐ Def. Waived
Attorney

☐ Attorney
Denied

Attorney For Defendant

Goody, T

☐ Appointed
☒ Retained

Crt Rptr Initials

Offense(s)

NC 14-306.4 Operate Gambling Machine

JUDGMENT/ORDER OR OTHER DISPOSITION

All seized property to be returned to owner, including
Gift Shop's Kiosk Machine, any cash and any other
seized property.

SIGNATURE OF JUDGE

Date

10 DEC 14

Name Of Presiding Judge (Type Or Print)

HON S. RAY

Signature Of Presiding Judge

[Signature]

Material opposite unmarked squares is to be disregarded as surplusage.

EXHIBIT

C-10

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
CASE NO. 2014 CR 01932
CASE NO. 2014 CR 50712

THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

MOTION TO DISMISS

KHALED ABED AMMAR,

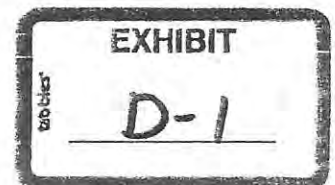
Defendant.

NOW COMES the Defendant, through the undersigned counsel, and moves to dismiss the charges against him, and in support would show the Court as follows:

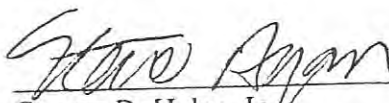
1. Defendant Khaled Abed Ammar has been charged with violation of N.C.G.S. § 14-306.4 for allegedly "possess[ing] and/or operat[ing] three (?) electronic machines for the purpose of sweepstakes."
2. The Gift Surplus machines and sweepstakes promotion at issue in this case are the *same* machines and the *same* sweepstakes promotion at issue in the case of *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, File No. 13 CVS 3705 (Onslow County Superior Court).
3. In that case, Superior Court Judge Jack Jenkins entered an Order on November 4, 2013, granting a preliminary injunction in favor of the plaintiffs and determining that the Gift Surplus machine and sweepstakes promotion is in compliance with applicable North Carolina law, including N.C.G.S. § 14-306.4.
4. Attached hereto and marked "Exhibit A" is a true copy of the Order of November 4, 2013, entered by Superior Court Judge Jack Jenkins in *Sandhill Amusements, Inc. and Gift Surplus, LLC v. Sheriff of Onslow County, et al.*, File No. 13 CVS 3705 (Onslow County Superior Court).
5. In the interest of justice and judicial economy, the charge of violation of N.C.G.S. § 14-306.4 brought by the State against Mr. Ammar in this case should be dismissed.

WHEREFORE, the Defendant prays of this Court that the charge against him of violation of N.C.G.S. § 14-306.4 be dismissed.

THIS the 10th day of August, 2014.



HYLER & LOPEZ, P.A.



George B. Hyler, Jr.

Stephen P. Agan

Attorneys for Defendant

38 Orange Street

Asheville, NC 28801

(828) 254-1070

(828) 254-1071 - fax

CERTIFICATE OF SERVICE

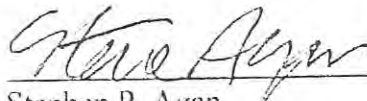
THIS IS TO CERTIFY that the undersigned has on this date served a copy of the foregoing **MOTION TO DISMISS** on counsel for the State of North Carolina, the Buncombe County District Attorney, by:

- () by hand delivery;
- (☒) by delivering a copy to the office of counsel for the opposing party;
- () by facsimile transmission to the office of counsel for the opposing party to the fax number stated below, with confirmed receipt by 5:00 p.m. on this date; and/or
- () by depositing a copy with the United States Postal Service in a postpaid wrapper, with adequate postage affixed thereto, properly addressed to:
- (☒) by electronic mail to:

Buncombe County Courthouse
Jeremy Ingle, Assistant District Attorney
P.O. Box 7158
Asheville, NC 28802
cdajdi@nccourts.org

THIS the 19th day of August, 2014.

HYLER & LOPEZ, P.A.



Stephen P. Agan

WA785536

File No. 14CR 050712

WARRANT FOR ARREST

Offense M: 612237 W: 785536 J:

I FREE TEXT-MISDEMEANOR
Electronic Sweepstakes

THE STATE OF NORTH CAROLINA VS.

