STATE OF ILLINOIS
ILLINOIS GAMING BOARD

ACCEL ENTERTAINMENT GAMING, LLC,	)	
	)	
Petitioner,	)	**No. 19-UP-023**
v.	)	
	)	
MIDWEST ELECTRONICS GAMING, LLC, et al.,	)	
	)	
Respondent,	)	
	)	

RE: Buccaneers Club d/b/a Johnston City Buccaneers (License No. 120713104)

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). Pursuant to the VGA, Rules and *J&J Gaming Ventures, LLC v. Wild, Inc.*, 2016 IL 119870, the Board has exclusive and original jurisdiction over contested use agreements.

FINDINGS OF FACT

The Board has before it the entire record of *Accel Entertainment Gaming, LLC, Petitioner, ("Accel") v. Midwest Electronics Gaming, LLC, Respondent, ("Midwest") RE: Buccaneers Club d/b/a Johnston City Buccaneers ("Buccaneers"),* Docket No. 19-UP-023, including the Petition filed, all Responses and other pleadings received, the Administrator's Recommended Decision, and any Exceptions filed.

On April 22, 2019, Accel filed its Petition pursuant to Rule 320 asserting the validity and enforceability of its use agreement ("UA") with Buccaneers. Accel's Petition also asked the Board to find Midwest's use agreement with Buccaneers invalid and unenforceable, and to require Midwest to remove its video gaming terminals from Buccaneers. On May 22, 2019, Midwest timely filed its Response. On January 7, 2022, Board Administrator Marcus D. Fruchter issued the Administrator's Recommended Decision ("ARD"). The ARD correctly considered the Petition, Response, and their respective exhibits. On January 21, 2022, Midwest timely filed Exceptions to the ARD. Neither Accel nor Buccaneers filed Exceptions to the Administrator's Recommended Decision.

CONCLUSIONS OF LAW

Contrary to the claims in Midwest's Response and Exceptions, the Board has not deprived Midwest of due process, ignored evidence, applied its rules retroactively, or exceeded its jurisdiction. In *Wild*, the Illinois Supreme Court recognized that there is no common law right to profit from gambling, the VGA which legalized video gaming is an exception to the general prohibition on gambling, the Board has original and exclusive jurisdiction over use agreements, and by "legalizing the use of video gaming terminals for commercial gambling purposes, the legislature enacted a comprehensive statutory scheme, ***creating rights and duties that have no counterpart in common law or equity.***" *Wild* at ¶ 32 (emphasis added).

The ARD accurately expressed the Board's policy preference to promote a level playing field between licensed establishments and licensed terminal operators in matters of UA renewals and terminations. It also correctly determined the Board's inquiry under Rule 320(b)(1)(D) is whether the renewal provision in the Midwest/Buccaneers UA "poses such obstacles against non-renewal, or confusion about the procedures for non-renewal, as to constitute an undue burden on the licensed video gaming location that has entered into the provision." 11 Ill. Admin. Code 1800.320(b)(1)(D). The ARD rightly found that, on its face, the non-renewal provision (Paragraph 15) of the Midwest/Buccaneers UA imposes such obstacles against non-renewal as to constitute an undue burden on Buccaneers to terminate under Rule 320(b)(1)(D).

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 April 22, 2019 Petition by clear and convincing evidence;

(3) Orders Midwest to remove its video gaming terminals from Buccaneers within 30 calendar days of the entry of the final Order.

Board Rules do not allow or require any motion or request for reconsideration. This is a final order subject to judicial review under the Administrative Review Law pursuant to 230 ILCS 10/17.1.

VOTED THIS THE TENTH DAY OF MARCH, 2022

[redacted]

Charles Schmadeke, Chairman

[redacted]

Dionne R. Hayden

[redacted]

Anthony Garcia

[redacted]

Marc Bell

The following is a list of all parties of record to *Accel Entertainment Gaming, LLC, Petitioner, ("Accel") v. Midwest Electronics Gaming, LLC, Respondent, ("Midwest") RE: Buccaneers, Inc. d/b/a Buccaneers ("Buccaneers"),* Docket No. 19-UP-023. Pursuant to Board Rules 1800.320(b)(2)(A), 1800.320(b)(12), 1800.320 (b)(13), and 1800.140, this Final Order is being served via e-mail and becomes effective upon such service.

