

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
CIVIL DIVISION

BHCMC, LLC,  
BOYD GAMING CORPORATION,  
and  
KANSAS ENTERTAINMENT, LLC  
Plaintiffs,

v.

POM OF KANSAS, LLC,  
Serve:  
4601 E. Douglas  
#700  
Wichita, KS 67218

and

BRY COMPANY, LLC.  
Serve:  
1545 SW Fairlawn Rd.  
Topeka, KS 66604

Defendants.

SN-2023-CV-655  
Division 3

**PETITION FOR DAMAGES OF BHCMC, LLC, BOYD GAMING CORPORATION,  
AND KANSAS ENTERTAINMENT, LLC.**

COMES NOW Plaintiffs BHCMC, LLC (“Boot Hill”), Boyd Gaming Corporation (“Boyd Gaming”), and Kansas Entertainment, LLC (“Kansas Entertainment”), (collectively, “Plaintiffs”), by and through undersigned counsel, and for the causes of action against Defendants, state as follows:

## NATURE OF THE CASE

1. This is an action for declaratory judgment, tortious interference, and common law unfair business practices brought by Boot Hill, Boyd Gaming, and Kansas Entertainment – companies who put in the time, money, and hard work to partner with the State of Kansas (the “State”) in the heavily-regulated gaming industry.

2. In 2008, Boot Hill paid the State \$5,500,000 for the privilege of managing the Boot Hill Casino & Resort in Dodge City, Kansas.

3. In 2010, a predecessor of Boyd Gaming<sup>1</sup> paid the State \$25,000,000 for the privilege of managing the Kansas Star Casino in Mulvane, Kansas, just a few miles south of Wichita, Kansas.

4. In 2010, Kansas Entertainment paid the State \$25,000,000 for the privilege of managing the Hollywood Casino at Kansas Speedway in Kansas City, Kansas.

5. The Boot Hill Casino & Resort, the Kansas Star Casino, and the Hollywood Casino at Kansas Speedway are hereafter referred to individually as a “Casino” or collectively as the “Casinos.”

6. In addition to payment of their privilege fees, Plaintiffs undertook duties including: paying for and coordinating the construction of the State-owned Casinos’ buildings; paying for and implementing extensive security systems for the State-owned gaming operations; and paying for and managing hundreds of State-owned electronic gaming machines to be located at the Casinos.

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<sup>1</sup> Peninsula Gaming, LLC was the original party who contracted with the State. Boyd Gaming acquired Peninsula Gaming in 2012. Hereafter, Boyd Gaming and its predecessor will be referred to as simply “Boyd Gaming.”

7. In consideration for Plaintiffs performing these duties and managing the Casinos, Plaintiffs receive a management fee calculated as a percentage of the managed Casino's gaming revenues. Plaintiffs also receive all food and beverage revenues generated by their respective Casinos.

8. Plaintiffs are three of the only four State-approved gaming facility managers across the entire State. Plaintiffs' hard work, dedication, and equity, in partnership with the State, has allowed gaming in Kansas to remain secure and legitimate.

9. Lured by Plaintiffs' success, Defendants POM of Kansas, LLC ("POM") and Bry Company LLC ("Bry Company") are attempting to circumvent Kansas's well-regulated gaming program in order to reap a profit, both the illegal gaming revenue and the associated food and beverage revenue derived from those who play the games.

10. Defendants have intruded upon Plaintiffs' bargained-for share of Kansas gaming revenues by placing illegal electronic gaming machines in bars, restaurants, and other unconventional locations across Kansas, without the agreement or approval of the State or the Kansas Lottery.

11. Defendants' conduct interferes with Plaintiffs' contractual rights and jeopardizes the integrity of gaming in Kansas.

### **PARTIES**

12. Plaintiff Boot Hill is a Kansas limited liability company registered to do business in Kansas. Butler National Service Corp. ("Butler National") is a member of Boot Hill with greater than 5% membership. Butler National is a resident of Kansas.

13. Plaintiff Boyd Gaming is a Nevada corporation registered to do business in Kansas.

14. Plaintiff Kansas Entertainment is a limited liability company organized under the laws of the State of Delaware that is registered to do business in Kansas.

