

AGAINST THE SPREAD: THE LEGALITY OF FULL-SERVICE SPORTS WAGERING KIOSKS

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I. INTRODUCTION

While a small number of other states allow sports betting in the form of lotteries and parlay cards,¹ Nevada is the only state that allows a full range of legalized sports wagering.² Until recently, sports betting was only allowed in locations that held a nonrestricted gaming license.³ However, in 2011, the institution of full-service sports wagering ‘kiosks’ in restricted gaming licensee locations alleviated the need to drive to a nonrestricted gaming licensee.⁴ These full-service ‘kiosks’ were, in the simplest terms, free-standing race and/or sports books which were linked to a nonrestricted licensee via dedicated landlines.⁵ Gone were the days where sports bettors drove to a nonrestricted establishment, found parking, trekked through the entire casino, and placed a

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¹ In 1992, Congress passed the Professional and Amateur Sports Protection Act (“PASPA”) which banned sports wagering in every state that did not, at that time, have legalized sports wagering. This narrowed the number of states to 6: Nevada, Oregon, Delaware, Montana, Washington and New Mexico. *See Sport Gambling – Legal Sports Gambling*, LIBRARY INDEX, <http://www.libraryindex.com/pages/1612/Sports-Gambling-LEGAL-SPORTS-GAMBLING.html> (last visited Oct. 3, 2013).

² *Id.*

³ NEV. REV. STAT. § 463.0177(2) (2011) (giving nonrestricted licensees the ability to operate a sports book). NEV. ADMIN. CODE § 26C.070(2) (2011) (“A book shall accept wagers only on its licensed premises, and only at betting stations approved by the chairman or through an account wagering system that has been approved by the chairman.” Even with account wagering, the account could only be initiated on the premises of a nonrestricted licensee). *See also* S.B. 416, 2013 Leg., 77th Sess. (Nev. 2013), <http://legiscan.com/NV/text/SB416/id/802179>, which makes changes to NEV. REV. STAT. § 463.0177 (2013) (governing nonrestricted licenses) and NEV. REV. STAT. § 463.0189 (governing restricted licenses). The legislature revised the definition of a restricted gaming location in 2013; the previous definition did not include any language regarding race book or sports pool. The change was made, in part, as a response to the sports wagering kiosks that are the topic of this note.

⁴ There are currently approximately 75-80 nonrestricted locations in the Las Vegas Valley. The exact number of restricted locations is almost impossible to determine, but is exponentially greater than the number of nonrestricted locations. PT’s Entertainment Group operates over 35 locations alone, not to mention smaller chains like The Lodge which has no fewer than 5 locations. *See* Michael Shackelford, *Vegas Hotel and Casino Reviews*, WIZARDOFVEGAS.COM, <http://wizardofvegas.com/hotels/> (last visited Oct. 2, 2013); PT’s ENTERTAINMENT GROUP, <http://www.pteglv.com/locations> (last visited Oct. 2, 2013); and search for The Lodge Locations in Las Vegas, GOOGLE.COM, <https://www.google.com/#q=the+lodge+las+vegas> (last visited Oct. 2, 2013).

⁵ *Hearing on the Application for Revenue Sharing by Golden Route Operations, Before the Nev. Gaming Comm’n.*, 7 (Sept. 22, 2011) [hereinafter *Golden Route Operations Hearing*].

bet with an actual person.⁶ Placing these sports betting kiosks in restricted locations was mutually beneficial for both the licensed establishments and for the would-be bettors. For example, a local sports bar or small tavern could create a more loyal and regular clientele by providing such a convenient amenity.⁷ Sports fans who enjoy the thrill of betting on their favorite team may prefer to frequent a smaller, easily accessed, neighborhood tavern to watch and wager, rather than bother with one of the casinos on Las Vegas Boulevard (the “Strip”).⁸ It seems only logical that the bettor is more likely to place a bet if he or she could do so from the relative privacy of a favorite local bar rather than at a big casino.⁹ In this light, the kiosks made perfect sense; creating a chance for more people to place sports wagers, which inevitably creates more taxable income for the gaming industry and state.¹⁰ And yet, intuitively, there does seem to be something amiss in allowing what is essentially a full-service sports book in a restricted gaming location.¹¹ Surprisingly, throughout 2012, these kiosks existed in locations around Las Vegas, prior to the Nevada Gaming Commission (“NGC”) determining whether or not the kiosks violated the laws governing restricted gaming locations.¹² In 2013, the Nevada Legislature convened for the 77th session.¹³ Six weeks later, on March 20, 2013, the Nevada Legislature opened the discussion on Senate Bill 416, which would eventually settle the debate on the legality of sports wagering kiosks.¹⁴

⁶ *Id.* at 20.

⁷ See Tedd Florendo and Tim Zietlow, *Sports-Betting Kiosks Promise Easy Way to Wager*, 8NEWSNOW.COM (Sept. 29, 2011, 4:59 PM), <http://www.8newsnow.com/story/15583036/sports-betting-kiosk-promise-easy-way-to-wager> (discussing the convenience of the kiosks).

⁸ *Id.* (discussing capturing the weekend bar-goer as clientele).

⁹ *Golden Route Operations Hearing*, *supra* note 5, at 23. The Resort Casinos on the Las Vegas Strip have become so vast that a trip to one for the purpose of placing a sports wager could take well over 30 minutes – not to mention the time needed to drive to the Resort. Parking and walking from the garage to the Casino (in some cases a distance of more than a quarter-mile) finding the sports book, placing a bet, and then returning to the car is no quick trip. See Nick Christenson, *The Top 5 Worst Las Vegas Casino Parking Garages*, LVREVEALED.COM, http://www.lvrevealed.com/articles/worst_parking_garages.html (last visited Oct. 2, 2013) (naming the MGM Grand as one of the worst casino parking garages and suggesting, somewhat tongue-in-cheek, that anyone parking there should “pack food and water” and “decide on a bivouac point for the first night you’ll spend on your trek” to the casino). ‘Local’ casinos, such as the Station Casino chain of resorts are much more accessible than their counterparts on Las Vegas Boulevard; however, they are dispersed throughout the Las Vegas Valley, meaning that frequenting one still requires time and transportation.

¹⁰ *Golden Route Operations Hearing*, *supra* note 5, at 23-24.

¹¹ *Id.* at 42.

¹² *Id.* at 66-67. (Discussing the fact that these kiosks already existed in a number of locations. This hearing was the first time the legality of these kiosks was discussed, but the Commission almost gave up on the discussion because the hearing was about a revenue sharing application and nothing more).

¹³ See 77th (2013) Session, NEVADA LEGISLATURE (2013), <http://www.leg.state.nv.us/Session/77th2013/>.

¹⁴ See SB 416, NEVADA LEGISLATURE, <http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=956> (last viewed Oct. 2, 2013) (reporting on the timeline for Senate Bill 416, from introduction to the Governor’s approval).

This article will discuss the passage of Senate Bill 416,¹⁵ which banned these full-service kiosks.¹⁶ Starting with the history of account wagering and the laws regarding restricted gaming and nonrestricted gaming in Nevada, this article will ascertain and chart the Gaming Control Board's ("GCB") and NGC's current and past interpretations of the regulatory schemes. Finally, an examination of the Nevada Legislature's discussion of Senate Bill 416 will show the kiosks should be repurposed to fit within the statutory scheme while still maintaining their usefulness to both their target audience and the State of Nevada.

A. *Obtaining Account Approval at a Sports Wagering Kiosk*

Understanding why the Nevada Legislature outlawed full-service sports wagering kiosks must begin with an understanding of how the kiosks function. Steve Arcana, the chief operating officer for Golden Gaming, outlined the process for the GCB in an attempt to prove that the kiosks complied with all current Nevada gaming regulations.¹⁷ He began by explaining how a potential patron opens an account on a kiosk managed by Golden Gaming. "[T]he first aspect of the transaction is that a potential Leroy's account would be started with a customer, a PT's customer who is in possession of a Golden Rewards card . . . the source of that Golden Rewards card is started from each of our individual locations through a bar host with a licensed scan."¹⁸ In starting this account, the patron's driver's license is scanned into the Golden Rewards system, so both the tavern and the sports book have a record of the patron's identification.¹⁹

Mr. Arcana went on to explain, "[t]he customer then would approach the kiosk and would be asked to start the Leroy's betting sequence or account start-up sequence. They touch the screen, they are asked to swipe their Golden Rewards card."²⁰ The Golden Rewards card, then, stands in for the Leroy's (now William Hill's) account wagering card and it becomes the basis of the account because it already includes the three pieces of information required by Regulation 22 in the initiation of an account for wagering.²¹ Once a patron

¹⁵ S.B. 416, 2013 Leg., 77th Sess. (Nev. 2013), available at <http://legiscan.com/NV/text/SB416/id/802179>.

¹⁶ *Id.* at 3, 5-6.

¹⁷ *Hearing to amend American Wagering, Inc.'s order of registration for a nonrestricted gaming license, race book and sports pool only before the Nev. State Gaming Control Board*, 18-21 (Sept. 8, 2011) [hereinafter *American Wagering Hearing*].

¹⁸ *Id.* at 18. Leroy's was a company that owned a nonrestricted license and operated race books and sports pools in other locations that had nonrestricted licenses but did not have the resources or ability to operate their own race book or sports pool. See Howard Stutz, *Leroy's Owner Still Ahead of the Game*, LAS VEGAS REV. J., April 24, 2012, <http://www.reviewjournal.com/business/casinos-gaming/leroy-s-owner-still-ahead-game>. "Golden Rewards" is a reward system run throughout PT's taverns and Sierra Gold taverns. A customer who plays a slot machine with a PT's tavern or Sierra Gold can input their card or number and have their bets tracked. Frequent players get rewards for their repeated playing of slot machines in those two chains of taverns. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 19.

²¹ *Id.* at 18-19 (stating that the Golden Rewards account includes picture identification, home address and telephone number). See also NEV. ADMIN. CODE § 22.140 (2013) (estab-

begins the account start-up sequence, a camera installed in the kiosk takes that patron's photo, allowing the employees in the Leroy's control room to ensure that the person placing the wager at the kiosk is, in fact, the account holder.²² Once the identity of the patron is established and confirmed, the account is approved for wagering.²³

B. Using a Sports Wagering Kiosk to Deposit Money, Place Bets, and Collect Winnings

Once the account is approved, the customer is asked for the last four digits of his social security number and given the terms of agreement.²⁴ Assuming the customer agrees to the terms, the kiosk then prompts the customer to deposit money into the newly created account by inserting cash into the bill acceptor on the kiosk.²⁵ After money has been deposited, the customer can, according to Mr. Arcana, "enter into the actual Leroy's betting software where [he or she] can then pick a sport and . . . any type of category of sports wagering, parlays, straight bets, et cetera."²⁶ With each bet the customer places, the account total will be debited the dollar amount of the placed bets. A summary of that wager also appears on the screen.²⁷ The kiosk prints receipts for the bets so the customer can easily keep track of his bets.²⁸ When the relevant games finish, Leroy's software will credit the account if the patron's wager was successful, or it will retain the lower amount if the wager was unsuccessful.²⁹

Mr. Arcana concluded his explanation with the process for withdrawing money from the account. "If at any time the guest would like to make an account withdrawal, they are permitted to do so by simply going to the kiosk, requesting a withdrawal amount, not to exceed \$500 a day, and if they make that withdrawal, the kiosk will print them a check, similar to a paycheck, that they can then cash."³⁰ The check can be cashed at the tavern, or at any Leroy's nonrestricted location.³¹

lishing the requirements for a sports book to take a wager placed through communication technology against a patron's account. Those requirements include: the wager must be initiated from within Nevada, the wager must be placed by the account holder, the account holder must be of legal gambling age.). NEV. ADMIN. CODE § 22, known as Regulation 22, contains the laws relating to Race Books and Sports Pools.

