

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

FILED

2008 APR 11 PM 4:51

CLERK, US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY \_\_\_\_\_  
DEPUTY

STATE OF TEXAS

Plaintiff,

VS.

EP 3:99-cv-320

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.

*RESPONSE*

~~MOTION~~ AND MEMORANDUM IN OPPOSITION TO MOTION FOR CONTEMPT

TO THE HONORABLE HARRY LEE HUDSPETH SENIOR DISTRICT JUDGE FOR THE  
WESTERN DISTRICT OF TEXAS

Comes now, the Defendants, YSLETA DEL SUR PUEBLO, et al., and moves this  
Honorable Court to reject Plaintiff's Motion for Contempt and would show:

1. Pursuant to 12(4)(b)(6) F.R.C.P. the Plaintiff has failed to state a claim upon which the relief sought can be granted, as set out below.
2. Following much litigation briefly outlined in Plaintiff's pleadings this Honorable Court issued an Amended Injunction permitting the Defendants herein to operate gaming if in "strict" compliance with Texas State Penal laws regulating gaming in the State of Texas as any other Texas state citizen would be required to do. The Texas Attorney General responding to complaints by local law enforcement of possible violations by Defendants sent two members of state law enforcement on Tribal land to investigate. The officers prepared an affidavit and gathered evidence suggesting that a possible violation of the law and the injunction was taking place. The Texas Attorney General believes the evidence gathered shows a violation of Texas Penal Law, and consequently, the Amended Injunction- we disagree.
3. Present Issue: Do either of the devices, or the marketing effort, described in Plaintiff's

affidavits and offer of proof constitute illegal gambling in contravention of either Texas Penal Code 47.01 or the Amended Injunction? No.

DEFENSES AND MEMORANDUM OF LAW IN SUPPORT:

- a. **Use of 8 liners-** As this Court examined in the Amended Order of Injunction and the State agrees, the use of the 8 liner device is not in and of itself a crime in Texas, *Texas v. Ysleta Del Sur Pueblo*, 220 F.Supp.2d 668 (W.D. Tex 2001 & Order Modifying Opinion 2002) ("*Ysleta II*") at 704 . In the instant case, the Department of Public Safety Sergeants acting in an undercover capacity, not in uniform at that point although it wouldn't have mattered, played the 8 liner and swore that the units would return no more than 10 times the amount played consistent with Texas Penal Code 47.01(4)(B) and that they were given a representation of value; a "use restricted" Simon Visa Card for use in obtaining a prize stored at another location. They further recounted their efforts to exchange the card for cash; Sgt. Rodriguez attempted to obtain money, a money order at Diamond-Shamrock and was turned down. The Sergeants double teamed Wal-Mart, Sergeant Wilbourn used the Visa card to purchase a pair of denim pants *receiving no money back* for his purchase then the other returned to Wal-Mart to exchange the pants for cash.

The Wal-Mart employee violated corporate policy (see exhibit A, Wal-Mart policy) in giving the Sergeant a cash return, possibly giving special deference to a member of law enforcement. Defendants would show that a thorough search was made of their records and that the names of the Sergeants were not found, instead two other names had the account numbers contained in the State's Affidavit and offer of proof. Defendants would show that they have complied with Texas Statute, 47.01(4)(B) and are dismayed at the action of two professional law officers; at punishing the Tribal members for a third party mistake in which law enforcement participated and precipitated the improper, illegal exchange. A contempt Motion is quasi-criminal in nature, and the State of Texas should be required to show a willful violation of the law by the Defendants not that its efforts at complying with both the law and injunction were subterfuged by law enforcement with an intent to do them harm.

Both parties agree, as does this Honorable Court, the laws of the State of Texas regarding this matter are as binding on the Tribe as on any other Texas citizen, in quoting from Ysleta I interpreting the Restoration Act, "All gaming activities which are prohibited by the laws of Texas are prohibited on the reservation and on lands of the tribe". 25 USC 1300g-6(a). The converse must follow, as this court implied; if the laws of the State of Texas do not prohibit the conduct then it must be available to the Tribe, as should any defenses.

In *Aces Wired, Inc v. Gametronics*, 1:07-cv-00768-LY, United States District Court, Western District of Texas, Austin Division, (this opinion is not cited as case authority, but as a logical legal mind looking at the problem; attached as Exhibit B), the Honorable Judge Lee Yeakel, approved a mediation in which the "redemption scheme" involved the ability of an amusement game provider storing consumer products at another location.

In this instance, the Tribe 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. (See exhibit C, for the agreement.)

- b. **Use of sweepstakes enabling device, Video Sweepstakes Terminal;** The attorney general's motion to the court to hold the Tribe in contempt of court for violation of the court's injunction to comply with the gaming laws of the State of Texas does not complain that the national sweepstakes being employed by the Tribe are in violation of state law. Defendants believe they are in compliance with state law in their sweepstakes operation based on the logic and reasoning of Federal Magistrate L. Stuart Platt set out in *G2, INC v MIDWEST GAMING, INC*, MO-06-CV-131, filed 17<sup>th</sup> of April 2007, concluding that such national sweepstakes operations are not in violation of the Texas Penal Code (this opinion is not cited as case authority, but as a logical legal mind looking at the problem; attached as Exhibit D).
- c. **Constitutionality of Texas Penal Code 47.01(4) (B).** The Defendants would show that the Statute as applied to it is unconstitutional. The Defendants rely

upon the protection of the United States Constitution, and the Constitution of the State of Texas, both of which contain "Due process of law" provisions and would show that the statute as applied in their situation has harmed them; by their inability to receive notice of the meanings of the parameters of the exceptions contained in TPC 47.01(4) (B) and law enforcement's arbitrary and selective action against them. The **Vagueness** doctrine focuses both on actual notice to citizens and arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357--58, 103 S.Ct. 1855, 1858--59, 75 L.Ed.2d 903 (1983). A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . ." *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

A statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or if it "encourages arbitrary and erratic arrests and convictions." *Goocher v. State*, 633 S.W.2d 860, 865 (Tex. Crim.App. [Panel Op.] 1982); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Either is an independent ground. *Adley v. State*, 718 S.W.2d 682, 685 (Tex.Crim.App.1985). Thus, a penal statute must define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and

do so in a manner that does not encourage arbitrary and discriminatory enforcement. *Lawson*, 461 U.S. at 357, 103 S.Ct. at 1858; *Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim.App.1984).(fn2) When challenging the constitutionality of a statute, a defendant must show that in its operation the statute, is unconstitutional as applied to him in his situation; that it may be unconstitutional as to others is not sufficient. *Bynum*, 767 S.W.2d at 774. In passing on a vagueness challenge where no first amendment rights are involved, the reviewing court should not consider hypothetical situations but should scrutinize the statute only to determine whether it is impermissibly vague as applied to the challenging party's specific conduct. *Id.*, *Briggs v. State*, 740 S.W.2d 803, 806 (Tex.Crim.App.1987).

In the instant case, the Tribe has complied with its best understanding of the law; with both the Amended Injunction, and the Texas Penal Law. As was pointed out, in the *Aces* decision, *infra* 47.01 et seq is a Penal Statute, and historically courts have strictly construed Penal Statutes. See *Brown v. De La Cruz*, 156 S.W. 3d 560, 564 (Tex.2004). This contempt motion is quasi-criminal in nature, calling for a range of sanctions, therefore; a showing of willful conduct should be shown.

47.01(B) (4) sets out an exception to the definition of a gambling device contained in 47.01(B), set out in Plaintiff's pleadings. In the instant case, the Defendant's relied upon a plain reading of that exception and awarded a "representation of value" for game players at its location.

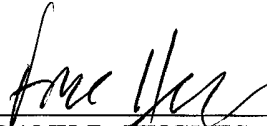
The second prong of the question of constitutionality of a statute is its proclivity for arbitrary enforcement by law enforcement.

- d. **Selective enforcement-** Interestingly, the City of El Paso contains several game rooms. No action has been taken against these locations, operating openly and notoriously in shopping centers and malls within the city limits. The Attorney General's office has announced publicly, innumerable times that it will not intercede, and will instead leave enforcement of "illegal" gaming activities up to the counties wherein lie the possible offenders, However; it appears the AG is willing to use any means necessary to attack the Ysleta Del Sur Pueblo; sadly...

some things never change.

WHEREFORE, PREMISES CONSIDERED, the Defendants, YSLETA DEL SUR PUEBLO et al pray that this Honorable Court order the Motion for Contempt be denied, and for all relief at equity and law to which it is entitled.

Respectfully submitted,



FRANK R. HUGHES

Attorney at Law

P. O. Box 8145

Greenville, Texas 75404

903/456-2703

Email: fhugheslaw@hotmail.com

State Bar No.: 10236500

Federal I.D. No. for the

Southern District of Texas: 6354



GREGORY B. PINE

Attorney at Law

303 Texas Ave

El Paso, Texas 79901

Email: [GBP251@aol.com](mailto:GBP251@aol.com)

Tel. (915) 532-5757

Fax: (915) 577-0787

915/532-5757

Texas State Bar: 16013500

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via Email to Nancy.Juren@oag.state.tx.us on March 9, 2008:



GREGORY B. PINE

# EXHIBIT "A"

## All Material Wal-Mart Confidential. © 2008

Page Source: WIRE

Date Printed: Wednesday, March 19, 2008

## Policies

# Wal-Mart® Corporate Policy

## Refunds/Exchanges

### Detailed Guidelines

Satisfaction Guaranteed. Our goal is to satisfy our Customers ... by Exchange, Refund, or Repair.

Number:  
A3-03

Revised:  
11/27/07

Within 90 Days with receipt	All store merchandise with the exception of the following:
45 Days with receipt:	• Computer components and computer accessories.
30 Days with receipt:	• Camcorders and digital cameras.
15 Days with receipt:	• Computers, digital music players, portable video players, GPS units and postpaid cell phones.
These items must be returned unopened:	• Prerecorded music, movies, and computer/video game software products.
These items must be returned unopened:	• Airbeds.
Firearms& Ammunition:	• Sales are final.
Tobacco & Alcohol:	• May only be returned to the store of purchase with original receipt (except where prohibited by law).
WIC Purchases:	• No refund for WIC-acquired items. • WIC-acquired items that are defective or out-of-date may only be exchanged for identical product. • WIC-qualified items must be returned with the original receipt.
After 90 Days with receipt	• If available, we offer repair service through the manufacturer.

### Take Action

Put NEW WAL-MART RETURN POLICY detailed guidelines in a binder and keep at the Customer Service Desk and CSM podium for easy access on how to handle specific Customer issues.

### Introduction

Our New Return Policy ...

**Everything in the store can be returned for exchange or return within 90 days of purchase with a receipt ... with the following exceptions:**

- - A few electronic items (computer components and computer accessories, digital music players, portable video players, GPS units, digital cameras, camcorders, computers and postpaid cell phones and prerecorded music, movies, computer/video game software products must be unopened) and regulated items (firearms, ammunition, tobacco, alcohol, WIC purchases and Food Stamp items) and Plants.

