IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, *Plaintiff*	§ §	
v.	§	
YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR FRANCISCO PAIZ OR HIS SUCCESSOR, LIEUTENANT GOVERNOR CARLOS HISA OR HIS SUCCESSOR *Defendants*	§ §	NO. EP-99-CA-0320-DB

STATE OF TEXAS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' FIRST AMENDED MOTION FOR CONTEMPT

TO THE HONORABLE JUDGE HARRY LEE HUDSPETH:

The State of Texas' contempt evidence demonstrates that Defendants are violating this Court's September 27, 2001 injunction, Chapter 47 of the Texas Penal Code, Chapter 25 of the Texas Civil Practice & Remedies Code, and § 1300g-6 of the Restoration Act by operating 8-liner gambling devices at Speaking Rock Casino that do not fall within the limited exception to illegal gambling activities circumscribed by § 47.01(4)(B) of the Penal Code. Specifically, Defendants are operating 8-liners that reward winning players with cash or with VISA cards that are cash-equivalents. *See* TEX. PENAL CODE § 47.01(4)(B). Defendants did not contest or refute that they are engaging in the activities described in the State's motion, but instead argued that as a matter of law these activities are not illegal. This Court, then, need only decide whether, as a matter of law, Defendants have contemptuously disregarded this Court's September 27, 2001

injunction (as modified)(hereinafter "the injunction") and the clear and well-established law of this case that prohibits the challenged gaming activities.

The State will address each of Defendants' legal points in turn. However, as a preliminary matter, the State objects to and moves to strike of Defendants' exhibits as unauthenticated and inadmissible hearsay, and as irrelevant to the issues at hand.[1]

I. Defendants' Actions Clearly Violate the Injunction

A. Eight-Liners Awarding VISA Cards

1. Summary of Relevant Facts

On March 5, 2008, Sergeants David Wilbourn and Conrad Rodriguez, entered Speaking Rock Casino.[2] When they entered the establishment they observed approximately 1,000 eight-liner devices throughout the casino. Both men went to the cashier and obtained prepaid internet cards and account cards required to play the gaming systems. The cashier who assisted Sgt. Wilbourn told him that the internet computer gaming system that used the prepaid internet card paid out in cash and the traditional eight-liner machines that used the account card paid out in Visa gift cards, and that is exactly what happened. *Id*. at p. 2, ¶9. Both men used their account cards to play on the traditional eight-liner machines. When they decided to obtain the winnings

---

[1] **Exhibit A** to Defendants' Response purports to be a WalMart Corporate Policy. Even were the policy properly authenticated, which it is not, it is irrelevant whether WalMart's policy was followed; the salient fact is that the VISA card was used as a cash equivalent to purchase merchandise of the players' choosing and not "prizes" as contemplated by § 47.01(4)(B). **Exhibit B** is unauthenticated hearsay and not relevant to the issue of whether Defendants violated this Court's injunction. Defendants' **Exhibit D** is not even what it purports to be; rather, it is the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff in *G2, Inc. V. Midwest Gaming Inc*., Case No. MO-06-CV-131 in the Western District of Texas-Midland-Odessa Division. Magistrate Judge L. Stuart Platt's actual findings and conclusions differed substantially. *See G2, Inc. V. Midwest Gaming Inc*., *id*., Doc. 52 (Judge Platt's Findings of Fact and Conclusions of Law, filed April 17, 2007).

[2] *See* Plaintiffs' First Amended Motion for Contempt ("Ps' Motion"), Exhibits 1 and 2, Attachment A, Investigative Report ("Investigative Report")) at p. 2.

from the card they went to a cashier and gave the cashier their account cards. The cashier swiped the account cards in a card reader and handed Sgt. Wilbourn two VISA debit cards worth twenty dollars each for his winnings; Sgt. Rodriquez received one VISA debit card worth twenty dollars for his winnings. *Id*. at p.2, ¶¶ 18, 20. On March 7, 2008, Sgt. Wilbourn went to Wal-Mart and purchased a pair of men's jeans for $18.15 using the VISA debit card he'd won at the Speaking Rock Casino. *Id*. at p.2, ¶ 23. [3]

2. Defendants' Actions Violate the Penal Code and the Injunction

Defendants' use of the eight-liner machines violates the injunction because Defendants are rewarding players with a prize that operates like legal tender in a retail establishment, namely a VISA debit card. Regardless of the label Defendants use to characterize the VISA debit card, it is indeed an award that is the equivalent of cash as expressed by this Court in *Ysleta II*[4] and by the Texas Supreme Court in *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003), and *State v. One Super Cherry Master Video 8-Liner Machine,* 102 S.W.3d 132 (Tex. 2003). The eight-liner gaming scheme offered by the Defendants does not strictly adhere to the prize limitations provided in section 47.01(4)(B) of the Texas Penal Code,[5] and therefore violates the injunction.