15. Defendant POM is a Wyoming limited liability company authorized to do business in Kansas. POM maintains a registered agent at 4601 E. Douglas Avenue #700 in Wichita, Kansas. Based upon information and belief, POM is a subsidiary of Pace-O-Matic, Inc. Pace-O-Matic, Inc. is a Wyoming Corporation with its principal office in Duluth, Georgia. Pace-O-Matic, Inc. develops and orchestrates the creation and distribution of the illegal gaming machines that are the subject of this litigation.

16. Defendant BRY Company, LLC is a Kansas for-profit corporation authorized to do business in Kansas. BRY Company, LLC. maintains a registered agent at 1545 SW Fairlawn Rd., Topeka, Kansas 66604. BRY Company, LLC owns and operates the Dugout Sports Bar & Grill, which is located at 1545 SW Fairlawn Road in Topeka, Kansas (the "Dugout"). Based on information and belief, POM and 34<sup>th</sup> State have distributed and installed inside the Dugout one or more of the illegal gaming machines that are the subject matter of this lawsuit, and all Defendants share in the revenue produced by the illegal gaming machine(s) installed inside the Dugout. Austin Phillips is the only member of BRY Company, LLC with 5% or greater ownership. Austin Phillips' registered address is 1545 SW Fairlawn Road, Topeka, Kansas.

#### **VENUE AND JURISDICTION**

17. This Court has personal jurisdiction over Defendants because Defendants transacted business and committed tortious acts in this State as described throughout this Petition.

18. Further, this Court has personal jurisdiction over Defendants because Defendants maintain registered agents within this State, and Defendant BRY Company, LLC's principal place of business is within this State.

19. Venue is proper in this Court pursuant to K.S.A. 60-604(1) because Defendant BRY Company, LLC's registered agent is located in Shawnee County, Kansas.

20. Venue is also proper in this Court pursuant to K.S.A. 60-604(3) as one of Defendants' illegal gaming machines that is the subject matter of this lawsuit is located inside the Dugout, which is located in Topeka, Kansas.

### **FACTS COMMON TO ALL COUNTS**

#### ***Plaintiffs are State-Approved Gaming Facility Managers***

21. Recreational gaming in Kansas is heavily regulated. As a matter of constitutional law, "[l]otteries ... are forever prohibited," except that "the legislature may provide for a state-owned and operated lottery." Kan. Const., Art 15 §§ 3, 3c.

22. The Kansas Legislature did so provide for a state-owned an operated lottery with the Lottery Act, K.S.A. 74-8701 through 74-8732. The Lottery Act established the Kansas Lottery as a state agency and vested it with full authority over all lottery operations.

23. In 2007, the original Lottery Act was supplemented by the Kansas Expanded Lottery Act, K.S.A. 74-8733 through 74-8773 ("KELA"). KELA provides for the operation of state-owned "lottery gaming facilities," *i.e.*, "that portion of the building used for the purposes of operating, managing and maintaining lottery facility games." K.S.A. 74-8702(1).

24. As required by the Kansas Constitution, KELA places "full, complete and ultimate ownership and operational control of ... the lottery gaming facility with the Kansas Lottery." K.S.A. 74-8734(h)(17). Furthermore, the Kansas Lottery "retain[s] full control over all decisions concerning lottery gaming facility games." *Id.*

25. In other words, KELA operates as the exception, legalizing certain games – such as the games found inside Plaintiffs’ Casinos – that would otherwise be illegal pursuant to Kansas law.

26. KELA formed four geographic gaming “zones” within the State, and only one state-owned lottery gaming facility may be placed in each zone. K.S.A. 74-8734(a). Plaintiffs’ operate three of those four State-authorized lottery gaming facilities.

27. Boot Hill has the privilege of managing one such lottery gaming facility at the Boot Hill Casino in Dodge City, Kansas.

28. Boyd Gaming has the privilege of managing another lottery gaming facility at the Kansas Star Casino in Mulvane, Kansas.

29. Kansas Entertainment has the privilege of managing another lottery gaming facility at the Hollywood Casino at Kansas Speedway in Kansas City, Kansas.

30. Plaintiffs manage their respective Casino by virtue of the Gaming Facility Management Contract (the “Agreement”) that they each entered with the Kansas Lottery.

31. Under the Agreement, each casino gaming facility is “owned and operated by the Kansas Lottery.” The Kansas Lottery “has the full, complete and ultimate ownership and operational control of the gaming operation.” This means that gaming facility electronic gaming machines (“EGMs”), and the revenue derived therefrom, are owned by the Kansas Lottery.