**Our Return Policy will remain: SATISFACTION GUARANTEED.**

**- We will continue to satisfy our Customers ... by Exchange, Refund or Repair.**

### Contents

- Exceptions to 90 Day Return Policy
- Connection Center Policies
- Compensation for Returned Merchandise Within 90 Days
- Payment Reimbursement for Merchandise Returned After 90 Days
- Merchandise Returned Without a Receipt
- Non-Receipt Return Limit

# EXHIBIT "A"



- Special Situations
- Where Returns Are Processed
- Return Processing Exceptions
- Warranty Information
- Pink Senso Labels

### Exceptions to 90 Day Return Policy

Wal-Mart will exchange, refund, or repair merchandise returned within 90 days from date of purchase with a receipt, with the exception of the situations listed below.

Exceptions	
<ul style="list-style-type: none"> <li>• Computer Components and Computer Accessories</li> <li>• Digital music players and portable video players</li> <li>• GPS units</li> <li>• Camcorders and Digital Cameras</li> <li>• Computers</li> <li>• Postpaid Cell Phones</li> <li>• Pre-recorded Movies, Music and Computer/Video Game Software Products</li> <li>• Firearms and Ammunition</li> <li>• Tobacco and Alcohol</li> <li>• WIC Items</li> <li>• Food Stamp Items</li> <li>• Plants</li> </ul>	Exceptions to "90 Day With Receipt" Policy.
Must be Returned Within 45 Days vs. 90 Days	
Computer Components and Computer Accessories	<ul style="list-style-type: none"> <li>• Can be returned within 45 days from date of purchase with a receipt.</li> </ul>
Must be Returned Within 30 Days vs. 90 Days	
Camcorders and Digital Cameras	<ul style="list-style-type: none"> <li>• Can be returned within 30 days from date of purchase with a receipt.</li> </ul>
Must be Returned Within 15 Days vs. 90 Days	
Computers	<ul style="list-style-type: none"> <li>• Can be returned within 15 days from date of purchase with a receipt.</li> <li>• After 15 days, all computers are subject to the manufacturer's warranty.</li> <li>• Wal-Mart computer suppliers will provide Customer support for hardware/software issues that arise on personal computers for a minimum of one (1) year from the date of purchase.</li> </ul>
Digital music players, portable video players and GPS units	<ul style="list-style-type: none"> <li>• Can be returned within 15 days from date of purchase with a receipt.</li> <li>• After 15 days, all Digital music players, portable video players and GPS units are subject to the manufacturer's warranty.</li> </ul>
Postpaid Cell Phones	<ul style="list-style-type: none"> <li>• Within 15 days of purchase, Wal-Mart will refund or exchange a postpaid cell phone purchase (phone or phone with contract) with a valid Wal-Mart receipt.</li> </ul>
Must be Returned Unopened	
Pre-recorded Movies, Music and Computer/Video Game Software	<ul style="list-style-type: none"> <li>• Can be returned within 90 days of purchase with a receipt, if the item is unopened and still in its original shrink wrap.</li> <li>• If items are opened, defective units may be exchanged for another unit of the <b>SAME TITLE</b>.</li> </ul>
Airbeds	<ul style="list-style-type: none"> <li>• Unopened Airbeds may be returned for refund or exchanged with receipt within 15 days.</li> <li>• Airbeds returned within the 15 days with receipt that have been opened or used, will be exchanged for the same airbed, or credit to one of equal or greater value.</li> </ul>

	<ul style="list-style-type: none"> <li>Defective Airbeds will be exchanged for the same Airbed, or credit to one of equal or greater value.</li> </ul>
<b>Legal Compliance - Non-Negotiable (Regulated Items)</b>	
Firearms and Ammunition	<p>All firearms and ammunition sales are final. This includes modern firearms as well as black powder. This does not apply to items such as Air Soft, BB guns, or paintball markers.</p> <ul style="list-style-type: none"> <li>Wal-Mart does not facilitate the repair of defective or damaged firearms.</li> <li>If a firearm is brought into the store, a salaried manager should be called <b>IMMEDIATELY</b>.</li> </ul> <p>Inform Customer they can send the firearm to the manufacturer's service facility themselves or a local gunsmith. The service facility address/information can be found in the firearm box along with the warranty paperwork. Addresses can also be found on the internet on the manufacturer's website as well as many firearm manufacturers have toll free phone numbers for customer service.</p> <p>Stores without a valid Federal Firearms License are <b>PROHIBITED</b> from accepting firearms back into the store for ANY reason.</p>
Tobacco and Alcohol Products	<ul style="list-style-type: none"> <li>Tobacco and alcohol products can only be returned with a receipt to the original store where they were purchased. (Except where prohibited by state specific law.)</li> <li>The store is required to destroy all returned tobacco and alcohol products and take appropriate markdowns.</li> <li>The Store Manager is responsible for verifying alcohol and tobacco regulations with local authorities for their individual store.</li> </ul>
WIC Items	<ul style="list-style-type: none"> <li>A WIC-qualified (eligible) item is defined as any item that is eligible according to the state specific WIC Approved Food List.</li> <li>A WIC-acquired (purchased) item is defined as any item that is eligible according to the state specific WIC Approved Food List and was purchased with a WIC food instrument (i.e. WIC Voucher, EBT card, etc.).</li> <li>A current copy of the state specific WIC Approved Food List is required to be available at the Customer Service Desk.</li> <li>A cash refund/credit is not permitted for WIC-acquired items.</li> </ul> <p><b>With a receipt:</b></p> <ul style="list-style-type: none"> <li>WIC-qualified (eligible) items can only be returned for cash/credit or exchanged for a different item with a receipt that indicates the item was not purchased with a food instrument (i.e. WIC Voucher, EBT card, etc.).</li> <li>WIC-acquired (purchased) items (i.e. purchased with a food instrument such as a WIC Voucher, EBT card, etc.) that are defective or out-of-date can be exchanged only for an identical item.</li> <li>Exchanges for WIC-acquired items for a different brand(s)/size(s) of the same type of item are not permitted.</li> <li>If a Customer has been issued an official Infant Formula Exchange Form from the state WIC agency, an exchange must be made according to the guidelines on the state specific Formula Exchange Form.</li> </ul> <p><b>Without a receipt:</b></p> <ul style="list-style-type: none"> <li>If the Customer does not have a receipt for a WIC-qualified item, the item is processed as if purchased with a WIC food instrument (i.e. WIC Voucher, EBT card, etc.). If the item is out-of-date or defective, the item can be exchanged only for an identical item.</li> <li>If a Customer has been issued an official Formula Exchange Form from the state WIC agency, an exchange must be made according to the guidelines on the state specific Formula Exchange Form.</li> </ul>
Food Stamp Items	<ul style="list-style-type: none"> <li>Items purchased with food stamps may be exchanged for other food stamp eligible items, or a refund must be made to the Customer's food stamp EBT account or with food stamp paper vouchers, if the Customer used paper vouchers for payment.</li> <li>Do not refund cash or credit.</li> </ul>
<b>May be Returned Within 1 Year</b>	
Plants	<ul style="list-style-type: none"> <li>All plants purchased at Wal-Mart are fully guaranteed and will be replaced, or money refunded, when returned with a receipt.</li> </ul>

**Connection Center Policies**

Postpaid Cell Phones	<ul style="list-style-type: none"> <li>• Within 15 days of purchase, Wal-Mart will refund or exchange a postpaid cell phone purchase (phone or phone with contract) with a valid Wal-Mart receipt.</li> <li>• The wireless carrier will bill the Customer for any used airtime.</li> <li>• After 15 days, the Customer will be subject to the wireless carrier's terms and conditions.</li> <li>• The wireless carrier's terms may include cancellation penalties and loss of deposit.</li> <li>• The carrier will also charge the Customer for airtime usage.</li> <li>• Certain defects with the phone are covered by the manufacturer's warranty.</li> <li>• These returns are required to be processed at the Connection Center.</li> </ul>
Prepaid Cell Phones	<ul style="list-style-type: none"> <li>• <b>Within 90 days of purchase</b>, Wal-Mart will refund or exchange a defective prepaid cell phone purchase (phone with no contract) with a valid Wal-Mart receipt.</li> <li>• Any prepaid cell phone returns that are past 90 days should be approved by the Photo/Connection Center Manager or store management on an individual store basis.</li> <li>• These returns should be processed at the Customer Service Desk.</li> </ul>
Prepaid Phone Cards	<ul style="list-style-type: none"> <li>• All returned Prepaid Phone Cards must have a receipt before the card can be exchanged or refunded.</li> <li>• The card number on the receipt must match the tracking number on the back of the Prepaid Phone Card in the bottom right-hand corner. This proves whether the card being returned was purchased at a register.</li> <li>• There are no even exchanges for Prepaid Phone Cards. If a Customer wants a new card, the defective card must be refunded and then a new card sold and activated.</li> <li>• These returns should be processed at the Customer Service Desk.</li> </ul>
Satellite Radio	<ul style="list-style-type: none"> <li>• With a valid Wal-Mart receipt, Wal-Mart will refund money or exchange defective satellite radio product within 90 days of purchase.</li> <li>• Any satellite radio product returns that are past 90 days should be approved by the Photo/Connection Center Manager on an individual store basis.</li> <li>• These returns should be processed at the Customer Service Desk.</li> </ul>
Satellite TV Certificates	<ul style="list-style-type: none"> <li>• With a valid Wal-Mart receipt and original certificate paperwork, Wal-Mart will refund money on a Satellite TV Certificate within 90 days of purchase, if the Satellite TV System has not been delivered and installed.</li> <li>• Action Required - The sales Associate must call DIRECTV at 1-888-355-7530 and verify the status of the order.</li> <li>- Refund if you confirm an appointment was not made and equipment was not delivered.</li> <li>- Refund if you confirm the appointment was made by the equipment was not delivered. Cancel the delivery before giving the refund.</li> <li>- No Refund if the Satellite TV equipment has been delivered and installed.</li> <li>• Any Satellite TV Certificate returns that are past 90 days should be processed by the Photo/Connection Center Manager on an individual store basis.</li> <li>• These returns should be processed at the Connection Center.</li> </ul>

**Compensation for Returned Merchandise Within 90 Days**

With Receipt	<ul style="list-style-type: none"> <li>• If the Customer has a receipt and the item was purchased by credit card, any refund is required to be issued by credit to the credit card that was originally used to purchase the item.</li> <li>• If the Customer has a receipt, but does not have the original credit card of purchase, scan the TC number on the receipt and the register will provide the credit card of purchase number automatically to credit back.</li> <li>• If the register does not supply the credit card number when the TC number is scanned and the original credit card of purchase is not available, any refund should be processed with a Shopping Card/Gift Card.</li> <li>• If the Customer has a receipt and the item was purchased by cash or check, any refund should be processed with cash or Shopping Card/Gift Card, however the Customer may prefer.</li> <li>• Do not refuse a Customer a refund to wait for a check to clear</li> </ul>
--------------	---

	a bank.
Without Receipt	<ul style="list-style-type: none"> <li>• If the Customer does not have a receipt, the following options are available. These may require CSM or salaried manager approval:           <ul style="list-style-type: none"> <li>? Send merchandise to the manufacturer for repair.</li> <li>? Exchange for another item.</li> <li>? Return for a refund by either:               <ul style="list-style-type: none"> <li>? Cash (refunds \$25 or less in total value).</li> <li>? Shopping Card/Gift Card (refunds greater than \$25 in total value).</li> </ul> </li> </ul> </li> </ul>

#### Payment Reimbursement for Merchandise Returned After 90 Days

Wal-Mart has a long-standing tradition of "Taking Care of the Customer." A salaried manager has the authority to make exceptions to do what's right to ensure the Customer is satisfied.

