STATE OF ILLINOIS
ILLINOIS GAMING BOARD

Accel Entertainment Gaming, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 17-UP-004**
	)	
Midwest Electronics Gaming, LLC d/b/a ME Gaming,	)	
	)	
Respondent.	)	

RE: HIALEAH CLUB, INC. d/b/a Hialeah Club (License No. 120706973)

FINAL BOARD ORDER

This cause comes before the Illinois Gaming Board (the "Board" or "IGB") pursuant to the Video Gaming Act (the "VGA"), 230 ILCS 40, and Section 1800.320(b) of the Board's Adopted Rules (the "Rules"). 11 Ill. Adm. Code 1800.320(b).

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

FINDINGS OF FACT

The Board has before it the entire record of *Accel Entertainment Gaming, LLC, Petitioner* ("Accel") *v. Midwest Electronics Gaming, LLC d/b/a ME Gaming, Respondent* ("Midwest") *Re*: HIALEAH CLUB, INC. d/b/a Hialeah Club ("Hialeah" or "Establishment") (License No. 120706973), Docket No. 17-UP-004. The record includes the Petition, the Response and other pleadings received, the Administrator's Recommended Decision ("ARD"), and any Exceptions filed.

On June 20, 2017, Accel petitioned the Board for an Order: (i) declaring its April 14, 2017 use agreement ("UA" or "Agreement") with Hialeah to be valid for the placement and operation of VGTs in Hialeah; (ii) invalidating Midwest's competing January 14, 2014 UA with Hialeah; and (iii) directing Midwest to remove its VGTs from Hialeah. On July 27, 2017, Midwest filed its Response to Accel's Petition. On January 18, 2022, Board Administrator

Marcus D. Fruchter issued an ARD in this matter. The ARD properly considered the Petition and Response, and their respective exhibits. The parties did not file Exceptions.

CONCLUSIONS OF LAW

Pursuant to the VGA, the Rules, and *J&J Ventures Gaming, LLC v. Wild, Inc.,* 2016 IL 119870, the Board has exclusive and original jurisdiction over agreements that purport to control the placement and operation of video gaming terminals. In *Wild*, the Illinois Supreme Court affirmed that there is no common law right to profit from gambling. *Wild* at ¶ 26. The Court also held that the VGA's legalization of video gaming is an exception to the general prohibition on gambling, that video gaming is allowed only as authorized by the VGA or the Rules, and that by "legalizing the use of video gaming terminals for commercial gambling purposes, the legislature enacted a comprehensive statutory scheme, creating rights and duties that have no counterpart in common law or equity." *Id*. at ¶ 26-32.

Accel's Petition asks the Board to decide whether Hialeah's January 14, 2016 notice to Midwest effectively terminated the January 14, 2014 Midwest-Hialeah UA. More specifically, the issue is whether this notice was sent by Hialeah and received by Midwest "not more than 90 days and not less than 60 days prior to the expiration of" the UA's "initial three-year term." The parties, however, dispute when the Agreement's initial term began to run. The genesis of this disagreement appears to be the fact that Midwest entered into two so-called use agreements with Hialeah, one in 2013 and the other in 2014.

Midwest claims that the 2014 UA is controlling, and the initial term began when Hialeah and Midwest executed it on January 14, 2014. According to Midwest, the UA's three-year term thus ended on January 14, 2017, making Hialeah's 2016 notice premature by approximately one year. Accel disagrees and contends that Hialeah's notice was timely because under the express terms of the 2014 Agreement, the initial term between Midwest and Hialeah ended three years from commencement of gaming at the Establishment, and not from the date of execution. Video gaming commenced at Hialeah under the 2013 agreement on April 3, 2013.

The ARD correctly determined that Hialeah's 2016 notice of termination was timely. The 2014 UA clearly provides that its initial term began on "the date of commencement of operation of VGTs" at Hialeah. The Midwest-Hialeah UA does not contain any language suggesting an alternative commencement date. It is undisputed that, pursuant to the 2013 agreement, video gaming went live at Hialeah on April 3, 2013. Because VGTs became operational at Hialeah on that date, the initial three-year term of the 2014 UA ended on April 3, 2016. Thus, Hialeah's January 14, 2016 termination notice was sent and received not more than 90 days and not less than 60 days prior to the UA's expiration date. Accordingly, the ARD accurately concluded that Hialeah's notice to Midwest properly terminated the parties' 2014 UA.