32. The Agreement required Plaintiffs to take numerous steps to ensure that the Casinos’ gaming operations are conducted in a secure and professional manner and to the State’s satisfaction. For example, the Agreement required Plaintiffs to:

- a. develop in collaboration with the Kansas Lottery a business plan for the Casinos’ operation;

- b. pay for and coordinate the construction of the Casinos' buildings;
- c. purchase, on behalf of the Kansas Lottery, the Casinos' EGMs;
- d. develop and present for the Kansas Lottery's approval a gaming floor plan including the precise location of each EGM and other lottery game to be offered to the public;
- e. develop and present for the Kansas Lottery's approval a security plan that ensures compliance with KELA and all applicable regulations;
- f. implement a central communication system that allows the Kansas Lottery to remotely monitor the Casinos' gaming facility operations; and,
- g. implement well-defined internal control procedures to ensure the integrity of all gaming operations.

33. In addition to the preceding, both Boot Hill's Agreement with the Kansas Lottery required it to pay the State a "privilege fee" in the amount of \$5,500,000, and both Boyd Gaming and Kansas Entertainment's Agreement with the Kansas Lottery required them to each pay the State a "privilege fee" in the amount of \$25,000,000. The difference in fees stemmed from the different populations in Plaintiffs' respective geographic gaming zones.

34. As consideration for all the preceding duties, obligations, and fees paid performed pursuant to KELA and the Agreement, Plaintiffs each receive a management fee calculated as a percentage of the managed Casino's gaming facility revenues. This fee is the only compensation that Plaintiffs receive for their services managing the gaming at their respective facilities.

35. The portion of the Casinos' gaming facility revenues that are not paid to Plaintiffs are retained by the State.

36. In addition to the percentage revenue for performing the gaming management services, Plaintiffs also receive all food and beverage revenues generated at their respective Casinos. Such food and beverage revenue is directly derived from those who go to Plaintiffs' Casinos to play games.

37. The Agreement thus serves dual purposes: it ensures the integrity of Kansas gaming by requiring Plaintiffs to manage the Casinos under the close supervision of the Kansas Lottery, and it incentivizes Plaintiffs to maximize the State's share of gaming revenues by tying Plaintiffs' own compensation to the same pool of revenue.

***Kansas Strictly Prohibits Gambling Devices Outside of State-Owned Lottery Gaming Facilities***

38. Given the State's significant business and societal interests in regulating EGMs, the possession and operation of EGMs is strictly controlled under KELA and other Kansas law.

39. Through both KELA and the agreements with lottery gaming facility managers, the State and the Kansas Lottery have endeavored to regulate and protect the gaming industry by strictly regulating how and where EGMs may be used in Kansas.

40. Again, gaming machines that are tantamount to a lottery are generally prohibited under Kansas law. KELA, however, operates as the exception, legalizing certain State-authorized EGMs.

41. Under KELA, EGMs may be placed only at the four State-owned lottery gaming facilities (*see* preceding paragraphs), as well as at certain parimutuel racing facilities (*see* K.S.A. 74-8743).

42. KELA limits both the number of State-owned lottery gaming facilities (*see* K.S.A. 74-8734(g)(19)) and the number of EGMs that may be placed at parimutuel racing facilities (*see* K.S.A. 74-8744(b)(2)).

43. Outside of the strict exclusions provided by KELA, Kansas law strictly prohibits the use of EGMs or similar electronic gambling devices. In other words, a gambling machine that is not authorized under KELA is generally, absent certain circumstances not applicable here, considered an illegal gambling device

44. In Kansas, the cornerstone of gaming law is the definition of a “lottery,” which is “an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which *is determined by chance*.” K.S.A. 21-6403(b) (emphasis added).

45. The element of chance is the key factor that differentiates something prohibitable from something legal.

46. A “gambling device” is an “electronic device ... [w]hich when operated [or “by the operation of which”] may deliver, *as the result of chance*, any money or property.” K.S.A. 21-6403(e)(2) (emphasis added).

47. However, the outcome of many games is determined by elements of both chance and skill. Therefore, Kansas courts apply a “dominant factor” test. *Three Kings Holdings, L.L.C. v. Six*, 45 Kan. App. 2d 1043, 1050–56 (2011). Even if a game requires elements of both chance and skill to win, if the outcome is predominantly determined by chance, the game is still a lottery or a gambling device pursuant to Kansas law. *Id.*

48. A common example of a predominantly chance-based EGM is a classic slot machine.

49. Over time, however, many new iterations of chance-based EGMs have been developed to attract players. Many of them are styled similar to traditional arcade-style games. Some such games may even require certain elements of skill in order to win.