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RE: Buccaneers Club d/b/a Johnston City Buccaneers (License No. #120713104)

ADMINISTRATOR'S RECOMMENDED DECISION

This dispute comes 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") asks the Board to: (1) find that Accel's August 10, 2018 Use Agreement ("UA") with Buccaneers Club d/b/a Johnston City Buccaneers ("Buccaneers") is valid for placement and operation of video gaming terminals ("VGTs"); (2) find that the initial term of Midwest Electronics Gaming, LLC's ("Midwest") UA with Buccaneers ended on May 14, 2019; and (3) require Midwest to remove its VGTs from Buccaneers.

After consideration of the parties' submissions, I recommend the Board grant Accel's Petition and require Midwest to remove its VGTs from Buccaneers within 30 calendar days of the entry of a final Board Order in this matter.

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; *J&J Gaming Ventures, LLC v. Wild, Inc.*, 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. "By legalizing the use of video gaming terminals for commercial gambling purposes, the legislature enacted a comprehensive statutory scheme, creating rights and duties that have no counterpart in common law or equity." *Id.* ¶ 32. The Board's broad authority over all aspects of video gaming includes the "exclusive, original jurisdiction" to determine the validity and enforceability over agreements that "purport to control placement and operation of video gaming terminals." *Id*; *see also* 11 Ill. Adm. Code 1800.320(b)(1).

II. RELEVANT BACKGROUND

On October 2, 2013, location licensee Buccaneers entered into a UA with licensed terminal operator Midwest. The parties' UA gave Midwest the exclusive right to place and operate VGTs in Buccaneers for five years from and after the date of commencement of video gaming at Buccaneers. The UA further provided that it "shall automatically be renewed for a period of five (5) years…unless [Midwest] is notified in writing by [Buccaneers] through the United States Postal Service by certified mail, return receipt requested and such written notice from [Buccaneers] is received by [Midwest] not more than 90 days and not less than 60 days prior to the expiration of the Initial Term of [Buccaneers'] intent to terminate this Agreement." On May 14, 2014, video gaming went live at Buccaneers and the parties' UA commenced. The five-year anniversary of the commencement of video gaming at Buccaneers under the Midwest/Buccaneers UA is May 14, 2019.

The UA imposed certain hurdles for Buccaneers to clear before it could non-renew or terminate the UA and engage a different terminal operator. Specifically, paragraph 15 provided that if Buccaneers notified Midwest of its intent to non-renew because of a competing offer from a different terminal

operator, Buccaneers "shall provide a complete copy of said written offer," Midwest will have thirty days to match the competing offer and Buccaneers shall withdraw its non-renewal notice.

On August 10, 2018, Accel and Buccaneers signed an agreement to place Accel's VGTs in Buccaneers upon termination of the Midwest/Buccaneers UA. On February 26, 2019, Buccaneers sent notice to Midwest of its intent to terminate and non-renew the Midwest/Buccaneers UA effective May 14, 2019. Midwest received Buccaneers' notice on February 28, 2019. Midwest rejected Buccaneers' notice, asserting that Buccaneers failed to comply with the UA's non-renewal provisions. On or about March 29, 2019, Midwest informed Buccaneers that its February 26, 2019 "letter does not meet the requirements set forth in the Use Agreement…", "failed to abide by [paragraph 15 of the UA] …" and the "Notice of non-renewal is withdrawn and the [UA] will now renew according to its terms." Accel filed this Petition on April 22, 2019.

III. DISCUSSION

Accel asserts that Buccaneers properly terminated its UA with Midwest, effective May 14, 2019. Midwest disagrees and responds that: (1) the Board lacks jurisdiction over this matter; (2) Buccaneers failed to properly terminate its agreement with Midwest; and (3) Buccaneers' failure to properly terminate the UA resulted in an automatic renewal of the UA for an additional five-year period through May 14, 2024. The parties' respective arguments are addressed below.

