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

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

PUEBLO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF THE ISSUES

1. Whether third-party sweepstakes like those offered at Ysleta del Sur Pueblo's Entertainment Centers are expressly excluded from this Court's prior injunction [ECF No. 165] and are legal under existing Texas law.

2. Whether the State of Texas' *ad hoc* interpretation of what activities constitute illegal gambling misconstrues and is contrary to existing Texas law and this Court's orders.

3. Whether Texas law prohibits the use of video displays to read sweepstakes results.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, the Pueblo Defendants hereby file this Motion for Summary Judgment against the State of Texas, and in support respectfully state to the Court as follows:

I. INTRODUCTION

Pursuant to this Court's prior orders and the proper construction of Texas law, "sweepstakes [in] which a participant may enter by means of a purchase, a paid admission, or a donation is not an illegal lottery if, at the same time, it offers a bona fide and genuine 'free entry' as an alternative means of entering the contest." ECF No. 337 at pp. 4-5 (Order of Oct. 18, 2010). In strict compliance with Texas law and this Court's prior orders, the Pueblo Defendants have adopted national third-party vendor sweepstakes to support its programs and services. These sweepstakes offer legitimate "free entry" means that are utilized in tremendous amounts by patrons. Yet Plaintiff, in this latest chapter of a longstanding attempt to suppress the Pueblo's economic development activities, ignores this controlling precedent and argues that sweepstakes permitted under existing Texas law and this Court's prior orders should be illegal. But the Court need not, cannot, and should not accept that invitation. Rather, it should apply the settled letter of the law and find that the Pueblo Defendants are entitled to judgment as a matter of law.

II. FACTUAL BACKGROUND

A. This Protracted Litigation

Underlying this current contempt proceeding is the State of Texas' nearly fifteen year-old lawsuit against the Ysleta del Sur Pueblo, a federally recognized tribe of Indians. Federally Recognized Indian Tribe List, 79 Fed. Reg. 4748, 4752 (Ex. 1). Congress previously recognized the Pueblo's sovereign right to engage in any gaming activity not prohibited by the provisions of the Texas Penal Code. 25 U.S.C. § 1300g-6(a). In the first stage of this lawsuit, this Court

entered an injunction requiring the Pueblo to discontinue all gaming activity in violation of Texas laws. ECF No. 165 at p. 6 (Order of May 17, 2002). After over a decade of litigation in both the District Court and the Fifth Circuit Court of Appeals, Plaintiff filed the pending Motion for Contempt against the Pueblo Defendants, asserting that sweepstakes being conducted at the Pueblo constitute prohibited gambling in violation of the Texas Penal Code and the underlying injunction. *See* ECF Nos. 356, 376, 397, and 423 (various amended versions of current Motion for Contempt). As its requested relief in this contempt proceeding, Plaintiff seeks an order that the Pueblo Defendants cease all sweepstakes promotions and pay penalties and costs to the State of Texas.

B. The Sweepstakes at the Pueblo Entertainment Centers

Following entry and modification of the 2001 Injunction, the Pueblo Defendants have strived to adapt their economic development activities to comply with the Court's rulings and the Texas Penal Code. Beginning in approximately April 19, 2012, national third-party vendors have operated sweepstakes that may be entered by various means at the Speaking Rock Entertainment Center and the Socorro Entertainment Center (collectively "Entertainment Centers"), which are owned by the Pueblo. *See* Affidavit of Maahs at ¶ 6 (Ex. 2); Affidavit of Saltiel at ¶ 4 (Ex. 3); Affidavit of Hamm at ¶ 4 (Ex. 4); Declaration of Queen at ¶ 5 (Ex. 5); Declaration of Witschger at ¶ 5 (Ex. 6); Declaration of Kerns at ¶ 3 (Ex. 7). The sweepstakes offered by these national third-party vendors were specifically designed to comply with Texas law and have been independently tested to assure such compliance. *See* Ex. 3 at ¶ 6; Ex. 7 at ¶ 7. The sweepstakes promotions at the Entertainment Centers are intended to encourage charitable donations to the Ysleta del Sur Pueblo, which in turn uses those donations for the betterment of its people in areas such as health care, public safety, veterans' services, education, elder care,

after school programs, and day care programs. *See* Ex. 3 at ¶ 10; Ex. 5 at ¶ 6; Ex. 6 at ¶ 6; Declaration of Linda Austin at ¶ 5 (Ex. 8).