50. Although such EGMs are not “slot machines” in the traditional sense, the outcome is still predominantly determined by chance, and thus such games remain gambling devices prohibited under Kansas law.

***Defendants’ “Dragon’s Ascent” Game Is an Illegal Gambling Device that Infringes Upon the Legal Gaming Market***

51. With the success of legalized and licensed EGMs in the State, unlicensed EGMs have started to proliferate across the State in locations such as bars, restaurants, and other unconventional establishments.

52. Manufacturers of these EGMs have sought to conceal their true nature by branding them and promoting them as “games of skill” or “skill games.”

53. Manufacturers of these EGMs promote these games to bars, restaurants, and other unconventional establishments by claiming installation of these games will lead to increased traffic within these establishments, and in turn lead to increased revenue from food and beverage sales.

54. Despite the manufacturers’ deceptive marketing campaigns, these EGMs are nothing more than prohibited gambling devices.

55. Dragon’s Ascent is one such game.

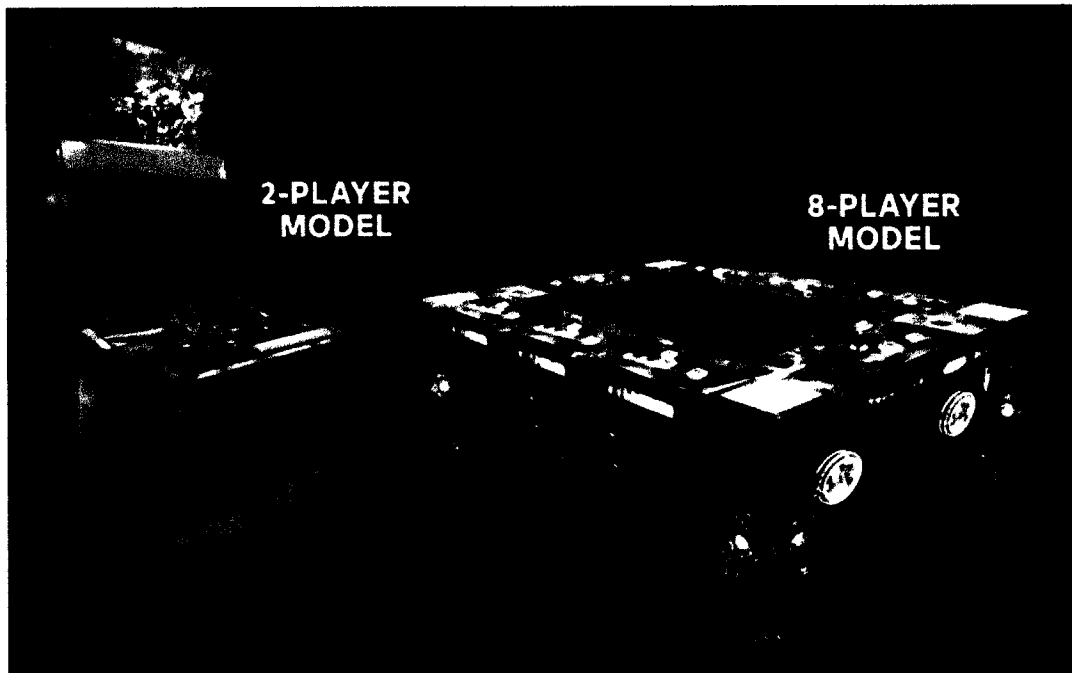
56. Dragon’s Ascent is an illegal EGM developed by Pace-O-Matic, Inc. that has been distributed and installed by Defendant POM at various bars, restaurants, and other establishments in different cities and towns across Kansas, including the Dugout, operated by Defendant BRY Company, LLC.

57. One of the ways that Defendant POM promotes installation of Dragon’s Ascent to bars and restaurants is by claiming such installation will lead to increased food and beverage revenues.

58. Upon information and belief, Pace-O-Matic, Inc., the parent company of Defendant POM, has also formed similar business subsidiaries in several other states in an effort to orchestrate a nationwide rollout of the Dragon's Ascent game.

