

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

New Hampshire Lottery Commission,		
Plaintiff,		
v.		Civil Case No.
Matthew Whitaker, in his official capacity		
As Acting Attorney General; United States		
Department of Justice		
Defendants		

**DECLARATION OF CHARLES R. MCINTYRE IN SUPPORT OF PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

I, Charles R. McIntyre, being over the age of 18, declare as follows:

1. I, Charles R. McIntyre, currently serve as the Executive Director of the New Hampshire Lottery Commission (“the Commission”). I have held that position since June of 2010;

2. Prior to accepting my current position, I served as the Assistant Executive Director and General Counsel of the Massachusetts Lottery from April of 2003 to June of 2010;

3. In addition to my duties with the Commission and the Massachusetts Lottery, I have also served on various lottery industry committees and associations including as the President of the National Association of State and Provincial Lotteries from September of 2017 to October of 2018 and as the current Vice-President of the Multi-State Lottery Association;

4. Based on over fifteen (15) years of experience in the lottery industry, I have personal knowledge of the operation of state lotteries and multi-jurisdictional lottery games;

I. New Hampshire Lottery Commission

5. The Commission is an executive branch agency of the State of New Hampshire created in 1964. The agency is overseen by three commissioners who are appointed and confirmed by the Governor & Executive Council of the State. The Executive Director is appointed by the Commission and is responsible for the day to day operations of the agency;

6. Pursuant to RSA 284:21-j, and Article 6(b) Part Second of the New Hampshire Constitution, any revenues created by the Commission, less monies required to fund the operations of the Commission, are credited to the state's Education Trust Fund.

7. Since its inception in 1964, the Commission has deposited in excess of \$2 billion in the Education Trust Fund for the support of New Hampshire public education;

8. For the 2018 Fiscal Year (July 1, 2017-June 30, 2018), the Commission recorded operating revenue of \$337.8 million and deposited \$87.2 million into the Education Trust Fund. The Commission expects its contribution to education to exceed \$90 million in the current fiscal year;

9. The Commission is authorized by law to sell multiple types of lottery games, the vast majority of which are sold through the Commission's network of over 1,400 retailers;

10. In order to operate the lottery games and support its retailer network, the Commission contracts with a lottery services vendor, Intralot, Inc., to provide a computer gaming system ("CGS") which manages the games and a back office system ("BOS") to manage inventory and sales data;

11. Pursuant to industry regulation and best practice, lotteries are required to have duplicate CGS locations so that they can continue to operate in the event that one system fails. Frequently, these duplicate systems will be sited in different states to create sufficient geographical diversity to continue operations in the event of a natural disaster. Lotteries are required through industry regulation to operate out of their disaster recovery site at least twice per year. The Commission's CGS servers for traditional retailer (commonly referred to as "bricks and mortar") based lottery products are currently located in Barre, Vermont with a disaster recovery location in Strongsville, Ohio;

12. Each retailer is provided at least one lottery terminal which is a computer device that connects the retailer to the vendor's CGS and BOS systems via the internet, through a cellular network, or through a satellite connection. Based on the type of game being played, the terminal sends and receives different types of data from the CGS and BOS;

II. Instant Ticket Games

13. The most common lottery game is an "instant" or "scratch" game, in which a player purchases pre-printed tickets and scratches the ticket to reveal the result of the game. Generally, these tickets may only be purchased with cash and the purchaser is physically present in the retail location;

14. Though the ticket is pre-printed with an outcome, the result of the ticket is also stored in the CGS. Activation of a ticket for sale and eligibility of prizes to be claimed are also controlled through the CGS. Accordingly, a retailer will use the lottery terminal to activate the ticket book, validate the results of the instant ticket, and ultimately record the sale and payment of prizes paid. For players who purchase tickets directly at lottery vending machines, this equipment includes a communications terminal which will validate the result

of tickets and generate credits for low tier winning tickets by communicating with the CGS. This data is transferred from the individual sale location in New Hampshire to the CGS and BOS servers in Vermont with a replication of the data then sent to the vendor's disaster recovery data center in Ohio;

15. The Commission has relied on the use of transmitting data from its retailers to its vendors via some form of wire communication since at least the 1980's;

16. Based on my knowledge and experience in the lottery industry, I understand that most of the 48 state and territorial lotteries in the United States rely on transmitting data to an out-of-state CGS server, out-of-state disaster recovery CGS server, or both to support their sales of instant tickets;

III. Draw Based Games

17. In addition to instant tickets, the Commission sells a variety of "draw based" games. In a draw game, a player purchases a ticket in the form of a set of numbers for a draw that will be conducted at some point in the future. At the designated time and place numbers are drawn either physically or through the use of a random number generator. The player matches their numbers against the draw results to reveal the outcome of their ticket.

18. With the exception of iLottery purchases, which are detailed below, draw games are purchased from a lottery retailer through the use of the terminal. The retailer terminal will request a ticket transaction from the CGS based on the type of bet made by the player. The CGS will then generate a transaction in the system and send that information to the terminal. The terminal prints a record of the transaction which is given to the player. This data travels over the internet, cellular network, or via satellite between the CGS in Vermont, a duplicate CGS system in Ohio, and the retailer terminal in New Hampshire.

