

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

JANINE LITMAN and TIMOTHY MAS-  
TROIANNI, individually and  
jointly,

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a Ne-  
vada limited liability company,  
WASHINGTON TROTTHING ASSOCIATION,  
INC., a Delaware corporation, WTA  
ACQUISITION CORP., a Delaware cor-  
poration, CANNERY CASINO RESORTS,  
LLC, CANNERY CASINO RESORTS and  
WASHINGTON TROTTHING ASSOCIATION,  
INC. t/d/b/a THE MEADOWS RACETRACK  
& CASINO, an unincorporated asso-  
ciation, CANNERY CASINO RESORTS,  
an unincorporated association con-  
sisting of one or more yet uniden-  
tified natural and/or legal per-  
sons, individually and jointly,

CASE NO: 2012-8149

**PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANTS' PRELIMINARY OBJEC-  
TIONS TO PLAINTIFFS' COMPLAINT**

On behalf of Plaintiffs

Counsel of Record for this Party:

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**FILED**

**SEP 30 2013**

**PR. MATHENY  
PROTHONOTARY**

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AND NOW, come Plaintiffs, averring as follows:

- The Meadows was taking an illegal commission from players at its Craps table. The Meadows entered into a Consent Agreement with the Pennsylvania Gaming Control Board. [Complaint Ex. 12]
- This case is the civil action counter-part to the facts underlying the Consent Order, to wit: Plaintiffs were being injured by the Meadows' illegal practices.
- It was the Plaintiffs who contacted the Pennsylvania Gaming Control Board and were all or part of the cause for the investigation that ensued by the Pennsylvania Gaming Control Board regarding the illegal practices by the Meadows.
- During the Pennsylvania Gaming Control Board investigation, before the Consent Agreement, and before Plaintiffs were thereby vindicated, the Meadows retaliated against Plaintiff Mastroianni having him blackballed from the Meadows. [Complaint Ex. 11]

- The Meadows ultimately entered into a Consent Agreement and paid a fine to the Pennsylvania Gaming Control Board. [Complaint Ex. 12]
- Defendants' assertion that all counts of Plaintiffs' Complaint, and the entire case, should be dismissed is completely and utterly untenable.

This case is unique because gambling facilities are highly regulated by this Commonwealth exactly because of the disparate power of the parties and the potential for error, injury and fraud averred herein. In fact, it was the injury to the Plaintiffs that caused and supported the investigation and the Pennsylvania Gaming Board Consent Agreement, for the benefit of the greater Commonwealth.

Because of the potential for injury and fraud to its citizens, this Commonwealth has its own independent social interest and clearly requires publication of rules of the games, which must be accurate and correctly administered. Moreover, this Commonwealth has its own independent social interest that the licensed facility ownership must be fully and accurately disclosed to prevent error, injury and fraud.

The disparity between the common general public members of society, many senior citizens on fixed incomes, and some uneducated, untrained and without financial sophistication, relative to highly sophisticated gambling companies, is well-known and immense.

**Wisdom teaches us that, if someone claims a mistake, and their money is in my pocket, I might believe it, but if my money is taken into their pocket, not so fast.**

There is a Pennsylvania Gaming Commission Consent Agreement arising from these facts. [Complaint Ex. 12] The volume of alternative counts, grounded upon the same set of set of facts, exists because a jury could find that one count, if not the other, supports the theory of recovery. Moreover, importantly, unlike in many other cases, where there is a single seed of the dispute, but, here, there are multiple seeds of the dispute, each having a different legal basis.

The basic facts are relatively commonplace for a consumer of gambling services: you and the general public are invited, by various mechanisms of advertising, to gamble in a gambling house; you may join a Player's Club with terms and conditions as part of the understanding; you gamble, and you expect that gambling facility to be trained, to accurately calculate payoffs and not to cheat. When you sit at a slot machine or a card table, you expect that the gambling house is not conducting itself in a manner that will be the cause a Consent Agreement and fine by the Commonwealth Gaming Control Board.