---

[3] Sgt. Rodriguez then took the jeans back to Wal-Mart and received a cash refund of $18.15. *Id*.

[4] *State of Texas v. Ysleta del Sur Pueblo*, *et al.*, 220 F.Supp.2d 668 (W.D. Tex. 2002)("*Ysleta II*").

[5] The term "gambling device" is defined in section 47.01(4) of the penal code. Subsection (4)(A) further defines what the term includes and subsection (4)(B) provides what the term excludes. Section (B) provides that the term:

> *does not include* any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance *rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value* redeemable for those items, that have a wholesale value available from a single play of the game or device of *not more than 10 times the amount charged to play the game or device once or $5.00, whichever is less*.

The injunction as modified permits Defendants to offer eight-liners as an amusement device, but only if the device strictly adheres to the prize limitations provided in Penal Code § 47.01(4)(B).[6] The eight-liner machine must exclusively offer noncash merchandise prizes, toys or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less (the "10 Times Rule"). *Id*. This Court added, in a footnote, that under *Hardy,* gift certificates are not a noncash merchandise prize. *Id*.

In *Hardy*, the defendant operated eight-liner gaming machines which recorded the number of points a player won. *Hardy*, 102 S.W.3d at 126. When a player finished playing a particular machine, an attendant would press a button on the machine to dispense the number of tickets corresponding to the number of points earned. A player could then exchange the tickets for a $5.00 gift certificate to Wal-Mart or Sam's Club or for credits to play another machine. *Id*. at 126. The *Hardy* Court held that the eight-liners did not satisfy the section 47.01(4)(B) exclusion because the machines rewarded the player with "'cash' or its equivalent."[7] *Id*. at132. The court found that "a gift certificate is not a toy or novelty;" rather, because "the gift

---

TEX. PEN.CODE § 47.01(4)(B).

[6] *Ysleta II*, 220 F.Supp.2d at 704.

[7] In *State of Texas v. One Super Cherry Master Video 8-Liner Machine,* the Texas Supreme Court held that their decision in *Hardy* was controlling and that 8-liners that dispensed tickets that were redeemable for cash used for additional play or gift certificates used to purchase items at local retailers do not, as a matter of law, meet the gambling device exception under section 47.01(4)(B). *Id*. at 133.

certificates were used as a medium of exchange at various retail outlets," they were the "equivalent of money." *Id*. at 131.[8] We have the same situation here.

The eight-liner gaming scheme Defendants are using is the same eight-liner gaming scheme used by the defendant in *Hardy*, with inconsequential differences.[9] Just as the gift certificate in *Hardy* was the noncash merchandise prize, Defendants in this case are operating eight-liner machines that award the player with VISA debit cards. These VISA debit cards can be used, and were, in fact used, as a medium of exchange at a retail outlet. *Id*. at p. 3, ¶23. Just like the Wal-Mart gift certificates awarded in *Hardy*.[10]

Defendants' characterization of the VISA debit card as a "representation of value" does not change the fact that some of the 8-liners in their casino reward players with a reward that "operates the same as legal tender in a retail establishment" and is therefore a cash equivalent that does not fall into the limited exception carved out by section 47.01(4)(B).

---

[8] The *Hardy* court held:

> If, as here, the reward operates in the same manner as legal tender in a retail establishment, it does not qualify as a noncash merchandise prize, toy of novelty item. This interpretation comports with the plain language of the statute.

Id. at 132.

[9] The eight-liner in *Hardy* recorded points on the machine that dispensed the number of tickets corresponding to the number of points won. Here, Defendants use an account card and instead of awarding a Walmart gift certificate as was awarded in *Hardy*, Defendants award a VISA debit card.