²² See *American Wagering Hearing supra* note 17 at 19 (*See infra* section III(a) for a discussion of the cameras installed in the kiosks).

²³ *Id.*

²⁴ *Id.* at 19-20.

²⁵ *Id.* at 20 (There are other methods of funding the account, including calling Leroy's or visiting a Leroy's nonrestricted location, but since this is a walk-through of what happens on the kiosk, those methods are not worth discussing in depth).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 20-21. Since the receipts cannot be redeemed for money, they are not considered betting slips. The receipts are nothing more than a physical record of the bets the patron placed using the kiosk. *Id.*

²⁹ *Id.* at 21.

³⁰ *Id.*

³¹ *Id.* at 23. The patron also has the option to withdraw any amount at a Leroy's nonrestricted location at any time. *Id.*

II. NEVADA'S GAMING REGULATORY SCHEME

A. Nevada's Two Tier System for Licensing Gaming Establishments

In 1981, Nevada decided to differentiate gaming establishments with two different types of gaming licenses, nonrestricted and restricted.³² The main reason for this split deals with the level of scrutiny prospective licensees undergo during the application process.³³ An applicant for a nonrestricted license undergoes a much more rigorous background check than someone applying for a restricted license.³⁴ During the legislative session of 1981, the Nevada Legislature further decided that a restricted license would allow for only a limited number of slot machines, "and no other game or gaming device."³⁵ This language has remained unaltered since 1981; the only exception was an amendment during the legislative session of 1989.³⁶ The Nevada Legislature is free to change or amend the language of this statute if, at any time, they see fit to alter the definition of a "restricted gaming establishment."³⁷ In other words, if the Nevada Legislature decided that allowing more than the current statutory limit of 15 machines, or allowing other kinds of gaming devices, other than slot and video poker machines, would be good for the State of Nevada, the Legislature could change the wording of the statute to reflect this desire. The fact that the statute has been amended only once in the last 30 years speaks directly to the Nevada Legislature's and Gaming Commission's desire to keep restricted licenses limited to smaller locations where gaming is, at least in theory, "incidental to the primary business of the establishment."³⁸

The 1981 bifurcation of gaming licenses resulted in a vast chasm between locations operating under a restricted license and the massive casino resorts that operate under nonrestricted licenses.³⁹ The statute defining a casino resort requires the establishment to have a 24-hour restaurant and a certain number of hotel rooms, among other requirements.⁴⁰ These requirements, in addition to the zoning laws, make nonrestricted gaming locations difficult to access for a majority of the state's locals, and make these casino-resorts nearly self-con-

³² NEV. REV. STAT. § 463.0177 (2011); NEV. REV. STAT. § 463.0189 (2011).

³³ *Golden Route Operations Hearing*, *supra* note 9, at 43-44.

³⁴ See Roger Dunstan, *Regulation of Gaming*, Gambling in California (Jan. 1997), <http://www.library.ca.gov/crb/97/03/Chapt6.html>.

³⁵ NEV. REV. STAT. § 463.0189 (2011).

³⁶ *Id.*

³⁷ See NEV. REV. STAT. § 463.0177 (2011); NEV. REV. STAT. § 463.0189 (2011) both statutes have been amended since their addition in 1981.

³⁸ NEV. REV. STAT. § 463.0189.

³⁹ NEV. REV. STAT. § 463.01865 (2011) (In order to get a nonrestricted license, an applicant must be running a location with: over 200 rooms; at least one bar with permanent seating capacity for more than 30 patrons that serves alcoholic beverages sold by the drink for consumption on the premises; at least one restaurant with permanent seating capacity for more than 60 patrons that is open to the public 24 hours each day and 7 days each week; and a gaming area within the building or group of buildings. Also, there are a few locations left around Las Vegas that do actually fit into the grey area between these two ends of the spectrum, but those locations were grandfathered in when the split was created in 1983. See *Id.*

⁴⁰ *Id.*

tained pleasure centers for visiting tourists.⁴¹ The downside is that many locals are hesitant to visit a casino because of the hassles involved in doing so, whether it is due to the size of the property or the location of the property.⁴²

Casinos are consequently looking for ways to garner more of the 'local business.' Out-of-state visitors will gamble, they don't need an excuse,⁴³ but locals are more difficult. As the city of Las Vegas has expanded, and as the size of local hotels have subsequently grown in proportion, enticing local residents to go out of their way to frequent one of the resorts in Las Vegas has become an increasingly difficult necessity.⁴⁴ A recent study found 62% of Clark County's residents⁴⁵ admitted to gambling occasionally and 46% said they gambled at least once a week.⁴⁶ Those may seem like high numbers, but those who run the casinos cannot rest on such laurels, they must continually seek to improve their profits.⁴⁷ Therefore, the Nevada Legislature, always interested in increasing the amount of wagering that takes place in Nevada in order to increase tax revenue, supported account wagering, one of the fastest evolving gaming innovations to date.⁴⁸

⁴¹ See NEV. REV. STAT. § 463.3086 (2011) (limiting Nevada restricted licenses to designated gaming enterprise districts); See also *Pools*, VEGAS.COM, <http://www.vegas.com/resorts/pools/> (last visited October 4, 2013) and *Las Vegas Spas*, VEGAS.COM, <http://www.vegas.com/spas/> (last visited October 4, 2013). Consider also, the ability of the Las Vegas concierge to find whatever a guest may need. See Bruno Maddox, *A Week in the Life of a Las Vegas Concierge*, TRAVEL AND LEISURE (June 2012), <http://www.travelandleisure.com/articles/a-week-in-the-life-of-a-las-vegas-concierge>.

⁴² *Golden Route Operations About Clark County Hearing*, *supra* note 5, at 56. (Even with the convenience of account wagering, casinos find it difficult to bring locals in for the initiation and original deposit needed for an account. It is no great logical leap to see that it's equally difficult to entice locals to make frequent trips to their local casino).

⁴³ GLS RESEARCH, *Las Vegas Visitor Profile: Calendar Year 2011 Annual Report*, available at http://www.lvcva.com/includes/content/images/media/docs/2011-Las_Vegas_Visitor_Profile.pdf, at page 5 (stating that 77% of all visitors to Las Vegas gambled during their trip in 2011).

⁴⁴ *Golden Route Operations Hearing*, *supra* note 5, at 56.

⁴⁵ Clark County is the county containing the city of Las Vegas. See, CLARK COUNTY NEVADA, <http://www.clarkcountynv.gov/pages/about.aspx>.

⁴⁶ Charles Higgins, *Gaming Activities of Las Vegas Locals - Recent Study Results*, LAS VEGAS EXAMINER, July 30, 2011, <http://www.examiner.com/article/gaming-activities-of-las-vegas-locals-recent-study-results>.

⁴⁷ The continued growth of Las Vegas, and the proliferation of new casinos (18 have opened in the past 20 years. See LAS VEGAS HOTELS/CASINOS TIMELINE, <http://www.library.unlv.edu/arch/casinosbytime.html> (last visited Nov. 12, 2013)) has forced the existing casinos to find new ways to entice customers away from their newer, flashier counterparts. See, e.g., *Competition Leads to Royal Rewards Loyalty Program at Plaza Hotel and Casino*, (June 5, 2013), <http://loyalty360.org/resources/article/competition-leads-to-royal-rewards-loyalty-program-at-plaza-hotel-and-casin>.

⁴⁸ See *How Gaming Benefits Nevada*, <http://www.nevadaresorts.org/benefits/taxes.php> (last visited Oct. 4, 2013) (discussing that the gaming industry pays almost \$2 billion dollars in taxes annually to the state, and that hotel/casinos account for more tax dollars than any other source). See also, *infra*, Part II(b) for a discussion of the evolution of account wagering.

*B. The History and Regulatory Scheme of Account Wagering in Nevada*⁴⁹

“[A]ccount wagering goes back to 1978. In the 1960’s and 1970’s, customers would simply call the licensee to place wagers.”⁵⁰ This gave patrons the ability to place sports wagers without going to a casino to place a bet.⁵¹ A patron interested in setting up an account could do so by going to the casino and providing proof of age, identification, and address.⁵² Once the account had been created, the patron could deposit money into that account.⁵³ Then, whenever the patron wanted to place a bet, he or she could call the casino and place the bet using the money already deposited.⁵⁴ The problem with this telephone-based system, was that it was difficult for the casino to verify that the person placing the wager was calling from a jurisdiction that allowed sports betting,⁵⁵ i.e. from a phone located within Nevada. With each development in account wagering, this problem of verification, be it location verification, age verification, or identity verification, has concerned the NGC.⁵⁶ “The first legally recognized system was a system to allow telephone . . . verification that goes back to 1978. So account wagering, otherwise known as telephone wagering, in the state of Nevada is basically older than [the technology capable of verifying location].”⁵⁷ As early as 1983, casinos began moving away from a human-based system by the introduction and implementation of computers into the sports wagering systems.⁵⁸ By the end of the 1990’s, the Excalibur introduced account-based wagering connected to individual computer terminals.⁵⁹

In 2000, two advances truly foreshadowed the combination of kiosks and account wagering: “Coast Resorts was approved for an account wagering system with a dial-up modem system. . . . Also in 2000 . . . Leroy’s added low powered beepers that only operated in the Las Vegas Valley to identify where customers were at the time they were playing their bets.”⁶⁰ These innovations presaged the proliferation of Internet wagering and introduced new ways to remotely verify the location of an account holder when the account holder was placing a bet.⁶¹ One year later, “[i]n 2001, Station Casinos offered Sports Con-

⁴⁹ NEV. ADMIN. CODE §§ 22.140 - 22.160 (setting out the guidelines regarding account wagering).

⁵⁰ *Golden Route Operations Hearing*, *supra* note 5, at 5.

⁵¹ *Id.* Account wagering started with a patron’s ability to call the casino to place a bet, which, by definition, would not require a trip to the casino.

⁵² NEV. ADMIN. CODE § 22.140.

⁵³ NEV. ADMIN. CODE § 22.160.

⁵⁴ NEV. ADMIN. CODE § 22.140 - .160.

⁵⁵ *Golden Route Operations Hearing*, *supra* note 5, at 7-8 (stating that with each technological advancement, legality and approval by the NGC has been premised on the ability to verify that the person placing the wager is in a jurisdiction with legal sports betting).

⁵⁶ *Id.*

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.*

⁶⁰ *Id.* (since the beepers only worked from within the Las Vegas Valley, any patron using one *had to be* in Nevada when placing a bet).

⁶¹ For the purposes of account wagering, it is important that both the *origination* of the bet (where the account holder is at the time of the bet) and the *acceptance* of the bet (the nonrestricted location) are both within the State of Nevada. *See* NEV. ADMIN. CODE § 22.060 and NEV. ADMIN. CODE § 22.140.

nection where customers could place wagers from their home computers utilizing Cox cable or closed loop home phone lines.”⁶² But, starting in 2004, nonrestricted licensees began placing their sports wagering ‘kiosks’ into restricted gaming locations.⁶³ Leroy’s soon followed suit and set up kiosks in local taverns, connecting them back to their central hub.⁶⁴ In simple terms, these kiosks were a direct link between the account-holder, using the touch-screen in the tavern, and the nonrestricted licensee.⁶⁵ “In 2009, Cantor Gaming introduced account wagering utilizing its in-house computer terminals and handheld wireless tablets.”⁶⁶ These allowed a casino patron to place wagers from anywhere on the casino property, utilizing an account wagering system.⁶⁷ Then, in January 2011, the last major shift in the sports betting proliferation paradigm occurred: the NGC approved a change to Regulation 22, allowing employees of a sports book to go into the community to enroll new customers in sports book wagering accounts, accept deposits into the account, and pay out the winning wagers.⁶⁸

The alteration to Regulation 22 created the loophole needed for the implementation of full-service sports betting kiosks.⁶⁹ In this regard, an employee of a nonrestricted licensee could go to a bar that had an older version of the kiosks (the version that cannot set up accounts, accept deposits, or provide withdrawals), enroll a patron for account wagering, and accept a deposit from the patron.⁷⁰ The patron could then use the touch-screen kiosk to place a wager on a game or race.⁷¹ Assuming a favorable outcome, the patron could then collect his or her winnings immediately from the representative of the nonrestricted

⁶² *Golden Route Operations Hearing*, *supra* note 5, at 7.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Hearing on the Application of Jacobs Entertainment, Inc. for an Amendment to Their Order of Registration for Licensure of a Race Book and to Conduct Off Track Pari-mutuel Race Wagering Before the Nev. State Gaming Control Bd.* (Apr. 5, 2012) [hereinafter *Jacobs Hearing*] at 6.

