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

STATE OF TEXAS,	§	
Plaintiff	§	
	§	
v.	§	
	§	
YSLETA DEL SUR PUEBLO,	§	
PUEBLO REGULATORY	§	
COMMISSION, the TRIBAL	§	
COUNCIL, TRIBAL GOVERNOR	§	**No. EP-99-CA-00320-KC**
FRANCISCO PAIZ, or his	§	
SUCCESSOR,	§	
Defendants	§	

PLAINTIFF'S RESPONSE TO PUEBLO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES

1. Should this Court apply the *Davis*[1] pretextual factors to this case to determine if consideration exists that would make the sweepstakes an illegal lottery?

2. Does renaming the Tribe's sweepstakes proposal a "third-party vendor sweepstakes" obviate the need to conform to this Court's permanent injunction?

3. Is the Pueblo Defendants' use of video displays to simulate illegal gambling one of the *Davis* pretextual factors to demonstrate consideration to establish an illegal lottery?

[1] *U.S. v. Davis*, 690 F.3d 330 (5th Cir. 2012, cert. den. 133 S.Ct. 1283, and 133 S.Ct. 1296).

PLAINTIFF'S RESPONSE TO PUEBLO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE KATHLEEN CARDONE:

Pursuant to Rule 56, Fed.R.Civ.P., Plaintiff State of Texas makes this response to Defendants' Motion for Summary Judgment and would show as follows:

I. INTRODUCTION

Summary judgment should be denied for two reasons. First, just as the *American Legion Knebel Post 82*[2] trial court's summary judgment was reversed upon finding a factual dispute in the non-movant's summary judgment evidence which showed that it was necessary to "put money on the card to play," *id.*, in the instant case the summary judgment evidence from Lt. Loper and Sgt. Martinez for the 2012 inspection, and Sgt. James Ferguson[3] for the 2014 inspection shows a fact issue exists on whether or not there was an option of free play for entry into the sweepstakes, since none of them were personally able to obtain free plays, and none of them observed anyone else using free plays without paying consideration

[2] *Texas Alcoholic Beverage Commission v. American Legion Knebel Post 82*, 2014 WL 2094195, pp 7-8 (Tex.App.-Austin 2014).
[3] See Sgt. Ferguson Px1Incident Supplement Pages Tx. 0604-0607 which show the gambling devices had no free entry.

of a "donation" at Speaking Rock and Socorro.[4] If there is cash consideration to play, the gambling devices are an illegal lottery and Defendant Tribe's summary judgment should be denied as a matter of law.[5]

Second, there are additional factual disputes preventing summary judgment raised by the summary judgment evidence due to a disconnect between the offsite "third-party vendors" who *only* supply software and hardware,[6] and the onsite Pueblo Defendants (Tribe), which actually physically operate the sweepstakes. Here, the summary judgment evidence shows that the four third-party vendors who supplied the hardware and software at both Tribal locations have no full-time employees on either site to operate or regulate the operation of the sweepstakes,[7] provide no training to Defendant Tribe's employees,[8] and therefore lack any meaningful knowledge of what actually occurs on the premises of Speaking Rock or Socorro. [9] As a result, any summary judgment evidence from the four absentee vendors about what signs are currently posted advising of free play,[10] or what

[4] See Ex. 19, Lt. Loper deposition, 14/10-13; 13/16-18; 15/8-16; 19/12-15; 20/14-21; 22/19-25; 40/23—41/8; 72/5-10; See Ex. 21, deposition Sgt. Martinez 17/21-24. Also see Ex. 20, deposition of Sgt. Ferguson 31/21—32/4; and 67/2-6.
[5] *U.S. v. Davis*, 690 F.3d 330, (5th Cir. 2012, cert. den. 133 S.Ct. 1283, and 133 S.Ct. 1296, 2013); See Ex. 19, Lt. Loper deposition, 13/11-15; 82/7-21; 84/1-8; and 85/12-24. See Ex. 21, deposition Sgt. Martinez 24/5-19. See Ex. 20, deposition Sgt. Ferguson 10/4—11/1; 13/14-24; 15/16—16/2; and 17/17—18/7; and 39/3-18.
[6] See Ex. 2 & Ex. 3 RFP 12 responses;
[7] See Ex. 2 & Ex. 3, RFP 33 response.
[8] See Ex. 2 & Ex. 3 RFP 48 response.
[9] See Ex. 2 & Ex. 3 which show that the vendors are not responsible for signage on either site, RFP47 response; and that the Tribe has possession of any testing reports, RFP 46 & RFP 79 responses; and the vendors have no knowledge of the *American Legion Knebel* software to compare their own software to, RFP 35.
[10] See Ex. 2 & Ex. 3 which show that the vendors are not responsible for signage on either site, RFP47 response.