#### Merchandise Returned Without a Receipt

If the Customer does not have a receipt, the following options are available. These may require CSM or a salaried manager's approval:

- Process a cash refund (refunds \$25 or less in total value)
- Issue a Shopping Card/Gift Card (refunds greater than \$25 in total value)
- Credit the Customer's Credit Card (if item was purchased with a Credit Card)
- Allow an exchange
- Deny the refund. (Always politely explain to the Customer that occasionally refunds may be denied because of compliance issues, condition of returned merchandise, other retailer's house brand, etc.)
- Repair designated items in selected departments.

#### Non-Receipt Return Limit

If a Customer has more than three (3) non-receipt returns within 45 days, the register system will automatically flag the transaction, and a Customer Service Manager or a salaried manager is required to approve the return.

#### How to Handle Special Situations

Recalled Merchandise by a Regulatory Agency (e.g. CPSC, NHTSA, FDA, USDA)	<ul style="list-style-type: none"> <li>• Recalled merchandise can be returned to any store regardless of when the recall was announced.</li> <li>• Returned recalled merchandise should never be placed back on the shelf for resale.</li> </ul>
Denying Returns	<ul style="list-style-type: none"> <li>• Special situations (compliance, WIC items, etc.) may occur that warrant denying a return.</li> <li>• Refer these situations to a CSM or a salaried manager..</li> </ul>
Gift Registry Items	<ul style="list-style-type: none"> <li>• Exceptions can be made for the quantity of Gift Registry items returned without receipts.</li> <li>• Refer these situations to a CSM or a salaried manager..</li> </ul>
Over-the-Counter Drugs (OTC) Medications	<ul style="list-style-type: none"> <li>• Returned over-the-counter product should never be placed back on the shelf for resale, regardless of whether the package is open or not.</li> <li>• Returns should be handled as damaged merchandise and taken to the Claims Department to ensure the appropriate markdown is taken.</li> </ul>
Diabetic Products: Meters, Strips, Lancets, Lancet Devices, and Syringes	<ul style="list-style-type: none"> <li>• These products are not returnable to Wal-Mart Stores.</li> <li>• An Associate should offer to help the Customer call the toll free number listed on the product box for refunds or exchanges.</li> <li>• After assisting the Customer, block out the UPC on the box with a black pen or marker and ensure the Customer DOES NOT leave the item in the store.</li> <li>• Refer to Pharmacy Operations Manual, Section 1102, Quality Assurance Responsibilities, for incorrectly filled prescriptions.</li> <li>• Refer to Medicare Billing Section of the WIRE for unassigned Medicare claims - refund procedures.</li> </ul>
Wal-Mart Credit Card Payments	<ul style="list-style-type: none"> <li>• If a payment is made in error and identified the same day, the correction is processed as a refund.</li> </ul>

	<ul style="list-style-type: none"> <li>• The refund transaction must be for the exact amount of the original transaction.</li> <li>• An additional payment transaction will be required to process the correct payment.</li> </ul>
Money Orders	<ul style="list-style-type: none"> <li>• Do not accept any Money Order issued by any party other than Wal-Mart.</li> <li>• Only cash Wal-Mart issued Money Orders at the Customer Service Desk.</li> <li>• Only accept Money Orders made out to Wal-Mart, or to the Customer.</li> <li>• Always call MoneyGram® at <b>1-800-794-7005</b> to verify that the Money Order is a valid item, and there are no holds or stops on the item.</li> <li>• If the Money Order was made out to the Customer, record the ID type and the number on the back of the Money Order.</li> <li>• If cash back for any of these situations is equal to or greater than \$3,000, the transaction is required to be manually recorded in the <b>"Money Services Business Log"</b> at the Customer Service Desk.</li> </ul>
Money Grams	<ul style="list-style-type: none"> <li>• Verify the photo ID of the Customer and call 1-800-666-3947 to have Money Gram process the refund. (Available only if the receiving Customer has not already picked the money up.)</li> </ul>
Express Bill Payments	<ul style="list-style-type: none"> <li>• Express Bill Payment is a non-refundable service.</li> </ul>
Walmart.com Purchases	<ul style="list-style-type: none"> <li>• All merchandise purchased on-line can be returned to any Wal-Mart Store, except Wal-Mart Neighborhood Markets.</li> </ul>
Returned Merchandise Purchased by Check	<ul style="list-style-type: none"> <li>• Purchases made by check <b>do not</b> require a waiting period for cash refund.</li> </ul>
Shopping Cards/ Gift Cards	<ul style="list-style-type: none"> <li>• Shopping Cards/Gift Cards can be used for the purchase of merchandise at any retail format of Wal-Mart Stores, Inc. in the United States or Puerto Rico.</li> <li>• Customers cannot redeem Shopping Cards/Gift Cards for cash upon request. Contact a salaried manager for further Customer Service information.</li> <li>- Refer to FG 310 for additional information.</li> <li>• Shopping/Gift Cards cannot be cashed out on balances greater than \$2, except in California, Washington, and Massachusetts, where it is required by law.</li> <li>- There are 2 exceptions to this rule: <ol style="list-style-type: none"> <li>1. A gas station attendant brings a card to the store for Customer Service situations due to problems with the gas pumps.</li> <li>2. Due to legal reasons, all old Shopping Cards that do not state we will not cash out Shopping Cards, need to be cashed out at the Customer's request.</li> </ol> </li> <li>- Cash outs can be overridden to support these exceptions by a CSM key flick for card balances less than \$2.</li> <li>- These exceptions for card balances of \$2 and over require a salaried member of management's override.</li> <li>• Lost or stolen Shopping Cards/Gift Cards cannot be replaced without original receipt.</li> <li>• Cards issued for returns without a receipt should not be altered.</li> <li>- Do not write on the cards or punch a hole in them.</li> </ul>
"Sale" Merchandise	<ul style="list-style-type: none"> <li>• Price adjustments will be given on prior Wal-Mart purchases within 7 days of purchase with a valid Wal-Mart receipt.</li> <li>• The Customer is required to provide the original receipt to receive the adjustment.</li> <li>• Price adjustments are not given for merchandise that is on clearance.</li> <li>• Price adjustments are not given for merchandise that goes on sale at another retailer.</li> <li>• Associates are not eligible to receive price adjustments.</li> </ul>
Food Returns	<ul style="list-style-type: none"> <li>• No returned food item of any kind can be restocked and/or resold to Customers.</li> <li>• This pertains to all food items ... perishable, boxed, canned, frozen, etc.</li> <li>• Do not store returned food in refrigerators at the Customer Service Desk.</li> <li>• Grocery items returned to stores should be processed through grocery reclamation claims (when applicable).</li> <li>- The exception is fresh items from the Meat Department, Produce Department, Service Deli, or Bakery.</li> </ul>

	<ul style="list-style-type: none"> <li>- Notify the Department Merchant immediately if a Fresh Department item is returned.</li> <li>• Send all perishable or temperature sensitive food items returned at the Customer Service Desk to the respective Department Merchant for appropriate disposal.</li> </ul>
Infant Formula	• Returned infant formula cannot be restocked.
200% Guarantee	<ul style="list-style-type: none"> <li>• The "200% Guarantee" program has been eliminated from the company. As of April 11, 2006th, we will no longer refund 200% of the purchase price on any item.</li> <li>• The system no longer automatically prompts for a "200% Guarantee" refund on any return items.</li> <li>• All 200% signing/references have been removed from all stores. Any "200% Guarantee" signing/references found should be destroyed immediately.</li> <li>• All perishable or temperature sensitive food items should be returned to the appropriate Department Merchant for appropriate disposal.</li> <li>• Customers cannot receive a cash refund for items purchased with Food Stamps or WIC.</li> <li>- See Return Policy for WIC and Food Stamp items.</li> <li>• In questionable situations, the Store Manager has the authority to determine the amount of refund or exchange or to deny the refund.</li> </ul>
Fuel-Operated Power Equipment	<ul style="list-style-type: none"> <li>• If Customer returns power equipment, and it still has fuel in it, an Associate must ensure fuel is removed in accordance with all applicable state and local disposal guidelines before the return is processed.</li> <li>- TLE is not responsible for disposal of fuel.</li> <li>• Failure to thoroughly drain gasoline from power equipment may result in injury and can lead to a serious compliance issue.</li> <li>• Refer to the Risk Control Home Page or the Claims Guide for disposal guidelines.</li> </ul>
Automotive Electronics	<ul style="list-style-type: none"> <li>• All returned Automotive electronics should be examined to ensure they include all original accessories and parts including, but not limited to, the following: Owner's Manual, car stereo unit, detachable faceplate (if not affixed to unit), wiring harness, and remote control (if originally included).</li> </ul>

#### Where Returns are Processed

- All merchandise returns are processed at the Customer Service Desk, with the exception of the situations listed below.
- All merchandise is required to be scanned at the register.
- All merchandise should be verified to the signed refund slip by a Customer Service Manager (CSM) or a salaried manager,

RETURN PROCESSING EXCEPTIONS	
<ul style="list-style-type: none"> <li>• Prescription Drugs</li> <li>• Prescription Eyewear</li> <li>• Gold, Silver, Diamond and Gemstone Jewelry</li> <li>• Automotive Batteries</li> <li>• Tires</li> <li>• Postpaid Cell Phones and Satellite TV Certificates</li> </ul>	<p>These returns are exceptions and must be returned to the specific area designated.</p> <p>ALL OTHER RETURNS ARE PROCESSED AT THE CUSTOMER SERVICE DESK.</p>

