STATE OF ILLINOIS
ILLINOIS GAMING BOARD

ACCEL ENTERTAINMENT GAMING, LLC,	)	
	)	
Petitioner,	)	
v.	)	**No. 17-UP-009**
	)	
J&J VENTURES GAMING, LLC, an Illinois Limited Liability Company,	)	
	)	
Respondent,	)	
	)	
ACTION GAMING and ILLINOIS GAMING INVESTMENTS, LLC,	)	
	)	
Intervenors.	)	

RE: 127 Lounge (License No. 120702283); American Legion Post No. 233 (License No. 120908732); Chief's (License No. 120704255); Mule Barn (License No.120709442); Lonnie's Liquor (License No. 120712852); Veterans Inn (License No. 120704250); and Wild, Inc. (License No. 120712877)

FINAL BOARD ORDER

This cause comes before the Illinois Gaming Board (the "Board" or "IGB") pursuant to the Video Gaming Act (the "VGA"), 210 ILCS 40, and Section 1800.320(b) of the Board's Adopted Rules (the "Rules"). 11 Ill. Adm. Code 1800.320(b).

The VGA, the Rules, and *J&J Gaming Ventures, LLC v. Wild, Inc.*, 2016 IL 119870 give the Board broad, exclusive and original jurisdiction over agreements that purport to control the placement and operation of video gaming terminals ("VGTs") in licensed video gaming locations. Under Rule 320(b), "[t]he Board shall decide a petition brought by a terminal operator, licensed video gaming location or other interested party to determine the validity or enforceability of an agreement, or portion of an agreement, that purports to control the placement and operation of [VGTs]." 11 Adm. Code 1800.320(b)(1).

FINDINGS OF FACT

The Board has before it the entire record of *Accel Entertainment Gaming, LLC, Petitioner* ("Accel") *v. J&J Ventures Gaming LLC, Respondent*, ("J&J") *and Action Gaming, LLC* ("Action") *and Illinois Gaming Investments, LLC* ("IGI"), *Intervenors*, Docket No. 17-UP-009. The record includes the filed Petitions, consolidated Response, other pleadings received and materials reviewed, the Administrator's Recommended Decision ("ARD"), and any Exceptions.

In May 2017, Accel filed seven Rule 320(b) Petitions asserting the validity and enforceability of its agreements with the above-referenced contested locations (the "Locations") for placement and operation of Accel VGTs. Accel's Petitions also asked the Board to invalidate J&J's competing agreements with the Locations and to require J&J to remove its VGTs from the Locations. On June 13, 2017, J&J filed its consolidated Response to Accel's Petitions. Action and IGI timely filed a Petition to Intervene on December 31, 2019, which the Administrator granted. On January 24, 2022, Administrator Marcus D. Fruchter issued an ARD in this matter. The ARD correctly considered the Petitions, Responses, and their respective exhibits. Accel did not file Exceptions to the ARD. On February 7, 2022, J&J timely filed Exceptions to the ARD that both Action and IGI joined and adopted.

CONCLUSIONS OF LAW

We conclude that the ARD correctly applied Rules 320(b)(1) and (10), as well as the reasoning the Board adopted in *J&J Ventures Gaming, LLC v. Accel Entertainment Gaming, LLC*, 17-UP-003, to uphold the validity of Accel's agreements with the Locations and to invalidate J&J's initial agreements with the Locations. We further find that, because the initial J&J agreements no longer govern the placement and operation of VGTs at the Locations, the ARD correctly recommended that the Board should not order J&J to remove its VGTs from the Locations.[1] Accordingly, we adopt the ARD.

The Board is not persuaded to reject or modify the ARD in response to the challenges raised in J&J's Exceptions. First, J&J contends the recommendation to invalidate the initial J&J agreements is an improper advisory opinion about an abstract question. According to J&J, whether its initial agreements with the Locations were valid and enforceable is a moot issue because those agreements no longer govern the placement and operations of VGTs at the Locations, thereby eliminating any justiciable controversy between Accel and J&J for the Board to resolve. We disagree.