[10] The eight-liner gaming scheme Defendants are using is the same eight-liner gaming scheme used by the defendant in *Hardy*, with a couple of inconsequential differences: the eight-liner in *Hardy* recorded points on the machine that dispensed the number of tickets corresponding to the number of points won. Here, Defendants use an account card and instead of awarding a Walmart gift certificate as was awarded in *Hardy*, Defendants award a VISA debit card.

B. Computer Gambling Devices Awarding Cash or "Sweepstakes" Points

1. Summary of Relevant Facts

At Speaking Rock, Sergeants Wilbourn and Rodriguez each purchased pre-paid internet cards from the Speaking Rock cashier, bought points (with one cent equal to one point) which were loaded onto the cards, and used these cards to play slot style games, keno, or poker on computer-type gaming systems.[11] Winnings from the games played on these systems could either be converted to additional playing points or paid out in cash by presenting the cashier with the card. *Id*. at ¶¶ 5, 6, 11, 17, 19. Both Sgt. Wilbourn and Sgt. Rodriguez cashed out their winnings. Sgt. Wilbourn won a total of forty-nine dollars ($49.00) cash and Sgt. Rodriguez won thirty dollars ($30.00) cash. *Id*. at ¶¶ 17, 19.

On several occasions, both investigators received winnings that exceeded ten times the amount wagered on the sweepstakes gaming terminals. At one point, Sgt. Wilbourn bet thirty-six (36) points worth thirty-six cents ($ .36) and won one thousand and seventy-two (1,172) points worth ten dollars and seventy two cents ($10.72). Sgt. Rodriguez bet forty-five (45) points worth forty-five cents ($ .45) and won five hundred fifty (450) points worth five dollars and fifty cents ($5.50). *Id*. at ¶ 13.

2. Defendants' Actions Violate the Penal Code and the Injunction

The gambling devices using the pre-paid internet cards do not fall within the limited exception of Penal Code § 47.01(4)(B) for two reasons. First, the players on these devices are *not* rewarded "exclusively with noncash merchandise prizes, toys, or novelties," nor was the reward "a representation of value redeemable for those items." The award was straight cash.

[11] *Id*. at p. 2, ¶¶ 5- 14, 17, 19.

Defendants even advertise that the sweepstakes pays in cash. *Id*. at p. 7, ¶ 4. Furthermore, the awards given on a single play of these games or devices far exceeded the "10 Times Rule."[12]

3. The Gambling is Not a Permissible Sweepstakes

Defendants make the vague assertion that their activities constitute a permissible "national sweepstakes." *See* Defendants' Response, p. 3, ¶ (b). In its Order modifying the 2001 injunction, this Court held, *inter alia*, that the September 27, 2001 injunction would be modified to permit third-party giveaway contests conducted by national vendors to the extent that any such contest does not violate Texas gaming law.[13] *Ysleta II,* 220 F.Supp.2d at 705-07. As shown above, the gambling permitted with the pre-paid internet cards violates the Penal Code and therefore it cannot be a permissible sweepstakes. There is no exception in the Penal Code allowing an otherwise illegal gambling operation simply because the activity may include some elements of a sweepstakes. Certainly, the activity of Defendants does not fall within any exception.

The Tribe's current "sweepstakes" scheme involves the use of prepaid internet cards and it is not apparent what national sweepstakes the Tribe is promoting. In fact, the scheme appears to be nearly identical to a sweepstakes proposal that the has already been presented by the Tribe

---

[12] As fully outlined in Sgt. Wilbourn and Sgt. Rodriguez's Investigation Report, both men received winnings that exceeded ten times that amount bet on the sweepstakes computer gaming system. *See* Investigation Report at pp. 2-3, ¶ 13, and pp. 11-14.

[13] While not exhaustive, the Court cites the following examples of national third-party vendor contests: (1) The Mobil 1 Advantage-receive a Mobil 1 Road Atlas / Travel Guide or Trip Maker CD with a purchase of Mobil 1 synthetic service; (2) The Mobil 1 25th Anniversary Dream Lease Sweepstakes-register to win a two year lease on a Corvette / Mercedes-Benz / Porsche; and (3) Mobil 1 Synthetic Service-replica NASCAR promotion. *Ysleta II,* 220 F.Supp.2d at 706.

and rejected by this Court.[14] In 2003, the Tribe filed an Emergency Motion for Clarification or Order Granting Summary Judgment and Injunction proposing a sweepstakes contest involving the purchase of prepaid phone cards. [Doc.. 177] Both the 2003 proposal and the Tribe's current sweepstakes scheme involves players purchasing prepaid internet/phone cards. *See* [Doc. 179, p. 5, ¶ 2]; Investigation Report, pp. 2-4. The purchaser of the phone card receives both prepaid internet privileges and sweepstakes contest entry points. The only apparent difference between the Tribe's 2003 sweepstakes proposal and the sweepstakes currently being utilized by the Tribe is that in 2003 the sweepstakes card said "Hello Money Phone Card" and the current card reads "Hello Internet." *Id*.