customers are orally told about the possibility of free entry into the sweepstakes without actually paying to play, are based solely on speculation and cannot be supported by any personal knowledge.

Moreover the issue of a factual dispute as to availability of free play is foreclosed by the Defendant Tribe's own expert witness who found that 29% of the paying customers at Speaking Rock were, like Lt. Loper, Sgt. Martinez, and Sgt. Ferguson, completely unaware that there might have been an alternate entry by free play available.[11] Moreover, that same survey showed that nine percent of the survey respondents were unaware that they were supposed to be making charitable donations for the benefit of the "members of the Ysleta Del Sur Pueblo."[12] All that is due to the factual disconnect between the absentee third-party vendors who actually designed a sweepstakes to resemble casino gambling, rather than for donations to the Tribe. [13] In fact, the vendors who designed the software admitted they did not know what the requirements of the *American Legion Knebel Post* sweepstakes software were, [14] even though the Pueblo Defendants' summary judgment relies heavily on the opinion of the trial court that was reversed on appeal. Thus, regardless of what the Pueblo Defendants assert as the *design* of the

[11] See Ex. 12, the Dr. Autry Report prepared for the Pueblo Defendants, and produced by them in this litigation.
[12] See Ex. 12, the Dr. Autry Report prepared for the Pueblo Defendants, and produced by them in this litigation.
[13] See Ex. 7—Ex.9 response to RFA 9.
[14] See Ex. 7—Ex.9 response to RFA 13.

sweepstakes—it is the *implementation* of the sweepstakes that truly matters. For this reason, the Texas State courts have not interpreted the *American Legion Knebel* case (before it was reversed on appeal) to say that a review of the *software or hardware alone* can determine whether consideration is required to play the sweepstakes—they note that "The actual handling of such a sweepstakes program is as much a factor in its legality as are the written rules in the abstract." [15]

As a result, the Pueblo Defendants' summary judgment evidence of entry into the sweepstakes by free play and/or charitable donations are in direct factual conflict with Plaintiff's summary judgment evidence, and Defendants' summary judgment should be denied pursuant to Rule 56, Fed.R.Civ.P.

II. STATEMENT OF RELEVANT FACTS

A. Current Sweepstakes proposal previously rejected by this Court.

Pursuant to § 1300g-6(c)[16] of the Restoration Act, 25 U.S.C. § 1300g et seq., Plaintiff Texas brought the original injunction lawsuit and on September 27, 2001, this Court in *Texas v. Ysleta Del Sur Pueblo et al.*, 220 F.Supp.2d 668 (W.D. Tex. 2001 & Order Modifying Opinion 2002) entered a permanent injunction enjoining

[15] See Plaintiff's MSJ Ex. 26 & 27 where the court in *Gonzales v TABC* discusses the application of the *American Legion Knebel* case-- before it was overturned on appeal.

[16] § 1300g-6(a) which provides that "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. Any violation of this prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986."

the Tribe, Ysleta del Sur Pueblo, et al. from engaging in activities at the Speaking Rock Casino in violation of Chapter 47 of the Texas Penal Code, and 25 U.S.C. § 1300g of the Restoration Act. *id*., at pp. 697-698.

Thereafter in 2008, Plaintiff State of Texas filed its first motion for contempt, and, following an evidentiary hearing, this Court granted the motion for contempt and ordered the Defendants to cease operation of their "…gaming devices in a manner that rewards the player with cash or the equivalent of cash, including but not limited to gift cards, credit cards, or debit cards, in violation of the Texas Penal Code." See ECF#281 Memorandum Opinion Granting Motion for Contempt[17] at pp.8-9.