⁶⁶ *Golden Route Operations Hearing*, *supra* note 5, at 7.

⁶⁷ *Cantor Takes Order for On-Premises Mobile Gambling*, CASINOMEISTER (July 11, 2008), http://www.casinomeister.com/news/july2008/online_casino_news2/CANTOR-TAKES-ORDER-FOR-ON-PREMISES-MOBILE-GAMBLING.php.

⁶⁸ *Golden Route Operations Hearing*, *supra* note 5, at 32-33; NEV. ADMIN. CODE § 22.140(7)(a) (2011) (allowing employees of a sports book to open accounts outside the premises of the book); NEV. ADMIN. CODE § 22.140(7)(c)(5) (2011) (the employee of the book must record “the patron’s approved credit limit or the amount of the patron’s initial wagering account or front money deposit”).

⁶⁹ *Golden Route Operations Hearing*, *supra* note 5, at 56 (discussing the “grey area” between having an employee in the bar handling deposits and withdrawals and having a kiosk that does the same thing).

⁷⁰ *Id.* (Statement of Vic Salerno: “[a]ll we’re doing is taking technology and replacing it human—not human beings but making it easier”).

⁷¹ *Id.* (Statement of Chairman Peter Bernhard: “[t]hey could do everything except they would have to open up the account wagering account through the process in the regulation, people would have to have money there, you couldn’t walk up to the device cold and put money in, which you can do at a sports book window”).

licensee.⁷² Once this loophole was realized, it was only a matter of time before a nonrestricted licensee decided to streamline the process by automating it.⁷³

III. REGULATION 22 AND THE IMPLEMENTATION OF SPORTS WAGERING KIOSKS

Account wagering, in its earliest form, was nothing more than a sophisticated legal version of what illegal bookies continue to do to this day,⁷⁴ with the exception that in the legal version, account holders are required to deposit their money prior to placing any bets.⁷⁵ The progression of account wagering in Nevada follows a very systematic pattern: a new method of account wagering is introduced, that method is tested for legality against Regulation 22, if the method is deemed legal, then it is instituted on a limited basis, only to be streamlined by automation.⁷⁶ Regulation 22, entitled “Race Books and Sports Pools,” sets forth the guidelines for operating a legal sports book in Nevada. Specifically, these innovations, with regard to account wagering, must comply with the standards of Regulations 22.140-22.160.⁷⁷ With each innovation in account wagering, the Commission will scrutinize the ability to verify that the person placing the bet is a) within the State of Nevada,⁷⁸ b) is the actual account holder,⁷⁹ and c) is of legal gambling age.⁸⁰ Account wagering is therefore only allowable because of the presumption that it is simply allowing a person, who can legally place wagers, to do so with money he or she has already deposited with the casino. If, at any point, one of those three aspects does not hold up to the Commission’s scrutiny, the innovation cannot move forward.⁸¹

⁷² *Id.* at 23. (Statement of Vic Salerno: “[y]ou call me on the phone, you say, Vic, I want to take out some money. I send you a check, you take the check, you go into a P.T.’s Pub, and they know who we are, they cash that check. You have never stepped foot into a book in that scenario, and that has been going on for a long time now”).

⁷³ See *Leroy’s to Provide Wagering Technology to PT’s Sports Bet Live Kiosks*, GAMING TODAY (Oct. 1, 2011, 8:02 AM), http://www.gamingtoday.com/articles/article/32693-Leroy_s_to_provide_wagering_technology_to_PT_s_Sports_Bet_Live_kiosks (explaining the changes to Regulation 22 were made in January of 2011, and the full-service kiosks were announced eight months later).

⁷⁴ See *supra* Part II(b) for a discussion of account wagering.

⁷⁵ See Allen Moody, *Dealing with Local Bookies*, ABOUT.COM, <http://sportsgambling.about.com/od/experiencedbettoronly/a/localbooks.htm> (last visited Oct. 16, 2013) (also referencing the legality of placing online sports wagers, a topic that is unnecessary, though, ancillary to the instant argument).

⁷⁶ Many of the advancements are, in themselves, automation of previous innovations, but the point is that eventually, anything that can be automated usually will to save on costs for the hotel/casino.

⁷⁷ NEV. ADMIN. CODE § 22.140 (2011) Wagering communications; establishing patron wagering accounts for sports, nonpari-mutuel race, and other event wagering; 22.145 (2011) Account wagering systems; 22.147 (2011) Account wagering rules; 22.150 (2011) House rules; 22.160 (2011) Wagering account transactions.

⁷⁸ NEV. ADMIN. CODE §§ 22.140(1)-(2) (2011).

⁷⁹ See *Hearing on the Application of Jacobs Entertainment, Inc. for Amendment to Order of Registration for Licensure of a Race Book and to Conduct Off-track Pari-mutuel Race Wagering Before the Nev. Gaming Comm’n*, 8-9 (2012) [hereinafter *Jacobs II Hearing*].

⁸⁰ See *American Wagering Hearing*, *supra* note 17, at 11.

⁸¹ See *Id.* at 19.

This overarching need for verification is evident with each innovation in account wagering, and is one of the largest issues involved in the new full-service sports book kiosks.⁸² The first advancements involved verifying the location of the person calling to place the wager.⁸³ The kiosks, in their first rendering, were a logical conclusion of location verification; if the kiosks were permanently situated in the bar, there would be no question that a patron using it to place a bet was in Nevada. Because Nevada is the only state that allows a variety of sports betting (and the only one that allows account wagering), verifying the location of someone placing a wager against his or her account is of the utmost importance.⁸⁴ However, anytime account wagering is used to place a bet, identity verification is also a concern.⁸⁵ Under Regulation 22, upon the opening of an account:

- (a) The patron must personally appear before employees of the book to open a wagering account. If the patron does not appear personally at the premises of the book or, for central site books, at an outstation, satellite or affiliated book, to open a wagering account, a book must file a request with the chairman for permission to have its employees open wagering accounts outside the premises of the book. . .
- (b) An employee of the book must examine, in the patron's presence, the patron's:
 - (1) Driver's license;
 - (2) Passport;
 - (3) Non-resident alien identification card;
 - (4) Other reliable government issue identification; or
 - (5) Other picture identification credential normally acceptable as a means of identification when cashing checks.⁸⁶

The reason for the need to appear personally to open the accounts is self-evident. The sports book needs to verify that the person opening the account is of legal gambling age.⁸⁷ The changes to Regulation 22 in January of 2011, allowed for this verification to happen outside the premises of the sports book. Regulation 22.140(7)(a) was amended to read:

[A] book must file a request with the chairman for permission to have its employees open wagering accounts outside the premises of the book. The request must include a comprehensive marketing plan setting out, at a minimum, the types of location and types of potential patrons to which a book intends to send its employees for the purposes of opening wagering accounts. A book may not act under its marketing plan prior to the chairman approving the request. The chairman may impose limitations

⁸² See *supra* Part II(b) (discussing each improvement to account wagering and the fact that each was done with the intent of creating a more secure transaction between the account holder and the nonrestricted licensee).

⁸³ *Golden Route Operations Hearing, supra* note 5, at 6-8.

⁸⁴ See NEV. ADMIN. CODE §§ 22.140(1)-(2) (2011). See also, *Sport Gambling – Legal Sports Gambling, supra* note 1.

⁸⁵ Age verification is imperative in Nevada's gaming regulatory scheme. Similarly, in account wagering, location verification is of utmost importance. Initially, the patron had to trust the Casino would only place wagers that the patron requested. Consequently, identification verification is essential to any kind of account based wagering.

⁸⁶ NEV. ADMIN. CODE §§ 22.140(7)(a)-(b) (2011).

⁸⁷ See NEV. ADMIN. CODE § 22.060(5) (2011) (“No book or agent or employee of a book may accept a wager from a person who the book, agent, or employee knows or reasonably should know is a messenger bettor or *is placing the wager in violation of state or federal law.*” (emphasis added)).

and conditions on any approved request. The chairman may rescind his approval of a request of a book to have its employees open wagering accounts outside the premises of the book upon written notice to the book. Wagering accounts may not be opened outside the State of Nevada.⁸⁸

Any book that is given the permission to sign up new account holders away from the physical location of the nonrestricted gaming license can only open accounts within the State of Nevada.⁸⁹ The regulation goes on to explain the need for valid photo identification *after* giving the basis for allowing this off-site account sign-up.⁹⁰ Further, an employee of a book who is given permission to sign-up account holders off-site, still must follow the guidelines for verifying the identification of the proposed account holder. The introduction of the first version of kiosks created little reason for the Commission to question a book's ability to verify identity when signing up new patrons. The kiosks did not offer account initiation functions, so patrons still had to either sign-up on the premises of the nonrestricted licensee that runs the kiosk (or to sign up with an employee of that nonrestricted licensee at an off-site location verified by the Commission chairman).⁹¹ Consequently, that first version of sports wagering kiosks were a logical progression for account wagering.⁹² The kiosks bypassed the location verification issues and still gave the nonrestricted operators some control over the age verification of the account holders.⁹³

The only issue remaining dealt with Regulation 22.060(5): “[n]o book or agent or employee of a book may accept a wager from a person who the book, agent, or employee, *knows or reasonably should know is a messenger bettor. . .*” (emphasis added).⁹⁴ This language regarding identification verification in account wagering is vague, allowing for a low bar in checking the bettor taking advantage of the funds in an account. The kiosks, in both forms, require an account number and a PIN to operate once the account has been initiated.⁹⁵ The newer version of the kiosk is the natural progression for account wagering with regard to identification verification as well. The kiosks are currently

⁸⁸ NEV. ADMIN. CODE § 22.140(7)(a) (2011).

⁸⁹ The account holders must place their wagers from within the state in order to comply with the Wire Act. There is no logic, therefore, in signing up new customers who are not in Nevada.

⁹⁰ See NEV. ADMIN. CODE §§ 22.140(7)(a)-(b) (2011).

⁹¹ See *Golden Route Operations Hearing*, *supra* note 5, at 40 (discussing the kiosks that were already in operation that required registration at the nonrestricted location and required some contact with the nonrestricted operator, if only in the account initiation, deposit, and withdrawal capacities).

⁹² *Golden Route Operations Hearing*, *supra* note 5, at 6-7.

⁹³ *Golden Route Operations Hearing*, *supra* note 5, at 40-41 (discussing that since the kiosks required an initial set up at a nonrestricted location as well as account verification to access the account, the age and identity of the patron were assumed to be verified once the account was verified).

⁹⁴ NEV. ADMIN. CODE § 22.060(5) (2013).