This Court rejected Defendants' 2003 proposal. After examining the details of the proposal, the Court held that the terminals are gambling devices that do not fit with in the 47.01(B)(4) exception, that the sweepstakes terminal is a gambling devices and is therefore illegal, and that even if the tribe paid out in gift certificates rather than cash, the terminals would still be illegal. [Doc. 179, pp. 6-7, 11]. The fact that the Tribe utilizes a sweepstakes validation terminal that this Court has already determined to be a gambling device with the meaning of Texas Penal Code § 47.01(4) that does not fall into the exception provided by § 47.01(4)(B), means that the Tribe has once again violated the Court's injunction and the Texas Penal Code.

---

[14] The following characteristics of Defendants' current gaming operations were present in 2002: The sweepstakes validation terminals utilized by the Tribe look and operate like an 8-liner device; it appears that in the "national sweepstakes," a participant provides "consideration" with the purchase of an internet card and additional sweepstakes points/internet time; in return, the player receives an opportunity to receive something of value—cash; the Tribe even advertises that the sweepstakes pays in cash; the player's ability to obtain the cash is solely determined by the chance the symbols will appear consecutively in an eight-liner grid; the more points a player chooses to use at any given time, the higher the possible prize award for that sweepstakes' eight-liner grid; the internet cards are geared towards inducing purchasers to participate in the sweepstakes so that the Tribe will receive financial gain; and the sweepstakes validation terminals are unquestionably gambling devices. Investigation Report at pp. 2-6, 12-16; Doc. 179, p. 5, ¶ 5.

[Doc. 179, pp. 10-11, ¶¶ 24-25]. Such egregious acts demonstrate Defendants' conscious disregard for the law and the authority of this Court.

4. Defendants Have Not Obtained Permission for a Sweepstakes

Moreover, the Court did not modify the injunction to permit the tribe to conduct its own sweepstakes "absent a firm detailed [sweepstakes] proposal absent a firm and detailed proposal showing that the said sweepstakes would be in compliance with Texas law," specifically, Chapter 45 of the Texas Business and Commerce Code (governing sweepstakes). *Id.* at 695-97. Fully aware that their current sweepstakes" scheme would violate both the Court's order and the penal code, the Defendants not submitted a proposal and therefore their so-called "sweepstakes" gambling activities are contemptuous.

II. The State Has Established the Elements of Civil Contempt; Willfulness is Not Required

A finding of civil contempt requires the showing that (1) a court order was in effect; (2) the order required certain conduct; and (3) the respondent failed to comply with the order.[15] *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries, Inc.*, 177 F.3d 380, 382 (5th Cir.1999). "A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Travelhost, Inc.*, 68 F.3d at 961(quoting *Securities and Exchange Comm'n v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir.1981)). Once the movant has

[15] In a civil contempt proceeding, the movant bears the burden of establishing the elements of contempt by clear and convincing evidence. *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir.1987). Clear and convincing evidence is "that weight of proof which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts' of the case." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir.1995).

established the failure to comply with an order, then the respondent bears the burden of showing mitigating circumstances that might permit the court to withhold exercising its contempt power. *Whitfield v. Pennington*, 832 F.2d 909, 914 (5th Cir.1987).

Here, the State's evidence satisfies the elements of civil contempt and Defendants have neither denied they are engaging in the activities described by the State's investigators nor offered cognizable mitigating circumstances. The assertion that Defendants "acted on reliance"of the agreements between VISA and participating retailers does not mitigate the fact that Defendants' gaming scheme rewards patrons with cash or cash-equivalent VISA cards.