59. Dragon's Ascent is a video game-styled EGM wherein the player shoots at dragons flying onscreen. The player can shoot as rapidly or as infrequently as they desire.

60. Dragon's Ascent is available in both a 2-player model and an 8-player model:



61. A person playing Dragon's Ascent pays to play the game, including paying for each "shot" the player takes.

62. If the player "captures" a dragon, he or she receives credit that can be redeemed for cash.

63. POM has tried to conceal the true nature of Dragon's Ascent by branding it as a "game of skill" or a "skill game." In various documents and pleadings, POM has claimed there are no elements of chance involved in Dragon's Ascent.

64. Contrary to POM's averments, however, upon information and belief, the outcome of Dragon's Ascent is predominantly determined by chance. Dragon's Ascent is therefore an illegal lottery and gambling device prohibited by K.S.A. 21-6403(b) and (e)(2), and 21-6406.

65. Defendants' distribution and operation of Dragon's Ascent improperly and illegally infringes upon Plaintiffs' expectations under the Agreement and KELA that they would be the managers of two of a limited number of lottery gaming facilities with the semi-exclusive right to offer EGMs for public use.

66. Defendants' distribution and operation of Dragon's Ascent interferes with Plaintiffs' reasonable expectancies under the Agreement and KELA because it threatens to turn every bar and restaurant in Kansas into unlicensed gaming facilities, thus subverting Plaintiffs' expectations under the Agreement and KELA that they would be competing only with the other State-owned lottery gaming facilities and the limited number of EGMs placed at parimutuel racing facilities. This impacts both Plaintiffs' income based on a percentage of gaming revenue as well as Plaintiffs' income based on the associated food and beverage revenue.

67. Boot Hill paid the \$5,500,000 privilege fee and undertook its other obligations under the Agreement based upon these expectations. Boyd Gaming and Kansas Entertainment each paid the \$25,000,000 privilege fee and undertook their other obligations under the Agreement based upon these expectations.

68. For these reasons, Plaintiffs bring these claims against Defendants.

## **CAUSES OF ACTION**

### **Count I: Tortious Interference with Contract and Business Expectancy**

69. Plaintiffs incorporate by reference all preceding paragraphs as though fully set forth herein.

70. Under Plaintiffs' Agreement with the Kansas Lottery, Plaintiffs have expended substantial time, money, and effort into the establishment and management of the Casinos, and in consideration receive a management fee calculated as a percentage of the managed Casinos' gaming facility revenues as well as all revenues generated from food and beverage sales at the respective Casinos.

71. The Agreement gives Plaintiffs a reasonable expectancy of future economic benefit.

72. Under the Agreement, KELA, and other applicable law, Plaintiffs' reasonable expectancy of future economic benefit is derived from their semi-exclusive right to manage a lottery gaming facility featuring EGMs and other State-approved lottery games, as well as the associated food and beverage revenue derived from individuals who play these EGMs and other State-approved lottery games.

73. Defendants have knowledge of the Agreement, this expectancy, and this exclusivity.

74. Defendants have, without proper justification and in contravention of Kansas law, interfered with the Agreement and Plaintiffs' reasonable expectancy of future economic benefit thereunder by manufacturing, selling, leasing, distributing, possessing, operating, or collecting revenue from illegal gambling devices or lottery games, as well as collecting associated revenue from food and beverage sales derived from those who are playing the illegal gambling devices.

75. Defendants' conduct has effectively caused a breach of Plaintiffs' Agreement with the State and the Kansas Lottery.

76. Defendants' conduct has negatively affected the value of Plaintiffs' Agreement with the Kansas Lottery and undermined their investment in the Casinos' lawful operations.

77. Plaintiffs are reasonably certain that, but for Defendants' tortious and unlawful conduct, Plaintiffs would have continued to realize in full their reasonable expectancy of future economic benefit under the Agreement.

78. Defendants' misconduct was intentional and without justification.

79. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered, and will continue to suffer damages, including (without limitation) lost revenue and profits.

### **Count II: Declaratory Judgment**

80. Plaintiffs incorporate by reference all preceding paragraphs as though fully set forth herein.

81. Defendant POM owns, develops, manufactures, and distributes Dragon's Ascent into bars, restaurants, and other establishments across Kansas.