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

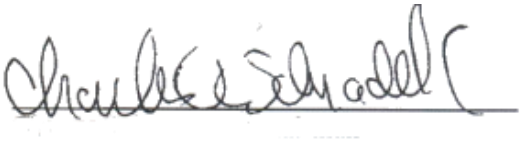
(1) Adopts the Administrator's Recommended Decision;

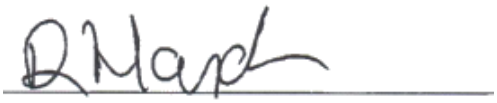
(2) Finds that Accel has proven its June 20, 2017 Petition by clear and convincing evidence;

(3) Orders Midwest to remove its video gaming terminals from Hialeah within 10 calendar days of service of this Final Order.

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

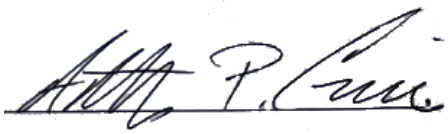
VOTED THIS THE TWENTY-SEVENTH DAY OF OCTOBER 2022





Charles Schmadeke, Chairman

Dionne R. Hayden



Anthony Garcia

STATE OF ILLINOIS
ILLINOIS GAMING BOARD

ACCEL ENTERTAINMENT GAMING, LLC,	)	
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Petitioner,	)	**No. 17-UP-004**
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v.	)	
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MIDWEST ELECTRONICS GAMINNG, LLC	)	
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RE: Hialeah Club, Inc. (License No. 120706973)

ADMINISTRATOR'S RECOMMENDED DECISION

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

Petitioner Accel Entertainment Gaming, LLC's ("Accel") asks the Board to find invalid and unenforceable the use agreement ("UA") for the placement and operation of video gaming terminals ("VGTs") between Respondent Midwest Electronics Gaming, LLC ("Midwest") and video gaming establishment licensee Hialeah Club, Inc. ("Hialeah"). Accel contends that Hialeah terminated the UA and, accordingly, further asks the Board to require Midwest to remove its VGTs from inside Hialeah so that Accel can operate its VGTs at the establishment. Midwest urges the Board to deny Accel's Petition because it claims Hialeah failed to properly terminate the UA. After consideration of the parties' submissions, I recommend the Board grant Accel's Petition and require Midwest to remove its VGTs from inside Hialeah within 30 calendar days of the entry of a final Board Order.

I. JURISDICTION

The Video Gaming Act (the "VGA") confers jurisdiction and authority upon the Board to

supervise all video gaming operations in Illinois. 230 ILCS 40/78; *J&J Gaming Ventures, LLC v. Wild, Inc.*, 2016 IL 119870 ¶¶ 3, 39-40. The Board has all powers necessary and proper to effectively execute the VGA, including authority to adopt regulations for the purpose of administering the VGA and "provide for the prevention of practices detrimental to the public interest and for the best interests of video gaming." *Wild,* 2016 IL 119879 ¶ 3. The VGA provides "a comprehensive statutory scheme that vests jurisdiction over video gaming operations" with the Board. *Id.* ¶ 42. The Board's broad authority over all aspects of video gaming includes the "exclusive, original jurisdiction" to determine the validity and enforceability of agreements that "purport to control placement and operation of video gaming terminals." *Id*., 2016 IL 119879 ¶ 42; *see also* 11 Ill. Adm. Code 1800.320(b)(1).

II. RELEVANT BACKGROUND

On January 8, 2013, Hialeah entered into a UA with licensed terminal operator Midwest. The parties' agreement provided that Midwest had the exclusive right to place and operate its VGTs inside Hialeah for two years from and after the date Midwest's VGTs commenced operation at Hialeah. The UA further provided it would automatically renew for a subsequent period of two years unless Hialeah exercised its termination rights under section 14 of the agreement. On January 24, 2013, the Board granted Hialeah a video gaming establishment license. On April 3, 2013, Hialeah went live with video gaming with Midwest as its terminal operator.