Name, Address, Telephone Number of Defendant

AMMAR, KHALED ABED
8 ASCOT POINT CIR, 205
ASHEVILLE, NC 28803
(H) 828-582-3267 (W)

Race	Sex	Date of Birth	Age
U	M	04/10/1970	43

Social Security Number	Drivers License No. & State
	34700010 NC

Name of Defendant's Employer

Offense Code	Offense in Violation of G.S.
I. 9998 (M)	FREE TEXT-MISD <i>14-306.4</i>

DV: NV: N	Date of Offense
	01/22/2014

Date of Arrest & Check Digit No. (As Shown on Fingerprint Card)

01/22/2014 1536DTJ

Complainant (Name, Address, or Department, Telephone No.)

(CP) STEVE J RIDDLE (VI)
ASHEVILLE POLICE DEPT
ASHEVILLE, NC 28801
(H) 828-259-9039
(W) 828-259-9039

Witnesses (Names, Addresses, Telephone Numbers)

[Signature]
8/21/17

☐ Offense Which Requires Fingerprinting Per Fingerprint Plan	Date Issued
	01/22/2014

STATE OF NORTH CAROLINA

BUNCOMBE

County

In the General Court of Justice
District Court Division

No Image Available

TO ANY OFFICER WITH AUTHORITY AND JURISDICTION TO EXECUTE A WARRANT FOR ARREST FOR THE OFFENSE CHARGED BELOW:

I, THE UNDERSIGNED, FIND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT ON OR ABOUT THE DATE OF OFFENSE SHOWN AND IN THE COUNTY NAMED ABOVE THE DEFENDANT NAMED ABOVE DID UNLAWFULLY, WILLFULLY
in violation of G.S. 14-306.4.

DID UNLAWFULLY, WILLFULLY POSSESS FIVE ELECTRONIC SWEEPSTAKE DEVICE MACHINES OF WHICH TWO WERE IN OPERATION

THIS ACT WAS IN VIOLATION OF THE LAW REFERENCED ON THIS WARRANT. YOU ARE DIRECTED TO ARREST THE DEFENDANT AND BRING HIM WITHOUT UNNECESSARY DELAY BEFORE A JUDICIAL OFFICIAL TO ANSWER THE CHARGES ABOVE. THIS WARRANT IS ISSUED UPON INFORMATION FURNISHED UNDER OATH BY THE COMPLAINANT OR COMPLAINANTS LISTED.

Signature

[Signature]
SCHMITT, JUDIANA

MAGISTRATE

Location of Court

Court Date

Court Time

tabbics®

EXHIBIT

D-2

ORIGINAL

01/22/2014 16:58:43

C 0948653-4

BCA WA 2014-01-11

STATE OF NORTH CAROLINA Buncombe County

The undersigned officer has probable cause to believe that on or about WED 2:55 (a.m.), the 22 day of JAN. 2014, in the named county, the named defendant did unlawfully and willfully operate a motor vehicle on a highway (public vehicular area).

- ☐ 1. At a speed of MPH in a MPH zone. G.S. 20-141.1.
- ☐ 2. In forward motion without having the provided seat belt properly fastened about the defendant's body. G.S. 20-135.2A.
- ☐ 3. By transporting a passenger of less than 16 years of age without having the passenger in a (weight appropriate child passenger restraint system) (seat belt). G.S. 20-137.1.
- ☐ 4. By transporting a child of less than five years of age and less than 40 pounds in violation without the child being secured in the rear seat, when the vehicle was equipped with an active passenger-side front air bag and the vehicle had a rear seat. G.S. 20-137.1(a).
- ☐ 5. While subject to an impairing substance. G.S. 20-133.1.
- ☐ 6. Without being licensed as a driver by the Division of Motor Vehicles of North Carolina. G.S. 20-7(a).
- ☐ 7. While the defendant's driver's license was revoked. G.S. 20-28.
- ☐ 8. While displaying an expired registration plate on the vehicle knowing the same to be expired. G.S. 20-11(2).
- ☐ 9. Without (displaying in/on a current approved inspection certificate) (having a current electronic inspection authorization for the vehicle), such vehicle requiring inspection in North Carolina. G.S. 20-183.8. Month Expires: _____
- ☐ 10. By failing to see before (starting) (stopping) (turning from a direct line) that such movement could be made in safety. G.S. 20-154.
- ☐ 11. By failing to stop at a duly erected (stop sign) (flashing red light). G.S. 20-158(b)(1), (b)(3).
- ☐ 12. By entering an intersection while a traffic signal was emitting a steady red circular light for traffic in defendant's direction of travel. G.S. 20-158(b)(2).
- ☐ 13. Without having in full force and effect the financial responsibility required by G.S. 20-313. The defendant was the owner of the motor vehicle that was (registered) (required to be registered) in this State. G.S. 20-313.
- ☐ 14. (Possess an open container of) (Consume) an alcoholic beverage in the passenger area of a motor vehicle. G.S. 20-136.7(a). (NOTE: Strike "operate a motor vehicle" and "public vehicular area" above.)
- ☐ 15. Without decreasing speed as necessary to avoid colliding with a (vehicle) (person). G.S. 20-141(m).