Such as it is with egregious crimes and torts, the volume of counts is simply commensurate with the nature of the conduct and injury, and the highly unique nature of proven injury from a regulated gambling facility.

Plaintiffs attempted to amend the Complaint in good faith until it became certain that Defendants would never, ever, concede that their illegal actions would support any claim for relief, notwithstanding three pleading attempts, 12 incorporated exhibits, and a Pennsylvania Gaming Commission Consent Agreement with a Gaming Control Board fine.

#### STANDARD FOR DEMURRER<sup>1</sup>

It is well established that, for purposes of determining preliminary objections in the form of a demurrer, the Court must accept as true all well-pleaded facts and reasonable inferences which may be deduced therefrom, but not conclusions of law. Moyer v. Davis, 67 Pa. Commonwealth Ct. 251, 446 A.2d 1355 (1982), aff'd, 501 Pa. 192, 460 A.2d 754 (1983). It is also true that a demurrer may not be sustained unless the face of the complaint shows that the law will not permit recovery, and that any doubt should be resolved in favor of overruling the demurrer. Ass'n of Pennsylvania State Colleges v. Commw. of Pa., 44 Pa. Commonwealth Ct. 193, 403

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<sup>1</sup> As captioned and averred by Defendants, all preliminary objections are demurrers pursuant to 1028(4), for legal insufficiency with deemed admission, rather than factual insufficiency for clarity to form a response. No part of the preliminary objections object to the content of the pleadings otherwise under 1028, including, but not limited to, 1028(2)-(3), and any such objections are accordingly waived. By demurrer, Defendants challenge the pleading by deemed admission to the averments.

A.2d 1031 (1979). A case is not tried at the preliminary objection phase of litigation. Insurance Adj. Bureau v. The Insurance Comm. for the Com-  
mw. of Pa, 86 Pa. Commonwealth Ct. 491, 485 A.2d 858 (Pa. Commw, 1984). A demurrer by a defendant admits all relevant facts sufficiently pleaded in the complaint and all inferences fairly deducible therefrom. Krajewski v. Gusoff, 53 A.3d 793 (Pa. Super 2012).

**Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.**

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa.Super.2011) (emphasis added).

#### ANALYSIS

Plaintiffs hereby incorporate the Third Amended Complaint (the "Complaint") into this document by this reference. This Court will note that the manner of pleading in the Complaint incorporates, by reference, facts into and among the counts within the Complaint. As the preliminary objections are demurrers, the Complaint speaks for itself and the facts asserted are deemed to be admitted by the Defendants. Krajewski, supra. Irrespective that Defendants indicate insufficient facts, at times, as a basis for their demurrer, they admit those facts as actually averred, with inferences drawn therefrom and their demurrers will be overruled unless it is "clear and free from doubt that [Plaintiffs] will be unable to prove facts legally sufficient to establish the right to relief." Id.

Each of the defendants is identified as actively participating, individually and jointly, in the operation of the Meadows, which solicits gaming patrons and by which Plaintiffs were injured. More specifically, Cannery Casino Resorts, LLC, is a Nevada limited liability company, that openly claims to be "owner and operator." [Complaint Ex. 1 (press releases, website), Ex. 3 (federal trademark registrations),

Cannery Casino Resorts, so-named as an unincorporated association, owns the federal copyright. Based upon the information available, no corporate identification is disclosed as part of the copyright notice; that is, e.g., no "LLC" designation [Complaint Ex. 4]. Compounding the averred fact of participation of the defendants in a group, is the fact that the fictitious name registered with this Commonwealth is owned by WTA Acquisition Corp., and Washington Trotting Association [Complaint Ex. 5]. That is, the owner of the federal trademark registration is not disclosed as owner of the fictitious name registration in this Commonwealth, which is itself an unincorporated association of business entities acting in concert pursuant to the fictitious name. Indeed, WTA Acquisition Corp. is the owner of the fictitious name, but is not disclosed as an owner or operator doing business as an approved operator in this Commonwealth. [Complaint Ex. 7; Ex. 5, pg. 5]

Therefore, there is a complete and highly confusing disconnect between the governmental disclosures, the public advertising, the public federal copyright notice, the public record of the federal trademark registrations, and the fictitious names filed with this Commonwealth.