Since the original 2001 Order at pp. 705-706, enjoined "Tribal sweepstakes," the Defendant Tribe properly chose to comply with that Order and on August 10, 2009 applied for permission from the Court to operate a sweepstakes, see ECF 284, Defendants' Notice of Filing and the Defendants' Proposal For Sweepstakes, ECF 284-2, Exhibit 23. As shown on p.2 of the Exhibit 23 Defendant Tribe's Proposal, "The sweepstakes shall be administered by a third party vendor through a central database server which will hold the pre-determined sweepstakes prizes." Moreover, the description presented in this Proposal is

[17] As part of this Order, the Defendant Tribe appealed only the right of inspection of records and gambling sites, but those rights granting Plaintiff were upheld by the Fifth Circuit, see *Texas v. Ysleta del Sur Pueblo, et al*., 2011 WL 2583615 (5th Cir. 2011, cert. den. 132 S.Ct. 1028, 2012).

identical in most respects to the *current* operation of sweepstakes at both Speaking Rock and Socorro, see ECF 284-2, pp. 3-6.[18] This Court, however, rejected the Tribe's sweepstakes Proposal, see Order Regarding Defendants' Motion to Approve Sweepstakes Proposal, ECF #337, as being incomplete, since it failed to explain the use of gambling devices (i.e. "eight-liners") to reveal the results of the sweepstakes as proposed, *id*. at pp. 4-5. This Court invited the Tribe to "…choose to propose a different means by which the participants can obtain sweepstakes results." –presumably without the use of gambling devices like eight-liners in their 2009 Proposal, (or video slot machines today).

Unfortunately, the Defendant Tribe's current summary judgment evidence shows that they ignored this Order from this Court and chose to engage gambling devices yet again, with all the attendant problems already rejected by this Court.

B. Current sweepstakes operates as an illegal lottery.

The Defendant Tribe chose not to appeal the ECF #337 Order, nor to submit any new applications to modify the injunction granted in *Texas v. Ysleta Del Sur Pueblo et al.*, 220 F.Supp.2d 668, 697-698 (W.D. Tex. 2001 & Order Modifying Opinion 2002). As a result, on March 13, 2012 and May 08, 2012, undercover inspections were conducted by peace officers in the Criminal

[18] Starting at p. 8 of the Tribe's Proposal, they even relied on the same legal authorities that they present in their current motion for summary judgment, including *Brice* and *Socony*.

Investigations Division of the Office of Attorney General. Since no agreement was reached, and following the exchange of more correspondence between the parties,[19] Plaintiff Texas wrote the Pueblo Defendants to request that they voluntarily cease operating their sweepstakes, and immediately apply for permission from this Court to pursue their sweepstakes proposal.[20] They refused, and this present contempt action ensued. As late as May 6, 2014, the use of gambling devices continue at both locations[21]in violation of this Court's prior Orders.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all

[19] See e.g. ECF # 381-1, the November 27, 2012 letter and attachments.
[20] See July 19, 2013 correspondence, ECF # 440-2, and Ex. 25. See RFA 15 response in Exhibits 4, 5, and 6.d
[21] See Ex. 1 May 6, 2014 Inspection Report.

inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for a summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

IV. ARGUMENT AND AUTHORITIES

A. Davis pretextual analysis shows consideration.

In *U.S. v. Davis*, 690 F.3d 330, (5th Cir. 2012, cert. den. 133 S.Ct. 1283, and 133 S.Ct. 1296, 2013), the Court upheld the criminal convictions of the defendants by finding that the sweepstakes operations used "electronic gambling devices" [22] which violated Texas state law. The Fifth Circuit defined an illegal lottery to require: "(a) A prize or prizes; (b) the award or distribution of the prize or prizes by chance; [and] (c) the payment either directly or indirectly by the participants of a consideration for the right or privilege of participating. *Brice v. State*, 242 S.W.2d 433, 434 (1951). " *Davis*, p. 333.

[22] "A 'gambling device' is '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.' Id. § 47.01(4) (emphasis added)." *Davis*, pp. 332-333.