Defendants assert that a contempt proceeding is "quasi-criminal in nature, and the State of Texas should be required to show willful violation of the law by the Defendants." *See Defendants' Response* at ¶ 2. A contempt order or judgment is characterized as either civil or criminal depending upon its primary purpose. *Petroleos Mexicanos,* 826 F.2d at 399. Here, the State seeks only to secure Defendants' immediate and future compliance with the injunction now in effect, and therefore the instant action is one for civil contempt.[16] Intent is not an issue in civil

[16] If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990)(citing *Port v. Heard,* 764 F.2d 423, 426 (5th Cir.1985)). If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil. *Id*. A key determinant in this inquiry is whether the penalty imposed is absolute or conditional on the contemnor's conduct. *Id.* (citing In *re Rumaker,* 646 F.2d 870 (5th Cir.1980)). When contemnors "carry the keys of their prison in their own pockets," the contempt proceedings are almost universally found to be civil. *Shillitani v. United States*, 384 U.S. 364, 368 (1966); *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir.1976). A court's characterization of a proceeding is not necessarily conclusive, but only one factor to be considered in properly determining the nature of the contempt judgment. *Southern Railway Co. v. Lanham*, 403 F.2d 119, 124 (5th Cir.1968); *Cliett v. Hammonds*, 305 F.2d 565, 569 (5th Cir.1962). The essential distinctions between civil and criminal contempt are that:

> (1) civil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act; (2) a judgment of civil contempt is conditional, and may be lifted if the contemnor purges himself of the contempt, while punishment for criminal contempt is unconditional; (3) civil contempt is a facet of the original cause of action, while criminal contempt is a separate cause of action brought in the name of the United

contempt proceedings; "the question is not one of intent but whether the alleged contemnors have complied with the court's order." *Jim Walter Res. v. Int'l Union, United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir.1980); *see Ysleta II*, 220 F. Supp. at 696 (State's action against the tribe for injunctive relief is a civil proceeding; in seeking injunctive relief the State is not required to meet criminal law standards or negate the exceptions or defenses referred to in the Penal Code."). Likewise, willfulness is not an element of civil contempt. *Petroleos Mexicanos*, 862 F.2d at 401.

III. Reliance on a Third Party's Policy is No Defense

In addressing the States' allegations that Defendants are violating this Court's September 27, 2001 injunction by operating 8-liner gambling devices at Speaking Rock Casino that do not fall within the exception circumscribed by § 47.001(4)(B), Defendants do not deny that they have violated the Court's injunction. Rather, Defendants assert that they "acted in reliance on the written policy of the issuer of the "limited use" Simon Visa card and its agreements not to return cash in any form." *Defendants' Response, p. 3, ¶ 3*.[17] But Defendants' alleged "reliance"

> States; (4) the notice for criminal contempt must indicate the criminal nature of the proceeding.

Rizzo, 539 F.2d at 463 (citations omitted). Civil contempt sanctions, such as the State seeks in this action, are penalties designed to compel future compliance with a court order; they are considered to be "coercive and avoidable through obedience." *Internat'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994).

[17] The State points out that even assuming that reliance were defense to civil contempt, which it is not, Defendants' own evidence does not support the defense. Defendants mistakenly refer to Exhibit C of their response motion as evidence to support their good faith argument. Unauthenticated Exhibit B, which is the "written policy" of the "limited use" Simon Visa card, specifically states that "Exchange or return of merchandise purchased with the Giftcard will be governed by the procedures and policies of each merchant and applicable law." Defendants' Response, Exhibit B, ¶ 3. If the Tribe relied so heavily on the written policy of issuer of the Simon Visa card, then surely the Tribe was aware that returned or exchanged merchandise is governed by merchant policy. The practical effect of this policy is that in order for the Tribe to ensure that merchandise purchased with the gift card could not be returned for cash

on a third party agreement defense is irrelevant.

Just as intent and willfulness are not issues in civil contempt proceedings, reliance (good faith) are not defenses to civil contempt. *Jim Walter Res. v. Int'l Union, United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir.1980); *Petroleos Mexicanos*, 862 F.2d at 401. In a civil contempt proceeding, the contemnor's good faith, or the fact that the violation was unintentional, is not a defense. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *see also Waffenschmidt v. MacKay*, 763 F.2d 711, 726 (5th Cir.1985), cert. denied, 474 U.S. 1056 (1986). "Good faith is not a defense to a civil contempt; the question is whether the alleged contemnor complied with the court's order." *Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir.2002); *Whitfield v. Pennington*, 832 F.2d 909 (5th Cir.1987).