Unlike an illegal 8-liner or traditional casino slot machine, the video sweepstakes readers used at the Entertainment Centers to display entry results in the sweepstakes promotions offered by the national third-party vendors do not contain random number generators or any electronic or mechanical means of creating a randomized result. *See* Ex. 3 at ¶ 5; Ex. 4 at ¶ 6; Ex. 5 at ¶¶ 11-12; Ex. 7 at ¶ 5; BMM Testlabs Certification Test Report (Aug. 30, 2013) (Ex. 9). Instead, the sweepstakes promotions are operated from computer servers located on-site at the Entertainment Centers that are operated by the vendors. *Id.* Prior to the start of a sweepstakes, the computer server generates every one of the finite pool of entries and shuffles them once. *See* Ex. 3 at ¶ 5; Ex. 4 at ¶ 6; Ex. 5 at ¶¶ 11-14, 20; Ex. 7 at ¶ 5; Ex. 9. Once the sweepstakes begins, the pool of entries is locked and cannot be altered. *Id.* The server software has security measures to prevent tampering, and to document any attempt to do so if it occurs. *Id.* The entries are distributed in order as requests are received from the sweepstakes readers until the entries are exhausted or the expiration date of the sweepstakes is reached. *Id.* There is no way to add or replace entries in the finite pool once the sweepstakes begins. *Id.* When a video sweepstakes reader sends an entry request to the computer server, the server responds with a computer code that reflects the result of the next entry in the pool. *See* Ex. 3 at ¶ 5; Ex. 4 at ¶ 6; Ex. 5 at ¶ 15; Ex. 7 at ¶ 6; Ex. 9. The video sweepstakes reader receives this result code and then generates and displays a graphic to match. *Id.* Each request for a sweepstakes entry generates a single result code drawn from the finite pool of available results, and that result is displayed on the video sweepstakes reader in a manner that entertains the patron. *See* Ex. 3 at ¶ 5; Ex. 4 at ¶ 6; Ex. 5 at ¶¶ 13, 15;

Ex. 7 at ¶ 6; Ex. 9. There is nothing the patron or the video sweepstakes reader can do to change the result code transmitted by the server. *Id.*

In addition to receiving complimentary sweepstakes entries as a courtesy for making a charitable donation to the Pueblo, anyone meeting the basic eligibility requirements can participate in any of the sweepstakes offered by the national third-party vendors without making a donation by either requesting entries at the Entertainment Centers, or by requesting them by mail directly from the vendors. *See* Ex. 3 at ¶ 8; Ex. 4 at ¶ 5; Ex. 5 at ¶ 18; Ex. 6 at ¶ 7; Ex. 7 at ¶ 7. The Pueblo Defendants have compiled 114 banker's boxes containing "no donation necessary" entry forms for 2013, and has collected 60 boxes containing no-entry forms for the first four months of 2014. *See* Declaration of Veronica Cortez at ¶¶ 10-11 (Ex. 10). Each box contains approximately 5,900 forms, and the Pueblo has received the estimated amount of approximately 1,026,000 "no donation necessary" entry forms from the beginning of 2012 through April 30, 2014. *Id.* at ¶ 12-13.

Every sweepstakes entry – whether accompanied by a donation or not – comes from the same finite pool and has the exact same odds of winning the exact same prizes. *See* Ex. 3 at ¶¶ 5, 9; Ex. 4 at ¶ 6; Ex. 5 at ¶ 19; Ex. 7 at ¶ 7. There is no advantage in the sweepstakes to having made a charitable donation. *Id.*