And, if those facts are not enough, Cannery Casino Resorts, LLC, is not even qualified as a foreign company or otherwise domesticated in this Commonwealth of Pennsylvania in violation of Pennsylvania law, and this Court can take judicial notice, e.g., to wit:

[http://www.portal.state.pa.us/portal/server.pt/community/corporations/12457/foreign\\_business\\_corporations/571872](http://www.portal.state.pa.us/portal/server.pt/community/corporations/12457/foreign_business_corporations/571872).

Defendants are in business. Big business. Defendants deal in money, profit and, most of all, statistical risk assessment. They are experts at playing the odds.<sup>2</sup>

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<sup>2</sup> Let us please use common sense and hypothesize. Plaintiffs bring this action with a claim of violation by the Defendants. When the claim was first made, Defendants retaliated and blackballed Mastroianni. But for the *ex post facto* Consent Agreement to substantiate the claim, *prima facie*, there would be a significant natural prejudice that the claim is by plaintiffs, e.g., who are just taking a shot at defendants. But, that is not true. Plaintiffs, and other citizens and visitors to this Commonwealth, were, in fact, injured,

It is Plaintiff's contention that Defendants are highly sophisticated, and highly regulated, in an industry that solicits adult patrons of all ages and some who are not sophisticated, including senior citizens using fixed incomes, and care must be taken as trained fiduciaries for calculations of some complex bets and payouts.

Accordingly Plaintiffs have pleaded that Defendants, individually, jointly, and in concert, own and operate a gambling facility commonly known as "The Meadows."

The Meadows actively solicits patrons of all ages and professions, including recreational and professional gamblers, including senior citizens. Defendant Cannery Casino LLC broadly advertises, by its admission, it owns and operates The Meadows.

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and the Consent Agreement, by all natural inclinations, demonstrates the *prima facie* basis. And, yet, Defendants still deny each and every claim for recovery grounded in contract, tort and statute. Without Plaintiffs' report to the Gaming Control Board, enduring retaliation and continuing cooperating with the government investigation, and the Gaming Control Board's action, Defendants' illegal practices would be continuing. Even so, defendants will make Plaintiffs, and anyone else similarly situated, work and work to do the right thing to seek recovery.

**COUNTS I-III**  
**Breach of Contract**

The Complaint speaks for itself, and is well-pleaded as can be pleaded for the context. Like the wolf of Aesop continuing to press the lamb for more reasons, Defendants argue that there are insufficient facts for a context that is as straight-forwardly pleaded at this time by facts, due inferences, and a Consent Agreement for the cause of action.

Plaintiffs pleaded the gambling activities that support the claims. The material facts are pleaded in more than 100 averments, and the material issue for the Defendants to deny is simply the liability fact that underlies the Consent Agreement: During the period averred, did you charge the vigorish fee to craps players when the rules indicated that you were not permitted to do it: yes or no? There is a Consent Agreement with a factual background that is incorporated into the Complaint. [Complaint Ex. 12]

Whether the jury will determine whether the facts and evidence supports a contract of a certain type remains to be seen. The facts are that Defendants put advertisements in various media, including "SEE YOUR OFFERS" [Complaint Ex. 10], as well as Player's Club invitations, and with claims of "place your bets" soliciting to do so. Subject to the averments, for these types of facts, alternative pleading for theories of recovery are permissible and proper.

Moreover, Defendants exclusively control significant evidence regarding the transactions; discovery has not yet been conducted and the parties will adduce details underlying the claims and the Consent Agreement, and Defendants will retain a full and fair post-discovery opportunity to conduct motion practice for summary judgment.