☒ 16. DID POSSESS AND/OR OPERATE THREE (3) ELECTRONIC MACHINES FOR THE PURPOSE OF SPEEDSTATES.

NCGS 14-306.4

1937

And on or about the date and time shown above in this county, the named defendant did unlawfully and willfully operate a (motor) vehicle on a (street) (highway) (public vehicular area).

EXHIBIT D-3

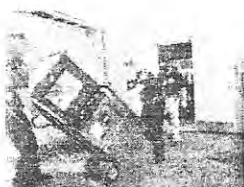
Date 3/13/14 Signature Of Officer, [Signature]

File No. 140801932	
NORTH CAROLINA UNIFORM CITATION	
Defendant is To Appear in District Court	
ADMIN. N.C.	
Day Of Week THURS.	Year 14
Month 05	Time 1-4
Day 08	PM
☐ D.L. ☐ D.C.I. ☒ Other	
No. Of Charges	
THE STATE OF NORTH CAROLINA VS.	
Name Of Defendant KHALED ABED ANNAR 612237	
Address 45 PENSACOLA AVE.	
City ARDEN	State NC
Zip 28704	Class C
Drivers License No. 34700010	CDL
Race A	Age 21/3
Sex M	Date Of Birth 4/10/70
Social Security No. Of Defendant 152-98-5155	Telephone No.
Vehicle License No.	State
Vehicle Type	Trailer Type
CMV	Haz. Mat.
Make	Year
Name And Telephone No. Of Defendant's Employer	
Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)	
ACKNOWLEDGMENT/RESIDENT PERSONAL RECOGNITION FOR APPEARANCE	
I acknowledge receipt of this Citation and I promise to appear in the named court at the time and place designated herein to answer the charge(s). I understand that my failure to appear to answer this Citation by other acceptable legal means, such as a waiver, will result in my operator's license issued by my state of residence being suspended until I have come so. Also, I may go before a magistrate and make bail in lieu of my personal recognition.	
Date	Signature Of Defendant
DEPARTMENTAL USE ONLY	
Officer B. HOAN	No. A2198
Truck District	BEAT
SHP Code	ASHEVILLE
Wear. Vis. Traffic Accident	Police Submit Speed
On Highway No./Street 2332 US Hwy 70	Police Submit Speed
At/Near Intersection	Passenger(s) Under 16
City Of SWANANOA	Chemical Analyst
Waiver	AC
Refused	