The Pueblo Defendants and the national third-party vendors that operate the sweepstakes have gone to great lengths to ensure that the participants are aware of the sweepstakes rules and know how to participate in the sweepstakes using alternative means of entry. To that end, the Entertainment Centers post numerous signs, prominently displayed, that confirm the sweepstakes' rules. *See* Ex. 2 at ¶¶ 6-8; Ex. 6 at ¶ 8; Ex. 7 at ¶ 9. Every video sweepstakes reader contains a sign stating, "no donation necessary," and the video sweepstakes readers begin

each session with an on-screen message from the Governor of the Ysleta del Sur Pueblo thanking the participant for his or her donation and describing the types of programs supported by the charitable donations. *See* Ex. 2 at ¶¶ 9-12. Furthermore, employees at the Entertainment Centers wear buttons that confirm the availability of "no donation necessary" entries, these employees are trained to provide information concerning alternative means of entry, and patrons can receive up to 1,000 "no donation necessary" entries every day by simply completing a form at one of the sweepstakes' assistance kiosks located at the Entertainment Centers, and patrons who visit the Socorro Entertainment Center before noon on Sunday through Thursday can receive additional "no donation necessary" entries. *Id.* at ¶¶ 11-15.

III. ARGUMENT

A. Standard for Summary Judgment

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Taita Chem. Co. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001). To avoid summary judgment, Plaintiff must present "significant probative evidence" supporting the essential elements of its claim on which it bears the burden of proof. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000); *see Nat'l Ass'n of Gov't Emps. v. City Public Serv. Bd. of San Antonio*, 40 F.3d 698, 712 (5th Cir. 1994). "If a rational trier could not find for the nonmoving party based on the evidence presented, there is no genuine issue for trial." *Id.* A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; instead, the non-moving party must introduce some significant probative evidence tending to refute the movant's evidence. *See Doe on Behalf of Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 216 (5th Cir. 1998). Summary judgment should

be granted if the evidence put forth by the Plaintiff is merely colorable or is not significantly probative. *See Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999).

B. Standard for Civil Contempt Proceedings

"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." *Seven Arts Pictures, Inc., v. Jonesfilm*, 512 F. Appx. 419, 422 (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., LLC. 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." *Id.* (*citing Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998)) (alterations in original). Plaintiff's burden in the underlying contempt motion is higher than the preponderance of evidence standard. *Travelhost*, 68 F.3d at 961. The Fifth Circuit has interpreted "clear 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).

C. Third-Party Sweepstakes Like Those Offered at Ysleta del Sur Pueblo's Entertainment Centers Are Expressly Excluded From This Court's Prior Injunction and Are Legal Under Existing Texas Law.

Both Texas common law and the Texas Penal Code decidedly establish that prohibited gambling consists of three specific elements, each of which must be present to find illegal

gambling: (1) consideration, (2) chance, **and** (3) a prize of value. *See Brice v. State*, 242 S.W.2d 433 (Tex. Crim. App. 1951); Texas Penal Code § 47.01(4) and (7).[1] If any one of the three elements is not present, the activity does not constitute prohibited gambling. *Brice*, 242 S.W. 2d at 434-35 (setting forth the three elements and finding no illegal lottery where the element of consideration was absent); *Tex. Alcoholic Beverage Comm'n v. Amer. Legion Knebel Post 82*, No. 03-11-00703-CV, 2014 WL 2094195, at *3 (Tex. App.—Austin May 16, 2014) ("Knebel Appellate") (listing the three elements). This Court has expressly recognized that the presence of all three elements described above is necessary in order to implicate Texas' gambling prohibition, observing that, "[g]enerally speaking, the element that distinguishes an illegal lottery from a legal sweepstakes is the element of consideration." ECF No. 337 at p. 4 (Order of Oct. 18, 2010). This Court further stated:

> If no consideration is required for entry in the contest, it is not a lottery. Even a sweepstakes which a participant may enter by means of a purchase, a paid admission, or a donation is not an illegal lottery if, at the same time, it offers a bona fide and genuine "free entry" as an alternative means of entering the contest.

Id. at 4-5 (internal citation omitted). The Court emphasized that where a sweepstakes offered a "legitimate free entry alternative," and "the free entrant stands a chance of winning equal to that of the donor entrant," the sweepstakes "would not be viewed as an illegal lottery." *Id.* at 4. Thus, this Court expressly recognized that a sweepstakes involving both donations and legitimate free entries would not constitute an illegal lottery, so long as participants had an equal chance of winning using either form of entry.

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[1] The Texas Penal Code at Section 47.01(4) defines "'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." Likewise, Section 47.01(7) defines "'Lottery' as any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value."

