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

STATE OF TEXAS,

Plaintiff,

v. **No. EP-99-CA-0320-KC**

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR FRANCISCO PAIZ OR HIS SUCCESSOR, LIEUTENANT GOVERNOR CARLOS HISA OR HIS SUCCESSOR, ACCELERATED MARKETING SOLUTIONS LLC, WINTER SKY, LLC, XCITE AMUSEMENT, INC., and BLUE STONE ENTERTAINMENT LLC,

Defendants.

PUEBLO DEFENDANTS' RESPONSE AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S FIFTH AMENDED MOTION FOR CONTEMPT

Sweepstakes that award cash prizes are not prohibited by law in the State of Texas. Texas courts have confirmed that sweepstakes using machines to reveal sweepstakes prizes in an entertaining fashion are not illegal. These sweepstakes also have been approved by the Texas Alcoholic Beverage Commission, and the Texas Lottery Commission has recognized that these types of sweepstakes are not necessarily illegal. The Federal Courts have confirmed that such sweepstakes are legal in Texas. And the Texas Legislature has never passed legislation making

it illegal to offer sweepstakes with cash prizes using machines to reveal sweepstakes entries in an entertaining fashion.

Ignoring this controlling precedent, Plaintiff argues that sweepstakes offering cash prizes should be illegal. But Plaintiff does not have the constitutional authority to add its desired restrictions as legal requirements under Texas law. Absent its own authority to do so, it instead invites this Court to impose Plaintiff's proffered legal restrictions. But the Court need not, cannot, and should not accept that invitation. It should instead apply settled law and deny Plaintiff's motion for an order to show cause.

THESTANDARD OF PROOF

As Plaintiff concedes, "[a] movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence . . . that the respondent failed to comply with the court's order." ECF No. 423 at 2 (*citing Seven Arts Pictures, Inc., v. Jonesfilm*, 2013 WL 599661, 2 (5th Cir., 2013, unpub.)); *see Travelhost Inc. v. Blanford*, 68 F.3d 958, 961 (5th Cir. 1995). Placing the burden on the movant is consistent with the requirement that the Court's inherent power to punish for contempt "must be exercised with restraint and discretion." *Hornbeck Offshore Servs., L.L.C. v. Salazar* 713 F.3d 787, 792 (5th Cir. 2013) (*citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)). "Rather than stemming from a 'broad reservoir,' they are 'implied power[s,] squeezed from the need to make the court function.'" *Hornbeck*, 713 F.3d at 792. (*citing Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998)) (alterations in original).

Plaintiff's burden is higher than the preponderance of evidence standard. *Travelhost,* 68 F.3d at 961. "[C]lear and convincing evidence" in a civil contempt proceeding as "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as

to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Id.* (citation omitted).

ARGUMENT

I. Plaintiff Has Tried and Failed Four Times to Demonstrate a Violation of the Court's Orders By Clear and Convincing Evidence.

Plaintiff filed the first version of its motion for order to show cause on September 24, 2013. ECF No. 356. Without a ruling on its motion, it filed three additional versions of this same motion, the most recent coming seven days after this Court had set Plaintiff's fourth amended motion for hearing. Plaintiff's course of conduct confirms its failure to use available tools of civil procedure to adequately prepare its case from its inception. And in its multiple pleadings, Plaintiff makes a number of concessions that are fatal to its claims. For example, it candidly concedes that in "the 2001 Injunction Order . . . the Court stated that Defendants [may] engage in (i) 'third-party giveaway contests conducted by national vendors'." ECF No. 423 at 6. As confirmed in materials provided by Defendants to Plaintiff a year and a half ago, that is exactly what the Pueblo is doing, in full compliance with applicable law. *See* Letter from Randolph H. Barnhouse to William T. Deane (November 27, 2012), attached as Exhibit A; BMM Testlabs Certification Test Report (Aug. 30, 2013) and BMM Testlabs Field Inspection Report (Sept. 3, 2013), attached as Exhibit B; *see also Am. Legion, Knebel Post 82 v. Texas Alcoholic Beverage Comm'n*, No. D-1-GN-10-003084, 2011 WL 9198989 (Dist. Ct. Travis Cnty., Oct. 14, 2011), attached as Exhibit C; *G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757 (W.D. Tex. 2007); Letter from Lou Bright, General Counsel for the Texas Alcoholic Beverage Commission, to Dewey Brackin, Attorney (Oct. 1, 2008) (concluding that a video sweepstakes did not violate applicable Texas law), attached as Exhibit D; 39 Tex. Reg. 1320 (Feb. 28, 2014) (Texas Lottery Commission statement that "the legality of devices commonly referred to as 'sweepstakes