The Board is not bound by traditional common law principles of mootness in resolving 320 Petitions, because the VGA and Rules created rights and duties that have no counterpart in common law or equity. *Wild* at ¶ 32. This matter does not become moot simply because J&J's initial agreements are no longer in effect. Rule 320(b), *Wild* and the VGA do not limit the Board's authority to determine the validity and enforceability of use agreements. Indeed, J&J does not present any authority that support its position that the Board's authority to determine the validity and enforceability of use agreements is limited. Rather, rule 320(b)(1) expressly provides that the Board "shall decide" a petition where, among other things, the disputed issues include whether the agreement controls the placement or operation of VGTs or where there are purported agreements with potential overlapping effective dates. 11 Ill. Adm. Code 1800.320(b)(1)(A) and (B). Validity and enforceability of the overlapping and competing J&J and Accel agreements are precisely the issues Accel's instant Petitions ask the Board to decide.

[1] Since the initiation of this proceeding, the agreements under which J&J initially operated VGTs at the Locations have been amended, renewed or otherwise discontinued in favor of new use agreements. Further, one of the Locations has since surrendered its gaming license.

Similarly, the fact that the ARD does not recommend removal of J&J's VGTs from the Locations does not mean that the Board has no relief to provide Accel. By claiming that it does, J&J misapprehends Rule 320(b)(10) and the relief the Board has authority to award. Indeed, validity determinations are one type of relief the Board can provide in a Rule 320(b) proceeding. Another relief available to the Board is to order the removal of VGTs from a licensed location. 11 Ill. Adm. Code 1800.320(b)(10). Thus, the Board's process for awarding relief is typically two-fold: determining validity and deciding whether to require the removal of any VGTs. *Id.* Here, the ARD falls squarely within Rule 320(b)(1) and Rule 320(b)(10). Having found the initial J&J agreements invalid, the Administrator appropriately recommended that the Board use its discretion and not require removal of J&J VGTs from the Locations given the existence of J&J's new agreements with the Locations – agreements not at issue in Accel's Petitions.[2]

Second, J&J's Exceptions to the ARD in this matter reassert the same objections J&J made to the ARD in 17-UP-003. The Board previously considered those arguments and was not convinced. We again find those objections unpersuasive here. By re-emphasizing that 17-UP-003 misapplies Illinois contract law, J&J misunderstands anew the Board's special authority in these matters. Whether this ARD adheres to Illinois contract law, and the Board takes no position on that question, is not relevant here because the jurisprudence of contract law is not binding in a Rule 320(b) proceeding. *Wild* at ¶ 32. In accord with *Wild*, the Board adopted Rule 320(b) (which was approved by the General Assembly's Joint Committee on Administrative Rules) to resolve disputes involving the validity and enforceability of agreements purporting to control placement and operation of VGTs. Nothing in Rule 320(b), *Wild,* or the VGA makes Illinois contract law binding precedent on the Board in a Rule 320(b) proceeding. Accordingly, we again decline J&J's invitation to impose such artificial restrictions.

Therefore, after careful review and consideration of the entire record, the Board hereby:

(1) Adopts the Administrator's Recommended Decision;

(2) Finds that Accel proved its May 15 and 16, 2017 Petitions by clear and convincing evidence;

(3) Denies Accel's request that the Board order J&J to remove its VGTs from the contested locations[3]; and

(4) Declares (to the extent necessary and appropriate) that the parties' various circuit court lawsuits may proceed with respect to any issues other than the validity and enforceability of agreements that purport to control the location and operation of VGTs in a manner that is consistent with the Illinois Supreme Court's holding in *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 199870.

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[2] J&J agrees with the ARD's finding that the Board should not require J&J to remove its VGTs from the Locations.

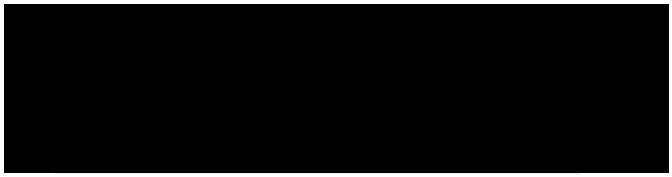
[3] The ARD instructed each party to submit a list of the Locations that it contends remain in dispute and subject to this Recommended Decision. J&J timely provided a list of Locations. The other parties to this Petition did not provide a list. Accordingly, the Board incorporates the J&J list of Locations as Appendix A to this Final Order, as the controlling list of Locations in this matter.

This is a Final Order subject to judicial review under the Administrative Review Law pursuant to 230 ILCS 10/17.1. The Rules of the Illinois Gaming Board do not permit motions or requests for reconsideration of this Order.

