

**VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF SPOTSYLVANIA**

**KINCER, ANDERSON & ASSOCIATES, LLC, :**  
**d/b/a AKA TOBACCO :**

**Petitioner, :**

**v. :**

**Case No. CL10-417**

**WILLIAM F. NEELY, COMMONWEALTH'S :**  
**ATTORNEY For Spotsylvania County, :**

**Respondent. :**

**FINAL ORDER**

The parties to this declaratory judgment action are Kincer, Anderson & Associates, LLC, d/b/a AKA Tobacco, Petitioner, and William F. Neely, Commonwealth's Attorney for Spotsylvania County, Respondent (referred to from time to time collectively as "the parties"), and

Whereas this matter came before the Court on June 15, 2010, for trial on Petitioner AKA Tobacco's declaratory judgment action, and

Whereas AKA Tobacco sought a ruling declaring that it was not operating illegal gambling devices in its business and that it had the right to continue to operate its business using free spin machines, and

Whereas the parties both asked the Court to interpret Va, Code 18.2-325 and 18.2-325.1, as amended by HB1010 ("new statute") to become effective July 1, 2010, and

The Court having decided that it had the authority under the Virginia Declaratory Judgment Act to consider the issues raised in this proceeding under the new statute, and

The Court having heard and reviewed the testimony of witnesses and other evidence introduced by the parties and considered the arguments of counsel,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that as operated the business in which AKA Tobacco is engaged constitutes illegal gambling pursuant to Va. Code 18.2-325 and 18.2-325.1, both as amended by HB1010 (to become effective July 1, 2010), based on the following findings:

1. That Va. Code 18.2-325 defines illegal gambling as occurring when there is a confluence of risk, consideration, and the chance to win a prize;
2. That the free spin machines operated by AKA Tobacco in its business are gaming machines of chance;
3. That Va. Code 18.2-325(1)(a) makes clear that betting or wagering includes risking “free points” credited to a purchaser of a product which “free points” are “redeemable by the purchaser for money at the location where the product was purchased”, which the Court finds is clearly how AKA Tobacco operates the free spin machines at its business;
4. That Va. Code 18.2-325(1)(b) provides, in part, that nothing in Sec. 18.2-325 “shall be construed or interpreted to prohibit the conduct of any *lawful* game, contest, lottery, scheme, or promotional offering that complies with the requirements contained in Sec. 18.2-325.1.” (Emphasis added.);
5. That Va. Code 18.2-325.1 provides that “any *lawful* game, contest, lottery, scheme, or promotional offering (the contest) may be conducted” provided certain requirements contained in Sec. 18.2-325.1



are met. (Emphasis added.);

6. That the requirement set forth in Sec. 18.2-325.1(2) is not met by AKA Tobacco because there is not an equal opportunity to play as is required in that a purchaser who buys more of the purportedly promoted product and who thereby receives more points with each such purchase may play more often than one who is provided one free spin per day and, therefore, the former is able to play more frequently than the latter;
7. That the requirement set forth in Sec. 18.2-325.1(3)(e) was not met by AKA Tobacco because the Court finds that the making of additional purchases gives the purchaser more opportunity of winning and therefore AKA Tobacco cannot accurately state that making a purchase will not increase the odds of winning in that one may spend more money and therefore receive more points to risk than one who only receives one free spin per day, thereby increasing the purchaser's odds of winning;
8. That AKA Tobacco is not able to meet the requirement set forth in Sec. 18.2-325.1(7) that provides that "No consideration or anything of value is required in order to play or enter into the contest, except for the product purchased, if any", because the evidence shows that many customers of AKA Tobacco view the points needed to play to try to win money as the product of greater value than the DVD movie rentals the free spin machines were purportedly designed to promote, in that the evidence shows that a large number of movie rental slips are abandoned

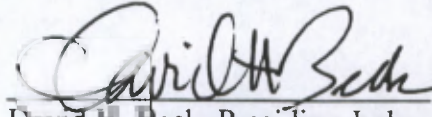


or discarded by purchasers;

- 9. That the Court finds that purchasers at AKA Tobacco put money into AKA Tobacco's free spin / DVD movie rental kiosk for what many purchasers view as a valueless product, i.e., the DVD movie rentals, in order to receive points that they may risk playing the free spin machines and that such points constitute consideration under Sec. 18.2-325(1)(a);
- 10. That the Court finds there is risk, consideration, and a chance to win a prize and that the manner in which AKA Tobacco operates the free spin machines at its business constitutes illegal gambling and that said machines are illegal gambling devices; and

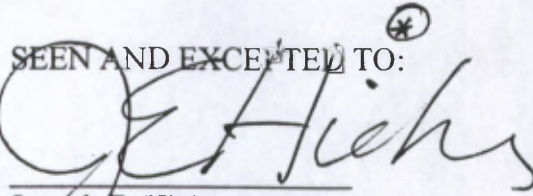
IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Petition is hereby dismissed, this matter shall be stricken from the docket, and this Order is final.