MAGISTRATE'S ORDER - MISDEMEANOR ONLY	
The named defendant has been arrested without a warrant and there is probable cause for the defendant's detention on the stated charges. This Magistrate's Order is issued upon information furnished under oath by the named officer. A copy of this Order has been delivered to the defendant.	
Signature Of Magistrate/Deputy/Assistant/CSC	
Date	
COURT USE ONLY	
District Attorney	
Attorney For Defendant At Time Of Trial Or Plea	
VERDICT/ FINDING: ☐ guilty/resp. ☐ not guilty/resp. ☐ no contest	
JUDGMENT: The defendant appeared in open court and freely, voluntarily and understandingly entered the above plea; on the above verdict/finding, it is ORDERED that the defendant: ☐ not guilty/resp. ☐ guilty/resp. ☐ no contest	
costs and a fine/penalty of \$ _____	
probation for _____ months, subject to the regular conditions of probation and the following: ☐ longer ☐ shorter period of probation than specified in G.S. 15A-134.2(d) is necessary.	
until properly licensed by DMV: ☐ (3) complete ☐ (4) Other: _____	
Execution of sentence is suspended and the defendant is placed on unsupervised probation for _____ days and pay the fee: ☐ (1) pay costs and a fine/penalty of \$ _____	
days in custody of the sheriff. Pretrial credit _____	
The Court finds that a ☐ MISD. CLASS: ☐ A1 ☐ A2 ☐ A3 ☐ A4 ☐ A5 ☐ A6 ☐ A7 ☐ A8 ☐ A9 ☐ A10 ☐ A11 ☐ A12 ☐ A13 ☐ A14 ☐ A15 ☐ A16 ☐ A17 ☐ A18 ☐ A19 ☐ A20 ☐ A21 ☐ A22 ☐ A23 ☐ A24 ☐ A25 ☐ A26 ☐ A27 ☐ A28 ☐ A29 ☐ A30 ☐ A31 ☐ A32 ☐ A33 ☐ A34 ☐ A35 ☐ A36 ☐ A37 ☐ A38 ☐ A39 ☐ A40 ☐ A41 ☐ A42 ☐ A43 ☐ A44 ☐ A45 ☐ A46 ☐ A47 ☐ A48 ☐ A49 ☐ A50 ☐ A51 ☐ A52 ☐ A53 ☐ A54 ☐ A55 ☐ A56 ☐ A57 ☐ A58 ☐ A59 ☐ A60 ☐ A61 ☐ A62 ☐ A63 ☐ A64 ☐ A65 ☐ A66 ☐ A67 ☐ A68 ☐ A69 ☐ A70 ☐ A71 ☐ A72 ☐ A73 ☐ A74 ☐ A75 ☐ A76 ☐ A77 ☐ A78 ☐ A79 ☐ A80 ☐ A81 ☐ A82 ☐ A83 ☐ A84 ☐ A85 ☐ A86 ☐ A87 ☐ A88 ☐ A89 ☐ A90 ☐ A91 ☐ A92 ☐ A93 ☐ A94 ☐ A95 ☐ A96 ☐ A97 ☐ A98 ☐ A99 ☐ A100	
PRIOR CONVICTIONS: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI ☐ VII ☐ VIII ☐ IX ☐ X ☐ XI ☐ XII ☐ XIII ☐ XIV ☐ XV ☐ XVI ☐ XVII ☐ XVIII ☐ XIX ☐ XX ☐ XXI ☐ XXII ☐ XXIII ☐ XXIV ☐ XXV ☐ XXVI ☐ XXVII ☐ XXVIII ☐ XXIX ☐ XXX ☐ XXXI ☐ XXXII ☐ XXXIII ☐ XXXIV ☐ XXXV ☐ XXXVI ☐ XXXVII ☐ XXXVIII ☐ XXXIX ☐ XL ☐ XLI ☐ XLII ☐ XLIII ☐ XLIV ☐ XLV ☐ XLVI ☐ XLVII ☐ XLVIII ☐ XLIX ☐ L ☐ LI ☐ LII ☐ LIII ☐ LIV ☐ LV ☐ LVI ☐ LVII ☐ LVIII ☐ LVIX ☐ LX ☐ LXI ☐ LXII ☐ LXIII ☐ LXIV ☐ LXV ☐ LXVI ☐ LXVII ☐ LXVIII ☐ LXIX ☐ LXX ☐ LXXI ☐ LXXII ☐ LXXIII ☐ LXXIV ☐ LXXV ☐ LXXVI ☐ LXXVII ☐ LXXVIII ☐ LXXIX ☐ LXXX ☐ LXXXI ☐ LXXXII ☐ LXXXIII ☐ LXXXIV ☐ LXXXV ☐ LXXXVI ☐ LXXXVII ☐ LXXXVIII ☐ LXXXIX ☐ XLXXX ☐ XLXXXI ☐ XLXXXII ☐ XLXXXIII ☐ XLXXXIV ☐ XLXXXV ☐ XLXXXVI ☐ XLXXXVII ☐ XLXXXVIII ☐ XLXXXIX ☐ LXXXX ☐ LXXXXI ☐ LXXXXII ☐ LXXXXIII ☐ LXXXXIV ☐ LXXXXV ☐ LXXXXVI ☐ LXXXXVII ☐ LXXXXVIII ☐ LXXXXIX ☐ LXXXXX ☐ LXXXXXI ☐ LXXXXXII ☐ LXXXXXIII ☐ LXXXXXIV ☐ LXXXXXV ☐ LXXXXXVI ☐ LXXXXXVII ☐ LXXXXXVIII ☐ LXXXXXIX ☐ LXXXXXX ☐ LXXXXXXI ☐ LXXXXXXII ☐ LXXXXXXIII ☐ LXXXXXXIV ☐ LXXXXXXV ☐ LXXXXXXVI ☐ LXXXXXXVII ☐ LXXXXXXVIII ☐ LXXXXXXIX ☐ LXXXXXXX ☐ LXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV ☐ LXXXXXXXV ☐ LXXXXXXXVI ☐ LXXXXXXXVII ☐ LXXXXXXXVIII ☐ LXXXXXXXIX ☐ LXXXXXXXX ☐ LXXXXXXXXI ☐ LXXXXXXXII ☐ LXXXXXXXIII ☐ LXXXXXXXIV 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Answer Man: Are video gaming machines legal?