On January 17, 2014, Midwest and Hialeah entered a second UA. The January 2014 UA was identical to the January 2013 UA, except that the new agreement defined the initial term as a three-year period rather than a two-year period from the date VGTs commenced operation at Hialeah. This change also had the effect of modifying any renewal term from two years to three years. Specifically, section 2 of the January 2014 UA defines the "Initial Term" as follows:

> [Midwest] shall have the exclusive right to place at the Premises, any and all VGTs used upon the premises for an initial term of three (3) years, hereinafter defined as the one thousand ninety five (1095) days of operational VGTs open and available for play at Premises, from and

> after the date of commencement of operation of VGTs as permitted in the State of Illinois ("Initial Term").

Section 14 of the January 2014 UA, like section 14 of the January 2013 UA, provides that the agreement "shall automatically be renewed for a period of three (3) years . . . unless [Midwest] is notified in writing by [Hialeah] through the United States Postal Service by certified mail, return receipt requested and such notice from [Hialeah] is received by [Midwest] not more than 90 days and not less than 60 days prior to the expiration of the Initial Term." Further, section 25 declared in part that "this Agreement shall replace and supersede any previously executed agreement, contract, or lease between the above parties involving VGTs, if any, covering [Hialeah]."

Two years later, on January 14, 2016, Hialeah sent a termination notice to Midwest by certified mail. Midwest received Hialeah's termination notice on or about January 19, 2016. Hialeah's notice asked Midwest to remove its VGTs from the establishment by April 3, 2016. April 3, 2016 is the three-year anniversary of the commencement of VGT operations at Hialeah and the date upon which Hialeah and Accel contend the UA's initial term ended. Midwest rejected Hialeah's termination notice as improper and ineffective under section 14 of the UA, because Hialeah sent the notice more than 90 days before January 14, 2017. January 14, 2017 is the three-year anniversary of the parties' execution of the January 2014 UA and, according to Midwest, the end of the initial term.

Since Midwest does not recognize the validity of Hialeah's termination notice, Midwest did not comply with Hialeah's request to remove its VGTs. Hialeah signed a UA with Accel on April 14, 2017, and Accel filed this Petition on June 20, 2017. The parties have been unable, or unwilling, to resolve this dispute in the intervening years. As of the date of this Recommended Decision, Midwest continues to operate VGTs at Hialeah and Hialeah and Midwest continue to share net terminal income from those VGTs.

III. DISCUSSION

The issue before the Board is whether Hialeah provided proper notice to Midwest of its intent not to renew the UA at the conclusion of the initial term. Resolution of that issue requires us to determine the starting date of the initial term of the January 2014 UA. To do so, we turn to the plain language of the parties' agreement. Section 2 states that the initial term "began from and after the date of commencement of operation of VGTs" at Hialeah. Midwest admits that VGTs commenced operations at Hialeah on April 3, 2013 with Midwest as the terminal operator. Midwest Resp. at ¶ 3. Midwest's acknowledgment of that fact should have put an end to this dispute at its inception.

Midwest nonetheless contends that the initial term began on January 7, 2014. To support its position, Midwest points to language in section 25 of the January 2014 UA stating that it supersedes and replaces all prior agreements between the parties. While that may be true for contract integration purposes, section 25 did not (and cannot) alter the undisputed historical fact of when Midwest's VGTs actually went live at Hialeah. Moreover, whatever impact section 25 may have had on the January 2013 UA is irrelevant here because *both* the January 2013 UA *and* the January 2014 UA contain identical language linking the start of the initial term to "*the date of commencement of operation of VGTs*" at Hialeah. As Midwest admits, the undisputed date of commencement is April 3, 2013. Had the parties desired to select a different starting point for the initial term, they could have easily done so by revising the language of section 2 in the January 2014 UA.

Midwest next asserts that a specific designation of "April 3, 2013" as the start of the initial term is a perquisite for predating the effective date of the January 2014 UA and that the agreement contains no such language. That assertion is unavailing. Midwest correctly observes that "April 3, 2013" appears nowhere in the January 2014 UA as the start of the initial term. But that observation is insignificant to the resolution of the parties' dispute. Indeed, no such explicit language is needed

because the parties did specifically identify in section 2 the triggering event that kicked-off the initial term – *i.e.,* when Midwest's VGTs commenced operation at Hialeah. As Midwest admits, that indisputably happened on April 3, 2013.