In this matter, while there is no dispute that the sweepstakes offer prizes and employ games of chance, the dispositive issue is whether the consideration element is present. Framed using its own terms, the central issue the Court must decide is whether the sweepstakes offered at the Entertainment Centers "offers a bona fide and genuine 'free entry as an alternative means of entering the contest.'" ECF No. 337 at 3-4. This Court's prior holdings and the prevailing view among Texas courts on this issue leave no doubt that the sweepstakes held at the Entertainment Centers fully complies with Texas law and this Court's orders.

Texas courts, interpreting the same Texas statutory law in the context of sweepstakes promoting charitable donations, have applied the same essential test. *See Am. Legion, Knebel Post 82 v. Texas Alcoholic Beverage Comm'n*, No. D-1-GN-10-003084, 2011 WL 9198989 (Dist. Ct. Travis County., Oct. 14, 2011) ("Knebel Trial Court") (holding that a sweepstakes is not gambling if, *inter alia*, there are "a finite number of entries and the prize assigned to each entry is fixed; the entries are randomly drawn from the same fixed finite pool; participants may enter the sweepstakes with or without donating," and "the odds of winning do not change according to how the entries are obtained"); *see also G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 769-77 (W.D. Tex. 2007) (finding that "Texas law does not contain any prohibition against a charitable entity accepting donations in conjunction with a legal sweepstakes, if alternative opportunities to enter, participate and win are available with no purchase or donation necessary"). Specifically, in *Knebel Trial Court*, the sweepstakes involved: (1) the ability to enter through making a donation, by purchasing an alcoholic beverage, or by requesting free entries, (2) fixed prizes randomly drawn, with the odds of winning not changed by how entries were obtained, (3) prizes revealed through entertaining video displays with game theme graphics that did not affect whether entries were winning, and (4) software that prevented

tampering with the database of fixed entries. *Id.* The trial court in *Knebel* found the sweepstakes with these characteristics legal, holding that "[p]roviding the opportunity to enter a game of chance without requiring a purchase means that one of the three essential elements of gambling, the element of 'consideration,' is removed." *Id.*

Recently in *Knebel*, the Texas appellate court remanded the case back to the trial court solely for the purpose of fully developing the factual record regarding "whether someone can play the Sweepstakes for free or whether payment is required." *Knebel Appellate* at *7. Significantly, the Court of Appeals instructed the trial court to establish a factual record of whether "someone" could enter for free – not whether "everyone" enters the sweepstakes for free as Plaintiff would wish. *Id.* The Court of Appeals carefully elected not to disturb the central holding of the trial court discussed above. *Id.*

The understanding of Texas law shared by this Court and the *Knebel* appellate court is consistent with longstanding precedent from Texas' highest criminal court in the *Brice* case, as well as numerous other cases. In *Brice*, for example, a store ran a prize drawing to publicize its grand opening. 242 S.W.2d at 433. Participants could enter once per day for the three-day promotion period by registering their name, address, and phone number. *Id.* at 434. No participant was required to buy anything. *Id.* Citing several Texas and out-of-state cases, the Texas Court of Criminal Appeals held that this promotion was not an illegal lottery because the element of consideration was lacking. *Id.* at 434-35. And it specifically held that, so long as consideration is not required, a benefit to the holder of a drawing does not establish prohibited gambling. *Id.*

Similarly, in *State v. Socony Mobil Oil Co.*, 386 S.W.2d 169 (Tex. Civ. App. 1964), the San Antonio Court of Appeals held that a "TV-Bingo" promotion lacked consideration because

participants could "receive a card and win a prize in TV-Bingo without paying one cent for the privilege of participating." *Id.* at 173. Further, in *Griffith Amusement Co. v. Morgan*, 98 S.W.2d 844 (Tex. Civ. App. 1936), the Austin Court of Appeals held that a promotion conducted at two movie theaters lacked consideration because "[n]o requirement or request was made that the registrant be a patron of or purchase an admission ticket to [the] theaters." *Id.* at 844-45.