⁹⁵ *Jacobs II Hearing*, *supra* note 79, at 12-13 (discussing the fact that Leroy's, now William Hill, has never “had a problem with an underage person or unauthorized person applying for an account and receiving an account number and PIN,” implying that those are the requisite necessities for accessing an open account).

placed in age-restricted locations only⁹⁶ with surveillance on them at all times (not to mention the employees of the restricted licensee), and they have a camera in the system.⁹⁷ These cameras give the book operator the ability to ‘look-in’ anytime someone accesses the system and verify the person logging into an account is the account holder by matching what they see through the kiosk’s built-in camera with the photo identification scan taken when the account was opened. The new full-service kiosks are a ‘safe’ way for account wagering to continue, because they satisfy the NGC’s concerns regarding age, location and identification verification.

IV. THE KIOSKS ARE SAFE AND SECURE, BUT ARE THEY LEGAL?

A. Prior to the 2013 Legislative Session, the Legality of Sports Wagering Kiosks was Never Fully Examined, Except for an ‘Intellectual Aside’ During a Revenue Sharing Application in Front of the NGC

In September of 2011, Golden Route Operations, a slot route operator,⁹⁸ filed an application to share the revenue from sports wagering kiosks located in PT’s Pubs and operated by Leroy’s.⁹⁹ The application seemed simple enough; the kiosks were already in place, they showed some success, and Golden Route Operations wanted to share in some of that success.¹⁰⁰ The Commission, however, quickly showed concerns about the upgraded kiosks.¹⁰¹ Chairman Peter Bernhard, in particular, voiced concerns over the new version of the kiosk and hinted at a few reasons they may not be legal:

I’m comfortable with the kiosks that are in operation now that require a registration at the nonrestricted location and require at least setting-up the account having some contact with a nonrestricted operator. But if you look at NRS 463.0189, it defines a restricted license as an operation with not more than 15 machines and no other game. And I think a sports book, race pool, is a game. I don’t think there is any question about that. That’s been our interpretation forever. It is defined in our statute

⁹⁶ During the Commission hearing on 9/22/11, the Commission discussed the fact that the same loophole that would allow the kiosks in restricted locations could conceivably allow them to exist in unlicensed locations as well. *See infra* Part IV(a).

⁹⁷ *Golden Route Operations Hearing, supra* note 5, at 12-13.

⁹⁸ Essentially, Golden Route Operations is a Slot Route Operator (“SRO”). SRO’s function by providing slot machines, or in this case sports wagering kiosks, to locations with restricted gaming licenses. The SRO either ‘rents’ space from the location, paying an agreed upon amount every month for each machine provided, or the SRO has a profit sharing agreement with the location whereby the two entities split the profits from each machine. Often these relationships start as ‘rental’ agreements for a specified amount of time, after which the entities will apply to the NGC for a profit sharing agreement. An SRO holds a slot machine operator’s license which is “a nonrestricted license which authorizes the holder to place slot machines in a licensed location and share in the profits therefrom without being on the license issued for the location.” NEV. ADMIN. CODE § 1.170 (1982).

⁹⁹ *See generally Golden Route Operations Hearing, supra* note 5.

¹⁰⁰ *Id.* at 4. (stating that the kiosks existed in PT’s as part of their rewards program. Golden Route Operations and Leroy’s entered into an agreement whereby those kiosks would be used to house the sports wagering kiosks).

¹⁰¹ *Id.* at 18 (After a brief discussion about the history of account wagering, the Commission took a short recess and the first question after the recess began a line of questioning that continued throughout the hearing. There was a constant back-and-forth between the two sides regarding the new kiosks and the revenue sharing application).

by the Legislature as a banking game or a percentage game where you are not playing against other players, you are playing against the establishment.

So that if a sports book, sports pool operation is a game, then you violate the definition of a restricted license if you allow that game in a restricted location.¹⁰²

Chairman Bernhard next questioned whether the kiosks fit within the exceptions of NRS 463.245, the ‘one license per location’ rule, and stated:

[NRS 463.245] says that we can only have one gaming license at a location unless it meets one of the exceptions. And one of the exceptions is subsection (3) which says that a person . . . who has been licensed to operate a sports pool or race book may be issued a license to operate a sports pool or race book at another establishment. And this is how the kiosks that actually operate like a sports pool or race book can operate in another nonrestricted location.

But I don’t know how you get around that definition or how you fit within that exception, because if we approve a sports book operation, or sports pool operation, at a restricted location, there will be a nonrestricted licensee and a restricted licensee, that would violate, in my mind at least at this point, that one license per location rule.¹⁰³

The back-and-forth on the legality of the sports book kiosks and the revenue sharing issue stopped after that point.¹⁰⁴ Chairman Bernhard admitted the issue being discussed was revenue sharing, but refused to ignore his problems with the new kiosks, and expressed his opinion of the revenue sharing in terms of the legality of the kiosk itself.

I have no problem with sharing revenue with a restricted licensee . . . but I do have a problem with a kiosk that I would call a full-service kiosk that does everything that you can do at a counter, a nonrestricted location, and I would not be in favor at this point of having this approval to share revenue being treated as an approval of a device that provides full-service sports betting. . .¹⁰⁵

His reasoning for the in-depth discussion of allowing full-service sports betting kiosks into restricted locations was clear; he did not believe the legislative intent of NRS 463.245 was to allow satellite sports books in locations other than establishments with nonrestricted licenses.¹⁰⁶

Chairman Bernhard seemed to be making a ‘slippery-slope’ argument regarding the full-service kiosks. He was troubled by the fact that nothing in Regulation 22 allowed a sports book to operate in an establishment with a restricted license.¹⁰⁷ There is a fine line between the allowance of the older version of the kiosks and the new full-service version, but the chairman saw it as an important one. If the regulations and statutes allow the slot route operator (“SRO”), the owner of the nonrestricted license, to put a full-service kiosk into a restricted location, then there is nothing stopping the SRO from placing the kiosks in any location where there is gaming operated by the SRO.¹⁰⁸ Chairman Bernhard didn’t “quarrel with the safety and security and technology side

¹⁰² *Id.* at 40.

¹⁰³ *Id.* at 41.

¹⁰⁴ *Id.* at 42-43.

¹⁰⁵ *Id.* at 43.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 52.

¹⁰⁸ *Id.* (discussing the possibility that the kiosks could end up in any 7-Eleven or grocery store).

of it. [He only wanted to know] how it fit within the statute. If the Legislature in section .245 would have said you can put it into a restricted or a nonrestricted location.”¹⁰⁹ This debate continued without much headway gained by either side, mostly because the debate was a moot issue at the time it was being discussed; the legality of the kiosks was only tangentially related to the gaming application at issue.¹¹⁰ Granted, if placing the kiosks in restricted locations violated state law, then the revenue sharing issue would immediately become irrelevant. However, as counsel for Golden Route Operations pointed out, the kiosks were already in operation.¹¹¹ Further, and much more importantly, because of the nature of the application and the fact that the kiosks were already in operation, “theoretically [Golden Route Operations] could just not activate the approval and do a flat fee arrangement instead of doing a shared revenue”¹¹² thereby removing the application from the agenda and ending the discussion.¹¹³

B. The Commission’s Concerns Over the Legality of Full-Service Sports Book Kiosks are Valid, Yet Not Thoroughly Convincing

Chairman Bernhard’s concerns regarding full-service sports kiosks can be split into three main areas: the ‘one location, one license’ issue, the ‘slippery-slope’ argument and the ‘other game’ issue.¹¹⁴ The ‘other game’ issue is the biggest concern and is dealt with in the next section. Chairman Bernhard’s first two concerns, while valid, are easier to deal with and were, in fact, answered during the revenue sharing hearing.¹¹⁵

1. Chairman Bernhard’s ‘One Location, One License’ Argument

Chairman Bernhard focused on the language of NRS 463.245 which creates the exceptions to the ‘one location, one license’ rule. NRS 463.245 provides:

1. Except as otherwise provided in this section:

(b) A gaming license may not be issued to any person if the issuance would result in more than one licensed operation at a single establishment, whether or not the profits or revenue from gaming are shared between the licensed operations.

¹⁰⁹ *Id.* at 57.

¹¹⁰ While the two issues may seem heavily interrelated, Scott Scherer, appearing on behalf of Golden Route Operations at the hearing, established the key difference noting, “theoretically we could just not activate the approval and do a flat fee arrangement instead of doing a sharing in revenue.” *Id.* at 67.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ While the NGC *did* and *does* have the ability to decide for themselves if the kiosks are legal, they did not. Instead, the NGC gave conditional approval of the revenue sharing to last until July 1, 2013 so that the Nevada Legislature could discuss the legality and make the ruling at the statutory level (*See Hearing before the Senate Committee on Judiciary and the Assembly Committee on Judiciary*, 77th Sess. 4, 13 (Nev. 2013) [hereinafter *Joint Hearing of SB 416*] (statement of Lorne Malkiewich, Nevada Resort Association (“NRA”)).

¹¹⁴ *See* discussion *supra* Section IV(a).

¹¹⁵ *See infra* Sections IV(b)(i)-(ii).

3. A person who has been issued a license to operate a sports pool or race book at an establishment may be issued a license to operate a sports pool or race book at another establishment if the second establishment is operated by a person who has been issued a nonrestricted license.¹¹⁶

The Chairman argued that the plain language reading of the statute, as well the legislative intent, maintains that kiosks cannot exist in a restricted location.¹¹⁷ Presumably, the wording allows the operator of a sports book to open a satellite location, such as a kiosk, in a location that has been issued a nonrestricted license.¹¹⁸ Further, the Chairman believed this was clearly the legislative intent as well.¹¹⁹ This does seem clear from the language. The statute explicitly states the operator “may be issued a license to operate a sports pool or race book at another establishment if the second establishment is operated by a person who has been issued a *nonrestricted license*.”¹²⁰

Counsel for Golden Route Operations, Scott Scherer, made two arguments against Chairman Bernhard’s comments.¹²¹ The first was unambiguously wrong,¹²² but the second argument, premised on the fact that these kiosks are a logical step in the progression of account wagering, was valid. So long as these kiosks are safe, secure, and create more handle with less overhead, and do not violate the spirit of the laws regarding account wagering, then there is no reason they should not be allowed.¹²³

2. Chairman Bernhard’s ‘Slippery-Slope’ Argument

Chairman Bernhard also voiced his concern with the ‘slippery-slope’ of allowing the kiosks into locations that are not nonrestricted licensees.¹²⁴ The argument, as Chairman Bernhard explained it, follows a simple path: if kiosks are allowed in restricted license holding taverns, what is to stop Leroy’s from placing the kiosks in other restricted license holding locations such as gas stations or supermarkets?¹²⁵ If the kiosks are allowed in grocery stores, gas stations, or other locations that are not age restricted and the licensing of the location is not at issue, then what is to stop Leroy’s from placing the kiosks in

¹¹⁶ NEV. REV. STAT. § 463.245 (2011).

¹¹⁷ See *Golden Route Operations Hearing*, *supra* note 5, at 42.

¹¹⁸ *Id.* at 43

¹¹⁹ *Id.* at 43-44.

¹²⁰ NEV. REV. STAT. § 463.245(3) (emphasis added).

¹²¹ *Golden Route Operations Hearing*, *supra* note 5, at 46 (Mr. Scherer stated that NEV. REV. STAT. § 463.245(3) allows a nonrestricted licensee “to operate a sports pool or race book at another establishment, which is any gaming establishment. It doesn’t say nonrestricted establishment.” However, he fails to mention that the statute states “at another establishment if the second establishment is operated by a person who has been issued a nonrestricted license.” NEV. REV. STAT. § 463.245(3). This was changed during the 2013 legislative session to further clarify exactly what types of locations can house one of these race books or sports pools).

¹²² See *Golden Route Operations Hearing*, *supra* note 5, at 46.

¹²³ *Id.* at 61. (Handle is a term used in sports gambling and refers to the total amount of money wagered by an individual at a casino).