Here, The Pueblo Defendants do not dispute that the sweepstakes offered at both Speaking Rock and Socorro "offer prizes and employ games of chance…" [23] and they agree that the issue of consideration is the "central issue" to determine whether or not their sweepstakes is in fact an illegal lottery. *Id.*

The Pueblo Defendants in their summary judgment attempt to escape the application of the *Davis pretextual analysis* to this case by relying on *American Legion Knebel Post 82 v. TABC* [24] and *G2 Inc. v. Midwest Gaming Inc*[25] at pp. 14-16 of their summary judgment motion in support of their theory that if anyone receives a free entry, the entire sweepstakes is legal, and would not be an illegal lottery. Apart from the fact that the *American Legion* summary judgment Order relied upon by the Pueblo Defendants was reversed due to a factual issue of evidence that all entries required the participants to "*put money* on the card to play," see *American Legion* at pp. 7-8; and that reliance on *G2 Inc. v. Midwest* case was previously found by the Fifth Circuit to be unreasonable "…because its discussion of the gambling statutes followed immediately after the court had determined that it lacked jurisdiction." [26] the Pueblo Defendants theory was outright rejected by both *Jester v. State*, 64 S.W.3d 553, 558-559 (Tex.App.—

[23] See ECF 468, p. 15, Pueblo Defendants' MSJ.
[24] *American Legion, Knebel Post 82 v. Tex. Alcoholic Beverage Comm'n,* No. D-1-GN-10-003084, 2011 WL 9198989 (Dist. Ct. Travis Cnty., October 14, 2011)
[25] *G2, Inc. v. Midwest Gaming, Inc.* 485 F.Supp.2d 757 (W.D.Tex.2007)
[26] See *U.S. V. Davis*, 690 F.3d 330, 341 (5th Cir. 2012, cert. den. 133 S.Ct. 1283, and 133 S.Ct. 1296, 2013).

Texarkana, 2001, no pet.) and by *U.S. v. Davis*, 690 F.3d 330, 339 (5th Cir. 2012, cert. den. 133 S.Ct. 1283, and 133 S.Ct. 1296, 2013). In *Davis*, the Fifth Circuit applied the *Davis pretextual analysis* and made clear that

> As the Jester court's reasoning shows, the consideration element in the Texas gambling statutes can be fulfilled without an explicit exchange of money for the opportunity to participate in a sweepstakes. We therefore reject the defendants' argument that consideration is limited to the exchange of money for the privilege of participating. *Davis,* p. 339.

In *Davis*, the Fifth Circuit held that the test for determining the element of consideration was "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." *Id*. In effect, just as the sale of telephone cards in *Jester,* the "donations" made in this *Ysleta* case are simply pretextual for the conduct of an illegal gambling operation.

The *Davis* Court identified certain factors ("Davis pretextual factors") that are determinative of the issue of consideration which are also present in the instant case. Those factors show that the true purpose of the sweepstakes is not donations to the Tribe, but rather as a subterfuge for gambling in a lottery paying cash prizes. The *Davis* Court recognized the following as factors which demonstrate this subterfuge:

A. The *Davis* Court found that "customer receipts with over 300,000 minutes of Internet time remaining" and the fact that "all of the people

> there were only engaged in playing the sweepstakes" were evidence that the customers did not value the Internet time they had purchased. *Davis*, at p.339.

Here, as in *Davis*, the Ex.16 Report and Ex. 17, ¶ 8 Declaration of Lt. Loper shows that it was clear that all the customers observed were there to gamble for cash and not to simply make cash donations. Lt. Loper observed that customers behaved as if in a gambling casino demonstrates their true purpose to "win cash" prizes, not to simply donate.[27] Also see Ex. 12 survey results from Dr. Autry, responses to questions Nos. 1, 9, 10, and 12. See Ex. 1 p. Texas 0605 "Other customers" reference. Moreover, the summary video, Ex. 28 clearly shows the operation of a casino, rather than the operation of a charity. The video in Exhibit 28 shows the cashier paying out casino winnings. In fact, the vendors have designed the sweepstakes to create a casino gambling experience.[28] Finally, Exhibit 22 contains three Attorney General Opinions that support the contention that even a charitable donation could be consideration for illegal gambling.