Since Plaintiff cannot refute the legitimacy of the sweepstakes "no donation necessary" entries, it retreats to an almost exclusive reliance on *United States v. Davis*, 690 F.3d 330 (5th Cir. 2012), to support its selective interpretation of Texas gambling law on the consideration element. Specifically, Plaintiff relies on *Davis* for the proposition that "[c]asino-like atmosphere extends premises stay for gambling purposes" and, as such, is a factor "determinative of the issue of consideration." ECF No. 423 at p. 15. Plaintiff, however, goes too far in asserting that atmosphere is the determinative factor for finding consideration.

Specifically, in *Davis*, the Fifth Circuit was faced with an entirely different situation than the Court herein as *Davis* was a sufficiency of the evidence/manifest miscarriage of justice challenge to the consideration element in a federal criminal conviction based on a violation of Texas gaming laws. *Davis*, 690 F.3d at 336.[2] In *Davis*, the evidence showed that the defendants ran various businesses that sold internet time to customers, which then allowed the customers to play various illegal lotteries. *Id.* at 334-335. The evidence further showed that "over 300,000 minutes of Internet time" went unused. *Id.* at 339. The Fifth Circuit relied on the opinion in *Jester v. State*, 64 S.W.3d 553 (Tex. App.—Texarkana, 2001), which stated that its "decision

[2] "The principle that state courts are the final arbiters of state law is well-settled." *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.*, 706 F.3d 622, 629 (5th Cir. 2013) (citing *Bell v. State of MD*, 378 U.S. 226, 237 (1964)). It is not the role of federal courts to "make an independent determination of state law where state courts have already decided the matters." *Id.*

turned on 'whether the sweepstakes was intended to promote the sale of telephone cards or whether the telephone cards were there as an attempt to legitimize an illegal gambling device." *Davis*, 690 F.3d at 338. The *Davis* court noted that the evidence in *Jester*, showed that the sham products being sold were telephone cards which were essentially worthless and did not work, thus proving that there was not a legitimate business behind the illegal gambling operation. *Id.* Both *Davis* and *Jester* cases involved gaming situations where participants were compelled to purchase internet time credits and telephone cards, respectively, in exchange for participation in the sweepstakes and both courts found that those sales amounted to an attempt to legitimize an illegal lottery. *See Davis*, 690 F.3d at 339.

Plaintiff's reliance on *Davis* is also misplaced because the *Davis* factors have not been followed in states that have adopted a "consideration" standard that is far more restrictive. Specifically, North Carolina's law on gaming explicitly prohibits any mechanism that "seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever." NCGS § 14-306.4. Despite such restrictive and explicit standard, the North Carolina's Supreme Court refused to follow *Davis*' factor analysis. *See Hest Technologies, Inc. v. State ex del. Perdue*, 366 N.C. 289 (2012). Moreover, it refused to hold that video sweepstake machines were summarily a pretext to circumvent antigambling statutes and declined to assume factual evidence that the sweepstakes' internet cards were mostly unused. *See id.* at 295. In doing so, the *Hest* court signaled that video sweepstake machines do not constitute illegal gambling, despite the uniquely strong legislative mandate to criminalize use of subterfuge. In order to restrict gaming, the court in *Hest* decided to rely on factual evidence that the sweepstakes' internet or telephone cards were worthless, basing the finding of subterfuge or pretense on that fact. Thus, the Supreme Court of North Carolina refrained from imputing consideration based factors such as

atmosphere or a scheme to foster protracted stay, despite an explicit statutory mandate in North Carolina to punish use subterfuge or pretense. In sum, the *Davis* decision to ascribe any significance to atmosphere is not supported by the gaming laws in Texas nor has been adopted by subsequent decision by the highest court in a jurisdiction that is far more committed than Texas Legislature and courts have been to curb using pretense and subterfuge to negate consideration.

Correctly reflecting the true state of Texas law, all three Texas Attorney General investigators, who purport to be trained in conducting investigations of gaming activities, expressly testified that the casino-like atmosphere does not make an activity illegal gambling. *See* Loper Dep. 16:9-17:12, 75:9-22 (Ex. 11 (excerpts)); Ferguson Dep. 27:9-28:11 (Ex. 12 (excerpts)); Martinez Dep. 26:25-27:16 (Ex. 13 (excerpts)). For example, lead investigator Lieutenant Tom Loper testified that the "general atmosphere of the facility is not illegal" and the atmosphere, low lights, and refreshments "don't define gambling." Ex. 11 at 75:10-15. Likewise, Sergeant Marcos Martinez testified that the lighting, set up, and windows or lack thereof do not make something illegal. Ex. 13 at 26:25-27:16. Sergeant Martinez correctly testified that "looks don't make it illegal." *Id.* Finally, Sergeant James Ferguson similarly testified that the setup of the building and lighting involved psychology but was not illegal or wrong. Ex. 12 at 27:9-28:11. Sergeant Ferguson further explained that the only elements that made something gambling were the use of cash or a cash voucher to win or lose money without skill. *Id.* at 28:12-24.