19. The Commission sells a New Hampshire draw based game, Keno 603, in which draws occur every five minutes between 11:00 a.m. and 1:00 a.m. every day and sells a wide variety of multi-jurisdictional draw games, as set forth in detail below;

IV. Multi-Jurisdictional Games

20. In 1985, the New Hampshire Legislature adopted RSA 287-F, creating the Tri-State Lotto Compact along with the states of Maine and Vermont. Tri-State Lotto offers a variety of instant and draw based games that sell in all three states. This includes multiple daily draw based games;

21. The Commission is also a member of the Multi-State Lottery Association which permits the Commission the ability to sell the multi-jurisdictional draw based games Powerball and Mega Millions which are each played twice a week. New Hampshire has also joined a consortium of 25 states and the District of Columbia in selling the draw based game Lucky for Life;

22. In New Hampshire, the sales of multi-jurisdictional games occur through the communications of the lottery terminal and the CGS as set forth above. For multi-jurisdictional games, however, additional actions must be taken to ensure the successful operation of the game. First, prior to the draw, the game transactions must be sent from the CGS to an independent control system (“ICS”) under the control of the Commission. This is done to ensure the integrity of the transaction information. In the case of New Hampshire, this data is transferred from Vermont or Ohio to two ICS servers in New Hampshire over the internet. Additionally, general sales and total transactions must be shared with the member states so that the jackpot amount can be accurately calculated and to reconcile the number of tickets sold and the monies received for those tickets. Currently, this is also transferred

through the internet to the multi-jurisdictional association running the game. Finally, once a jackpot is won, the participating lotteries will transfer their portion of the jackpot to the jurisdiction that sold the winning ticket, either directly or through the association that runs the game. This is typically accomplished through a wire transfer of funds or an automated clearing house (“ACH”) process;

23. These multi-jurisdictional draw games, which involve up to 48 states and territories have operated on the interstate transfer of bet data and prize money through the telephone, internet, and wire transactions for well over thirty (30) years;

V. iLottery Games

24. In 2017, the New Hampshire Legislature authorized the sale of lottery tickets “through the use of mobile applications by mobile devices or over the Internet.” *See* RSA 284:21-h, II (e);

25. On September 4, 2018, the Commission launched its “iLottery” platform which allowed players to purchase e-instant tickets and certain draw based tickets through the internet;

26. The iLottery platform is operated through one retailer, NeoPollard Interactive (“NPI”); a subcontractor to Intralot, Inc. NPI operates a separate CGS with server sites located within the State of New Hampshire. Prior to placing a bet on the internet platform, a player must provide personal data which is then vetted to ensure that the person is an eligible player. The system also uses geo-location data from the player’s PC or mobile device to ensure that the player can only purchase a ticket when they are physically located within the State of New Hampshire;

27. iLottery instant games and draw games can be played on the internet platform in essentially the same manner as traditional tickets. E-instant tickets have pre-determined outcomes that are revealed when a player “scratches” the virtual ticket. Draw games request that the CGS create a transaction which is then sent to the player as a virtual ticket rather than a physical ticket. In all other respects the games operate in the same manner;

28. Players pay for the game through a digital wallet which may be funded through debit cards, ACH, or PayPal, however, players may only make deposits when they are physically located within the state. Accordingly, all financial transactions and bets must begin and end in the State of New Hampshire. Given the nature of the internet, however, the Commission cannot guarantee that intermediate routing of data or information ancillary to the transaction does not cross state lines;

29. From September 4, 2018 to January 31, 2019, the Commission received over \$3 million in deposits and sold more than \$12 million in tickets via the iLottery platform. The Commission anticipates revenues from this sales channel to be approximately \$4-6 million for Fiscal Year 2020, and \$6-8 million for Fiscal year 2021;

VI. Advertising and Customer Interaction

30. As a revenue generating State agency, the Commission advertises its’ products through a variety of media channels.

31. The Commission maintains a website which advertises lottery games, posts draw results, provides information on where games can be played, game rules, odds, and prizes. The website also has information and demonstrations of the Commission’s iLottery product. While iLottery transactions are not permitted outside of the state, this website is not walled off to New Hampshire and is available to any person with internet access.

32. The Commission also engages in e-mail marketing with individuals who have signed up for the Commission's former loyalty program or have created a New Hampshire iLottery account. These e-mails provide information on lottery games and may contain offers or promotions for lottery products. While sales of the Commission's products may only occur within the state, e-mails may be routed to New Hampshire residents who are temporarily out of state or to individuals who set-up an account in New Hampshire but reside in other locations.

33. In recent years, the Commission has also used various social media channels including Facebook, Twitter, Instagram, and YouTube to advertise products, hold promotional contests, and post draw results. These channels are open to the platform's users worldwide and are not limited to the State of New Hampshire.