In 2012, Sgt. Marcos Martinez, who previously worked for the Texas Lottery Commission investigating illegal gambling devices[29] spent nearly ten days

[27] See Ex. 17 ¶ 9 Declaration of Lt. Tom Loper.
[28] See responses to RFA 9 in Exhibits 7-9.
[29] See Ex. 21, deposition Sgt. Martinez 5/24—6/21.

inspecting these two locations[30] and found them to contain gambling devices because he and other customers put money into the machines in order to play the sweepstakes.[31] He did not observe any free play entry into the sweepstakes.[32]

In May 2014, Sgt. James Ferguson, an investigator with prior Department of Public Safety criminal investigator experience[33] and particular experience at investigating gambling devices,[34] also observed people putting cash into the machines and concluded that they were illegal gambling devices.[35]

B. "Further evidence that the defendants' true purpose for the cafés was to create a place where people would be comfortable staying for a long time, purchasing Internet time and playing the sweepstakes, was the casino-like atmosphere at the cafés, complete with tinted windows and free food and drink." *Davis*, at p. 339.

A view of the video in Ex. 28 made at the May 6, 2014 inspection shows this to be a casino. Nothing else would explain the rows and rows of gambling devices. The third-party vendors designed the sweepstakes to create a casino gambling experience.[36] These two locations were twice inspected in 2012 and 2014. As shown in the Ex. 17 Declaration of Lt. Tom Loper, in the 2012 inspection both Speaking Rock Entertainment Center and Socorro Entertainment Center used

[30] See Ex. 21, deposition Sgt. Martinez 18/7-20.
[31] See Ex. 21, deposition Sgt. Martinez 24/5-19.
[32] See Ex. 21, deposition Sgt. Martinez 17/21-24.
[33] See Ex. 20, deposition Sgt. Ferguson 5/7-14.
[34] See Ex. 20, deposition Sgt. Ferguson 6/7-23.
[35] See Ex. 20, deposition Sgt. Ferguson 10/4—11/1; and see 13/14-24; 15/16—16/2; and 17/17—18/7.
[36] See responses to RFA 9 in Exhibits 7-9.

casino-like practices of low lighting, bright video terminal displays, cash-out kiosks, and had roving employees providing refreshments—all designed to keep customers in these gambling places so they could spend more money. Moreover, he identified signs advertising cash prizes, and the operation of a "casino."[37] Here, the donations could be made in $2 increments[38] for exactly the same purpose—to encourage customers to stay and gamble on the video-devices for cash prizes by making additional "incremental" donations to obtain more sweepstakes entries and continue the play. As shown in the Ex. 17 Declaration of Lt. Tom Loper, both Speaking Rock Entertainment Center and Socorro Entertainment Center used casino-like practices of low lighting, bright video terminal displays, cash-out kiosks, heavy security guard presence, and roving employees providing refreshments—all part of a casino-like atmosphere designed to keep customers in these gambling places so they could spend more money.[39] Moreover, a casino like atmosphere can be observed in the summary video, Ex. 28. It shows the same types of gambling devices in a casino atmosphere like Lt. Loper has observed in legal casinos in Las Vegas, New Mexico, Florida, and Louisiana, Exhibit 17 , ¶ 6. At Speaking Rock Lt. Loper observed the staff identifying certain gambling devices as "hot," indicating they would pay more cash prizes, Exhibit 17, ¶ 8. Lt. Loper

[37] See Ex. 17, ¶. 5.
[38] Ex. 16, p. Texas 0015,
[39] See Ex. 17, ¶ 5.

testified that general conditions like low light, food availability, etc. are important because in his experience, he found those in legal casinos.[40] Similarly Karl Maahs, General Manager, also testified that the sweepstakes games were designed to keep the customer at both gambling locations physically[41] for the longest possible time.

C. "Finally, it is reasonable to infer that Davis's and Clark's purpose for the cafés was to legitimize illegal gambling from the fact that café customers were required to sign a form stating that they were not gambling upon entering at least one of the cafés; legitimate businesses ordinarily do not require such formalities." *Davis,* at p. 339.

Here, there is the complete absence of any signs, rules, or records that Defendant Tribe tracks accounts to the players for the purpose of issuing any income–tax information for their alleged "charitable donations." Instead, all the Defendant Tribe produces are 1099s for $10,000 winners[42] but fails to provide any other record of charitable donations,[43] nor even the required[44] Currency Transaction Reports to the Internal Revenue Service.[45] Apparently, making donations is not why anyone comes to and stays at Speaking Rock or Socorro.