Here, the sweepstakes promote donations that are bona fide contributions to the Pueblo, a sovereign governmental entity, and are used for the betterment of the tribal community. See Ex. 8 at ¶ 5. The tremendous volume of no-donation entries confirms that participants clearly

understand how to obtain "no donation necessary" entries, and how to use them to participate in the sweepstakes. See Ex. 10 at ¶¶ 10-13 (stating that the Pueblo has received the estimated amount of approximately 1,026,000 "no donation necessary" entry forms from the beginning of 2012 through April 30, 2014). The level of participation by "no donation necessary" entries demonstrates that the alternative means of entry is both meaningful and easy to use. Further, the evidence shows that the entertainment centers and machines prominently advise sweepstakes participants that the donations are for the benefit of the tribal community, and each time a donation is made the visual display on the machine advises the participant that the funds help the Pueblo provide specific services. See Ex. 2 at ¶¶ 9-12. In short, the uncontroverted evidence in this case is that the donations help the Pueblo fund public services for tribal community, and sweepstakes participants are advised by both signs and screen displays that their donations support this cause. See id. The State has not attempted to show and cannot show that the donations at issue in this case are equivalent to the facts of Davis. To the contrary, on their face the Davis and Jester cases are inapposite.

Furthermore, the prior Orders rendered by this Court have never addressed these additional factors, or suggested that the nature of the entertainment atmosphere, or the expectations or behavior of participants, somehow affected the legality of the activities. Indeed, recently and well after *Davis*, the Texas Court of Appeals had the occasion to consider these issues in the *Knebel* appellate opinion. *Knebel Appellate* at *7. The Court of Appeals chose not to adopt any standards or factors discussed in *Davis* and mentioned by Plaintiff in its motion. If it wanted to endorse or adopt the factors discussed in *Davis* or signal they are of any importance, the Texas Court of Appeals could have done so.

As this Court has made clear, a sweepstakes offering a "legitimate free entry alternative" in which "the free entrant stands a chance of winning equal to that of the donor entrant" lacks the element of consideration and therefore does not run afoul of Texas gaming law – and by extension cannot contravene this Court's injunction. *See* ECF No. 337 at pp. 4-5 (Order of Oct. 18, 2010). Applying these principles to the uncontroverted evidence here, it is clear that the element of consideration is entirely missing in this case, and that the sweepstakes do not violate Texas law or this Court's injunction. Specifically, the undisputed facts in this case establish that:

(1) a person may enter the sweepstakes without making a donation, and every video sweepstakes reader has signs advising that non-donation entries are available;

(2) the odds of winning with a non-donation entry are the same as the odds of winning for the participant making a donation;

(3) information regarding the availability of entry into the sweepstakes without a donation is readily available at the Entertainment Centers; and

(4) a substantial number of non-donation entries are regularly made at the Entertainment Centers.

Finally, it is uncontroverted that if participants choose to donate, those donations are bona-fide contributions to the Ysleta del Sur Pueblo, a sovereign governmental entity, and are used for the betterment of the tribal community.

Summary judgment, therefore, should be granted in favor of the Pueblo Defendants that the sweepstakes held at the Entertainment Centers offer a "legitimate free entry alternative" and therefore the promotions are not illegal gambling according to Texas law and this Court's orders.

D. Plaintiff's *Ad Hoc* Interpretation of What Activities Constitute Illegal Gambling Misconstrues and Is Contrary to Existing Texas Law and This Court's Orders.