machines' is a much debated question in this state, with various government officials and courts coming to different conclusions"), attached as Exhibit E. Instead of identifying or discussing the decisions by Texas administrative agencies, and Texas state and federal courts holding that sweepstakes operations similar to those here are legal, Plaintiff has once again chosen to mischaracterize applicable law and Defendants' operations in its attempt to obtain a show cause order.

a. Plaintiff "Evidence" Violates This Court's Orders.[1]

Congress has denied Plaintiff civil and criminal regulatory jurisdiction over the Pueblo's activities and the Pueblo's property. 25 U.S.C. § 1300g-6(b). In compliance with the Restoration Act, this Court and the Fifth Circuit carefully tailored a limited grant of authority to Plaintiff to inspect the Pueblo's records to ensure compliance with the Order Granting Summary Judgment and Injunction (ECF No. 115), as amended. *See* Order Regarding Defendants' Motion to Modify Previous Order at 2 (ECF No. 324) (Court allowed "representatives of the State limited authority to conduct discovery to insure the Defendants' compliance with the injunction and contempt order."); *Texas v. Ysleta Del Sur Pueblo*, 431 Fed. Appx. 326, 331 (5th Cir. 2011), *cert. den.* 132 S. Ct. 1028 (2012). Yet in flagrant violation of this carefully crafted solution, and in admitted violation of its absence of power to do so, Plaintiff has conducted prohibited criminal undercover operations on the Pueblo's land.

The Ysleta Del Sur Pueblo is no more a public place than is Fort Bliss or Fort Hood Texas. The Pueblo, just like a military installation, is a federal enclave with title held by the Secretary of the Interior for the use and benefit of the Pueblo. 25 U.S.C.A. § 1300g-4(a).

[1] The Pueblo Defendants have filed a Motion in Limine on this issue and briefing is complete. *See* Pueblo Defendants' Motion in Limine Regarding Improperly Gathered Evidence (ECF No. 415). The Pueblo incorporates by reference the legal authority and arguments contained in its briefing on the Motion in Limine.

Plaintiff has again filed a motion founded upon purported "evidence" gathered illegally during unauthorized criminal undercover operations on federal lands where it has no jurisdiction. All of that evidence must be excluded by the Court. *See Burkette v. Waring*, No. 10-10230, 2010 WL 3419463, *4 (E.D. Mich. Aug. 27, 2010) (concluding that "fairness dictates" the exclusion of evidence wrongfully obtained in violation of a protective order).

b. Applicable Law Permits Third-Party Giveaway Contests Conducted by National Vendors.

Third-party giveaway contests conducted by national vendors are permitted under Texas law and this Court's orders. *Eg.* Order Modifying September 27, 2001, Injunction (ECF No. 165) at 13. Ignoring applicable legal determinations entered by Texas administrative agencies and state and federal courts, Plaintiff unilaterally add its own, additional restrictions on sweepstakes, none of which are contained in Texas law. The additional requirements Plaintiff has created include a demand for: (1) a "national" plan for donations; (2) express pre-approval by the Court of specifically named third-party vendors; and (3) lack of any internet connection or "subassembly operation." ECF No. 423 at 12-14. Plaintiff, however, cannot point to any basis in applicable law to support its fabricated requirements.