**COUNTS IV**  
**Unjust Enrichment**

Quite simply, based upon the facts averred, even if a jury determined that the facts did not support a contractual relationship, there were clearly benefits conferred upon Defendants, acceptance or retention



of such benefits under circumstances that it would be inequitable for Defendants to retain the benefit. Defendants occasionally set forth a minimal quotation out of context without also quoting all the incorporated facts and averments otherwise made and the inferences therefrom. Moreover, the assertion that the benefits were derived by cheating and pursuant to the same facts for which the Gaming Control Board Consent Agreement exists demonstrates unjust acquisition of benefits.

**COUNTS V**  
**Breach of Fiduciary Duty**

Defendants' assertion that they are not fiduciaries is contrary to reality and all understanding. The house is sophisticated, trained, regulated, holds the bets, operates the games, manages the game-play, enforces the rules, and calculates the payout. Anyone who has ever played craps will easily draw the inference of complexity ("vigorish," "come out point," "pass bet," "supplemental wagers," etc.), and the statistical payout calculations are set forth in Complaint, Ex. 6. This Court can take judicial notice that there is no skill requirement to play the game of craps, and the Commonwealth does not have any financial standard or skill standard for game-play [See, eg., Complaint Ex. 6]. Defendants' implicit suggestion that certain games require advance training and/or competency tests is untenable. Possibly is it something that everyone should consider, such as options trading: financial, educational or training requirements to gamble, with "CONSUMER BEWARE" signs, but that currently is not the case. Instead, the advertising is to "LET'S HAVE SOME FUN" [Complaint Ex. 9] Untrained, uneducated and even relatively poor people are invited by Defendants to play all games, all day and every day. The regulated gambling house is clearly a fiduciary, with significant power, and a jury can find that the Defendants breached that duty.

**COUNTS VI**  
**Tortious Interference**

Plaintiffs and their activities were known to Defendants. It is effectively pleaded that Defendants, in blackballing Mastroianni, were in-

terfering with the relationship between the Plaintiffs with the intent to harass, annoy or alarm another, Mastroianni, engaged in a course of conduct committed acts which served no legitimate purpose. Clearly, in paragraph 72 and otherwise it is averred that Defendant Mastroianni was known to be collecting data regarding the play, as he was openly documenting play statistics for use, data warehousing and data sharing with Plaintiff Litman. Again, Defendants by caption title and averment have demurred and not sought a more specific pleading; thereby, Defendants admit the averment for purposes of their objection, and the averment sets forth facts grounding a cause of action. It is averred that Defendants are acting individually and jointly.

**COUNTS VII-VIII**  
**Unfair Trade Practices**

Plaintiffs were consumers and purchasers of the gambling services offered by Defendants. For this service, the house collects, by various calculations of odds and payouts, fees for services. Plaintiffs pleaded various fraudulent and unfair trade practices: confusion as to who really owns and operates "The Meadows," because the federal copyright notice, federal trademark filings, fictitious name filing are mixed up and incongruent. Moreover, those facts, with the fact that no "Cannery" entity is registered with this Commonwealth to do business as a foreign entity, and a clear violation of the published rules of game-play, with a Consent Agreement by the Pennsylvania Gaming Control Board clearly set forth a basis for the claim. Moreover, WTA Acquisition Corp., a foreign entity that owns the fictitious name for operating The Meadows is apparently not otherwise disclosed or openly operating.