Midwest cites *Grubb & Ellis Co. v. Bradley Real Estate Trust*, 909 F.2d 1050, 1054 (7th Cir. 1990) to support its assertion that the January 2014 agreement went into effect the date the parties signed it. Midwest's reliance on *Grubb* is misplaced. Insofar as that case held contracting parties can agree to give retroactive effect to a date that is not the date of execution where their contract expressly states that its terms are to take effect at an earlier date, this decision adopts *Grubb*'s analysis. Here, the UAs at issue unambiguously establish a "date of commencement" described as the "initial term," and both specifically state that initial term begins "from and after the date of commencement of operation of VGTs" at Hialeah. Thus, under *Grub*, the January 2014 UA expressly sets a retroactive effective date of April 3, 2013.

For these reasons, the initial three-year term of the parties' agreement began on April 3, 2013 and concluded on April 3, 2016. Accordingly, Hialeah properly exercised its termination rights through its January 14, 2016 notice, which it sent, and Midwest received not more than 90 days and not less than 60 days prior to the expiration of the initial term. To find otherwise would incorrectly overlook the purpose of the initial term clause of the UA, treating it as inoperative or surplus. *See Gallagher v. Lenart*, 226 Ill.2d, 208, 232 (2007) (contract terms must be construed in the context of the entire agreement and not apart and in isolation from each other). In this instance, there is no basis to conclude a contractual provision which specifically delineated the triggering event for when a UA becomes effective should be ignored in favor of the date the parties signed it. That is particularly true where, as here, the date of execution is neither mentioned nor defined anywhere in the parties' agreement.

Finally, Midwest claims that even if Hialeah's termination was sufficient, Hialeah waived its

termination rights by knowingly allowing Midwest to operate on the premises and continuing to receive net terminal income and other benefits from Midwest. We reject that theory in its entirety. Until the advent of the Rule 320 petition process in 2017, it was unclear what remedy Hialeah had in response to Midwest's intransigence and where such recourse could be pursued. For Midwest to argue Hialeah is precluded from demanding the removal of Midwest's VGTs out of its location because Hialeah failed to timely assert its rights to do so incorrectly assumes there was a mechanism of which Hialeah delayed availing itself. The critical delay in estoppel and waiver cases is usually attributed to a party's failure to act. The opposite is true here, in that the delay (if any) is attributable in part to the unavailability of a remedy – this very petition process. Indeed, the 320 Petition process did not exist until after the Supreme Court's decision in *J&J Ventures v. Wild* and the adoption of Board Rules to govern the process.

More importantly, any financial benefits that accrued to Hialeah from the operation of Midwest's VGTs after April 3, 2016 are *directly* attributable to Midwest's refusal to remove the machines from Hialeah's premises and its continued operation of them. Undoubtedly, Hialeah would have certainly faced legal liability and other unpleasant consequences had it taken self-help corrective measures and physically removed or disabled the VGTs over Midwest's objections. And, like Hialeah, Midwest continues to receive net terminal income from these VGTs after the initial term expired on April 3, 2016.

For these reasons, Midwest's attempted enforcement of a starting date not reasonably contemplated by the parties and directly contradicted by the plain language used in the UAs is a practice detrimental to the public and against the best interests of Illinois video gaming in violation of Rule 320(b)(1)(F). Accordingly, Board action is necessary and appropriate under Rule 320(b)(10).

IV. CONCLUSION

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

1. Adopting this Recommended Decision;

2. Granting Accel's Petition, finding that Hialeah correctly terminated its UA with Midwest; and

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

Pursuant to Rule 320(b)(7), any party to this Petition wishing to file exceptions must do so no later than 14 days after receipt of the Recommended Decision.

DATED: January 18, 2022

RESPECTFULLY SUBMITTED,

MARCUS D. FRUCHTER
ILLINOIS GAMING BOARD ADMINISTRATOR

The following is a list of all parties of record to *Accel Entertainment Gaming, LLC, Petitioner, ("Accel") v. Midwest Electronics Gaming, LLC, Respondent, ("Midwest") RE: Hialeah Club, Inc. d/b/a Hialeah Club ("Hialeah")*, Docket No. 17-UP-004. Pursuant to Board Rules 1800.320(b)(2)(A), 1800.320(b)(12), 1800.320 (b)(13), and 1800.140, this Final Order is being served via e-mail and becomes effective upon such service.

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