Even assuming that Defendants had a good faith belief that the "agreements" of the "limited use" Simon Visa Card would ensure that they would be acting in compliance with the Court's injunction and the penal code, Defendants' reliance argument is not a recognized defense to civil contempt. The only question is wether Defendants violated the Court's injunction. Have Defendants complied with the Court's orders? No.

IV. Defendants' Collateral Constitutional Attack on the Injunction is Improper and Neither Penal Code Chapter 47 Nor Court's Injunction Is Vague.

As a "defense" to the contempt motion, Defendants assert that Texas Penal Code § 47.01(4)(B) is unconstitutionally vague. *See* Defendants' Response at pp. 3-5. This challenge is untimely. Defendants have had ample opportunity to challenge the constitutionality of the Penal

---

(as occurred in this case), the Tribe would have to know whether each merchant that accepts Visa has a no "cash" return policy.

Code but have not done so.[18] At this stage, their challenge amounts to nothing more than an impermissible collateral attack on the Court's injunction. Where, as in this case, the injunction was subject to earlier review, a collateral attack in a contempt proceeding is prohibited. *Western Water Management, Inc. v. Brown*, 40 F.3d 105, 108 (5th Cir.1994). The constitutionality of Texas Penal Code § 47.01(4)(B) is simply not the issue in this contempt action.

Moreover, even were the Penal Code subject to attack at this stage, which it is not, it would survive. Under the Fifth Circuit's two-part test for determining if a criminal statute is void for vagueness, a statute is constitutional if it "defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited an[d] in a manner that does not encourage arbitrary and discriminatory enforcement." *Smallwood v. Johnson*, 73 F.3d 1343, 1350-52 (5th Cir. 1996); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Only a reasonable degree of certainty is required. *United States v. Tansley*, 986 F.2d 880, 885 (5th Cir.), *cert. denied*, 441 U.S. 923 (1993); *United States v. Barnett*, 587 F.2d 252, 256 (5th Cir.) *cert. denied*, 441 U.S. 923 (1979). The requirement that statutes give fair notice cannot be used as a shield by someone who is already intent on wrongdoing. *Tansley*, 986 F.2d at 885 (quoting *United States v. Brewer*, 835 F.2d 550, 553 (5th Cir. 1987)). "A statute is unconstitutionally vague only where no standard of conduct is outlined at all; when no core of prohibited activity is

[18] Defendants might have raised their constitutional challenge in their motion for summary judgment (listed on docket sheet as Doc. 86); or their October 12, 2001 Motion for New Trial and to Amend Judgment (listed on docket sheet as Doc. 118); or in their November 2001 appeal to the Fifth Circuit of the September 27, 2001 summary judgment and injunction [Doc. 132] (listed on docket sheet as Doc. 136); or in their March 1, 2002 Motion for Clarification of Order Granting Summary Judgment and Injunction [Doc. 160]; or in their various motions to modify the September 27, 2001 injunction [Docs. 181, 191, 194]. They did not. *See, e.g.*, *Ysleta II*, 220 F.Supp. at 682-688 (9/27/01 Memorandum Opinion [Doc. 109](listed on docket sheet as Doc. 113) at pp. 15-24), and at 702 (5/17/02 Order Modifying 9/27/01 Injunction [Doc. 165] at 5).

defined." *Ford Motor Co. v. Tex. Dep't of Transport.*, 264 F. 3d 493, 507 (5th Cir. 2001). "...to sustain such a challenge, the complainant must prove that the enactment is vague...in the sense that no standard of conduct is specified at all..." *Tansley*, 986 F.2d at 886 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982)). Chapter 47 of the Texas Penal Code, and in particular sections 47.01(4) and 47.01(4)(B), outlines the requisite standard of conduct and describes the prohibited gaming activity, thereby defining a core of prohibited conduct with sufficient definiteness to guide those who must interpret it.[19] That is all that is required.