¹²⁴ *Id.* at 52.

¹²⁵ *Id.*

locations that have no licensing, neither restricted nor nonrestricted?¹²⁶ This argument is premised on the idea that the kiosks are, at base, a technology for account wagering that allows the account holder to place a wager ‘at’ Leroy’s but to do so from any other location (any other location that has one of these kiosks). Since the kiosks would fall outside the definitions of the types of equipment allowed at a restricted location, they could, theoretically, not be considered gaming for the sake of non-licensed locations. Unfortunately, the problem with this argument is that it does not factor in Regulation 22.140(7)(a). Even if the kiosk is not deemed a sports book, and even if it does not fit within any of the other definitions included in NRS 463.0189, Regulation 22.140(7)(a) still requires that before opening new accounts ‘off-premises’, the nonrestricted operator must file a request with the NGC.¹²⁷

In other words, a book operator would need Commission approval for *any and all* kiosk locations. If the Commission is worried about seeing kiosks in local coffee shops (or any other non-age-restricted locations), regulations could be adopted to prevent such action. While Chairman Bernhard was correct in giving deference to the Nevada Legislature with regard to the language of NRS 463.245, he does not appear to have given the same credence to the Legislature with regard to Regulation 22.

3. *The Kiosks Cannot be Allowed into Restricted Locations Because They Do Not Fit into the Definition of a Restricted License*

The main problem in trying to determine the legality of sports betting kiosks, is defining exactly how they fit into the gaming regulatory scheme of Nevada. The first question, by necessity, must be ‘where will the kiosks be located?’ The reason for this is simple: if the kiosks were to exist only in nonrestricted locations, then all further inquiries would be moot.¹²⁸ The intent behind NRS 463.245 makes this type of “satellite location” clearly legal.¹²⁹ Further, there does not appear to be any logical reasons against allowing satellite sports books in nonrestricted locations; both the location owner and the sports book operator have undergone the background check required for a nonrestricted license.¹³⁰ However, what happens when full-service kiosks are placed in locations that do not hold nonrestricted licenses?¹³¹

According to statute, placing one of these full-service kiosks in a restricted location is only allowable if the kiosks fit within the definition of the games

¹²⁶ *Id.* at 61 (the word ‘nonrestricted’ in this sense refers to the fact that the Starbucks and Coffee Grinds do not have a restricted license). In this situation, the equipment’s legality would not be at issue because it would fall outside the definition of what is allowed in a restricted location.

¹²⁷ NEV. ADMIN. CODE § 22.140(7)(a) (2011). *See supra* Section III for a discussion about the change in Regulation 22 allowing nonrestricted licensees to enroll patrons off-site.

¹²⁸ NEV. REV. STAT. § 463.245(3) (2011).

¹²⁹ *See Golden Route Operations Hearing, supra* note 5, at 43 (stating that “the legislative intent of NRS 463.245 seems to be that the legislature wanted both a nonrestricted location to be licensed to operate the sports pool and the satellite to be located where there is another nonrestricted license”).

¹³⁰ *Id.* at 44.

¹³¹ *Id.* at 43.

allowed as a restricted licensee.¹³² NRS 463.0189, the statute controlling restricted licenses, has four distinct clauses. The only clauses relevant to this discussion are parts two and three; “not more than 15 slot machines” and “no other game or gaming device.”¹³³ Those clauses can be further separated into three distinct categories: “slot machine,” “other game,” and “gaming device.”¹³⁴ Any argument for or against the legality of a wagering mechanism in a restricted location must be based on at least one of these three definitions.¹³⁵

a. Sports Wagering Kiosks as “Slot Machines”

On its face, a sports wagering kiosk seems to fall outside the definition of a “slot machine.”¹³⁶ As defined by NRS 463.0191, a “slot machine” is:

[A]ny mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator in playing a gambling game which is presented for play by the machine or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or anything of value, whether the payoff is made automatically from the machine or in any other manner.¹³⁷

Arguably, full-service kiosks fit this definition. The first clause is easily satisfied; every kiosk, by definition, is a “mechanical, electrical, or other device, contrivance or machine. . .”¹³⁸ Similarly, the last clause is also easily satisfied. Sports wagering kiosks, both the original version, with no bill or coin acceptor and the new ‘full-service’ version, “. . . entitle the [winner] to receive cash . . . whether the payoff is made automatically . . . or *in any other manner*.”¹³⁹ (emphasis added). The two middle clauses are more problematic, but are still broad enough to include sports wagering kiosks.

It is certainly no great stretch to see that the kiosks only allow a player to wager after “payment of consideration.”¹⁴⁰ This clause does, however, provide the first major split between the original kiosks and the newer full-service

¹³² NEV. REV. STAT. § 463.0189 (2011) (defining exactly what kind of wagering is lawful at a restricted location, anything that does not fit into the definition violates the statute and is, therefore, unlawful).

¹³³ *Id.* The first clause merely states what the statute defines as restricted licenses. The fourth clause is unimportant to this discussion because it concerns only the location’s primary business and sheds no light on the legality of the machines placed in the establishment.

¹³⁴ *Id.*

¹³⁵ The plain language of the statute makes clear that if anything falls outside these three definitions it is allowable and legal. *See Id.*

¹³⁶ Compare Charles Jay, *How Did Slot Machines Get Their Start*, SUPERIORCASINO.COM, <http://blog.superiorcasino.com/online-casino/how-did-slot-machines-get-their-start/> (last visited Sept. 30, 2013) (describing slot machines), and DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING 330* (2006) (explaining that wins were based on a specific number of symbol sequences), with *Golden Route Operations Hearing*, *supra* note 5, at 19-21 (explaining the process of these kiosks).

¹³⁷ NEV. REV. STAT. § 463.0191 (2011).

¹³⁸ *Id.*

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ *Id.*

kiosks. The plain definition of this second clause intends the “payment” be immediate.¹⁴¹ The phrase “insertion of a coin, token, or similar object” implies the intention that payment of consideration immediately precedes the wager.¹⁴² Consequently, the original kiosks could not fit into this definition because they did not have the ability to accept cash.¹⁴³ The new kiosks, on the other hand, allow a player to deposit money and then immediately wager that money.¹⁴⁴

The third clause is problematic because it requires that the user be “able to play or operate” the machine.¹⁴⁵ With regard to what is traditionally considered a slot machine, “playing” is relatively straightforward, but with regard to a sports wagering kiosk, is it ‘played’ when the bet is placed? Is it ‘operated’ as soon as the account holder logs in and checks the lines? Taken together, the idea of “playing or operating” a slot machine and “playing or operating” a sports wagering kiosk would imply that once an account holder has placed a wager using the kiosk, and the event wagered upon has begun play, then the kiosk has been ‘played or operated.’¹⁴⁶ Consequently, sports wagering kiosks most certainly *can* be ‘played or operated,’ and as such, they could be deemed slot machines, and would therefore not be allowed into a restricted location that already contains 15 other slot machines. In other words, if a patron playing video poker is considered to have begun play the moment he or she presses the deal button, then a patron placing a sports wager is considered to have begun play the moment his or her wager is submitted and accepted.

b. Sports Wagering Kiosks as a “Gaming Device”

NRS 463.0189 also disallows the existence of any other “gaming device” past the 15 permitted slot machines in a restricted location.¹⁴⁷ On its face, any version of sports wagering kiosks appear to be a ‘gaming device.’ However, the NGC is not overly concerned with what something is ‘on its face,’ but rather, whether it fits the statutory definition. “Gaming device” is defined in NRS 463.0155 (in relevant part) as follows:

“Gaming device” means any object used remotely or directly in connection with gaming or any game which affects the result of a wager by determining win or loss and which does not otherwise constitute associated equipment. The term includes, without limitation:

1. A slot machine.
2. A collection of two or more of the following components:

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Golden Route Operations Hearing, supra* note 5, at 40. Making a deposit at the nonrestricted licensee’s establishment and then, at a later time, using the kiosk to place a bet is clearly a stretch for “inserting” consideration as it is intended in NEV. REV. STAT. § 463.0191.

¹⁴⁴ *Id.* at 21.

¹⁴⁵ NEV. REV. STAT. § 463.0191 (2011).

¹⁴⁶ Sports wagers cannot be rescinded once the game has begun. This may, in fact, be the only argument that the kiosk are not, in fact, a ‘full-service’ sports book. When placing a wager at a sport book in a casino or other nonrestricted location, a patron can alter or rescind a bet at any time up to the beginning of the sporting contest.

¹⁴⁷ NEV. REV. STAT. § 463.0189 (2011).

(b) A cabinet with electrical wiring and provisions for mounting a coin, token or currency acceptor and provisions for mounting a dispenser of coins, tokens or anything of value;

(c) An assembled mechanical or electromechanical display unit intended for use in gambling;

6. Any combination of one of the components set forth in paragraphs (a) to (d), inclusive, of subsection 2 and any other component which the Commission determines by regulation to be a machine used directly or remotely in connection with gaming or any game which affects the results of a wager by determining a win or loss.¹⁴⁸

This definition is intentionally inclusive, particularly with subsection 6, which gives the NGC the ability to determine a component can be included in the components set forth in subsection 2(a)-(d).¹⁴⁹ Although the split between the older version of sports wagering kiosks and the new version is evident, both versions adhere to subsection (2)(c). The whole point of the kiosk is that it is an “electromechanical display intended for use in gaming. . .”¹⁵⁰ Without the screen, the kiosk would be useless, and without its interactive functionality, it would not be of any use in gaming.

Since the statute requires “a collection of two or more . . . components. . .”¹⁵¹ a machine with only one component cannot be considered a “gaming device.” However, with the addition of the ability to deposit money, the new version of the kiosk falls within the definition of a “gaming device” by combining both (b) and (c) of subsection 2 in one machine.¹⁵² Further, the kiosks also have a card-swipe that allows the patron to swipe his or her Golden Rewards card to initiate the process of accessing his or her account. The NGC could easily deem such a card-swipe to be “used remotely or directly in connection with gaming.”¹⁵³

Ultimately, the Commission deemed the kiosks to be “associated equipment.”¹⁵⁴ “Associated Equipment” is defined, in relevant part, as:

1. Any equipment or mechanical, electromechanical or electronic contrivance, component or machine used remotely or directly in connection with gaming or mobile gaming, any game, race book or sports pool that would not otherwise be classified as a gaming device, including dice, playing cards, links which connect to progressive slot machines, equipment which affects the proper reporting of gross revenue, computerized systems of betting at a race book or sports pool, computerized systems for monitoring slot machines and devices for weighing or counting money. . .¹⁵⁵

The problem with this definition is that it does not give any specific reason why the kiosks cannot be deemed a “gaming device.” Counsel for Leroy’s commented that, “[t]he machines don’t determine the outcome of any game. It

¹⁴⁸ NEV. REV. STAT. § 463.0155 (2011).

¹⁴⁹ *Id.* at (6).

¹⁵⁰ *Id.* at (2)(c).

¹⁵¹ NEV. REV. STAT. § 463.0155(2) (2011).

¹⁵² *Id.* at (b), (c).

¹⁵³ NEV. REV. STAT. § 463.0155.

¹⁵⁴ *Golden Route Operations Hearing*, *supra* note 5, at 24.