Plaintiff's proposal that this Court now adopt, for the first time, previously unheard of restrictions confirms its own inability to set forth, specifically, for the Court and the defendants, what applicable law requires. Indeed, as one Texas appellate court has observed, the "multifarious issues of what is and is not permitted by the 1991 amendment to section 47 of article III [concerning illegal lotteries] have yet to be resolved." *Verney v. Abbott*, No. 03-05-00064-CV, 2006 WL 2082085, *2 (Tex. App. Jul. 28, 2006). Further, "they remain the subject of legislative debate and Attorney General opinions." *Id.* In this vacuum of legal uncertainty – where even Plaintiff cannot define what is legal or illegal and, instead, takes a "I know it if I see

it" approach – Plaintiff has assumed the role of legislator, enforcer, and arbiter of Texas gaming laws, without the constitutional authority to do so. Under the scheme Plaintiff asks this Court to adopt, Defendants could never comply with Plaintiff's constantly shifting definitions of legal versus illegal sweepstakes.

In developing its own definitions of legal requirements, Plaintiff entirely ignores the requirement of consideration, and the lack thereof in the sweepstakes offered by the national vendors on the Pueblo. The sweepstakes offered on the Pueblo qualify as sweepstakes under applicable law because consideration is not required to enter. *See Brice v. State*, 242 S.W.2d 433, 434 (Tex. Crim App. 1951); Tex. Att'y Gen Op. JC-0174 (2000).

Plaintiff also claims – again without citation to any legal precedent – that the sweepstakes offered by national vendors on the Pueblo cannot offer cash prizes. But, as in its previous versions of this motion, Plaintiff again fails to identify any controlling legal precedent for this novel argument, or to explain how thousands of other Texas sweepstakes can offer cash prizes without running afoul of Texas law. Exhibit C (confirming the legality, under Texas law, of cash sweepstakes prizes); s*ee also* Official Rules for Search and Win Sweepstakes and Official Rules for Prizes Brought to You by Publishers Clearing House, attached as Exhibit F (Grand Prize is "$100,000.00 A-Week-For-A-Year"); 2013 Monopoly Game at McDonald's Official Rules, attached as Exhibit G (including a sweepstakes prize of $1,000,000); Oprah Magazine $25,000 Life Saver Sweepstakes Official Rules, attached as Exhibit H ("Winner will receive $25,000"); Miller Lite Dallas Cowboys Sweepstakes 2013 Official Rules, attached as Exhibit I (Grand Prize is "Miller Lite Dallas Cowboys ticket package, ARV: $575). Plaintiff is unable to point to any provision of law prohibiting cash prizes in sweepstakes. Indeed, in its Order of August 4, 2009, the Court noted that the VFW was offering legal sweepstakes (with cash sweepstakes prizes),

and suggested the Pueblo consider doing the same. Order Regarding Defs.' Third Mot. For Clarification (ECF No. 282 at 3 and 4).

c. Plaintiff Cannot Provide any Legal Authority for its Claim that Machines Cannot Be Used to Reveal Sweepstakes Entries.

In its fifth motion, plaintiff once again offers statements of undercover law enforcement officers describing the exterior of machines they say were operated in 2012 on the Pueblo. But Plaintiff does not offer the Court any legal precedent for its proposition that machines cannot be used to reveal sweepstakes entries. *See, e.g., City Cyber Café, LLC v. Coakley*, No. 12-4194-BLS, 2012 WL 6674481 *1 (Mass. Super. Dec. 17, 2012) (discussing a Massachusetts statute that "criminalizes the use of video monitors and game-simulating video displays to communicate the results of otherwise lawful sweepstakes promotions"); *Allied Veterans of the World, Inc. v. Seminole Cty.*, 783 F.Supp.2d 1197, 1202 (M.D. Fla. 2011) (same). And plaintiff offers no evidence regarding how the machines operate. Neither Plaintiff nor the Court can determine what the machines do simply by looking at them from the outside.

To qualify as a "gambling device" under Texas law, a machine must "afford[ ] the player an opportunity to obtain anything of value." Tex. Penal Code Ann. § 47.01(4). The machines Plaintiff's agents looked at from the outside did not award participants any type of prize, cash or non-cash, nor afford the participant an opportunity to obtain such a prize. Rather, the machines are dummy readers and only reveal a predetermined outcome from third-party give-away contests all in compliance with applicable law. While the machines do so in an entertaining manner, that is not prohibited under Texas law. *See* Exhibit C; Exhibit D; Exhibit E; *see also* Tex. Att'y Gen Op. GA-0591 (2008) (video reader does not change the essential character of game under Bingo statute). In fact, the Texas Legislature has on multiple occasions considered, but ultimately declined, enacting legislation that would prohibit such devices. ECF No. 270 at 6-

7 (discussing proposed legislation prohibiting sweepstakes devices). Therefore, while the State of Texas has considered prohibiting such devices, it has declined to do so and Plaintiff has no authority to legislate on its own – nor does it have authority to enforce non-existent laws.