Because Plaintiff cannot and has not identified any material, legal differences between the national third-party sweepstakes that this Court previously approved and those currently offered by national third-party vendors at the Entertainment Centers, Plaintiff now attempts to unilaterally add its own additional requirements to invalidate the sweepstakes at issue. Specifically, Plaintiff contends that the sweepstakes are illegal because: (1) the vendors did not obtain express pre-approval from the Court; (2) the sweepstakes do not include a "'national' plan of donations to Defendant Tribe"; and (3) the sweepstakes offer cash prizes. Plaintiff, however, offers no legal justification for these newly fabricated requirements, and they are entirely inconsistent with Texas law or this Court's prior orders.

i. The Injunction Permits Sweepstakes Operated by Third-Party Vendors Beyond Those Previously Identified by Name by the Court.

This Court has never required that the Pueblo Defendants obtain pre-approval for national third-party vendors before those vendors can offer sweepstakes at the Pueblo. In its May 17, 2002, order modifying the Injunction, this Court expressly approved "third-party giveaway contests conducted by national vendors." ECF No. 165 at 12-14. After identifying eleven representative sweepstakes that were then being offered, the Court explained that "the injunction will be modified to permit these and **other like-national third party vendor contests**, provided that no specific contest violates Texas gaming law." *Id* at 13. (emphasis added). The Court further held that any sweepstakes conducted directly by the Pueblo, termed "Tribal sweepstakes" by the Court, would require pre-approval through a "detailed proposal showing that said sweepstakes would be in compliance with Texas law." *Id* at 14. Without justification, Plaintiff has merged these two separate statements to make the Court's orders more restrictive.

It is undisputed that the national third-party vendors offering the sweepstakes at the Entertainment Centers have no connection to the Pueblo Defendants beyond promoting donations through the sweepstakes. As such, these national third-party vendor sweepstakes are not "Tribal sweepstakes" and are plainly permitted under the injunction.

ii. Neither Texas Law Nor the Injunction Require a "National" Plan of Donations.

In these contempt proceedings, Plaintiff asks the Court to revisit the Injunction to find that the vendor sweepstakes violate the Injunction because they do not include a "national" plan of donations. Because the Court has never required that a valid sweepstakes include "national" donations and because such a requirement can be found nowhere in Texas law, it is not grounds for contempt. Furthermore, adding requirements beyond what is explicitly stated in the Texas Penal Code violates the Restoration Act's intent and explicit terms. 25 U.S.C. § 1300g-6(a) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."); *id.* (b) ("Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.").

iii. Neither Texas Law nor the Injunction Prohibit Sweepstakes that Award Cash Prizes.

Plaintiff further claims that the sweepstakes offered at the Entertainment Centers are illegal because they offer cash prizes. Yet Plaintiff has failed to offer a distinction or explain how thousands of other Texas sweepstakes can offer cash prizes without violating Texas law. Indeed, nothing in the Court's injunction or Texas law requires that sweepstakes not offer cash prizes. The *Knebel* appellate court specifically found it was not illegal or gambling *per se* when the defendant offered sweepstakes with cash prizes, even with entries revealed in an entertaining fashion. *See* 2011 WL 9198989.

In fact, thousands of current sweepstakes are regularly offered in the state of Texas and have never been held, or even alleged, to be illegal because they offer cash prizes. *See* ECF No. 431-2 at pp. 18-40 (identifying official rules for sweepstakes offered by Publishers Clearing House, Monopoly Game at McDonald's, Oprah Magazine, and Miller Lite). None of these cash prizes has been held to constitute illegal gambling in Texas, and Plaintiff has offered no distinction recognized by Texas courts between these cash prizes and those offered by national third-party vendors at the Entertainment Centers.

Though it is clear from the case law and from widespread practice in Texas that sweepstakes with cash prizes are legal and offered regularly, Plaintiff has entirely failed to identify in what manner the sweepstakes offered at the Entertainment Centers differ from those offered by others in Texas. Plaintiff has further failed to provide this Court with legal authority to demonstrate that those unidentified differences have been held by Texas courts to constitute illegal gambling. Plaintiff's effort to convince this Court to ratify these additional requirements demonstrates a strategy to impose a constantly moving standard for the Pueblo Defendants to meet, so that strict compliance with Texas law and the Court's orders will never be enough to satisfy Plaintiff and otherwise end this seemingly eternal suit. Furthermore, Plaintiff's request violates the Restoration Act's intent and explicit terms by attempting to legislate additional requirements that are not part of Texas law. 25 U.S.C. § 1300g-6(a), (b).