 **John Boyle**, jboyle@citizen-times.com 6:39 p.m. EST January 8, 2015



(Photo: John Boyle/jboyle@citizen-times.com)

Today's batch of burning questions, my smart-aleck answers and the real deal:

Question: There is currently no certified use of video poker machines in the state. However, some businesses that are using the machines in the mountains are being told to shut them down, while others are being allowed to keep using them. Several stores had theirs closed at least four weeks now in Black Mountain while businesses in Swannanoa are still going strong. Seems some selective enforcement by local ALE officers. What's up with that?

My answer: For \$1,000 in quarters, I will provide you with an answer that has a one in seven chance of being correct.

Real answer: This issue gets much more complicated than it seems, in part because what seems like inconsistent enforcement is actually just officers following recent court decisions.

Asheville attorney George Hyler, who has represented a company in several cases that have gone to court, offered a good overview, first noting that "the status of these machines is the subject of ongoing disputes and litigation across North Carolina.

"There are a number of video games and machines that have been declared illegal (Video poker, keno, Pot-of-Gold machines, for example)," Hyler said via email. "Some other game operators have tried to use a 'pre-reveal' system, but that has recently been declared illegal."

That system uses software that allows game players to find out if they've won before they play the game.

Hyler represents Gift Surplus LLC, "an online sales company which uses stand-alone kiosks as promotional devices to sell their online products." The machines are limited in number and operate a certified sweepstakes, and those factors have been key in their legal success.

"These kiosks have survived legal challenge in over a dozen district court criminal cases, and our office obtained an injunction in a Superior Court ruling, which was upheld by the Court of Appeals," Hyler said, adding that these victories mean the Gift Surplus kiosks and sweepstakes "are completely legal."

But this had an unintended consequence.

"The fact that we have been successful has led others to try to use illegal games and other systems, which do not comply with the applicable law," Hyler said. "Most local law enforcement officers are struggling with the applicability of the new law. This I think has led to the appearance of inconsistent enforcement."

 Buncombe County Sheriff's Office Spokeswoman Natalie Bailey said the department has essentially adhered to a policy of enforcement against the games that do not operate the Gifts Surplus system. They also held a meeting this week with new District Attorney Todd Williams to discuss the matter. 

"The sheriff is meeting with the new district attorney to see what his philosophy is about it," Bailey said, adding that the Sheriff's Office enforcement generally has been complaint driven. "It's been awhile since we've had anyone submit (a complaint) on gaming machines."

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Video poker machines have a notorious history in the state and particularly in Buncombe County. Former Sheriff Bobby Medford is serving a 15-year sentence in federal prison after being convicted of accepting bribes from gambling machine operators.

This is the opinion of John Boyle. To submit a question, contact him at 232-5847 or jboyle@citizen-times.com (<mailto:jboyle@citizen-times.com>)