Exception	Who Processes the Return	Special Instructions
Prescription Drugs	Pharmacist -Authorizes and processes all prescription drug returns.	
Prescription Eye Wear	<ul style="list-style-type: none"> <li>• Vision Center</li> <li>- Vision Center Manager or a salaried manager is required to authorize and process all refunds, exchanges and</li> </ul>	

	repairs for prescription eyewear.	
Gold, Silver, Diamond and Gemstone Jewelry	<ul style="list-style-type: none"> <li>• Jewelry Department</li> <li>- Returns are required to be processed in the Jewelry Department.</li> <li>- All merchandise is required to be verified to a signed refund slip by a Customer Service Manager (CSM) or a salaried manager.</li> <li>- Refunds under \$50 without a receipt, or refunds of any amount with a receipt, are required to be processed by a CSM, salaried manager, Jewelry Department Manager, or an authorized full-time Jewelry Associate.</li> <li>- All refunds over \$50 without a receipt are required to be processed by a CSM or salaried manager.</li> <li>- Stores with CSM Handheld Workstations: A CSM or a salaried manager is required to approve all Jewelry returns.</li> </ul>	<ul style="list-style-type: none"> <li>• Within 90 days with a receipt, the Customer can return, exchange, or request repair on all Jewelry Department items.</li> <li>• After 90 days with a receipt, the store can repair or replace diamond, gemstone, gold, and silver fine jewelry for up to one year from the original date of purchase. Fine jewelry repairs are completed by the Wal-Mart Sizing &amp; Repair Center. Refer to the Jewelry Department Page for warranty and repair instructions, or (<a href="http://wmstores/dept32/dept32.htm">/wmstores/dept32/dept32.htm</a>)</li> <li>• After 90 days with a receipt, the store can offer repair through the manufacturer, if available, for watches and all other jewelry merchandise.</li> </ul> <p>Fine Jewelry Warranty</p> <ul style="list-style-type: none"> <li>• With a receipt, Wal-Mart offers free repair or replacement of fine jewelry for one year from the original date of purchase.</li> <li>• After one year with receipt, the Customer can request to have repair work done for a service charge.</li> <li>• Wal-Mart Fine Jewelry Warranty does not include abuse or loss of merchandise.</li> </ul>
Automotive Batteries	<ul style="list-style-type: none"> <li>• <b>Battery Adjustments</b></li> <li>- Battery <b>adjustment</b> transactions are processed at the TLE Department register, or in stores that do not have a TLE, at the Customer Service Desk.</li> <li>• <b>Battery Refunds</b></li> <li>- All battery <b>refund</b> transactions are required to be processed at the Customer Service Desk.</li> <li>• <b>Automotive Battery Core Charge Refund</b></li> <li>- Battery <b>core</b> refunds may be processed either at the Customer Service Desk or the TLE Department register.</li> </ul>	<p>Battery returns should be tested in the Automotive Department or Tire &amp; Lube Express (TLE), before processing an exchange or refund.</p> <p><b>Bad Batteries:</b></p> <ul style="list-style-type: none"> <li>- Batteries that confirm a test result of "Bad" should be exchanged or refunded.</li> <li>- Batteries have specified pro-rated warranties.</li> <li>- Battery exchange values or refunds are automatically pro-rated through the register, based on the length of time since the initial purchase.</li> </ul> <p><b>Good Batteries:</b></p> <ul style="list-style-type: none"> <li>- Batteries that confirm a test result of "Good" should be returned to the Customer.</li> </ul> <p><b>Note:</b> Some batteries may require additional charging to bring to "full" charge status before returning to the Customer.</p>
Tires	<ul style="list-style-type: none"> <li>• TLE Department Register</li> <li>- Tire adjustment transactions are required to be processed at the TLE Department register.</li> <li>• Customer Service Desk</li> <li>- Tire refund transactions are required to be processed at the Customer Service Desk.</li> </ul>	<ul style="list-style-type: none"> <li>• Tires have specified pro-rated warranties.</li> <li>• Tire exchange values or refunds are determined by a Tire &amp; Lube Express (TLE) Associate and are pro-rated based on the Tire Tread Wear or Mileage Warranty.</li> </ul>
Postpaid Cell Phones and Satellite TV Certificates	<ul style="list-style-type: none"> <li>• Connection Center</li> <li>- A Connection Center Associate is required to process all postpaid cell phone and satellite TV certificate refunds and exchanges in the Connection Center.</li> </ul>	<ul style="list-style-type: none"> <li>• Refer to the Division 45 Connection Home Page for refund guidelines.</li> </ul>

## Warranty Information

### Warranty Repair Program

The Warranty Repair Program offers exceptional service to our Customers while maintaining a good relationship with our suppliers. Select items with electronic and/or mechanical components may be included in this program. Included items are listed by supplier in the Warranty Repair System located at the Customer Service Desk.

- Select items are electronically registered with the supplier at the time of purchase through the SIRAS program.
- When a Customer returns a SIRAS registered item, with or without a receipt, the information regarding his/her purchase is available through the scanning of the UPC number located on the item.
- When a Customer returns an item that is listed on the Warranty Repair System, but is outside the return/exchange period or the Customer does not have a receipt, the Customer Service Desk Associate will refer to the Warranty Repair System for specific Warranty Information and determine whether or not the supplier has provided coverage to repair the item.
- The Customer Service Desk Associate must check the details regarding the shipping of items returned without a receipt or outside of the return/exchange period before informing the Customer the item cannot be shipped for exchange or repair.

#### NOTE:

- The Warranty Repair Program provides Customer Service and Satisfaction through the repair of merchandise purchased by Customers.
- Defective or damaged merchandise taken from store inventory is not sent for repair (i.e. merchandise that is damaged in shipment, used as a display or taken back as a refund)

### GE Small Appliance Warranty Program

GE Small Kitchen Appliances (EXCLUDING MICROWAVES and REFRIGERATORS) are an exclusive private label program for Wal-Mart Stores, Inc.

- These small appliances have a TWO YEAR SATISFACTION GUARANTEED WARRANTY that is clearly defined in the USE AND CARE MANUAL of each GE Small Appliance.
- This program guarantees the Customer will receive an exchange or refund on any GE Small Appliance for up to two years from purchase date WITH RECEIPT.
- If a customer does NOT have a receipt, we will offer an EXCHANGE only for similar product of similar value ONLY IF THE RETURNED PRODUCT APPEARS TO BE IN REASONABLE CONDITION and not abused or misused.
- Items covered in the GE program would include the following:

Toasters	Roaster Ovens	Deep Fryers
Blenders	Irons	Toaster Ovens
Coffeemakers	Hair Dryers	Electric Skillets
Mixers	Can Openers	Vacuums
Curling Irons	Hot Plates	Slow Cookers
Indoor Grills	Waffle Irons	Juicers
Griddles	Food Processors	

### Pink Senso Labels (People Greeter Expectations)

- PINK SENSO LABELS (People Greeter Expectations):

The People Greeter will attach a pink senso label to each individual item coming through the entrance doors that is being returned or exchanged. When possible, the People Greeter should direct Customers to the appropriate return location (i.e. Customer Service Desk, Pharmacy, Vision Center, Jewelry, Automotive, etc.).

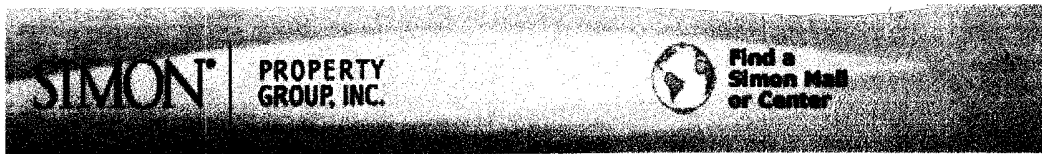
If a Customer brings an item to the Customer Service Desk for refund without a pink senso label, a CSM or a salaried manager should be called for approval. The situation should be handled tactfully. The Customer/item could have been missed by the People Greeter or the Customer could have entered through another entrance (i.e. Garden Center, Tire & Lube Express, etc.). Always treat the Customer with respect, never accuse a Customer of anything, and follow CSM or salaried manager approval directions.



Customer Service Desk Associates should remove the pink senso label from all returned items, attach label to the refund slip associated with the respective refund/exchange, and these should be retained by the store.

- Any returned item that is not sealed in the original manufacturer's packaging should be sent to claims for processing.
- No returned food item of any kind can be restocked and/or resold to Customers.
- Only the following items should be returned to the sales floor:
  - Merchandise returned in unopened original manufacturer's packaging.
  - Merchandise that is not damaged or defective.
  - Merchandise in mint condition.

# EXHIBIT “B”



Email Address   
 Password   
☒ Sign In ☐ Register  
[Forgot your](#)

[Find a Store](#) | [Promotions](#) | [Simon Giftcards](#) | [About Simon](#) | [Leasing](#) | [Development](#) | [Property Management](#) | [Marketing](#) | [Careers](#)

■ Simon Gift Home

▶ About Simon Gifts

**Buy Now!**

▶ Simon Giftcard

▶ Simon Giftaccount

Send Thank You eCard

My Accounts

Check Balance

Order History

▼ Terms & Conditions

Simon Giftcard

Simon Giftaccount

▶ Fee Schedule



**U.S. Bank Simon Giftcard® Cardholder Agreement**  
 (Effective 8/01/07)

To view the Simon Giftaccount<sup>SM</sup> Terms & Conditions, Click Here

**Giftcard:** xxxxxxxxxxx1325 [View T&C for another Simon Giftcard or a Simon Giftaccount](#)

■ You can check your balance at:

- 1-866-300-9401
- [www.simongiftcard.com](http://www.simongiftcard.com)
- Simon Guest Services

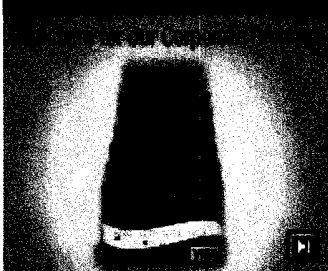
■ The value of your Giftcard may be reduced by the following U.S. Bank® fees:

- \$2.50 monthly administrative fee, from the thirteenth month until Giftcard expires.
- \$5.00 fee to replace a lost or stolen Giftcard.
- \$15.00 fee to replace an expired Giftcard.

■ There is a \$5.95 handling fee paid by the purchaser when the Giftcard is purchased.

■ This Giftcard is a prepaid card issued by U.S. Bank National Association.

**NEED TO ORDER IN BULK?**



This Cardholder Agreement ("Agreement") governs your U.S. Bank Simon Giftcard ("Giftcard"). By signing the back of the Giftcard, using the Giftcard, or allowing someone else to use the Giftcard, you accept this Agreement and you are responsible for all transactions. In this Agreement, the terms "we," "us," and "our" mean U.S. Bank and "you" and "your" mean the person who has received the Giftcard or is authorized to use it. The laws of the State of Ohio apply to this Agreement. We may change the terms of this Agreement at any time, with or without notice, in accordance with applicable law. Current terms and conditions are available at Simon Guest Services or [www.simongiftcard.com](http://www.simongiftcard.com).