Also, notwithstanding that neither Cannery Casino Resorts, LLC nor Cannery Casino Resorts, owns any portion of "The Meadows Racetrack and Casino" fictitious name used within this Commonwealth [Complaint, Ex. 5], Cannery claims to be "owner and operator" the Meadows in Complaint Ex. 1, when, in fact, Complaint Ex. 5, pg. 5, indicates that Cannery Casino Resorts, LLC is the owner of PA MezzCo, LLC, which owns PA Meadows, LLC, and PA Meadows, LLC, owns Washington Trotting Association, Inc., the Gaming

Control Board licensee, and neither are record owners, as required, of the Pennsylvania fictitious name filed for use in this Commonwealth. In fact, as averred, upon information and belief, and for this purpose admitted by Defendants, no "Cannery Casino" will be able to produce evidence of ownership in the Washington Trotting Association, Inc., the gaming licensee. Defendants use the "Cannery" designation, for the reason admitted here by Defendants to be true, to lead the public to believe that Cannery, with a Las Vegas reputation, is responsible for "big time" operations in a manner baiting the "like you're in Las Vegas" reputation. The public record contradicts the assertion. In fact, there are apparently at least 47 indirect owners in Washington Trotting Association, Inc.

Defendants mistake the claim and theory of recovery with the averments of fact. The averments of fact regarding the copyrights, trademarks, fictitious names, qualification to do business, licensing and ownership problems are not necessarily separate causes of action themselves, but are averments of fact setting forth factual conditions supporting the captioned claim of unfair trade practices and scheme of fraud, admitted by Defendants to be true for purposes of preliminary objections.<sup>3</sup>

Particularly in light of the fact that Defendants admit Plaintiffs' averments by demurrer, Plaintiffs are entitled to make their case of fraud and deceptive practices; Defendants' contention that Plaintiffs' 108 paragraph pleading allows "no doubt" whatsoever that fraud or a deceptive practice could not occur is flatly untenable, particularly in light of a Consent Agreement by the Pennsylvania Gaming Control Board.

**COUNTS IX  
Conversion**

Plaintiffs have averred that Defendants have taken Plaintiffs' money under a false pretense, fraudulently, and in a deceptive practice. The trespass to Plaintiffs' monies grounds in simple conversion, as Defendants

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<sup>3</sup> As distinguished from a count and theory of recovery, if Plaintiffs state a fact that is not true, Defendants can simply deny it in due course (having legally admitted it for this procedural purpose). Is each defendant qualified as a foreign company? Is the fictitious name accurate, or is the trademark registration accurate, or both?

have converted Plaintiffs' monies, and continue to have converted Plaintiffs' monies, to Defendants' own use illegally and without justification.

**COUNTS X**  
**Negligence**

There are tort claims made in the Complaint in conjunction with a contract claim. The basis is that the rights of Plaintiffs do not subsist only in a contract claim, but within the social and highly regulated system for gambling facilities. This scenario is not really an exception to the general rule, as it is of less common applicability; to wit, most relationship scenarios are grounded exclusively in either assent or social imposition. In a case, such as this, as sometimes viewed for professional services, the focus is whether "actions lie from a breach of the duties imposed as a matter of social policy" or "from the breach of duties imposed by mutual consensus." Redevelopment Auth. of Cambria County v. Int'l Ins. Co., 454 Pa.Super. 374, 685 A.2d 581, 590 (1995). In this case, clearly, "gist of the action" is inapplicable in that Plaintiffs have pleaded that Defendants, in a highly socially and legally regulated environment, selling to consumers, has contractual and tortious social implications.

This context is a text-book case of where contract subsides incidentally with independent social tortious theories of recovery.

**COUNTS XI**  
**Violation of Gaming**

Plaintiff have averred that Defendants violated the statutes identified throughout the Complaint and in the Exhibits, particularly, as stated, Complaint Ex. 12, incorporated into the Complaint and which the specific laws are set forth by the Commonwealth Gaming Control Board itself. Plaintiffs could do no better than the Gaming Control Board of this Commonwealth regarding a statement of legal violations. It is untenable for Defendants to plead that they do not have an understanding of the 108 averment Complaint, which attaches the Consent Agreement which further sets forth the applicable law and to which Defendants were actually fined

by the Commonwealth Gaming Control Board. In due course, Defendants can simply admit or deny any violation whatsoever, or may otherwise admit in part and deny in part. Again, Defendants objected by demurrer, admitting the averments with inferences. If Defendants desired a more specific pleading, Defendants might have requested that relief from that particular objection, but Defendants have, for this purpose, admitted the Complaint averments as they stand, as incorporated by reference, with inferences.