To avoid the pretextual analysis above, the Pueblo Defendants rely on a North Carolina case, *Hest Technologies , Inc. v State, ex rel. Perdue,* 366 N.C. 289, 749 S.E.2d 429 (2012) for the proposition that a federal Court in Texas should

[40] See Exhibit 19 Lt. Loper deposition 75/8—76/4.
[41] See Maahs deposition 71/18—72/7.
[42] See Ex. 18 Maahs deposition, 18/14—19/12.
[43] See Ex. 18 Maahs deposition, 19/19-22.
[44] See Ex. 18 Maahs deposition 20/19—21/7.
[45] See Ex. 18 Maahs deposition, 20/6-8.

ignore both Texas state law cases like *Jester* and Fifth Circuit precedent like *U.S. v. Davis* which require the analysis of the *Davis* factors to determine if consideration exists to change a sweepstakes into an illegal lottery, see pp. 18-19 of Pueblo Defendants' motion for summary judgment. That would be a misreading of *Hest Technologies* for the simple reason that *Hest Technologies* defined the issue on appeal to be "…whether to characterize what N.C.G.S. § 14–306.4 actually regulates as conduct or protected speech" in a First Amendment context. *Hest* at 434. The statute in question "…bans the operation of electronic machines that conduct sweepstakes through the use of an 'entertaining display.'" *Hest* at 431. This *Hest* case, unlike the instant *Ysleta* case, does not implicate any analysis under criminal law for gambling, and therefore the analysis at pp. 433-434 of *Hest* was included to show the inapplicability of that criminal law analysis. The Supreme Court in *Hest* found in particular that unlike *Davis*, "…the factual record here does not show whether the telephone or Internet time that sweepstakes participants purchase is ever used. Thus, legislative findings and common sense notwithstanding, we cannot on this record summarily conclude that these plaintiffs are involved in an illegal gambling operation that uses the sale of legal products as a pretext to avoid state gambling laws." *Hest* at 434.

Moreover, the other case cited at p. 434 of the *Hest* opinion, viz., *Telesweeps of Butler Valley, Inc., v. Kelly*, 2012 WL 4839010 (M.D. Pa., 2012; affirmed by the Third Circuit in 537 Fed.Appx. 51 (3rd Cir. 2013) decided just two months prior to *Hest* more closely aligns with the use of the *Davis* pretextual factors to determine the existence of consideration since it too rejected the same theory the Pueblo Defendants advance here—that any free play makes it a legal sweepstakes—and held instead:

> Plaintiff emphasizes that there is "no purchase necessary" to participate in the sweepstakes, meaning the consideration element is absent. However, that argument has been rejected by Pennsylvania courts. In *Commonwealth of Pennsylvania v. Wintel, Inc.*, the Commonwealth Court found that "[a]lthough the player gets two free games on each visit, each game requires eight credits. Once the free credits are used, the player has four credits left. To continue playing, the player must place money into the machine." 829 A.2d 753, 758 (Pa.Commw.Ct.2003) (affirming the trial court's conclusion "that the machines were gambling devices per se because they were games of chance that required no skill to play; money had to be placed into the machine to continue playing after the first 20 credits were used; and the prize was a monetary award."). The same is true here. Once a customer uses up his first 100 free credits, he must "pay to play." *Telesweeps of Butler Valley,* at p. 9.

On the pretext theory of applying the *Davis* factors to find consideration, the federal district court in *Telesweeps of Butler Valley,* as did the Fifth Circuit *Davis* opinion, found that "What is demonstrably the same, however, and deliberately so, is the simulated gambling program 'does give the participant the, if you will, the look and feel of participating in actual poker.'…For Plaintiff to argue that its

sweepstakes is not gambling when it works to create a player experience which mimics casino-style games as closely as possible is too much for this Court to accept." *Telesweeps of Butler Valley*, at p. 10.