**Using This Giftcard**

The Giftcard may be used when making purchases from any merchant that accepts Visa. The dollar amount of the purchase will be deducted from the value of the Giftcard. The Giftcard cannot be refunded or exchanged for cash, cash equivalents (such as money orders or travel checks), or credit. No additional value may be added to the Giftcard. The Giftcard may not be used for illegal transactions or for Internet gambling transactions. Some merchants (such as restaurants and salons) will obtain an authorization on the Giftcard for up to 20% more than the total purchase to cover any gratuity that you may add to the purchase. Hotels, car rental agencies, and gas stations may also secure an authorization on the Giftcard in excess of the estimated purchase amount to ensure that adequate funds are available to cover the final purchase. The entire amount of the authorization will remain unavailable until the actual transaction posts (typically within three business days), although only the amount you actually authorize will be deducted from the value of the Giftcard.

**U.S. Bank Fees**

There are no fees when using the Giftcard to purchase goods and services from merchants in the United States. The U.S. Bank fees disclosed with this Agreement and the foreign transaction fees described below will be deducted from the value of the Giftcard, except where provided otherwise by applicable law.

**Foreign Transaction Conversion and Fee**

Transactions made in a foreign currency will be converted into U.S. dollars under the approval of Visa USA. As of August 1, 2006, Visa rules provide that the amount of your transaction will be the amount of the foreign currency times: (a) a rate selected by Visa from the rates available in wholesale currency markets for the applicable central processing date, which

vary from the rate Visa itself receives; or (b) the government-mandated rate in effect for applicable central processing date. We may charge a fee equal to 3% of the transaction for transactions with merchants located outside of the U.S., even if currency is not converted.

#### **Overspending**

Transactions that exceed the remaining Giftcard balance will be declined.

#### **Customer Service/Balance Inquiries**

To check the available balance on the Giftcard, review recent transactions, or obtain any customer service at no charge, you may visit Simon Guest Services or [www.simongiftcard.com](http://www.simongiftcard.com) call 1-866-300-9401 anytime, 24 hours a day, seven days a week.

#### **Returned or Exchanged Merchandise**

You agree that **U.S. Bank National Association**, Visa, and Simon Property Group and its affiliates, employees, and agents are **>not** responsible for the services or merchandise purchased with the Giftcard or for any damages resulting directly or indirectly from the use of the Giftcard. If you have a problem with merchandise or services purchased with a Giftcard, you should contact the merchant from whom the goods or services were purchased. Exchange or return of merchandise purchased with the Giftcard will be governed by the procedures and policies of each merchant and applicable law. At the time of any exchange or return, you should present both the merchant receipt and the Giftcard. If you receive a credit, it may take up to seven business days for the credit to be reflected in the available balance on the Giftcard.

#### **Preauthorized/Recurring Payments**

You agree not to make preauthorized or recurring regular payments through the use of the Giftcard.

#### **Liability for Failure to Complete Transactions**

U.S. Bank may be liable for failure to complete transactions. However, we will not be liable in certain circumstances, such as:

- If through no fault of ours, you do not have enough money on the Giftcard to cover the transaction; or
- If the transaction would exceed your available balance; or
- If the terminal or system was not working properly; or
- If circumstances beyond our control (such as flood or fire) prevent the transaction despite the reasonable precautions that we have taken; or
- If there are other exceptions stated in these terms and conditions or provided by applicable law.

#### **Liability and Error Resolution Procedures**

If there is a problem or dispute with a purchase of goods or services, you must address it with the merchant involved. Refunds and returns are subject to the merchant's policies and applicable laws. In case of any other errors on your Gift Card account call Gift Card Services immediately at 1-866-300-9401. You must call within 30 days of the date of the transaction. If you need more information about error resolution procedures please call Gift Card Services at 1-866-300-9401.

#### **Liability for a Lost/Stolen Giftcard or Unauthorized Transactions**

Call Giftcard Services at 1-866-300-9401 immediately, 24 hours a day, seven days a week, if your Giftcard has been lost, stolen, or subject to unauthorized use. You will be required to provide your name, the Giftcard number, original value, and transaction history. You are liable for all transactions that occur on your Giftcard before you report it lost or stolen. You may also be liable for transactions that occur on your Giftcard after you report it lost or stolen unless: (a) you signed the signature panel on the back of the Giftcard in permanent ink; (b) you promptly report to us all facts surrounding a loss or theft of your Giftcard; and (c) you fully cooperate with our investigation to the best of your ability. If you comply with these procedures and we determine that there is a balance on your lost or stolen Giftcard, you may request a replacement Giftcard. We will charge a \$5.00 fee to replace a lost or stolen Giftcard, which will be deducted from the balance on the Giftcard. A replacement Giftcard may take up to 30 days to process.

#### **Disclosure of Information to Third Parties**

We and Simon Property Group may disclose information to third parties about your Giftcard transactions you make: (a) to complete transactions; (b) to verify the existence or condition of the Giftcard; (c) to utilize services of third parties who assist us in providing the Giftcard and its services; (d) to comply with government agency rules or court orders; (e) to pursue legal proceedings against you in connection with your Giftcard; (f) to protect against potential fraud or other crimes; or (g) as otherwise authorized by you or permitted by applicable law. We and Simon Property Group may share information about you and our transactions and experiences with each other and with third parties.

**Expiration**

The Giftcard plastic is valid through the expiration date shown on the front of the Giftcard. The value on the Giftcard reaches \$0, except where otherwise provided by applicable law, you may use the Giftcard after the expiration date. Before the expiration date, you can apply any balance toward the purchase of a new Giftcard (handling fee will apply). After the expiration date, you can call 1-866-300-9401 to request that a new Giftcard be issued. The new Giftcard will have an expiration date at least 20 months from the date of reissue and a value equal to the remaining balance of the expired Giftcard minus a \$15.00 fee to replace it. If you do not request a new Giftcard, any unused balance on the expired Giftcard will be handled in accordance with applicable escheatment law.

**No Resale**

You may give the Giftcard to another person to use but you may not sell the Giftcard. If you attempt to sell the Giftcard, we may cancel the Giftcard and all of the rights under the Giftcard, including the right to redeem its value.

**Revocation**

U.S. Bank may revoke the Giftcard at any time without cause or notice. You must surrender the revoked Giftcard and may not use it to make purchases. Unless the Giftcard was cancelled as a result of a breach of this Agreement, any balance remaining on a revoked Giftcard will be paid to you by check if you provide your name and address and return the Giftcard to U.S. Banc Center, PO Box 6318, Fargo, ND 58125-6318.

**Internet, Mail, and Phone-Order Purchases**

Purchases usually may not be made on the Internet or by mail or telephone unless we have your information regarding the Giftcard owner on file. If you wish to make Internet, mail, or phone purchases, go to [www.simongiftcard.com](http://www.simongiftcard.com) first and enter your name, address, telephone number, and e-mail address.

**IMPORTANT INFORMATION FOR GIFTCARD RECIPIENT—DO NOT DISCARD****Congratulations!**

You've received a U.S. Bank® Simon Giftcard®, a prepaid card issued by U.S. Bank National Association that lets you shop everywhere Visa® debit cards are accepted. The value of your Giftcard is limited to the amount of money that was stored on it at the time of purchase. When you use your Giftcard, the purchase amount is deducted from its balance. You can have your Giftcard, but before you put it in your wallet, sign the back of it, write down your card number in a safe place, and please take a few moments to review the following important information.

**What is it worth?**

Always know the exact dollar amount available on your Giftcard. Most merchants do not have access to this information and cannot determine the balance on your Giftcard. **your balance at [www.simongiftcard.com](http://www.simongiftcard.com) or by calling 1-866-300-9401.**

**What happens when the balance is not enough?**

If you try to spend more than the amount available on your Giftcard, the transaction will be declined. To purchase an item that costs more than the available amount on your Giftcard, you may need to combine the value of your Giftcard with another form of payment. Follow these steps for a smooth transaction:

- Inform cashier in advance you will be using two forms of payment.
- Pay cashier the difference first with the alternate form of payment.
- Present the Giftcard and state specific amount to be used.

**Hold on to your Giftcard.**

Be sure to keep your Giftcard (even after the balance has been depleted) in case you need to return any items purchased with the Giftcard.

**Know your Giftcard number.**

Keep a record of your Giftcard number in a safe place, separate from your Giftcard.

**If you experience problems when shopping with your Giftcard, please review the hints!**

If a merchant declines your Giftcard, immediately verify the balance on your Giftcard by calling 1-866-300-9401 or by visiting [www.simongiftcard.com](http://www.simongiftcard.com). Most merchants cannot check your balance.

- If the purchase is greater than the value on the Giftcard, follow the procedures on above for combining forms of payment.
- If your Giftcard was declined and there are sufficient funds to cover the purchase, Giftcard Services at 1-866-300-9401.

**Your Giftcard is good anywhere Visa debit cards are accepted, but some places special treatment.**

The Giftcard can be used anywhere Visa debit cards are accepted. You may find these tips when using the Giftcard at:

- **Restaurants.** It's customary for restaurants and some other service-oriented places to factor in an additional 20% to cover any tip you may leave on the Giftcard. If you add the additional 20%, exceeds the amount on the Giftcard, the transaction may be declined. You should ensure that your Giftcard has an available balance that is greater than your total bill.
- **Gas stations.** Always pay at the counter. Do not pay at the pump. Always pay in the operator how much you want taken from your Giftcard. When you pay at the pump, the amount is automatically deducted from your Giftcard until the actual transaction posts (typically within three business days). If you have less than \$50 on your Giftcard, your transaction may be declined at the pump.
- **Hotels or car rental agencies.** Companies specializing in travel services may factor in an additional amount to cover incidental charges that you might incur. You should ensure that your Giftcard has an available balance that is 20% greater than your total bill.
- **Internet, mail, and phone-order purchases.** Internet, mail, and phone-order purchases may require that U.S. Bank have personal information of the Giftcard owner on file. If you wish to make Internet, mail, or phone-order purchases, you will need to go to [www.simongiftcard.com](http://www.simongiftcard.com) and enter your name, address, telephone number, and e-mail address prior to performing an Internet, mail, or phone-order transaction.

**Does your Giftcard ever expire?**

Yes! Your Giftcard plastic expires when the remaining value is \$0 or on the expiration date on the front of the Giftcard, whichever comes first. The minimum expiration date is 20 (twenty) months from the date of purchase. If you have a balance remaining after the expiration date, call 1-866-300-9401 to request a new Giftcard. The new Giftcard will have the value equal to the remaining balance of the expired Giftcard minus a \$15.00 fee to replace it. Or apply the remaining balance before the expiration date toward the purchase of a new Giftcard (the handling fee for a new Giftcard will apply). See Cardholder Agreement full details.