As the Texas Lottery Commission has recently recognized "[t]he question of whether a particular device qualifies as an illegal gambling device has proven to be a complex one, resulting in different answers throughout the many jurisdictions in this state." 39 Tex. Reg. 1320 (Feb. 28, 2014), attached as Exhibit E. It further acknowledged that "the legality of devices commonly referred to as 'sweepstakes machines' is a much debated question in this state, with various government officials and courts coming to different conclusions." *Id.* During Plaintiff's one and only inspection of the Pueblo's operations and records, the Pueblo produced reports generated by an independent test laboratory with expertise in third party give-away contest regulatory compliance. *See* Exhibit B. The laboratory issued the reports based upon its testing of software and inspections of machines and software located at the Pueblo's facilities, including the machines that Plaintiff describes in its fifth motion. As confirmed by the attached reports, the machines are nothing more than dummy readers that are "[r]esponsible for the entertaining display, printing and redemption of sweepstakes tickets." Exhibit B at 2. The reports specifically describe the "entertaining display features that are used to present the results of a sweepstakes entry that has been delivered to the dummy reader when requested by the participant" and that "[t]he entertaining display is solely determined by the outcome delivered to the dummy reader by the [third-party's] Sweepstakes System." *Id.*

Just as in every sweepstakes, the prizes provided in the sweepstakes at issue here are predetermined – not by the machine, but in advance of the contest. *See* Exhibit B. A machine may read the sweepstakes entry, but in doing so it simply reveals the result of the predetermined entry – just as a Monopoly board at McDonalds. *See* Exhibit G. Plaintiff's declaration that from

the outside these machines look like "gambling devices" proves no more than does the conclusion that a cap gun fires real bullets.

II. Plaintiff's Request for Non-Compensatory and Non-Coercive Fines Is Improper.

"Judicial sanctions in civil contempt proceedings, may in a proper case, be employed for either or both of two purposes[:] to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947). However, contempt fines that are fixed, determinate and retrospective, and that provide the defendant no opportunity to purge the fine, are criminal in nature and require different constitutional protections to the defendant, such as a right to a trial by jury. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 836-38 (1994). Here, Plaintiff has offered no compensatory or coercive justification for its request to impose approximately $750,000.00 in fines to be paid to the Court's registry. ECF No. 423 at 20. Notably, Plaintiff separately requested compensatory fines by way of costs. *Id.* The requested non-compensatory and non-coercive fines are beyond those allowable in a civil contempt proceeding and, as a result, are unavailable in this civil proceeding.

Moreover, Plaintiff's request for fines must be viewed in light of its delay in presenting its claim to the Court and the additional delay resulting from its refusal to allow Defendants to conduct discovery. Plaintiff delayed filing its first iteration of this motion for over a year and a half after it collected its alleged "evidence." Additionally, Plaintiff has fought to avoid Defendants discovery regarding the allegations of this motion, resulting in additional delay and costs. *E.g.,* Pl.'s Resp. to Defs.' Opposed Mot. to Restore Case to Active Calendar for Disc. (ECF No. 353); State's Mot. to Quash and Mot. for Protective Order (ECF No. 359); Pl.'s Resp. to Def. Ysleta Del Sur Pueblo's Req. for Oral Argument (ECF No. 368). Plaintiff's attempts to

avoid discovery was ultimately unsuccessful. *See* Order Regarding State's Mot. to Quash and Mot. for Protective Order (ECF No. 373).

CONCLUSION

The Court should decline to enter an order to show cause, vacate the injunction, and dismiss this case.

Dated: April 7, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, I caused a true and correct copy of the foregoing to be served electronically by the Court's CM/ECF system on the following counsel of record or by U.S. Mail to the Defendant if no counsel of record was found:

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