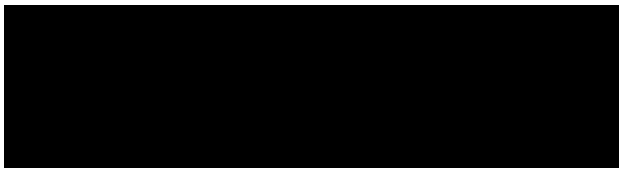
VOTED THIS THE SIXTEENTH DAY OF JUNE, 2022

Charles Schmadeke, Chairman

Dionne R. Hayden



Anthony Garcia



Mark Bell

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ADMINISTRATOR'S RECOMMENDED DECISION

These consolidated Petition come before the Illinois Gaming Board (the "Board" or "IGB") under Section 1800.320(b) of the Board's Adopted Rules (the "Rules"). 11 Ill. Adm. Code 1800.320(b). This Recommendation issues under Rule 320(b)(6). 11 Ill. Adm. Code 1800.320(b)(6).

Petitioner Accel Entertainment Gaming, LLC ("Accel") filed seven Rule 320 Petitions against Respondent J&J Ventures Gaming, LLC ("J&J"), asking the Board to: (1) declare valid and enforceable Use Agreements for the placement and operation of video gaming terminals ("VGTs") under which Accel previously operated its machines at seven video gaming establishments (the "Contested Locations") before several Illinois trial courts ordered Accel to remove them; (2) find invalid and unenforceable competing Use Agreements under which J&J

operated its VGTs at the Contested Locations; and (3) order J&J to remove its VGTs from the Contested Locations.

Since Accel filed the consolidated Petitions, the Use Agreements under which J&J initially operated its VGTs at the Contested Locations have variously been amended, renewed, or otherwise discontinued in favor of new use agreements (the "successor agreements"). Additionally, one Contested Location surrendered its video gaming establishment license. Under these circumstances, the Use Agreements that are the subject of Accel's Petitions no longer form the basis for the operation of video gaming at the Contested Locations. Accordingly, this Recommendation addresses the issues raised in Accel's Consolidated Petitions but does not address any successor agreements entered into by the Contested Locations.

After considering the parties' submissions, I recommend the Board grant Accel's consolidated Petitions in part and deny them in part. Specifically, I recommend the Board enter a Final Order finding that Accel's Use Agreements were valid and enforceable for the placement and operation of VGTs at the Contested Locations; and finding the contested J&J agreements were invalid and unenforceable for the placement and operation of VGTs at the Contested Locations. Because video gaming is not occurring in the Contested Locations under the initial J&J Use Agreements, I further recommend that the Board reject Accel's request for an order requiring J&J to remove its VGTs from these establishments.

I. JURISDICTION

The Video Gaming Act (the "VGA") confers jurisdiction and authority upon the Board to supervise all video gaming operations in Illinois. 230 ILCS 40/78; *Wild,* 2016 IL 119870 ¶¶ 3, 39-40. The Board has all powers necessary and proper to effectively execute the VGA, including authority to adopt regulations for the purpose of administering the VGA and "provide

for the prevention of practices detrimental to the public interest and for the best interests of video gaming." *Wild*, 2016 IL 119870 ¶ 3. The VGA provides "a comprehensive statutory scheme that vests jurisdiction over video gaming operations" with the Board. *Id.* ¶ 42. The Board's broad authority over all aspects of video gaming includes the "exclusive, original jurisdiction" to "determine the validity and enforceability of agreements that purport to control placement and operation of video gaming terminals." *Id.*

II. RELEVANT BACKGROUND

At various dates during July and August 2009, Action Amusement Company ("Action Amusement") entered into agreements with the Contested Locations purporting to give Action Amusements the exclusive right to place and operate VGTs inside of the establishments once the Board licensed the signatories. Each of the agreements were substantially similar and provided that the signatories would become licensed under the VGA. On October 5, 2010, Action Amusement assigned its interests in these agreements, along with many other purported VGT placement agreements, to Intervenor Action Gaming, LLC ("Action Gaming").[1]

On July 19, 2012, the Board preliminarily denied Action Gaming's terminal operator license application.[2] Subsequently, on August 24, 2012, Action Gaming entered into an Asset Purchase Agreement ("the APA") assigning its rights, title, and interest in the placement agreements to J&J. When Action Gaming assigned the placement agreements to J&J, none of

[1] Action Gaming and Illinois Gaming Investment, LLC intervened in these proceedings as "interested parties" under Rule 320(b)(8) and joined J&J's positions.