**Help! What if your Giftcard is lost or stolen?**

Immediately report lost or stolen Giftcards by calling 1-866-300-9401. You will need the card number to cancel the Giftcard and have a replacement Giftcard issued. Always keep a record of your Giftcard number in a safe place, separate from the Giftcard.

top of page

# EXHIBIT “C”

**ACES WIRED, INC., AS THE  
SUCCESSOR IN INTEREST TO  
ACES WIRED, LLC,  
Plaintiff,**

**vs.**

**GAMETRONICS, INC.,  
Defendant.**

**ARBITRATION PENDING**

**IN AUSTIN, TEXAS**

**BEFORE CRAIG T. ENOCH**

**ARBITRATION OPINION**

**Delivered September 6, 2007**

**By Craig T. Enoch**

**Introduction**

Aces Wired, LLC and Gametronics, Inc. signed a Game and Back Office Development Letter of Intent on July 20, 2006 ("Letter of Intent"). Under the Letter of Intent, Aces Wired and Gametronics entered into a business relationship by which Gametronics would provide video reel, video poker, video keno and video bingo games for use by Aces Wired as part of its Amusement with Prizes gaming platform.

By entering into the Letter of Intent, both Aces Wired and Gametronics sought to promote a gaming system that would fully comply with the laws of the State of Texas. The Letter of Intent describes the Amusement with Prizes gaming platform as a "system that is considered a legal gaming enterprise in Texas by allowing the awarding of prizes of a value being the lesser of five dollars or ten times the amount paid by a player for each play." Paragraph 4 of the Letter of Intent provides "[t]he parties intend that the Games shall be used in the Amusement With Prize market in Texas and shall conform to those rules and regulations." Paragraph 14 provides the Letter of Intent may be terminated by Gametronics if "the gaming platform or games is found to be in contravention in the jurisdiction of operation." In the final

EXHIBIT "C"



paragraph of the Letter of Intent, the parties agreed to submit any dispute regarding the terms of the Letter or the obligations of the parties to binding arbitration before a single arbitrator chosen by the parties. The parties selected the undersigned as arbitrator.

**Factual Background**

Aces Wired has developed a gaming platform known as "the ace advantage system" (the "Aces Wired System"). Under the Aces Wired System, a customer goes to an Aces Wired location and signs up for an account by providing a valid government-issued photo id card, their social security number, address, and a personal identification number ("PIN"). When a customer signs up for an account, he must review and complete a Cardholder Agreement and Disclosure form. By signing the Cardholder Agreement and Disclosure form, the customer agrees to its terms. The Cardholder Agreement and Disclosure form provides:

A card is available to anyone 21 years of age with a valid ID. Your membership in the Program and your Prize Points are not transferable. If you voluntarily give your Card and/or PIN to another person, it will be a violation of these Rules and will result in the cancellation of your Program membership and the forfeiture of all your Prize Points.

....

A valid ID must accompany your Card for all Prize Point redemptions. You agree to not receive monetary refunds or rebates on Merchandise redeemed through use of your Prize Points.

You cannot use Points on your Card to: obtain cash, money orders, cashiers or travelers checks, postage stamps, or specie, including gold or silver coins; or pay a debt or make a payment to any person. If you make any these [sic] transactions, or attempt any of these transactions, your Program membership will be cancelled and you will forfeit all of your Prize Points. You assume all responsibility and liability for all losses, costs and expenses incurred as a result of such transactions.

After the customer has signed the Cardholder Agreement and Disclosure form and an

Aces Wired employee has verified the customer's information, a Cash and Prize Point Account for the customer is opened and the customer is issued an Ace Advantage card. The card bears an Ace Advantage logo and is similar in design to a credit card in that it is approximately the same size, is imprinted with the customer's name, bears a magnetic strip on the back of the card, and contains a blank signature space for signature verification.

Once a card has been issued, the customer can load cash onto the account that is accessed by use of the card. The customer then uses the stored cash to play Aces Wired's game machines. Through game play, the customer has an opportunity to win Prize Points. Accumulated Prize Points are stored on the account and accessed by the card.

Although both cash and Prize Points are stored on the account, only cash loaded by the customer onto the account and accessed by the card may be withdrawn -- through an ATM or the "cash back" option for a debit transaction. Prize Points, on the other hand, may not be converted to cash -- only redeemed for non-cash merchandise prizes, toys, or novelties at participating merchants.

To redeem Prize Points, a customer goes to a participating merchant and selects a merchandise prize. The customer then tenders the Ace Card through the merchant's point of sale to request redemption of Prize Points. The customer must also provide personal identification and a signature or digital signature. The redemption request is transmitted electronically through the vendor's financial network to the Aces Wired Central System. If the customer has enough Prize Points to obtain the merchandise prize, the transaction is approved by Aces Wired and the customer is able to secure the prize. To complete the transaction, Aces Wired sends the merchant money from an Aces Wired account to pay for the merchandise. If the customer attempts to receive cash back during the transaction, the transaction will be denied.

If Aces Wired determines that a merchant's point of sale transaction is incompatible with the Aces Wired's financial system such that Aces Wired is unable to prevent the customer from obtaining cash back at the point of sale, Aces Wired either does not engage the merchant for Prize Point redemption or discontinues the use of that merchant for Prize Point redemption.

#### Issue Presented

"[W]hether the operation of Aces Wired's amusement machines violate Texas gambling laws -- specifically, the limitation in the 'fuzzy animal' law that machines may reward players only with 'noncash merchandise prizes, toys or novelties', or a representation of value redeemable therefore." See Plaintiffs Brief in Support of Declaratory Relief, p. 4.

#### Analysis

Historically, possession or operation of all gambling devices was illegal in Texas. Today, gambling devices are generally prohibited under Chapter 47 of the Penal Code (the "Act") -- which prohibits gambling, including betting money or other things of value on games played with cards, dice, balls, or other gambling devices. TEX. PEN. CODE § 47.02. The Penal Code defines a "gambling device" as "any electronic, electromechanical, or mechanical contrivance . . . that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance." TEX. PEN. CODE § 47.01(4).

In 1993, the legislature amended the definition of "gambling device." TEX. PENAL CODE § 47.01(4)(B). As amended, the definition of "gambling device" excludes:

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, whichever is less*

TEX. PENAL CODE § 47.01(4)(B) (emphasis added). This exclusion is often referred to as the "fuzzy animal" exception. *Fifty Six (56) Gambling Devices v. State*, No. 07-03-0132CV, 2004 WL 635429, at \*2 (Tex. App.—Amarillo 2004, no pet); Tex. Att'y Gen. Op. No. GA-0527 (2007) at 2. To meet this exception, the Prize Points awarded by the Amusement with Prizes gaming platform must award:

- (1) exclusively noncash merchandise prizes, toys or novelties; or
- (2) a representation of value redeemable for those items; and
- (3) 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.

To determine the legality of the Aces Wired System, it appears two primary questions must be answered. One is whether a Prize Point awarded to a customer is a "representation of value" redeemable exclusively for noncash merchandise prizes, toys or novelties. The second is whether the Prize Points may be accumulated for the purposes of noncash merchandise prize redemption.

#### *Representation of Value*

In September 2006, the Bexar County District Attorney requested an Attorney General opinion on whether "an amusement machine [that] records a player's winnings onto a stored-value debit card is excluded from the definition of gambling device . . . ." RQ-0529-GA. See Exhibit A, RQ-0529-GA. In response, Texas Attorney General issued Opinion No. GA-0527. See Exhibit B, Op. Tex. Att'y Gen. No. GA-0527 (2007). The Attorney General answered the question "no," but the Opinion is not persuasive, and, in all likelihood, would not be followed by a Texas Court.

The stored-value card, about which the request was made, was essentially a contract between the gaming establishment and the retailer authorizing the retailer to transfer possession of personal property to the gaming establishment's player. In exchange, the gaming establishment approved the transaction and authorized the retailer to draw funds from the gaming establishment's account -- which then reconciled its own account with its player. Absent that contract, the player had no authority to expend any winnings. An easier way to describe the card's function is that it simply permitted the gaming establishment to contract with another source for the noncash merchandise so that the gaming establishment need not maintain an inventory of prizes on its premises. This arrangement lowered operational costs for the gaming establishment by reducing inventory costs. In addition, the arrangement permitted the gaming establishment to offer a greater variety of prizes. Though the merchandise was kept by a merchant and the player dealt with the merchant to obtain the prize, clearly the card, as described by the request, did not function like cash. In reaching his opinion to the contrary, the Attorney General specifically acknowledges that he ignored these facts.

The more serious flaw in the Attorney General's opinion, however, is that he provides no thoughtful analysis of the statutory exclusion's specific permission for amusement games to award a "representation of value." Rather, the sum and substance of the Attorney General's opinion is that stored-value cards are equivalent to cash (and, therefore, the amusement game is prohibited) because "the stored-value cards . . . are used as a medium of exchange . . . that can be exchanged for merchandise." Yet the Act specifically authorizes an award of "a representation of value redeemable for [noncash merchandise]". Consequently, Opinion No. GA-0527 is not helpful.

Although there are no reported Texas appellate court cases interpreting the phrase

"representation of value," a primary rule of statutory construction is that words and phrases will be read in context and construed according to the rules of grammar and common usage. TEX. GOV. CODE § 311.011(a). The word "representation" in common usage means "the act or action of representing." Webster's Ninth New Collegiate Dictionary, p. 1000, 1988. "Represent" means to "to take the place of in some respect" or "to serve as a specimen, example, or instance of." *Id.* at p. 1000. "Value" means "a fair return or equivalent in goods, services, or money for something exchanged" or "the monetary worth of something." *Id.* at 1303. Thus, based on common usage, a representation of value is something that takes the place of goods, services, or money in some respect.

In this case, Prize Points are awarded and stored on an Aces Wired account and accessed by use of a card issued to a customer. The Prize Points have no cash value, but represent one dollar (for each Prize Point) strictly for purposes of prize redemption. And when a customer redeems Prize Points at a participating retailer, the retailer transfers possession of the customer's selected noncash merchandise upon Aces Wired's approval of the transaction, including Aces Wired's agreement to pay the retailer for the noncash merchandise selected by the customer. Accordingly, a "Prize Point" is no more than a representation of value as contemplated by the Act.

Related to the question of representation of value is that the Prize Points may only be redeemable for noncash merchandise prizes, toys or novelties. The word "noncash" simply means "not cash." *Hardy v. State*, 102 S.W.3d 123, 131 (Tex. 2003). "Cash" is defined as "ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)" or "money or its equivalent paid immediately or promptly after purchasing." *Id.* "Merchandise" is a commodity or good bought and sold in business. Webster's

Ninth New Collegiate Dictionary at p. 742. "Prize" means "something offered . . . in contests of chance." *Id.* at p. 936. Therefore, a noncash merchandise prize is any commodity or good that is not ready money awarded as a prize.