¹⁵⁵ NEV. REV. STAT. § 463.0136(1) (2011).

is not a gaming device.”¹⁵⁶ But, the definition does not list this as the defining characteristic of “associated equipment.” In fact, the defining characteristic with devices used in connection with race books or sports pools is that the device “would not otherwise be classified as a gaming device.”¹⁵⁷ This is circular logic, especially considering the above discussion concerning the possibility that the full-service kiosks could be considered a “gaming device.” The defining characteristic of “associated equipment,” is that it is not a “gaming device,” and yet, it appears that the reason the kiosks’ viability as a “gaming device” is not questioned is specifically because it is considered “associated equipment.” Regardless, the Commission has given deference to the lab,¹⁵⁸ and decided the kiosks are “associated equipment” and not “gaming devices.”¹⁵⁹

c. Sports Wagering Kiosks as “Other Game”

Finally, the last part of the restricted license statute is to decide whether the kiosks constitute an “other game.”¹⁶⁰ As Chairman Bernhard pointed out, “if a sports book, sports pool operation is a game, then you violate the definition of a restricted license if you allow that game in a restricted location. So then the question is, what is a sports book or race pool operation?”¹⁶¹ The statutory definition of a “game” is clearer than that of “associated equipment” and more specific than that of “gaming device.”¹⁶² NRS 463.0152 provides a non-exhaustive list of games that fall within the definition as well as a broad definition of what a “game” is.¹⁶³ While sports books are not part of that list, Chairman Bernhard points out that he “think[s] a sports book, race pool, is a game. [He doesn’t] think there is any question about that. That’s been [the NGC’s] interpretation forever.”¹⁶⁴ With that in mind, the issue rests on whether the kiosks are considered a sports book or not. But, as the chairman stated,

[I]f you have a place where you can sign up for an account, you can deposit money in the account, you can look at the reader board that shows all the odds, you can place your bet, you can watch the game, you can then take your winnings out, that seems like it is an operation of a sports pool. . . . [I]f you are saying, well, the sports pool is only operated where my hub is, it just doesn’t make common sense to me.¹⁶⁵

To further this argument, the statutory definition of “sports pool” allows businesses to “accept wagers on sporting events or other events *by any system*

¹⁵⁶ *Golden Route Operations Hearing*, *supra* note 5, at 24.

¹⁵⁷ NEV. REV. STAT. § 463.0136(1).

¹⁵⁸ *See Golden Route Operations Hearing*, *supra* note 5, at 63-64. Put simply, all new gaming equipment is tested by a third party laboratory which provides the NGC with a report of its findings. In this case, the laboratory found the kiosks were ‘associated equipment.’ NEV. REV. STAT. § 463.670(7) (2011).

¹⁵⁹ *Golden Route Operations Hearing*, *supra* note 5, at 24.

¹⁶⁰ NEV. REV. STAT. § 463.0189 (2011).

¹⁶¹ *Golden Route Operations Hearing*, *supra* note 5, at 40-41.

¹⁶² Compare NEV. REV. STAT. § 463.0152 (2011) (defining “game”), with § 463.0136 (defining “associated equipment”), and § 463.0155 (defining “gaming device”).

¹⁶³ NEV. REV. STAT. § 463.0152.

¹⁶⁴ *Golden Route Operations Hearing*, *supra* note 5, at 40.

¹⁶⁵ *Id.* at 42.

or method of wagering.” (emphasis added).¹⁶⁶ This language was intended to allow for account wagering, but a plain interpretation of the statute, in conjunction with the statutory definition of “game” and the Commission’s interpretation that a sports book *is* a “game” lead to the conclusion that the full-service kiosks cannot be defined as anything other than a full-fledged sports book (or at the very least, a “game” in and of itself). In other words, because the kiosks sit as their own independent sports book, they must be considered as such, individually, and so they cannot be allowed in restricted locations.

V. 2013: THE NEVADA LEGISLATURE STEPS IN

The revenue sharing application hearing that brought about the NGC’s many concerns regarding sports wagering kiosks ended with a tentative agreement; Leroy’s and PT’s taverns could share revenue from the sports wagering kiosks but would be required to cease operations in July of 2013.¹⁶⁷ The apparent reason for this was to give the Nevada Legislature the chance to discuss the issue and rule on it at the legislative level.¹⁶⁸ As a result, when the discussion was opened on March 20, 2013, advocates from both sides of the issue were prepared with facts and statistics.¹⁶⁹ The proponents of abolishing the kiosks argued that the kiosks were not legal according to the current Nevada statutory scheme.¹⁷⁰ Proponents of the kiosks’ continued existence argued that they were simply an extension of account wagering which Nevada has allowed since the 1970’s.¹⁷¹

The first legislative discussion regarding sports wagering kiosks, which was a joint meeting of both the Senate and Assembly, began with Senate Chair Tick Segerblom discussing the need for the Nevada Legislature to look to the future when discussing gaming in Nevada.¹⁷² Chair Segerblom recognized that the current gaming atmosphere, both nationally and internationally, means that Nevada has to be proactive in protecting and promoting the gaming industry.¹⁷³ Assembly Chair Jason Frierson then echoed Chair Segerblom’s sentiment, going on to say that, “[w]ith the advancement of interactive gaming and technology, it is more important than ever to stay on top of developments and find ways to stay ahead of the game.”¹⁷⁴ Chair Frierson’s sentiment is astute; with the Nevada Legislature convening every other year, staying ahead of technological advancement is impossible.¹⁷⁵ Consequently, the Legislature embedded

¹⁶⁶ NEV. REV. STAT. § 463.0193 (emphasis added). The statutory definition of a race book is almost exactly the same, but deals with the acceptance of wagers upon the outcome of events held at a track which uses the pari-mutuel system of wagering. NEV. REV. STAT. § 463.01855.

¹⁶⁷ *Golden Route Operations Hearing*, *supra* note 5, at 87.

¹⁶⁸ *Joint Hearing on SB 416*, *supra* note 113, at 4.

¹⁶⁹ *See generally Joint Hearing on SB 416*, *supra* note 113.

¹⁷⁰ *See supra* Section IV.

¹⁷¹ *See supra* Section II(b).

¹⁷² *Joint Hearing on SB 416*, *supra* note 113, at 2.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ The existence of this note is proof positive that the Legislature has difficulty staying ahead of technological advancements in gaming. The institution of the full-service kiosks

the discussion of sports wagering kiosks, and the gaming industry in general, in the larger concept of ‘mobile gaming.’¹⁷⁶

A. *The Nevada Resort Association’s Argument*

After the statements by the two Chairs, the hearing quickly opened up to discussion by advocates from both sides, beginning with two representatives from the Nevada Resort Association (NRA).¹⁷⁷ Lorne Malkiewich, the first representative to speak on behalf of the NRA, began by mentioning the same NGC hearing discussed above in Section IV.¹⁷⁸ His cohort, Billy Vassiliadis then began a discussion of the policy concerns inherent in the gaming industry at the beginning of the 2013 Nevada legislative session.¹⁷⁹ According to Mr. Vassiliadis, “[the] licensing categories [had] become blurred. What [could] be offered at a nonrestricted location versus a restricted location [was] the most prominent challenge before [the] Legislature.”¹⁸⁰ Essentially, the NRA representatives made the argument that the Legislature created a split between nonrestricted and restricted gaming for policy concerns, and reviewing those policy concerns could help determine whether full-service sports books should be allowed in restricted gaming locations.¹⁸¹ Mr. Vassiliadis separated his argument into four concerns: the ‘historic/level of investment’ concern; the ‘erosion of gaming standards in Nevada’ concern; the ‘we will because we can’ concern; and the ‘protectionism’ concern.¹⁸²

1. *The ‘Historic/Level of Investment’ Concern*

Mr. Vassiliadis began his discussion of gaming policy concerns by mentioning that “[h]istorically, the amount of gaming allowed was proportionate to investment.”¹⁸³ He delved further into this concern shortly thereafter by pointing out the vast chasm between the investment needed to start a new nonrestricted location and the investment needed to fund a restricted location.¹⁸⁴ He added, “[t]he Legislature needs to weigh the balance between the quality of gaming and the product in drawing tourists versus convenience.”¹⁸⁵ This argument appears to be premised on an implied policy that promoting the growth of tourism in Nevada, specifically Las Vegas, is more important than promoting the growth of more convenient forms of gaming for locals.¹⁸⁶

occurred shortly after the 2011 Legislative session, but were never discussed by the Legislature until the 2013 session and the introduction of Senate Bill 416.

¹⁷⁶ See generally *Joint Hearing on SB 416*, *supra* note 113.

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.*; *supra* Section IV.

¹⁷⁹ *Joint Hearing on SB 416*, *supra* note 113, at 4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 4-7.

¹⁸² *Id.*

¹⁸³ *Id.* at 4.

¹⁸⁴ *Id.* at 5. (stating, “[l]ast week, there was an announcement regarding a new property to be built on The Strip. The investment is estimated to be between \$2 billion and \$7 billion. The investment for a neighborhood tavern/casino is approximately \$500,000 to \$700,000”).

¹⁸⁵ *Id.* at 5-6.

¹⁸⁶ The logic of this argument is based on the concept that taxing casinos on wagers made by locals creates tax revenue from money already in the local economy, while promoting

Reminding the Legislature of that historical aspect to the division between nonrestricted and restricted licenses gave Mr. Vassiliadi the chance to voice the NRA's other concerns.

2. *The 'Erosion of Gaming Standards in Nevada' Concern*

The NRA's concern over what Mr. Vassiliadis calls the 'erosion of gaming standards in Nevada' is in reference to the proliferation of Dotty's¹⁸⁷ and the ambiguity of the word "incidental" within the statute for restricted gaming.¹⁸⁸ And yet, the existence of full-service sports wagering kiosks in restricted locations plays a role in this supposed 'erosion of gaming standards.'¹⁸⁹ Mr. Vassiliadis' and the NRA's concern is that Dotty's locations violate the spirit of the restricted license because the obvious 'business' of a Dotty's location is gaming, nothing else.¹⁹⁰

The existence of full-service sports wagering kiosks in restricted locations creates a parallel argument to Mr. Vassiliadis' point about Dotty's. Exploitation of Nevada's leniency regarding the phrase "incidental to the primary business" allows Dotty's to blur the line between the full-fledged casinos and the taverns that have ancillary gaming. Similarly, the presence of a full-service sports wagering kiosk in a restricted location blurs the line between a nonrestricted gaming location and a restricted gaming location.¹⁹¹ If the line dividing nonrestricted gaming locations and restricted gaming locations rests on 15 slot machines and/or games other than slot machines, then sports wagering kiosks should not be allowed to exist in restricted locations for all of the reasons discussed in Section IV.¹⁹²

tourism allows the state to tax money brought into the economy, which boosts the amount of money circulating in the local economy.

¹⁸⁷ *Joint Hearing on SB 416*, *supra* note 113, at 5. Dotty's Casinos exist within the gray area of the restricted license; the restricted license requires that gaming be "incidental" to the business, but never defines incidental. The main business of a Dotty's location is slot machines. There is a bar, and they do sell cigarettes, but generally, the food that is for sale is in the form of pre-packaged candy and snacks. The Nevada Resort Association is opposed to the existence of Dotty's Casinos because the business model blurs the line between casinos and taverns that have gaming. *See, e.g.* J. Patrick Coolican, *Why Nevada Needs to Look at Dotty's One Way, Sports Book Kiosks Another*, LAS VEGAS SUN, May 8, 2013, <http://www.lasvegassun.com/news/2013/may/08/why-nevada-gaming-regulators-need-look-dottys-one/>.

¹⁸⁸ *Id.* at 5. NEV. REV. STAT. § 463.0189 (2011) (the statute regarding restricted gaming locations, states that gaming must be "incidental to the primary business of the establishment." The ambiguity in this phrase is the reason Dotty's Casinos exist: Mr. Vassiliadis hints at the fact that local governments have operated on the 'presumption' that an establishment is a tavern so long as they serve some sort of food and alcoholic drink).

¹⁸⁹ *Id.* at 6.

¹⁹⁰ *Id.* at 5.

¹⁹¹ Though Mr. Vassiliadis does not make this exact argument, it is implied by the discussion of Dotty's and the "we will because we can" concern *infra* Section V(a)(iii).