82. Gambling is illegal in Kansas under K.S.A. 21-6404.

83. Kansas law prohibits using a gambling device (K.S.A. 21-6404(a)(2)), possessing a gambling device (K.S.A. 21-6408), manufacturing or distributing a gambling device (K.S.A. 21-6407), and participating in a lottery (K.S.A. 21-6404(a)(2)).

84. K.S.A 21-6403(b) defines a "lottery" as "an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance."

85. A "gambling device" is an "electronic device ... [w]hich when operated [or "by the operation of which"] may deliver, *as the result of chance*, any money or property." K.S.A. 21-6403(e)(2) (emphasis added).

86. Thus, in Kansas, an illegal lottery has three elements: (1) prize, (2) consideration, and (3) chance.

87. The outcome of many games is determined by elements of both chance and skill. Therefore, Kansas courts apply a “dominant factor” test. *Three Kings Holdings, L.L.C. v. Six*, 45 Kan. App. 2d 1043, 1050–56 (2011). Even if a game requires elements of both chance and skill to win, if the outcome is predominantly determined by chance, the game is still a lottery or a gambling device pursuant to Kansas law. *Id.*

88. The element of chance is the key factor that differentiates something legal from something illegal. A machine or electronic device is considered a “gambling device” if chance (rather than skill) is the predominant factor in determining whether the player/operator receives a prize.

89. Defendant POM’s game, Dragon’s Ascent, is a video game-styled EGM wherein the player shoots at dragons flying onscreen. The player can shoot as rapidly or as infrequently as they desire.

90. A person playing Dragon’s Ascent pays to play the game, including paying for each “shot” the player takes.

91. If the player “captures” a dragon, he or she receives credit that can be redeemed for cash.

92. POM has tried to conceal the true nature of Dragon’s Ascent by branding it as a “game of skill” or a “skill game.” In various documents and pleadings, POM has claimed there are no elements of chance involved in Dragon’s Ascent.

93. Contrary to POM’s averments, however, the outcome of Dragon’s Ascent is predominantly determined by chance. Dragon’s Ascent is therefore an illegal lottery and gambling device prohibited by K.S.A. 21-6403(b) and (e)(2), and 21-6406.

94. As stated above and throughout this Petition, Defendants' illegal gambling device is interfering with Plaintiffs' reasonable business expectations of exclusivity with regard to operating and deriving revenue from gambling machines in the State of Kansas.

95. Plaintiffs thus seek a judicial declaration that the outcome of Dragon's Ascent is predominantly determined by the element of chance, and is thus a gambling device so infringing on Plaintiffs' reasonable business expectations.

96. This is an actual and existing controversy that exists between the parties for which this Court must declare the parties' rights. This controversy is judiciable, ripe for judicial determination, and appropriate for declaratory relief.

### **Count III: Kansas Common Law Unfair Business Practices**

97. Plaintiffs incorporate by reference all preceding paragraphs as though fully set forth herein.

98. All entities conducting business and transactions within the State have a duty to operate and abide by pertinent Kansas regulations, statutes, and law.

99. Plaintiffs have fulfilled this duty by spending the time, effort, and equity to partner with the State and the Kansas Lottery in managing legal gaming operations at the Casinos.

100. Defendants have breached this duty by manufacturing, selling, leasing, distributing, possessing, operating, or collecting revenue from illegal gambling devices or lottery games and collecting revenue from food and beverage sales derived from those who play the illegal gambling devices or lottery games.

101. Defendants' conduct has negatively affected the value of Plaintiffs' Agreement with the Kansas Lottery and undermined their investment in the Casinos' lawful operations.

102. As a direct and proximate result of Defendants' breach, Plaintiffs have sustained and will continue to sustain damages, including (without limitation) lost revenue and profits.

### **PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court award:

- a. damages in excess of \$75,000;
- b. special damages, including lost profits and other consequential damages;
- c. Plaintiffs' attorneys' fees as permitted under any applicable law;
- d. prejudgment and postjudgment interest on all damages as permitted under applicable law;
- e. Plaintiffs' costs and disbursements in this action;
- f. a judicial declaration that the outcome of Dragon's Ascent is predominantly determined by chance; and
- g. all other relief as the Court deems just and proper.

### **DEMAND FOR JURY TRIAL**

Plaintiffs respectfully request a trial by jury on all issues so triable.

Respectfully submitted,

**EDGAR LAW FIRM LLC**

Dated: December 22, 2023

/s/ Ryan Loehr

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