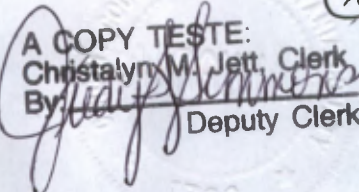
7/20/10  
Date

  
David H. Beck, Presiding Judge

I ASK FOR THIS:

*See endorsement on attached page*  
Jack L. Gould, Esquire  
Counsel for Respondent  
10615 Judicial Drive, Suite 102  
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VSB 17521

SEEN AND EXCEPTED TO: <sup>(\*)</sup>  
  
Joseph E. Hicks, Esquire  
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VSB 46291

A COPY TESTE:  
Christalyn M. Jett, Clerk  
By  Deputy Clerk  
<sup>(\*)</sup> As reflected in the objections attached hereto as "Attachment for Objections..."



**Attachment for Objections to Circuit Court for Spotsylvania County's Circuit Court's Ruling and Order in the matter of Kincer, Anderson & Associates, L.L.C. d/b/a AKA Tobacco v. William F. Neeley, Commonwealth's Attorney for Spotsylvania County.**

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Kincer, Anderson & Associates, L.L.C. (hereinafter AKA Tobacco) hereby specifically continues and reasserts all Objections raised at and during the Declaratory Judgment hearing. In addition, AKA Tobacco offers the following Objections to the Ruling of this Honorable Court:

1. Generally, AKA Tobacco objects to the finding of the Court that their operation of the DVD movie rental sweepstakes, and the associated video game terminals, constitutes illegal gambling, in that said finding is contrary to the law and the evidence of the case.
2. The Court erred in finding that AKA Tobacco's operation of the DVD movie rental sweepstakes was not a lawful promotional offering, as contemplated by the amended §18.2-325 and newly enacted §18.2-325.1 of the Code of Virginia, 1950, as amended; and,
3. The Court erred in finding that AKA Tobacco's operation of their DVD movie rental promotional offering did not meet the definition of a "lawful game", as provided in the newly enacted §18.2-325 (1) (b) and §18.2-325.1 (2), (3)(e), and 7 of the Code of Virginia, 1950, as amended; and,
4. The Court erred by failing to properly interpret the term "lawful" and the term "odds of winning" as provided in the applicable sections of the above-noted Statutes.
5. The Court erred in its consideration of the term "consideration, risk and reward", as the applicable statutes do not use such term in its definition of a "lawful game;" and,
6. The Court erred in the consideration of a "primary purpose test", after the same was clearly rejected by the General Assembly, when considering the Amendments to §18.2-325 and the enactment of §18.2-325.1, of the Code of Virginia, 1950, as amended, and was not made a part of the applicable Statutes; and,
7. The Court erred in finding that individuals were limited to one free entry per day, in AKA Tobacco's operation of their DVD movie rental promotional offer; and,
8. The Court erred in finding that AKA Tobacco's operation of the DVD movie rental promotional offering did not meet the requirements of a "lawful...promotional offering," as provided in the newly enacted §18.2-325.1 of the Code of Virginia, 1950, as amended; and,
9. The Court erred in finding that the case presented an issue of "frequency of play," as this term was invented by the Court and not provided for in the applicable statutes; and,
10. The Court erroneously used the term "frequency of play", which is not mentioned in the statutes, but used by the Court as a basis for the decision. Contrary to the evidence and specific provisions of the Statutes, the Court found that an individual participating on a free entry was treated unfairly and did not have the same odds of winning a prize, as someone who purchased the DVD movie rental product, as the purchaser had the opportunity to make as many purchases as they may want, providing an increase in their odds of winning a prize through the individual's increasing the frequency of their play through the promotional offering; and,
11. The Court failed to consider the statutory provisions for "safe harbor" specifically provided in §18.2-325 (1) (b) and §18.2-325.1 of the Code of Virginia, 1950, as amended.



or discarded by purchasers;

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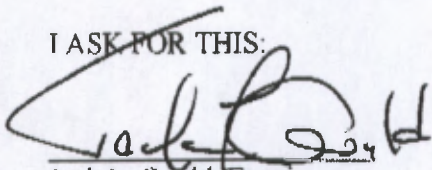
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David H. Beck, Presiding Judge

I ASK FOR THIS:

SEEN AND EXCEPTED TO:



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