[2] After the Board preliminarily denied Action Gaming's terminal operator license application, Action Gaming petitioned the Board for a hearing under Board Rule 615(c). The Board denied Action Gaming's request on September 20, 2012, rendering the Board's denial of Action Gaming's license application a final order. 11 Adm. Code 1800.615(g). Action Gaming did not seek administrative review or appeal the Board's final order.

the parties to the agreements were licensed by the Board. Under the APA, Action Gaming received certain sums of money from J&J for every establishment that hosted and activated J&J's VGTs. Additionally, if J&J remained the terminal operator at the locations three months after its VGTs were activated, Action Gaming would receive additional payments over a three-year period.

J&J succeeded in effectuating many of the VGT placement agreements it acquired from Action Gaming by installing and operating its VGTs in the assigned locations once the locations were licensed by the Board. However, J&J failed to do so at the seven Contested Locations. Instead, before being licensed each of the seven Contested Locations signed separate agreements with Accel on various dates in August 2012. After the IGB licensed the Contested Locations, each went live with VGTs Accel installed and operated.

J&J and Action Gaming responded by filing multiple lawsuits in the Illinois Circuit Courts of Washington, Jackson, Montgomery, and Madison Counties, seeking to establish J&J's exclusive right to operate VGTs in the Contested Locations under the placement agreements obtained by assignment from Action Gaming. Accel intervened in each lawsuit, claiming in part that the assigned placement agreements were invalid because they were not procured by a licensed terminal operator. Accel asserted that only its agreements with the Contested Locations were valid because they were the only agreements signed by a licensed terminal operator.

While the parties' various lawsuits were pending in the circuit courts, the Illinois appellate court for the Third District issued an opinion addressing the validity of a placement agreement like the J&J agreements. In *Triple 7 Illinois, LLC v. Gaming & Entertainment Management Illinois, LLC,* 2013 IL App (3d) 120860, *petition for appeal denied,* 2 N.E.3d 1051 (Nov. 27, 2013), the Third District held in part that VGT placement agreements between an

unlicensed establishment and an unlicensed terminal operator are not subject to IGB regulation, and thus valid and assignable. *Triple 7,* 2013 IL App (3d) 120860 ⁋ 23. Based on the holding in *Triple 7*, the various circuit courts found that the J&J agreements were valid and enforceable contracts, enjoined Accel from operating VGTs in the Contested Locations, and ordered Accel to remove its installed VGTs.

Accel appealed the circuit court decisions. Ultimately the Illinois Supreme Court held that Illinois courts lack subject matter jurisdiction to determine the validity and enforceability of agreements that purport to control the placement and operation of VGTs within licensed establishments. *Wild,* 2016 IL 119870, ¶ 42. The Supreme Court's opinion in *Wild* led the IGB to adopt and implement the Rule 320 Petition process which brings this matter before the Board.

III. DISCUSSION

Accel's consolidated Petitions assert that the agreements J&J purchased from Action Gaming do not control video gaming at the Contested Locations and that its Use Agreements should take priority over what it argues are J&J's non-conforming agreements. According to Accel, the J&J agreements are invalid and unenforceable because the original agreements assigned by Action Gaming to J&J were not signed by a licensed terminal operator. Accel further urges the IGB not to uphold J&J's agreements because doing so would allow Action Gaming and its ownership to indirectly profit from video gaming even though the Board found both unsuitable for licensure.

J&J counters that the VGA and IGB Rules in effect at the time the J&J placement agreements were signed did not prohibit unlicensed parties from entering into agreements for the future placement of VGTs once the parties are licensed by the IGB. J&J also asserts that prohibiting these agreements would violate the parties' freedom to contract. J&J further

contends that a January 2016 agreement between the Board and Action Gaming favorably resolved any questions relating to the APA.

In deciding Accel's Petitions, the Board should uniformly apply the law and Board Rules and follow the principles it articulated in its prior Rule 320 Order in *J&J Ventures Gaming, LLC v. Accel Entertainment Gaming, LLC*, ARD 17-UP-003, which addressed similar facts and issues as are present here. *See City of Monmouth v. Pollution Control Board*, 57 Ill.2d 482 (1974) (quasi-judicial administrative agency decisions may be relied on as precedent in subsequent disputes involving the same facts and issues).