The lone Texas Supreme Court case addressing section 47.01(4) is *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003). In *Hardy*, the Court analyzed whether an eight-liner that dispensed tickets *redeemable for gift certificates* satisfied the statutory exclusion. The Court framed the principal issue as a question of "whether a gift certificate . . . is a 'noncash merchandise prize.' From the record, it was apparent the gift certificates were owned by the customer, were freely transferable, and could be readily exchanged for merchandise redemption. As the Court concluded, the gift certificates could "be used in precisely the same manner as five-dollar bills." Consequently, the gift certificates for which the tickets were redeemable were not noncash merchandise. Of note, in footnote 6, the Court made a point to say it was not addressing "whether an eight-liner that dispenses gift certificates as representations of value redeemable for noncash merchandise prizes, toys, or novelties, and that otherwise complies with section 47.01(4)(B), may satisfy the statutory exclusion."

Here, the Prize Points awarded by the Aces Wired System are similar to the hypothetical fact pattern the Court distinguished in footnote 6 of *Hardy* because the Prize Points are issued directly by the gaming devices. In short, the Prize Point is the "ticket" -- the representation of value -- not the prize itself. And because Prize Points are only redeemable for commodities or goods that do not constitute ready money, the Aces Wired System conforms to the requirement that the representation of value only be redeemable for noncash merchandise prizes, toys, or novelties.

### *The Accumulation Problem*

The more difficult question is the third element of the Act's limitation on its exclusion -- "a wholesale value available from a single play of the game." Specifically, the Act's exclusion is limited to:

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.

TEX. PENAL CODE § 47.01(4)(B)(emphasis added).

The placement of the comma after "items," but the use of the word "that" presents an interpretive problem. Because "that" is a demonstrative term used generally to identify and limit the immediately preceding noun, conceivably the Texas Legislature intended "items" (that is, the "noncash merchandise prizes, toys, or novelties") to have an individual wholesale value of the lesser of ten times the amount charged to play a single game or \$5. See Bryan A. Garner, *A DICTIONARY OF MODERN USAGE*, pp. 647-48, (Oxford University Press 1998) (explaining that clauses beginning with "that" typically are *restrictive* in that they provide essential information about a preceding noun). On the other hand, by separating "that" from "items" with the comma, the remaining phrase (that would more correctly begin with "which") appears as well descriptive. That is, the phrase equally appears to describe the entire subject that precedes the comma. Consequently, it is not unreasonable to conclude not only the noncash merchandise prizes, toys, novelties, but also the representation of value, is permitted to have a wholesale value available from a single play of up to \$5, depending on the cost of the play. As to which interpretation controls, there are no reported Texas appellate court opinions. And how the Legislature would answer the interpretation question is not at all clear.

What is the accumulation problem? As a simple matter, it appears by the text of the Act,



that so long as you cannot receive a prize the wholesale value for which exceeds the lesser of ten times the cost for single play of the game or \$5, you can play the game any number of times and acquire any number of prizes. Various states have dealt with this problem differently. For instance, Alabama restricts the wholesale value of the prize awarded to \$5, but acknowledges the player may accumulate tickets redeemable for the merchandise as long as the amount of the ticket earned on a single play does not exceed \$5. ALA. CODE § 13A-12-76. Arizona, on the other hand, imposes two limits, a \$4 limit on the merchandise, but a \$35 limit on the accumulation of coupons, regardless of the number of plays. ARIZ. REV. STAT. § 13-3301. Indiana clearly restricts the award to merchandise with a \$25 wholesale value. IND. CODE § 35-45-5-1. Michigan, having a low threshold on wholesale value for the merchandise awarded, permits accumulating the representations of value up to \$250. MICH. COMP. LAWS ANN. § 750.303. Among the states there are a number of variations of this concept. See Exhibit C - Summary of Penal Statutes from Various States (submitted as an Exhibit to Aces Wired's letter brief, dated July 27, 2007).

In Texas, however, the statutory exclusion is less clear as to whether a player may accumulate Prize Points and redeem them for a single merchandise prize that itself exceeds a wholesale value of \$5. As Aces Wired argues, assuming a Prize Point earned from a single play of the game equals an exchange value of \$1, if the player wishes to acquire an item from a participating retailer that has a wholesale value of \$30, the player will have to redeem 30 separate Prize Points. Thus, though the item itself exceeds the \$5 limit, no Prize Point exchanged will have any value exceeding the ten times price of a single play or \$5 limit.

Another quite plausible and perhaps reasonable interpretation of the statute -- the idea behind which is to keep the value of prizes so low that playing the game remains the object of

the play rather than any hoped for financial payout -- is that all anyone can hope to win is a "fuzzy animal" or similar prize of nominal resale value. And while one can play the game a number of times, the most that can be hoped for is a number of "fuzzy animals," rather than an accumulation of any real value.

But, it must be remembered, the statute under review is a penal statute. And, historically, courts have strictly construed penal statutes. See *Brown v. De La Cruz*, 156 S.W.3d 560, 564 (Tex. 2004). Further, a court may declare a statute void for vagueness if the statute does not "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Briggs v. Texas*, 740 S.W.2d 803, 805 (Tex. Crim. App. 1987) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972)). Given that the question here is what interpretation to give to the statute, the interpretive rule should be if the statute is susceptible to an interpretation that is reasonable and that favors the legality of a citizen's conduct then that is an interpretation that must be accepted. Because the statute does not prohibit representations of value from being accumulated, and because the Aces Wired System prohibits any one representation of value from exceeding the lesser of ten times a single play or \$5, the system complies with Texas law.

**Conclusion**

In sum, the Prize Points awarded by the Aces Wired System comply with section 47.01(4)(B) of the Texas Penal Code in that the Prize Points awarded constitute a representation of value redeemable for noncash merchandise prizes, toys, or novelties, and no award of Prize Points exceed the wholesale value available from a single play of the game . . . of more than 10 times [one] . . . play . . . or \$5, whichever is less. Consequently, and to this extent, Aces Wired amusement machines using the Aces Wired System comply with Texas gambling laws.

  
Craig T. Enoch

**Date: September 6, 2007**

## Exhibit A



**Susan D. Reed**  
Criminal District Attorney  
Bexar County, Texas

**RECEIVED**

SEP 11 2006

**OPINION COMMITTEE**

FILE # ML-44986  
I.D. # 44986

September 5, 2006

The Honorable Greg Abbott  
Office of the Attorney General  
Post Office Box 12548  
Austin, Texas 78711-2548

**RQ-0529-GA**

Re: Opinion request regarding an amusement machine which records a player's winnings onto a stored-value debit card.

Dear Attorney General Abbott:

Pursuant to Texas Government Code § 402.043, I respectfully request your opinion as to whether an amusement machine which records a player's winnings onto a stored-value debit card is excluded from the definition of gambling device pursuant to Texas Penal Code § 47.01(4)(B).

The amusement machine in question operates like a traditional eight-liner machine. The machine, however, requires a player to create an electronic account with the machine operator. The player's winnings are recorded in the account and the player is given a stored-value card representing the accumulated winnings. The player can redeem his winnings for merchandise at various stores once the merchant verifies, through the machine operator, that sufficient winnings are in the player's electronic account. If there are sufficient winnings in the player's account, the game operator purchases the merchandise and allows the merchant to give the merchandise to the player. The stored-value cards are not transferable. The player is required to utilize a PIN number when redeeming the winnings. Furthermore, the player cannot redeem the card for cash, nor get cash back from a transaction.

A person commits a gambling offense pursuant to Texas Penal Code § 47.02 if he plays and bets for money or other thing of value at any game played with cards, dice, balls, or other gambling device. A gambling device means any electronic, electromechanical, or mechanical contrivance that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. Texas Penal Code § 47.01 (4). Excluded from this definition of gambling device is a contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with non-cash merchandise prizes, toys, or novelties, or a representative of value redeemable for those items, that have a wholesale value available from a single play of the game.

Bexar County Justice Center • 300 Dolorosa, Fifth Floor • San Antonio, Texas 78205-3030  
(210) 335-2311  
For Victim Assistance call (210) 335-2105

**EXHIBIT A**

Letter to The Honorable Greg Abbott

September 5, 2006


Page 2

or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less. Texas Penal Code § 47.01 (4) (B).

The Texas Supreme Court has ruled that a gift certificate is not a non-cash prize and thus an amusement machine that rewards a player with such an item is included in the definition of gambling device. In light of the difference between a stored-value debit card and a gift certificate, is an amusement machine that issues a stored-value debit card excluded from the definition of gambling device?

Thank you for considering this request. Your opinion in this matter will assist me in carrying out my duties.

Very truly yours,



Stuart D. Reed

SDR/mgs

Enclosure(s)

### Brief

**Issue:** Is an amusement machine that records winnings onto a stored-value card excluded from the definition of gambling device?

**Facts:** The amusement machine in question operates like a traditional eight-liner machine. The machine, however, requires a player to create an electronic account with the machine operator. The player's winnings are recorded in the account and the player is given a stored-value card representing the accumulated winnings. The player can redeem his winnings for merchandise at various stores once the merchant verifies, through the machine operator, that sufficient winnings are in the player's electronic account. If there are sufficient winnings in the player's account, the game operator purchases the merchandise and allows the merchant to give the merchandise to the player. The stored-value cards are not transferable. The player is required to utilize a PIN number when redeeming the winnings. Furthermore, the player cannot get cash back.

**Law:** A person commits a gambling offense pursuant to Texas Penal Code § 47.02 if he plays and bets for money or other thing of value at any game played with cards, dice, balls, or other gambling device. A gambling device means any electronic, electromechanical, or mechanical contrivance that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. Texas Penal Code § 47.01 (4). Excluded from this definition of gambling device is a 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 representative 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. Texas Penal Code § 47.01 (4)(B).

The Texas Supreme Court ruled in *Hardy v. Texas*, 102 S.W.3d 123 (Tex. 2003), that machines that awarded tickets that could be exchanged either for gift certificates or cash to play other machines were gambling devices because the machines were not dispensing noncash winnings. The Court found that "noncash" simply means not cash. Cash is defined either as "ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)" or "money or its equivalent paid immediately or promptly after purchasing." *Id.* at 131. In *Hardy*, the Court found that the gift certificates were used as a medium of exchange at various retail outlets, and were the equivalent of money, legal tender. *Id.*

However, in Attorney General Opinion No. GA-0341 (2005), the Attorney General opined that a charity could offer a prepaid credit card as a prize because it was

not money as defined under the Charitable Raffle Enabling Act. Under this statute, money is defined as "coins, paper currency, or a negotiable instrument that represents and is readily convertible to coins or paper currency." Tex. Occ. Code § 2002.002(1-a). Quoting the Federal Deposit Insurance Corporations General Council's Opinion, the Attorney General stated that "a prepaid, or "stored value," credit card is not a negotiable instrument." A stored-value card is not in writing, not signed by the maker, and does not contain an unconditional promise to pay a sum certain in money and no other promise, order, obligation or power. Since it is not a negotiable instrument, it is not money, and can be given away as a raffle prize.