Finally, the Court's May 17, 2002 order modifying the September 27, 2001 injunction leaves no doubt as to what activities involving "amusement devices" such as 8-liners are allowed and which are prohibited. *Ysleta II*, 220 F.Supp. at 702-04 (5/17/02 Order Modifying 9/27/01 Injunction [Doc. 165] at pp. 8-11):

> the Tribe shall be permitted to offer eight-liners as an amusement device, but only to the extent that it strictly adheres to the prize limitations provided in § 47.01(4)(B). That is, the device must exclusively offer noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

Id., 220 F.Supp. at 704 (5/17/02 Order Modifying 9/27/01 Injunction [Doc. 165] at pp. 10-11). Beyond that, the Court specifically cautioned that "the Tribe in offering amusement devices is to strictly adhere to the language of § 47.01(4)(B) and the case law interpreting it," and further

---

[19] Since 2000, at least four Texas Courts of Appeal have reviewed and held that section 47.01(4) is constitutional in the context of the possession, operation, use, etc., of eight-liners. See *Legere v. State*, 82 S.W.3d 105 (Tex.App.-San Antonio 2002 no pet.); *State v. Hancock*, 35 S.W.3d 199 (Tex.App.-Waco 2000, no pet.); *State v. Wofford*, 34 S.W.3d 671 (Tex.App.-Austin 2000, no pet.); and *Owens v. State*, 19 S.W.3d 480 (Tex.App.-Amarillo 2000, no pet.).

noted that "gift certificates are not a noncash merchandise prize." *Id*.[20]

V. "Selective Enforcement" Argument is Untimely and Inapplicable to Action to Enforce Injunction

This is not the first time Defendants have raised the issue of selective enforcement. But the Court has already held that the "selective enforcement" defense is not applicable in this case:

> [T]he undisputed record does not sustain a claim by the Defendants of selective or discriminatory prosecution. The Court has further noted that this is a civil case. The State in seeking injunctive relief is not required in meet criminal law standards or to negate the exceptions or defenses referred to in the Penal Code.

Id. at 696. Defendants' vague assertion of selective enforcement is not applicable given that this matter deals with the enforcement of a civil injunction and not the prosecution of a penal code statute.[21] Furthermore, there can be no "selective enforcement" of an injunction which, as here, applies only to the these Defendants, against whom the State brought the contempt action. That the State is not enforcing this injunction against non-parties is axiomatic.

VI. Sanctions

"[F]ederal courts should employ state remedies . . . to enforce 'surrogate' federal gambling laws against tribes."[22] Texas' common nuisance law, under which the State sued

---

[20] In their appeal of the Court's 5/17/02 Order, Defendants did not raise a void-for-vagueness challenge to the injunction as modified. *See State of Texas v. Ysleta del Sur Pueblo*, 69 Fed. Appx. 659, 2003 WL 21356043 (5th Cir. 2003).

[21] Furthermore, the facts and law of this case are well established showing Defendants' persistent recalcitrance. *See Ysleta II*, 220 F.Supp.2d at 690-92, 695-96. The Court has already found, *inter alia*, that "Defendants . . . have embarked upon a long-continued habitual course of conduct clearly violative of the Gambling Laws of the State of Texas and . . . unless enjoined, will continue such habitual illegal activities at Speaking Rock Casino." *Id*. at 695-97.

[22] *Ysleta II*, 220 F.Supp. at 694 (quoting Judge Hudspeth's January 13, 2000 order [Doc. 22] denying Defendants' motion to dismiss). "[A]ny state gambling law becomes federal law for purposes of reservation gambling." *Id*. at 694. That is, "Texas law . . . functions as surrogate federal law." *Id*. (citing

Defendants, provides that the following sanctions may be assessed against a person who violates a temporary or permanent injunctive order for civil contempt, such as the injunction issued by this Court against Defendants: (1) a fine of not less than $1,000 or more than $10,000; (2) confinement in jail for a term of not less than 10 or more than 30 days; or (3) both fine and confinement. TEX. CIV. PRAC. & REM. CODE § 125.002. Therefore, such sanctions are appropriate here.

In addition to state law remedies, the Court may employ the following federal civil contempt sanctions that have been utilized and affirmed as purely civil in nature: (1) incarceration for up to 18 months, 28 U.S.C. § 1826(a);[23] (2) order payment of actual damages, including attorney's fees, from one party to another, *Petroleos Mexicanos*, 826 F.2d at 399 ("sanctions for civil contempt are meant to be wholly remedial and serve to benefit the party who has suffered injury or loss at the hands of the contemnor.");[24] *In re Musslewhite*, 270 B.R. 72, 78 (S.D.Tex.2000) (affirming court's civil contempt sanction awarding attorney's fees to

---

Ysleta I at 1335. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir.1998), cert. denied, 525 U.S. 813 (1998)(determining that where Nebraska case law provided for injunctive relief against violations of state gaming laws, federal court was required to enforce "surrogate" federal statute with reference to state law remedy).