**COUNTS XII**  
**Civil Conspiracy**

Plaintiffs have averred that Defendants acted in concert, and they have clearly done so according to the record. Each public record referenced contradicts another, within the framework of a Consent Agreement for violation of the gaming rules, implemented onto all players of craps, for an extended period of play prior to the governmental cease and desist letter. [Complaint Ex. 12, pg. 4, ¶10] With the facts admitted for this purpose as true, a jury could certainly believe, as averred, that the Defendants acted in common for a common purpose for their profit, more particularly in light of their conscious retaliatory actions of blackballing Mastroianni, and until such time as this Commonwealth issued a cease and desist. [Id.]

**COUNTS XIII**  
**Accounting**

Defendants' objection to the accounting is premature and must survive as a matter of law as pleaded, because the basis for the objection deals only with identification the parties and as to ultimate discovery relevance, which is admitted for this purpose for this purpose by Defendants' demurrer.

**COUNTS XIV**  
**Special Damage**

Defendants' objection to the count for special damages is contradicted by the incorporation by reference in paragraph 107 of the Complaint.

**Incidental Demurrers regarding  
Punitive Damages and Tort Claims**

Defendants' further object pursuant to 1028(4) by demurrers to Plaintiffs' claims for punitive damages, as well as the tort claims. Once again, Defendants are demurring to specific items and not the counts, which is the proper subject of other objections that have been waived.<sup>4</sup>

Matters regarding the "gist of the action" doctrine relating to torts are resolved above in the response to X - Negligence, in that, for unique cases such as this the focus is whether "actions lie from a breach of the duties imposed as a matter of social policy" or "from the breach of duties imposed by mutual consensus." See Redevelopment Auth. of Cambria County v. Int'l Ins. Co., 454 Pa.Super. 374, 685 A.2d 581, 590 (1995), and related cases. In this case, the relationship with the greater Commonwealth general public is governed by a set of socially imposed rules, taken as factually true for purposes of Defendants' demurrers. This is not a case where there are two parties of reasonably equal bargaining power who enter into a, e.g., 20 page written agreement, with legal counsel to assist. This is a case where society itself, by government or otherwise, impose social obligations by the fact that a sophisticated gambling facility invites the general public, including senior citizens on fixed income, relatively poor people, uneducated and untrained people to come in and just "HAVE SOME FUN!" in a context of sophisticated rules, and, in this case, the Pennsylvania Gaming Control Board has already found a social basis for a cease and desist letter and Consent Agreement with a fine. [Complaint Ex. 9, 12]

WHEREFORE, Plaintiffs hereby request that Defendants' motion be dismissed in its entirety, as the facts asserted in each count, admitted by

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<sup>4</sup> To the extent that Defendants are seeking specificity or to strike, they have not asked for that relief. Defendants are demurring, and it is well-settled that this Court will simply read the pleadings, draw inferences and rule, based upon the legal standards. There are certainly sufficient facts pleaded in the 108 count pleading, plus subparts. Defendants cannot say on the one hand they cannot frame a defense, and on the other hand, say that they admit everything for purposes of the demurrer. Plaintiffs are responding to the demurrers set forth by Defendants.

Defendants to be true for this purpose, support the theory of relief claimed by Plaintiffs.

September 30, 2013

Respectfully submitted,  
TEV LAW GROUP, PC

By: s/Gregg Zegarelli/  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on all Defendants on this date, by depositing the same in the United States Mail, First Class, Postage Pre-Paid upon the following:

WILLIAM L. STANG, ESQ.  
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September 30, 2013

s/Gregg Zegarelli/  
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