E. Texas Law Does Not Prohibit the Use of Video Displays to Read Sweepstakes Results.

No Texas court has held that the use of video screens is prohibited in a sweepstakes. Even Plaintiff's misapplied "ace in the hole" opinion in *Davis* did not hold that video screens with entertaining graphics were *per se* illegal. While other states have passed legislation regulating or prohibiting "video sweepstakes," Texas has not. *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). Plaintiff cannot provide this Court with any legal authority prohibiting the use of video screens and graphics to reveal the results of sweepstakes entries in Texas, and there is no legal basis for this Court to create new law when the Texas legislature has opted against such measures.

Specifically, the Texas legislature has not chosen to regulate or prohibit the use of video displays and computer graphics. The lack of guidance on this subject has been officially noted by the Texas Lottery Commission, which is the state agency charged with regulating charitable bingo, raffles, the Texas lottery, and other forms of legalized gambling in Texas. Specifically, when publishing the official copy of a proposed rule in the Texas Register for public comment, the General Counsel of the Lottery Commission wrote that "[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 of this state." 39 Tex. Reg. 1320 (Feb. 28, 2014) (Ex. 14). The General Counsel then illustrated the point by comparing Attorney General Opinion JC-482 (holding that some free entries still constitute gambling) with the dicta in *G2, Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757 (W.D. Tex. 2007) (discussing that provision of free entries removes sweepstakes from the gambling statute), and observing that it "is a much debated question in this state, with various government officials and courts coming to different conclusions." *See* Ex. 14.

When the Lottery Commission recently published the adopted version of the rule, it responded to public comments received. In doing so, the General Counsel provided even more insight. When one public comment pointed out that the Lottery Commission was using a definition of "game of chance" which differed from the definition provided by the Attorney General in opinion JC-449 (2002), the General Counsel responded that this was intentional, because the Commission "believes that adopting the Attorney General's definition would lead to absurd results." 39 Tex. Reg. 3589 (May 2, 2014) (Ex. 15). Another commenter complained of inconsistent enforcement of gambling laws regarding gambling devices across Texas. The Lottery Commission agreed "that local law authorities in a particular jurisdiction may find a particular machine illegal, while local law authorities in another jurisdiction may find the same machine acceptable." *See* Ex. 15 at 3590. Due to these discrepancies, the Texas Lottery Commission's new rule "believes it prudent to rely on local law authorities to determine the presence of gambling devices" by waiting until a local prosecutor actually prosecutes a gambling case before bringing an administrative action against a bingo hall for allowing "another game of chance" on the premises. *Id.*

Notably, Plaintiff previously held the position that use of a video display to reveal the results of instant bingo would not convert said activity into prohibited electronic bingo. *See* Attorney General Opinion No. GA-0591 (Jan. 17, 2008) (Ex. 16). Specifically, Plaintiff previously stated that "[a]ssuming that the video confirmation device does nothing more than inform players of the winning numbers in a bingo game, we do not believe that it would convert a bingo game into electronic bingo."). Therefore, Plaintiff would agree that a video sweepstakes reader, that cannot control or affect the outcome of an otherwise valid sweepstakes promotion, does not render the device prohibited.

IV. CONCLUSION

The Pueblo Defendants respectfully request that the Court enter judgment as a matter of law finding that the state is not entitled to a show cause order because the sweepstakes offered at the Entertainment Centers are legal under Texas law, and dismissing further proceedings in this matter.

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Respectfully submitted,
JOHNSON BARNHOUSE & KEEGAN LLP
/s/ Randolph Barnhouse
Randolph Barnhouse
Justin J. Solimon
Admitted Western Dist. of Texas
7424 4th Street N.W.
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (telephone)
(505) 842-6124 (facsimile)
Attorneys for Defendants
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 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:

William T. Deane
Bill.Deane@oag.state.tx.us; jean.reich@oag.state.tx.us

David Glickler
david.glickler@texasattorneygeneral.gov

Richard Andrew Bonner
rbonner@kempsmith.com; ycas@kempsmith.com; kramirez@kempsmith.com

/s/ Randolph Barnhouse
Randolph Barnhouse