¹⁹² *Id.* at 6. Mr. Vassiliadis does not actually go so far as to say that they should be banned, but rather that the existence of Dotty's casinos and sports wagering kiosks has created an "erosion between the categories" of nonrestricted and restricted gaming licenses, *supra* Section IV .

3. *The 'We Will Because We Can' Concern*

The third concern voiced by Mr. Vassiliadis revolved around technological advancements and the idea that just because certain technologies exist, Nevada should allow them to be used.¹⁹³ Interestingly, even Mr. Vassiliadis conceded that such technological advancements *should* be allowed and used.¹⁹⁴

This is a concern that strikes at the very heart of gaming technology; just because the technology exists for something does not mean it should be utilized. Mr. Vassiliadis' concern with sports wagering kiosks stems from an all too real concern that technology tends to constrict the job market, not widen it.¹⁹⁵ Installing full-service sports wagering kiosks in taverns throughout the Las Vegas Valley would allow every Las Vegas local to bet on sports without ever entering a resort casino.¹⁹⁶ Consequently, the proliferation of sports wagering kiosks directly affects the number of employees a casino needs to staff a race and sports book.¹⁹⁷ Mr. Vassiliadis' technology argument was, essentially, an appeal to fear; he was attempting to scare the Legislature into believing that sports wagering kiosks will significantly increase the unemployment rate in Nevada.¹⁹⁸

4. *The 'Protectionism' Concern*

Mr. Vassiliadis closed his initial statement with a discussion of what he termed "protectionism" and the economy of gaming in Nevada.¹⁹⁹ This concern stems from the taxation of gaming in Nevada and the money at stake in the gaming industry.²⁰⁰ Locations are taxed differently based on the type of license they have and the number of slot machines and other games they operate.²⁰¹ It

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Joint Hearing on SB 416*, *supra* note 113, at 4-6.

¹⁹⁶ *See supra* Section I (explaining the ability of patrons to initiate accounts, deposit money, place bets, and withdraw money all on one kiosk).

¹⁹⁷ While this argument is not entirely without merit, I think it something of an *argumentum ad absurdum* fallacy as well as a form of 'broken window' fallacy. If hundreds more of the kiosks were installed throughout Las Vegas, and if hundreds, or even thousands, of people initiated accounts through the kiosks, and if all of those people were to *only* use the kiosks for their sports wagers, *then* the resort casinos would, *theoretically*, need to employ fewer people to staff their race and sports books. This argument is based *entirely* on the assumption that all of those same patrons would definitely place the same bets at a resort casino that they placed at a kiosk. However, this argument completely skips over the possibility that the kiosks were created to appeal to people *who did not want to go to a resort casino to place their wagers in the first place*.

¹⁹⁸ Ironically, this same appeal can be used to argue in favor of allowing Dotty's to exist. When Dotty's began showing up throughout Las Vegas, the company started by buying up bars and taverns that were going out of business. They were providing jobs in an economy that was destroying other businesses. *See, e.g.,* Mike Trask, *Busted Slot Joint's Rebirth?*, LAS VEGAS SUN, May 6, 2009, <http://www.lasvegassun.com/news/2009/may/06/busted-slot-joints-rebirth/>. The appeal to fear would say that creating legislation that would force Dotty's to close would eliminate hundreds, if not thousands, of jobs throughout the Las Vegas Valley.

¹⁹⁹ *Joint Hearing on SB 416*, *supra* note 113, at 6-7.

²⁰⁰ *Id.* at 7.

²⁰¹ *See* NEV. REV. STAT. §§ 463.370-463.3857 (2011) (stating the different fees associated with running a gaming location).

would be unfair if the State of Nevada decided to tax a small tavern the same way it did a mega-resort like the Venetian Las Vegas.²⁰² Essentially, this argument becomes: resorts invest more money in building, employ more people, and pay more money in taxes, money which goes to the public fund in the State of Nevada, and, as such, the Legislature should protect them from outside competition.²⁰³

B. *The Argument in Favor of Sports Wagering Kiosks*

After the representatives from the NRA finished giving their statements, the advocates in favor of sports wagering kiosks were given a chance to speak their minds.²⁰⁴ Scott Scherer, speaking on behalf of American Wagering, Inc. and William Hill US, began by rehashing much of the same testimony he gave at the September 2011 revenue sharing application hearing.²⁰⁵ He then pointed out that Deputy Attorney General Darlene Caruso stated that the Office of the Attorney General did not believe that the kiosks would violate any law if approved by the Legislature.²⁰⁶ Further, although the NGC asked for “documents [to be submitted] to the Attorney General [making the argument] as to why . . . it was not keeping within the law to approve kiosks,” no one followed through on that request.²⁰⁷ While this was a non-sequitur, it does lend a small amount of credence to the possibility that the kiosks did not, in fact, violate the law.²⁰⁸

Interestingly, Mr. Scherer went on to explain why the kiosks were not slot machines, “[a] slot determines win or loss. . . . Nothing in the kiosk determines a win or loss. A win or loss is determined on the sport itself.”²⁰⁹ While this differentiation does not actually exist within the statutory definition of a slot machine,²¹⁰ it does, however, appeal to common sense regarding why a kiosk should not be deemed a “slot machine.”

Following Mr. Scherer’s statements, Sean T. Higgins, a representative for the Nevada Restricted Gaming Association as well as Golden Gaming, discussed the policies behind SB 416 and sports wagering kiosks.²¹¹ Mr. Higgins’ argument was directly pointed at the ‘erosion of gaming standards in Nevada’ and the technological ‘we will because we can’ arguments made by Mr. Vas-

²⁰² See generally James Frater, *10 Tricks Casinos Use on You*, LISTVERSE (FEB. 9, 2010), <http://listverse.com/2010/02/09/10-tricks-casinos-use-on-you/> (nonrestricted locations are designed to keep people gambling); NEV. REV. STAT. §463.0189 (2011) (restricted locations must be designed so that gambling is “incidental to the primary business”). Because of the stark differences between restricted and nonrestricted locations, it would be inappropriate to tax them using the same standards.

²⁰³ *Joint Hearing on SB 416*, *supra* note 113 at 7.

²⁰⁴ *Id.* at 12-22.

²⁰⁵ *Id.* at 11.

²⁰⁶ *Id.* at 13.

²⁰⁷ *Id.*

²⁰⁸ In this respect, the argument is a non-sequitur because it states that the kiosks are legal because no one submitted documents disputing their legality. The conclusion does not logically follow from the premises.

²⁰⁹ *Joint Hearing on SB 416*, *supra* note 113 at 14; *supra* Section IV(b)(iii)(1).

²¹⁰ See NEV. REV. STAT. § 463.0191.

²¹¹ *Joint Hearing on SB 416*, *supra* note 113 at 15-18.

siliadis.²¹² His argument was that regardless of the checks, or lack thereof, imposed on technology in the field of gaming, a location with a restricted license is still limited to a maximum of 15 machines.²¹³ Even assuming that “in the future that a patron may be able to walk into a tavern and a bartender will hand him or her an iPad or tablet to play. Those locations would still be restricted to 15 games. [He disagrees] that technology has allowed for more games.”²¹⁴ The point Mr. Higgins so adamantly urged is that there can be no erosion or blurring of the standards if restricted locations are still being strictly held to 15 or fewer machines.²¹⁵ Unfortunately, while this argument did speak to the issues regarding Dotty’s²¹⁶ and the phrase “incidental to the primary business,” it did nothing to fix the problem of having 15 slot machines *and* a sports wagering kiosk.

Enter Joe Asher, CEO of William Hill US, and his testimony specifically addressing the sports wagering kiosks.²¹⁷ As Mr. Asher pointed out, there was no direct evidence to show that the kiosks were having a detrimental effect on the resort casinos in Nevada.²¹⁸ Mr. Asher presented statistics showing sports wagering in Nevada in 2012 was up 20 percent from 2011.²¹⁹ He went on to state that William Hill’s “kiosks were \$600,000 of the \$30 million increase in wins with the other \$29.4 million from the casinos.”²²⁰ This means that of all the money paid out in winning sports wagers in 2012, two percent was a result of the kiosks. In other words, of the 20 percent increase in sports wagers between 2011 and 2012, 2.2 percent of that increase was due to sports wagering kiosks, and the other 17.8 percent was due to more natural growth.²²¹ Mr. Asher also pointed out that the closest comparison that can be drawn is to Delaware, where similar kiosks exist in even closer proximity to casinos than they do in Nevada.²²² According to the statistics provided by Mr. Asher, “[t]he casinos in Delaware were up 7 percent [in 2012].”²²³ Mr. Asher’s implication was obvious: the amount of sports wagers in Nevada increased by more than two-and-a-half times that of Delaware over and above any wagers that took place using a kiosk, so how badly were they affecting the resorts’ business? Further, there is a possible implication that the existence of the sports wagering kiosks works to stimulate the growth of sports wagering throughout Las Vegas. This implication is premised on the idea that the kiosks act as a gateway into sports wagering, giving bar patrons the chance to test out sports wagering, then to progress into going to a resort to place their wagers.

²¹² *Id.* at 15-16.

²¹³ *Id.* at 15.

²¹⁴ *Id.* at 15-16.

²¹⁵ *Id.* at 15-18.

²¹⁶ *See supra* notes 188-189.

²¹⁷ *Joint Hearing on SB 416, supra* note 113 at 18.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Using the numbers provided by Mr. Asher, winning payouts in 2011 were approximately \$25 million. Which means that the increase in pay outs was approximately \$5 million. If \$5 million is 20 percent, then \$600,000 is 2.2 percent. *See Id.*

²²² *Id.*

²²³ *Id.*

Towards the end of the hearing, Paul Kraft, owner of Wahoo's Fish Tacos, and Gary Costello, owner of four Bounty Hunter Taverns, lobbied on behalf of the businesses that house sports wagering kiosks.²²⁴ As Mr. Costello put it, "[the] industry of hospitality and service has been driven by one powerful concept: give them what they want, not what you have."²²⁵ In other words, if the market demands an innovation, the NGC, GCB, and Nevada Legislature should find ways to regulate and promote that innovation rather than seek to extinguish it. In the opinion of Mr. Kraft, the ability to bet on sports helps support taverns.²²⁶ As he sees it, the growth of Wahoo's in Las Vegas is integrally linked to its ability to offer sports wagering to patrons.²²⁷ According to Mr. Kraft:

[S]ports betting is an additional offering to [the] customers. As a business owner, I do not make a lot of money off the sports betting aspect. It drives and attracts more people to my business and gives me the opportunity to retain and attract new business. A patron who is watching a game at my location is not going to leave to go place a bet at a casino regardless of whether or not I have the capabilities.²²⁸

Ultimately, Mr. Kraft's point describes the dividing line perfectly: do the kiosks work to the benefit of the State of Nevada by creating more taxable wagers, more local interest in going to taverns with the kiosks, and thus more income for those local businesses? Or are the kiosks detrimental to the statutory scheme of Nevada gaming because they take business away from the resorts and blur the line between restricted and nonrestricted gaming?

C. *The Outcome of Senate Bill 416*

On June 3, 2013, after an almost unanimous passage through both the Senate and the Assembly, the Governor approved the passage of SB 416.²²⁹ The final version of the bill changed numerous parts of NRS 463.²³⁰ Almost all of the changes were directly related to sports kiosks and what constitutes the operation of a race book or sports pool.²³¹ Section 1 of SB 416 changed the definition of a restricted license to read:

"Restricted license" or "restricted operation" means a state gaming license for, or an operation consisting of, not more than 15 slot machines and no other game or gaming device, *race book or sports pool* at an establishment in which the operation of slot machines is incidental to the primary business of the establishment (emphasis added).²³²

²²⁴ See *Id.* at 21-22.