In light of the difference between a stored-value debit card and a gift certificate, is an amusement machine that issues a stored-value debit card excluded from the definition of gambling device?



## Exhibit B



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 6, 2007

The Honorable Susan D. Reed  
Bexar County Criminal District Attorney  
Bexar County Justice Center  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205-3030

Opinion No. GA-0527

Re: Whether a machine that records a player's  
winnings onto a stored-value debit card is a  
"gambling device" for purposes of section  
47.01(4)(B) of the Penal Code (RQ-0529-GA)

Dear Ms. Reed:

You ask about an amusement machine requiring the player to pay money in order to play.<sup>1</sup> You inform us that the machine "requires a player to create an electronic account with the machine operator." Request Letter, *supra* note 1, at 1. The player can accumulate winnings, which are "recorded in the account[,] and the player is given a stored-value card" in an amount of the accumulated winnings. *Id.* You describe how a player can then use the stored-value card to purchase merchandise. *See id.* Noting that the Texas Supreme Court has determined that a machine rewarding players with a gift certificate to be used for merchandise is a gambling device,<sup>2</sup> you inquire whether "[i]n light of the difference between a stored-value debit card and a gift certificate, ... an amusement machine that issues a stored-value debit card [is] excluded from the definition of gambling device." *Id.* at 2.

"As early as 1861, the Texas Constitution prohibited most types of gambling." *Hardy v. State*, 102 S.W.3d 123, 130 (Tex. 2003) (citing TEX. CONST. of 1861, art. VII, § 17). Pursuant to the constitutional mandate to "pass laws prohibiting lotteries and gift enterprises," the Legislature enacted chapter 47, Texas Penal Code, which makes gambling a criminal offense. TEX. CONST. art. III, § 47(a); *see* TEX. PENAL CODE ANN. §§ 47.01-.10 (Vernon 2003). In Texas, a person commits an offense if the person "plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device." TEX. PENAL CODE ANN. § 47.02(a)(3) (Vernon 2003). It is also a criminal offense for a person to "knowingly own[], manufacture[], transfer[], or possess[] any gambling device" designed for gambling purposes. *Id.* § 47.06(a). A "gambling device" is defined as

---

<sup>1</sup> See Letter and Brief from Honorable Susan D. Reed, Bexar County Criminal District Attorney, to Honorable Greg Abbott, Attorney General of Texas, at 1 (Sept. 5, 2006) (on file with the Opinion Committee, also available at <http://www.oag.state.tx.us>) [hereinafter Request Letter and Brief, respectively].

<sup>2</sup> See *Hardy v. State*, 102 S.W.3d 123, 132 (Tex. 2003).

EXHIBIT B

The Honorable Susan D. Reed - Page 2 (GA-0527)

any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; . . .

*Id.* § 47.01(4) (Vernon 2003). In 1993, the Legislature added an exception to the definition.<sup>3</sup> See Act of May 31, 1993, 73d Leg., R.S., ch. 774, § 1, 1993 Tex. Gen. Laws 3027, 3027. The exception, commonly known as the fuzzy animal exception,<sup>4</sup> provides that a gambling device:

(B) 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, whichever is less.

TEX. PENAL CODE ANN. § 47.01(4)(B) (Vernon 2003). Your specific question focuses on paragraph (B) and whether the amusement machine and its reward as you describe it falls within the exception. See Request Letter, *supra* note 1, at 1.

You state that the machine in question operates like a traditional "eight liner." See *id.* An eight liner is an electronic device, resembling a slot machine, on which a person wins by "matching symbols in one of eight lines—three horizontal, three vertical, and two diagonal." *Hardy*, 102 S.W.3d at 125. Eight liners record points won or credits. See *id.* at 126; *State v. One Super Cherry Master Video 8-Liner Mach.*, 55 S.W.3d 51, 54 (Tex. App.—Austin 2001) (describing operation of

<sup>3</sup>Paragraph (B) was introduced in Senate Bill 522, which amended section 47.01(4) and became effective August 30, 1993. Yet when the new Penal Code became effective on September 1, 1994, it did not contain paragraph (B). Consequently, the Legislature re-enacted the amendment in 1995." *Hardy*, 102 S.W.3d at 131, n.5 (citations omitted); see also Tex. Att'y Gen. Op. No. DM-466 (1998) at 1-2.

<sup>4</sup>See *Fifty Six (36) Gambling Devices v. State*, No. 07-03-0132-CV, 2004 WL 635429, at \*2 (Tex. App.—Amarillo 2004, no pet.) (not reported in S.W.3d) (referring to section 47.01(4)(B) as the fuzzy animal exception).

The Honorable Susan D. Reed - Page 3 (GA-0527)

eight liners), *rev'd*, 102 S.W.3d 132 (Tex. 2003). Upon completion of play, the player or the operator pushes a button on the machine, which cancels the existing credits and issues some form of indicator as to the number of points or credits earned, which in turn equates to money. *See Hardy*, 102 S.W.3d at 126; *One Super Cherry Master Video 8-Liner Mach.*, 55 S.W.3d at 54. With regard to the machine about which you ask, the value of the money accumulated is recorded on a stored-value card, which can be redeemed for merchandise at various stores. *See Request Letter, supra* note 1, at 1.

You correctly note that the Texas Supreme Court ruled that gift certificates are not "noncash merchandise prizes" within the exception and that machines that issue them are gambling devices. *See id.* at 2. In *Hardy v. State*, the Texas Supreme Court considered whether eight-liner machines that issued gift certificates fell within the gambling device exception. *See Hardy*, 102 S.W.3d at 125. The machines in question produced tickets that could be exchanged for gift certificates redeemable for merchandise at Wal-Mart and Sam's Club or for credits to play at another machine. *See id.* at 126. The eight liners in the case did not award prizes, toys, or novelties, and the awarded gift certificates were not redeemable solely for such items, so the question for the court was whether a gift certificate itself was a noncash merchandise prize. *See id.* at 131 (stating that the parties agreed a "gift certificate is not a toy or novelty"). The court defined cash as "ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)" or "money or its equivalent paid immediately or promptly after purchasing" and then defined "noncash" simply as not cash. *See id.* Critical to the court's analysis was the fact that the gift certificates "were used as a medium of exchange at various retail outlets." *Id.* The court observed that the gift certificates were the equivalent of money, noting that the denomination of the certificate coincided with the denomination of paper bills and that they were easily converted to cash. *See id.* at 131-32. The court stated that if the "reward operates in the same manner as legal tender in a retail establishment, it does not qualify as a noncash merchandise prize, toy or novelty item." *Id.* at 132. Finally, the court held that "because the eight liners . . . rewarded the players with 'cash' or its equivalent, the machines do not satisfy the section 47.01(4)(B) exclusion." *Id.*

In *Hardy*, the court's holding rested on the premise that the item rewarded by the machine, a gift certificate, was used as a medium of exchange. Because the gift certificates were a cash equivalent, they were not "noncash" merchandise prizes. *See id.* Similarly, the stored-value cards you describe, despite any restrictions and limitations on ease of use, are used as a medium of exchange. The amount of value stored on the card equates to an amount or value that can be exchanged for merchandise. *See Request Letter, supra* note 1, at 1. In other words, even with a requirement to present identification or a personal identification number, the stored-value card "operates in the same manner as legal tender in a retail establishment." *Hardy*, 102 S.W.3d at 132.<sup>5</sup>

---

<sup>5</sup>You suggest our conclusion in Attorney General Opinion GA-0341 (2005), that a prepaid credit card was not a negotiable instrument under the Charitable Raffle Enabling Act, would direct another result here. *See Brief, supra* note 1, at 1-2. The question in Attorney General Opinion GA-0341 was whether a prepaid credit card was "money" as the term "money" was defined by the Charitable Raffle Enabling Act. *See Tex. Att'y Gen. Op. No. GA-0341 (2005)* at 2 (construing section 2002.002, Occupations Code). By contrast, here we examine the Penal Code's term "noncash," as construed by the Texas Supreme Court in the absence of a statutory definition.

The Honorable Susan D. Reed - Page 4 (GA-0527)

Such a stored-value card, like a gift certificate, is a money equivalent and does not constitute a "noncash merchandise prize." Accordingly, a machine that issues a stored-value card enabling the purchase of merchandise does not fall within the exception of section 47.01(4)(B) and is a gambling device.<sup>6</sup>

---


<sup>6</sup>We do not here consider a stored-value card that is redeemable solely for noncash merchandise "prizes, toys, or novelties" in accordance with section 47.01(4)(B). However, in addition to our conclusion that the amusement machine at issue does not satisfy the section 47.01(4)(B) exception, we note that in a prior opinion this office concluded that section 47.01(4)(B) is unconstitutional. See Tex. Att'y Gen. Op. No. DM-466 (1998) at 3. We also note that a bill now pending before the Eightieth Legislature would eliminate such constitutional infirmities by, among other changes, removing the fuzzy animal exception entirely. See Tex. H.B. 330, 80th Leg., R.S. (2007).

The Honorable Susan D. Reed - Page 5 (GA-0527)

**S U M M A R Y**

A stored-value card enabling the purchase of merchandise is a medium of exchange within the definition of cash and therefore does not constitute a "noncash merchandise prize" within the exception of section 47.01(4)(B), Penal Code. Eight-liner machines rewarding play with such a stored-value card are gambling devices.

Very truly yours,

  
GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

ELLEN L. WITT  
Deputy Attorney General for Legal Counsel

NANCY S. FULLER  
Chair, Opinion Committee

Charlotte M. Harper  
Assistant Attorney General, Opinion Committee

## Exhibit C

State	Statute	Permits Award of Prizes for Play of Amusement Machines*	Implicitly or Expressly Prohibits Accumulation	Implicitly or Expressly Allows Accumulation	Limits Value of Accumulation
Alabama	Ala. Code § 13A-12-76	May reward player exclusively with merchandise limited to noncash certificates or novelties, each of which has a wholesale value of not more than \$5	No	May accumulate tokens or tickets redeemable for merchandise, so long as the amount of tokens or tickets earned on a single play does not exceed \$5 per unit	No
Arizona	Art. Rev. Stat. § 13-3301	May reward player with a merchandise prize or coupons redeemable for a merchandise prize with a wholesale fair market value of less than \$4	No	Yes	Regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than \$35
Arkansas	Art. Code Ann. § 26-57-402	May reward player exclusively with merchandise limited to toys, novelties or representations of value which have a wholesale value of not more than 10 times the costs to play the machine one time or \$5, whichever is less	No	Yes	In the event of the accumulation of redeemable representations of value by any player, no toy or novelty having a wholesale value of more than \$12.50 may be awarded

\*Summary does not include states that prohibit amusement with prize redemption machines, do not regulate amusement with prize redemption machines or allow only those amusement machines whose rewards are contained within the machine itself.

1 of 6

EXHIBIT C