34. The Commission also engages in traditional television and radio marketing to advertise its product and mission. While the Commission only buys advertisements from New Hampshire media outlets these broadcasts may, by their nature, cross state lines.

VII. Effect of DOJ Opinion

35. As with all other industries, the lottery business has adopted the use of modern communications technology, including the internet, to conduct its business. In doing so, the Commission has relied on the specific statutory authorizations granted by the New Hampshire Legislature including authorizations to join multi-state compacts and to sell multi-jurisdictional games. The Commission has further relied on the uninterrupted practice for several decades of utilizing interstate communications for the purposes of operating high profile multi-jurisdictional lottery games.

36. The Commission ensured that when it engaged in online sales of lottery products, it did so consistent with the federal Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”).

37. In March of 2009, the Commission requested a review of legality of online sales of lottery subscriptions from then New Hampshire Attorney General Kelly Ayotte. The Attorney General provided an opinion that internet based subscriptions did not constitute unlawful internet gambling under the provisions of UIGEA.

38. Based on the actions of certain banks in scrutinizing lottery transactions, the Commission again asked for a review of that opinion from New Hampshire Attorney General Joseph Foster in June of 2015. Again, the New Hampshire Department of Justice confirmed that the online sales of subscriptions complied with the provisions of UIGEA and were lawful under that act.

39. As the Commission moved to direct sales of lottery tickets online, it again ensured that the platform complied with the state and federal requirements including the UIGEA. Specifically, the Commission and its vendors ensured that all bets are initiated in New Hampshire through the use of state of the art geo-location technology. Further, all bets are completed within the state at the CGS servers located within New Hampshire. In launching this iLottery platform, the Commission further relied on the 2011 DOJ opinion that the Wire Act only applied to sports betting and did not encompass lottery transactions.

40. I have reviewed the recent United States Department of Justice (“DOJ”) Slip Opinion entitled “Reconsidering Whether the Wire Act Applies to Non-Sports Gambling” which was published by the DOJ on or about January 14, 2019. The DOJ opinion states that the prohibitions relating to using a wireless communication facility to transmit bets and

wagers or using wire interstate transmissions to receive money or credit as a result of bets or wagers or information assisting in the placement of bets and wagers apply to all bets, including lawful lottery transactions.

41. This opinion provides the Commission with no guidance on whether incidental or ancillary interstate wire transmissions are considered a violation and seemingly invalidates clarifying language from UIGEA that intermediate routing is not considered an interstate transmission. This action provides the Commission significantly less clarity than existed on this subject prior to the issuance of the opinion.

42. The opinion further fails to clarify the breadth of the phrase “information assisting in the placement of bets and wagers” while expanding the application of that phrase to include all kinds of legal wagering, including lotteries. Without clarification, that phrase could be read to criminalize almost all electronic communications by the Commission as it is our business to advertise, sell, and process bets and wagers.

43. It is apparent that the DOJ did not take into account the far reaching implications of this action. The reversal of the 2011 opinion has potentially criminalized conduct which has been conducted by the Commission and other lotteries for several decades. While the opinion expressed a concern that lotteries relied on the 2011 opinion to sell tickets online, in fact, the potential effect of this decision is to undermine lottery sales and practices which have been ongoing for decades before the 2011 opinion.

44. There is not an element of the Commission’s sales which is not potentially implicated by a broad interpretation of the DOJ opinion. As such, the Commission is likely to face harm as a result of this action. Without clarification or reversal, the Commission and its vendors face uncertainty as to the legality of well-established infrastructure and operations;

45. The broadest interpretation of the current DOJ opinion could result in the suspension of all Commission sales resulting in an immediate annual loss of over \$90 million to the state as well as additional expenses to comply with the implied interpretation of the DOJ opinion. To the extent the Commission cannot utilize internet communications in any of its operations, I would anticipate that sales would be reduced to approximately 25% of their current level;

46. Less severe interpretations of the DOJ opinion may still require suspension of multi-jurisdictional games and compacts that have operated with great success for the nation's lotteries since the 1980's. The sharing of transaction information and money across state lines is essential to the operation of these games. Such an action would deprive New Hampshire of approximately \$80 million in annual revenue and \$40 million in education funding;

47. To the extent DOJ seeks only to enjoin the sale of lottery tickets directly over the internet, this action would be inconsistent with the prior actions of the New Hampshire Legislature, the United States Congress, and the prior opinion of the Department of Justice. The Commission relied on each of these legal authorities in launching an iLottery platform.

48. The DOJ's reversal of its opinion, without any further action, is likely to have a chilling effect on banks accepting and processing these transactions which can effectively shut down this sales channel merely through an unaccountable administrative action. This would result in a loss of approximately \$6-8 million in education funding for New Hampshire.

49. The administrative action taken by the DOJ has the potential to wreak catastrophic consequences for lotteries across the country and to jeopardize billions of dollars in state funding for good causes that are supported by those lotteries.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of February 2019.

By: /s/Charles R. McIntyre
Charles R. McIntyre