The Board's recent decision in 17-UP-003 involved the same parties and intervenors (Accel, J&J, Action Gaming, and Illinois Gaming Investments) and similar underlying facts and claims related to the contested VGT agreements at issue in this matter.[3] In deciding 17-UP-003, the Board found instructive Illinois common law principles about conditions precedent to a contract. In 17-UP-003, the Board ruled the disputed VGT placement agreements in that case were invalid and unenforceable unless certain acts or events occurred. By their own terms, the disputed VGT placement agreements at issue in 17-UP-003 could not become effective until the Board licensed the relevant terminal operator and locations *and* the terminal operator subsequently installed IGB approved VGTs inside the locations. The Board found that unless those contingencies were met, neither a valid use agreement nor an enforceable agreement of any kind exists in the video gaming context, and either party could effectively withdraw from the agreement and sign with another entity. ARD 17-UP-003, at 8. On that basis, the Board found that Accel met the contractual contingencies involving the Contested Locations while J&J had

[3] This ARD presumes the parties' familiarity with 17-UP-003, so it will avoid a lengthy discussion of that case here.

not. Thus, the J&J agreements never became valid and enforceable. ARD 17-UP-003, at 8-9.

In opposing Accel's Petitions here, J&J essentially advances the same arguments that the Board rejected in 17-UP-003. J&J claims it was entitled to operate VGTs in the Contested Locations because the agreements Action Gaming assigned to it preceded Accel's agreements. J&J's argument fails here for the same reason it failed in ARD 17-UP-003. Specifically, J&J's argument ignores the contingent nature of competing agreements recognized in 17-UP-03 and fails to establish what actions, if any, J&J took to satisfy the conditions precedent. Like the agreements in 17-UP-03, J&J's agreements here never became valid and enforceable because the contingencies that would have perfected them never occurred. J&J has not offered a compelling reason why the Board should deviate from ARD 17-UP-003 and reach a different result here.

Prior to being licensed by the Board, the Contested Locations withdrew from their initial agreements with J&J by signing new agreements with Accel. Once licensed, the Contested Locations accepted placement of Accel's machines in their video gaming establishments. Accordingly, the terms of the Accel agreements took effect on the dates when the licensed Contested Locations affirmatively allowed Accel to install VGTs inside their establishments, and the IGB allowed the VGTs to go live for patron play. While J&J initially succeeded in enforcing its agreements and supplanting Accel in the Contested Locations through its circuit court lawsuits, that victory dissolved once the Illinois Supreme Court held in *Wild* that the IGB, and not the Illinois courts, have the authority to determine the validity and enforceability of agreements that purport to control placement and operation of VGTs. *Wild*, 2016 IL 119870, ¶ 42. In compliance with the Supreme Court's decision in *Wild*, the Board articulated in 17-UP-003 how and when use agreements become perfected. *See* 17-UP-003, at 6-7.

Applying those principles here means that Accel held valid and enforceable use agreements with the Contested Locations. It further means that J&J's agreements never became valid and enforceable as to the Contested Locations because (but for the circuit courts' actions) the contingencies that would have perfected the agreements never occurred. However, since none of the Contested Locations are still operating under the initial agreements J&J acquired from Action Gaming, Accel's request for an order requiring J&J to remove its VGTs from those locations should be rejected. Any agreements J&J may have entered into subsequently are not the subject of Accel's Petitions and, therefore, the Board's order should not extend to them.

Finally, as in 17-UP-003, this determination regarding the threshold deficiencies of the J&J agreements with the Contested Locations renders discussion of the parties' other arguments unnecessary.

IV. CONCLUSION

For the foregoing reason, I recommend the Board enter an Order:

1. Adopting this Recommend Decision;

2. Finding that Accel's Use Agreements with the Contested Locations were valid and enforceable for the placement and operation of VGTs in the Contested Locations;

3. Finding that J&J's competing agreements with the Contested Locations were invalid and unenforceable for the placement and operation of VGTs in the Contested Locations;

4. Denying Accel's request for a Board order requiring J&J to remove its VGTs from the Contested Locations; and

5. Declaring (to the extent necessary and appropriate) that the parties' various circuit court lawsuits may proceed with respect to any issues other than the validity and enforceability of agreements that purport to control the location and operation of VGTs in a manner that is consistent with the Illinois Supreme Court's holding in *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 199870.

Pursuant to Rule 320(b)(7), any party to this Petition wishing to file exceptions must do so no later than 14 days after receipt of this Recommend Decision. Notwithstanding the filing of exceptions by any party, and within 14 days of receipt of this Recommended Decision, each party SHALL submit a list of Contested Locations that it contends remain in dispute and subject to this Recommended Decision. The Final Board Order will identify the Contested Locations.

DATED: January 24, 2022 **RESPECTFULLY SUBMITTED,**

MARCUS D. FRUCHTER
ILLINOIS GAMING BOARD ADMINISTRATOR