[23] A fixed term of imprisonment, "with the proviso that the contemnor will be released if he complies with the court order, is a proper penalty for civil contempt and the imposition of such penalty does not make the proceeding criminal." *In re Dinnan*, 625 F.2d 1146, 1149 (5th Cir.1980) (per curiam) (citing *United Mine Workers*, 330 U.S. at 303-04). A district court may order the civil contemnors imprisoned until they comply with the order or condition imposed by the court. *FDIC v. LeGrand*, 43 F.3d 163, 168 (5th Cir.1995); *see also Hutto v. Finney*, 437 U.S. 678, 690 (1978) ("Civil contempt proceedings may yield a conditional jail term[.]"). "Unlike criminal contempt where imprisonment and a fine cannot be combined, a finding of civil contempt permits the coercive combination of both fine and imprisonment." *In re Dinnan*, 625 F.2d at 1150 (citation omitted).

[24] Compensatory damages awarded as a sanction for violation of a court order are to "[reimburse] the injured party for the losses and expenses incurred because of his adversary's noncompliance." *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir.1976).

party); (3) impose a prospective per diem fine payable to the court to coerce compliance with a court order requiring prospective performance of an affirmative act, *see Lamar Financial Corp.*, 918 F.2d at 567 (affirming prospective per diem fine of $500 payable to court until contemnor produced certain documents).[25]

When a contempt sanction is coercive, "the district court has broad discretion to design a remedy that will bring about compliance." *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.1982) (citing *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979); *Powell v. Ward*, 643 F.2d 924, 933 (2d Cir.1981) (per curiam)). "Courts have, and must have, the inherent authority to enforce their judicial orders and decrees in cases of civil contempt. Discretion, including the discretion to award attorneys' fees, must be left to a court in the enforcement of its decrees." *United Mine Workers*, 330 U.S. at 303-304.

Defendants continue upon a habitual course of conduct clearly violative of the gambling laws of the State of Texas. *Ysleta II*, 220 F.Supp. at 702-04. They have already been enjoined from engaging in such habitual illegal activities at Speaking Rock Casino. *Id*. Despite being enjoined, the facts and law of this case again establish and confirm Defendants' persistent recalcitrance. Therefore, the State respectfully asks the Court to utilize both the state and federal remedies it has available to it in crafting the appropriate civil sanctions that will secure

---

[25] The court is permitted to impose a conditional fine for the purpose of compelling the contemnor to comply with the court's order, provided the amount is reasonably designed to force compliance, without being punitive. *In re Dinnan*, 625 F.2d at 1149. "A coercive, nonpunitive fine payable to the clerk of the court is an appropriate tool in civil contempt cases." *Id*. (citing cases and treatise). In setting a prospective per diem fine amount to coerce compliance with a Court Order, the Court should consider the following factors: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order. *Adams*, 918 F.2d at 567.

Defendants' immediate and future compliance with the injunction now in effect

Specifically, the State asks the Court to find that Defendants' current sweepstakes activities violate the Court's injunction or in the alternative, Defendants sweepstakes should be enjoined until such time that Defendants properly petition the Court for modification and present the Court with "a firm detailed proposal showing that the said sweepstakes would be in compliance with Texas law." *Ysleta II*, 220 F.Supp.2d at 705-07. In addition, the State asks that it be allowed monthly access to the Pueblo premises and access to all books and records of Defendants' gaming activities proposed to be conducted thereon in order to assure future compliance with this Court's injunction order of September 27, 2001 (as amended). Plaintiff also requests such other and further relief to which it may show itself entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

ROBERT B. O'KEEFE
Chief, General Litigation Division

/s/ *Nancy K. Juren*
NANCY K. JUREN
Lead Counsel
Texas Bar No. 11059300
WYLIE E. KUMLER
Texas Bar No. 24050896
YVONNE D. BENNETT
Texas Bar No. 24052183

Assistant Attorney Generals
General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2120
Fax: (512) 320-0667

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via e- mail, on April 29, 2008, to:

Frank R. Hughes
PO Box 8145
Greenville, TX 75404,
903-456-2703
fhugheslaw@hotmail.com

Greg Pine
303 Texas Ave Ste 905
El Paso, TX 79901
915-532-5757
gbp251@aol.com

/s/ *Nancy K. Juren*
NANCY K. JUREN
Assistant Attorney General