²²⁵ *Id.* at 21.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Nev. S.B. 416, 2013 Leg., 77th Sess. (Nev. 2013), available at <https://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=956> (the Senate passed the bill 18-3, and the Assembly passed it 41-0 with 1 person excused).

²³⁰ See S.B. 416, 2013 Leg., 77th Sess. (Nev. 2013), available at <https://nelis.leg.state.nv.us/77th2013/App#/77th2013/Bill/Text/SB416>.

²³¹ See *Id.* (NRS 463.161 was also amended to fix the ambiguity in the phrase "incidental to the primary business." Everything else deals directly with the operation of race books and sports pools).

²³² *Id.* (emphasis is used to show the added language).

The added language is, however, vague with regard to the sports wagering kiosks. As noted in Part IV, the NGC's concerns about sports wagering kiosks revolved around whether each individual kiosk should be deemed its own race book or sports pool or whether a sports book operator can have multiple kiosks in multiple locations under one license.²³³ That question was never answered, so the new addition of language to NRS 463.0189 does nothing to clear up the ambiguity inherent in the sports wagering kiosks.

Section 2 of SB 416 amends NRS 463.160 by defining "the operation of a race book or sports pool"²³⁴ as:

- (a) Allowing patrons to establish an account for wagering with the race book or sports pool;
- (b) Accepting wagers from patrons;
- (c) Allowing patrons to place wagers;
- (d) Paying winning wagers to patrons; or
- (e) Allowing patrons to withdraw cash from an account for wagering or to be issued a ticket, receipt, representation of value or other credit representing a withdrawal from an account for wagering that can be redeemed for cash, whether by a transaction in person at an establishment or through mechanical means, such as a kiosk or similar device, regardless of whether that device would otherwise be considered associated equipment. A separate license must be obtained for each location at which such an operation is conducted.²³⁵

This definition was repeated in section 4(6) of SB 416, pertaining to NRS 463.245, and clarifies that kiosks are not allowed in locations with restricted licenses.²³⁶ Further, SB 416 also banned nonrestricted license holders from going out into the community to establish new accounts for account wagering.²³⁷ Effectively, the Legislature banned an activity already permitted by the NGC²³⁸ in order to eliminate any grey area in the definition of a race book or sports pool.

However, subsection (c) of SB 416 section 2(5) and 4(6) states that anyone "allowing a patron to place a wager" is operating a race book or sports pool.²³⁹ Effectively, this means even the original version of the sports wagering kiosk is now considered a full race book or sports pool because they "allo[w] a patron to place a wager."²⁴⁰ This phrase will have a lasting effect on sports wagering in Nevada because of the ramifications it may have on mobile gaming. To say that a restricted location cannot accept wagers, pay out winnings, or allow patrons to withdraw from their accounts all seem like standard operations for a race book or sports pool. To say that a restricted gaming location cannot

²³³ See *supra* Part IV.

²³⁴ Nev. S.B. 416.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* (stating that a nonrestricted licensee *may* operate a race book or sports pool at a second location, but *only if* that location also has a nonrestricted license).

²³⁸ See *supra* Part II(b) (stating "in January 2011, the last major shift in the sports betting proliferation paradigm occurred. The NGC approved a change to Regulation 22, allowing employees of a sports book to go into the community to enroll new customers in sports book wagering accounts, accept deposits into the account, and pay out the winning wagers").

²³⁹ Nev. S.B. 416.

²⁴⁰ *Id.*

“allo[w] a patron to *place* a wager” affects all of account wagering.²⁴¹ Despite the Legislature’s efforts to eliminate ambiguity in the language of SB 416, there is a vast grey area in what constitutes “placing a wager.”

If a patron can “place a wager” by calling the nonrestricted licensee that operates his or her account, then a tavern would be violating the letter of the law by knowingly providing patrons the means to do so. This is counter to the spirit of the law for two reasons. First, account wagering is legal in Nevada and is highly regulated,²⁴² so to prohibit tavern patrons from being able to phone in wagers to a resort where the patron has an account, the Legislature is, in the opinion of this author, overstepping its bounds. Further, by not allowing patrons to “place a wager” from a local tavern, the Legislature is implying that the patron must *leave* the tavern in order to place that same wager. In other words, the patron has the choice of either not placing the wager, and thereby not creating that taxable income for the state, or leaving the tavern to place the bet, and in so-doing, stopping the generation of sales. Second, the regulations regarding account wagering are in place to ensure the patron placing the wager is a) the account holder, *and* therefore b) of legal age, *and* c) placing the wager from within the State of Nevada.²⁴³ Allowing a patron to place a wager from within a local tavern, particularly from a kiosk with a dedicated camera satisfies all three of these qualifications, whereas requiring the patron to place a phone call in order to access their account satisfies none.²⁴⁴

Further, with the proliferation of sports wagering phone applications, a tavern might be liable if it allows patrons to place a wager using such an application from within the tavern’s premises. This could violate the spirit of both SB 416 and the regulations regarding account wagering for all of the same reasons just discussed. Unfortunately, it is impossible to say whether these changes will, in fact, have the effects hypothesized above. However, it is probable the new definition of “operating a race book or sports pool” proffered by SB 416, will have drastic effects on the future of sports wagering, account wagering, and mobile gaming.

VI. CONCLUSION: WHAT’S NEXT?

The surge of technological advancements that continue to affect the gaming industry in Nevada has forced casinos, slot route operators, and other gaming entities to try to keep up with the desires of their clients.²⁴⁵ Over \$2 billion

²⁴¹ *Id.* (emphasis added).

²⁴² See generally Nev. Gaming Reg. §§ 22.010-22.210 (2013).

²⁴³ *Id.*

²⁴⁴ This seems like an obvious solution to satisfying the three requirements. If a tavern patron can use a kiosk for the sole purpose of *placing* the wager, or in this case, transmitting the wager to the nonrestricted licensee, then the age requirement is satisfied by the simple fact that the kiosk is in an age-restricted location. Requiring that the kiosks have a dedicated camera in them to allow the nonrestricted licensee to view the person placing the wager allows for identification verification on each wager. And requiring that kiosks are only in Nevada satisfies the location verification.

²⁴⁵ *Golden Route Operations Hearing*, *supra* note 5, at 30-31.

dollars are wagered on sports every year,²⁴⁶ and a large portion of that comes from out-of-town visitors.²⁴⁷ One of the reasons locals do not bet on sports more than they already do is the annoyance factor of having to go to a casino to place their bets.²⁴⁸ The solution seems simple; build an easier and more convenient way for locals to gamble, and they will.²⁴⁹ The introduction of sports wagering kiosks created a way to allow locals to wager on sports without the hassle of dealing with a resort casino to place every bet.²⁵⁰ The placement of sports wagering kiosks in restricted gaming locations throughout Las Vegas seemed like a win-win situation; locals had the chance to place sports wagers from the relative comfort of a favorite tavern, and more wagers would equal more tax revenue for the state.

Ultimately, the Nevada Legislature decided to ban sports wagering kiosks from locations with restricted licenses. For better or worse, this decision had, and will continue to have, a drastic impact on the future of sports wagering in Nevada. Currently there are more than 80 kiosks still in place throughout Las Vegas,²⁵¹ despite the fact they cannot be used to place a sports wager. Many of these kiosks sit in taverns and function as simple account tracking devices for Golden Rewards Club members. All of them still have the technological ability, even though it has been disabled, to place sports wagers according to the account wagering system Nevada has condoned for over 40 years. It is impossible to say what the future of sports wagering will look like. Unfortunately, Nevada is falling behind in regulating technology. Nevada has “a Legislature that meets every two years. We’re already two years behind. We’re trying to bring something up that is new[.]”²⁵² There are already a few exceptions written into the statutes regarding restricted and nonrestricted licenses that allow for some restricted locations to maintain “games” that would otherwise violate NRS 463.0189.

To be in compliance of the new law, those in favor of using the kiosks are faced with an overhaul of the purpose and intent of the kiosks. Unfortunately,

²⁴⁶ *Over \$3 Billion Bet on Sports in Nevada in 2011*, WAGERMINDS (Feb. 9, 2012), <http://www.wagerminds.com/blog/sports-books/over-3-billion-bet-on-sports-in-nevada-in-2011-4264/>; *Las Vegas Sports Betting Revenue*, THESPORTSGEEK, <http://www.thesportsgeek.com/sports-betting/las-vegas/> (last visited Oct. 15, 2013).

²⁴⁷ See generally *Las Vegas Sports Betting*, THESPORTSGEEK, <http://www.thesportsgeek.com/sports-betting/las-vegas/> (last visited Oct. 15, 2013) (the exact percentage is almost impossible to track).

²⁴⁸ Charles Higgins, *Gaming Activities of Las Vegas Locals - Recent Study Results*, EXAMINER.COM (July 30, 2011), <http://www.examiner.com/article/gaming-activities-of-las-vegas-locals-recent-study-results> (“Forty - four percent of locals who do not gamble on the famed strip say it’s due to crowds, tourists, traffic, or difficulty in locating convenient parking. Twenty - three percent of local non-Strip gamblers claimed other places were closer to home or more convenient versus the Strip.”).

²⁴⁹ See *Id.* (if a local casino is more convenient, and that is why locals gamble there, it stands to reason that if the tavern they frequent is even more convenient, locals will gamble even more).

²⁵⁰ *Golden Route Operations Hearing*, *supra* note 5, at 20.

²⁵¹ See Chris Sieroty, *William Hill Considering After Sports Betting Kiosk Ban*, LAS VEGAS REV. J., May 31, 2013, <http://www.reviewjournal.com/business/casinos-gaming/william-hill-considering-options-after-sports-betting-kiosk-ban>

²⁵² *General Route Operations Hearing*, *supra* note 5, at 58.

with the statutory amendments made by SB 416, altering the machines from the latest incarnation, a cash-in, cash-out machine to the previous incarnation, an access point and wager transmission device is no longer possible.²⁵³ Even though this was permissive for many years, it no longer is. The Legislature's decision to ban sports wagering kiosks seems reactionary and overly restrictive; it essentially denies a patron the ability to partake in a form of wagering that has been promoted in Nevada for over 40 years.

Further, there is a very small loophole in SB 416's definition of "race book or sports pool" that might allow for the use of the former variety of sports wagering kiosk; SB 416 prohibits a restricted licensee from "allowing a patron to place a wager."²⁵⁴ It does not, however, prohibit a race book or sports pool from allowing a patron to *transmit* a wager to a nonrestricted licensee. While this is a marginal semantic difference, it is a loophole that will probably become much more relevant as technology advances to allow tavern patrons to use tablets as slot machines or for use in playing casino-style games. If William Hill US, Cantor Gaming, Wahoo's Fish Tacos, and the other proponents of sports wagering kiosks are able to convince the NGC and GCB that the kiosks still in place throughout Las Vegas had been reprogrammed to work only as transmission devices, then the continued growth of sports wagering in Nevada would not be hampered by the Legislature's hasty decision in passing the final version of SB 416.

With the prevalence, and continued growth of Internet wagering and cell phone applications that allow sports wagering, the complete banishment of sports wagering kiosks from locations with restricted licenses was a far too drastic measure. In the prophetic words of Commissioner Townsend,

Tomorrow there is going to be another . . . gaming appliance that we're never going to apply and it might not fit anywhere. . . . [W]e can't just keep running up there and reacting to things. We need to have a dialogue . . . to better understand where we need to be, shall we say, open-minded and flexible . . . for purposes of economic development[.]²⁵⁵

²⁵³ See *supra* Part V(c) for a discussion on the problem with the amendments.

²⁵⁴ *Id.*

²⁵⁵ *Golden Route Operations Hearing*, *supra* note 5, at 34.