A. Midwest's Jurisdictional Challenge

Midwest first contends that the Board lacks jurisdiction over this dispute. Midwest is wrong and ignores the Board's exclusive authority to resolve this matter under the VGA, Board Rules, and binding Illinois Supreme Court precedent. Our analysis begins by recognizing the well-settled principle that there is no Illinois common law right to engage in or profit from gambling through contract or otherwise. *E.g., Wild*, 2016 IL 119870 ¶ 26 (internal citations omitted). The VGA, "which legalized the use of

video gaming terminals under certain limited circumstances, is an exception to the general prohibition against gambling." *Id*. The Illinois Supreme Court made clear in *Wild* that the Board has exclusive, original jurisdiction to determine the validity and enforceability of any agreements that purport to control placement and operation of VGTs in Illinois. *Id.* ¶ 42.

VGTs may be placed only in a licensed establishment that has entered into a written "use agreement" with a licensed terminal operator. 230 ILCS 40/25(e). A use agreement is a contract between a licensed terminal operator and a licensed establishment that provides the terms and conditions for placing and operating VGTs at that establishment. 11 Ill. Adm. Code 1800.110. The Board's Rules establish minimum standards for use agreements. 11 Ill. Adm. Code 1800.320. Among other things, and relevant to this dispute, Video Gaming Rule 320(b)(1)(D) expressly provides the Board with the authority to decide whether a renewal provision in a use agreement "poses such obstacles against non-renewal, or confusion for non-renewal, as to constitute an undue burden" on a licensed establishment. 11 Ill. Adm. Code 1800.320(b)(1)(D). Thus, and contrary to Midwest's assertion, the Board has exclusive jurisdiction to decide this Petition.

B. The Midwest/Buccaneers Use Agreement

Having disposed of Midwest's jurisdictional challenge, we next address whether the non-renewal provisions of the Midwest/Buccaneers UA constitute an undue burden on Buccaneers under Rule 320(b)(1)(D). The Board expressed a policy preference to promote a level playing field between licensed establishments and licensed terminal operators in matters of UA renewals and terminations when it adopted Rule 320(b)(1)(D). Rule 320(b)(1)(D) and the policy it articulates flow directly from the Board's statutory authority over video gaming and to issue rules to "prevent practices detrimental to the public interest and promote the best interests of video gaming." 230 ILCS 40/78(a)(3); *cf. Windy City*

Promotions, LLC v. Illinois Gaming Board, 87 N.E.3d 915 at 922 (affirming the Board's authority to adopt interpretive rules).

The Board's inquiry under Rule 320(b)(1)(D) is whether the renewal provision in the Midwest/Buccaneers UA "poses such obstacles against non-renewal, or confusion about the procedures for non-renewal, as to constitute an undue burden on the licensed video gaming location that has entered into the provision." 11 Ill. Admin. Code 1800.320(b)(1)(D). First, there is no dispute that Buccaneers delivered its February 26, 2019 non-renewal notice to Midwest "not more than 90 days and not less than 60 days prior" to May 14, 2019 as required by the Midwest/Buccaneers UA. As such, the only dispute here is whether Buccaneers failed to comply with paragraph 15, and if so, whether that failure precludes Buccaneers from terminating the UA. Paragraph 15 states in its entirety:

> In the event that Establishment notifies Terminal Operator that Establishment will not renew this Agreement, at the expiration of its term according to the requirements in Section 14 and such non-renewal is a result of a competing offer from another entity or individual to provide VGTs similar in form or function to the VGTs provided by Terminal Operator, Establishment shall provide a complete copy of said written competing offer that must include all terms (specifically including, but not limited to, game manufacturer, game program version, cabinet specifications, any item(s), game(s) and/or term(s) that are perceived by Establishment to be an improvement as compared to the items, games and terms provided by Terminal Operator, name of proposed new terminal operator and principal owner, name of the person who provided a representative of Establishment with the competing offer, the date a representative of Establishment was initially solicited by a representative of the proposed new terminal operator and the date the competing offer was provided to a representative of Establishment) to Terminal Operator attached to the notice of non-renewal from Establishment. Terminal Operator shall have thirty (30) days from receipt of notice of non-renewal, as per the terms of Section 14, to match the material terms of any competing offer in form and function and Establishment shall withdraw its notice of non-renewal. This Agreement shall continue in full force and effect if Terminal Operator files suit or pursues arbitration to determine the validity of a competing offer received by Terminal Operator.

This paragraph—which Midwest authored—mandates Buccaneers to provide such robust and specific information as to effectively bar Buccaneers' ability to end the parties' UA. Midwest created a labyrinth that trapped Buccaneers in this contract with the above paragraph. Midwest argues that to comply with this provision Buccaneers merely needed to take the "simple step" of identifying "material

terms of any competing offer, and if [Buccaneers] received a competing written offer, send the specific terms…and a copy of that written offer with the notice." (Respondent's Brief, ¶ 4-5.)

However, Buccaneers' path out of this contractual maze is not as simple or straightforward as Midwest portrays. In fact, the UA demands that Buccaneers produce a burdensome list of detailed information for Midwest' approval. Specifically, paragraph 15 provides that in order for Buccaneers to successfully submit a "complete copy of said written competing offer [from Accel]" Buccaneers "must include all terms (specifically including, **but not limited to**, game manufacturer, game program version, cabinet specifications, any item(s), game(s) and/or term(s) that are perceived by Establishment to be an improvement as compared to the items, games and terms provided by Terminal Operator, name of proposed new terminal operator and principal owner, name of the person who provided a representative of Establishment with the competing offer, the date a representative of Establishment was initially solicited by a representative of the proposed new terminal operator and the date the competing offer was provided to a representative of Establishment)…." (Emphasis added.)

The level of unacceptable specificity Buccaneers must provide is almost unattainable even if the Board does not consider the open-ended discretion given Midwest to evaluate the completeness of Buccaneers' termination notice. For example, paragraph 15 requires Buccaneers to identify the date it was solicited by its would-be terminal operator. In other words, if Buccaneers received a call from a potential terminal operator it bears a burden to record the date of the call because at some time in the future *if* Buccaneers wishes to pursue a UA with that terminal operator it is required to provide Midwest with the date of that initial solicitation. Additionally, if Midwest employs the "but not limited to" language in paragraph 15 Midwest could, at its sole discretion, find any copy of a written competing offer deficient. For example, the above requires the date a representative of Buccaneers was initially solicited but does not specify the medium of the solicitation. Midwest, at its sole discretion, could reject Buccaneers' submission of a written competing offer because it failed to include this non-specified piece

of information.

Paragraph 15, through both the specificity and open-endedness of its language and terms, imposes such obstacles against non-renewal as to constitute an undue burden on Buccaneers to terminate under Rule 320(b)(1)(D). Paragraph 15, and Midwest's attempted unreasonable enforcement of it, are detrimental to the best interests of Illinois video gaming and contravene the Board's policy against such practices. Accordingly, Board action is necessary and appropriate under Rule 320(b)(10).

IV. CONCLUSION

For the foregoing reasons, I recommend that the Board enter an Order:

1. Adopting this Recommend Decision;

2. Granting Accel's Petition, finding that paragraph 15 of the Midwest/Buccaneers Use Agreement poses such obstacles against non-renewal, or confusion about the procedures for non-renewal, as to constitute an undue burden on Buccaneers, and;

3. Upon the Board's entry of a Final Order adopting this Recommended Decision, ordering Midwest to remove its VGT's from Buccaneers within 30 calendar days of the entry of the final Order.

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 the Recommend Decision.

DATED: January 7, 2022

RESPECTFULLY SUBMITTED,

[redacted]

MARCUS D. FRUCHTER
ILLINOIS GAMING BOARD ADMINISTRATOR