B. "Third-party" vendor[46] sweepstakes can violate Injunction.

Beginning at page 22 of the Pueblo Defendants' motion for summary judgment they argue that "…these national third-party vendor sweepstakes are not 'Tribal sweepstakes' and are plainly permitted under the injunction."[47] They then focus their argument on some new immunity theory that if the Tribe can show these are third-party vendor sweepstakes[48], the Tribe is immune[49] from meeting the requirements of the injunction. Nothing could be more wrong.

The *Ysleta II* injunction Order did not insulate the third-party vendors from compliance with the injunction. To the contrary, *Ysleta II*, 220 F.Supp.2d at 705-07 analyzed eleven third-party vendors and held that "…the Court will presume that they are of a type that are common at fuel stations and grocery stores across the

[46] The "third-party giveaway contests conducted by national vendors" are national giveaway programs conducted by eleven named national vendors and are permitted to continue to the extent that any such contests do not violate Texas gambling law. See *Ysleta II*, 220 F.Supp.2d at 705-07.

[47] Although elsewhere the Pueblo Defendants' pleadings in this case merge third-party and Tribal sweepstakes, see e.g. Defendants' Proposal, ECF 284-2, p.2 where the Pueblo Defendants assert that "the sweepstakes shall be administered by a third party vendor through a central database server which will hold the pre-determined sweepstakes prizes."

[48] At pp. 22-23 of their motion for summary judgment the tribe disputes whether or not the current four vendors have to be one of the eleven original vendors in the 2001 injunction Order, and whether or not the vendors have to have a "national plan" of donations. These points are irrelevant to any issue in this contempt action.

[49] This strategy may be explained by the past history the Defendant tribe has had with sweepstakes. See ECF 281, pp. 7-8 Contempt Order, where this Court made it clear that no sweepstakes can be conducted on the premises without prior Court approval. The Defendant Tribe did later submit a sweepstakes proposal, and by ECF #337 Order this Court denied the new sweepstakes proposal for the Tribes' third-party vendor sweepstakes.

country. For this reason, 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. To the extent any such contest violates Texas gaming law, it continues to be prohibited by the injunction."

Thus, whether denominated third-party vendor sweepstakes or Tribal sweepstakes, everybody has to comply with the Injunction. It is a distinction here without a difference.

As shown above, the *U.S. v. Davis* Fifth Circuit analyzed a sweepstakes just like the one contained in this Pueblo Defendants' motion for summary judgment. In *Davis* "The sweepstakes ran on computer software that, at the outset, created a finite number of 'entries.' Within that universe of entries, the software designated particular entries as winning entries, and assigned a cash value to each winning entry. The software then shuffled the universe of entries so that the winning entries were randomly distributed….There were three ways for sweepstakes participants to acquire entries. First, by purchasing Internet time at one of the cafés; each dollar of Internet time purchased came with 100 entries. Second, by requesting entries in person at the café, up to 100 entries a day. Or third, by requesting entries by mail, also up to 100 entries a day." *Davis*, at p. 333. To find out if the entries were winners, the participant could "ask the clerk" or find out by "playing a variety of

casino-like games available on each computer terminal." Afterward the participant could "go to a clerk and receive cash." *Id.*

A review of pp. 10-11 of the Pueblo Defendants' motion for summary judgment shows exactly the same mechanics as outlined in *Davis* above. Consequently, where, as here, it is shown that the Pueblo Defendants' sweepstakes cannot pass the *Davis* pretextual test factors to demonstrate free entry, this sweepstakes is an illegal lottery and fails to satisfy the terms of the *Ysleta II* injunction as shown above. See 2014 Inspection Report Ex. 1; and 2012 Inspection Report Ex. 16. Summary judgment should be denied.

C. Any cash prize sweepstakes requires Court approval.

At pp. 23-24 of the Pueblo Defendants' motion for summary judgment argues that "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." The Pueblo Defendants then offer samples of sweepstakes like those offered by Publisher's Clearing House and McDonalds for comparison. What the Pueblo Defendants failed to consider was that it is not sweepstakes *per se* that are prohibited from paying cash, but

sweepstakes operated with *gaming devices*[50] that are specifically prohibited from *paying cash.*

In this Court's Order of July 30, 2009, ECF 281, the Pueblo Defendants were found to be in contempt of Court for "…operating gambling devices in violation of Texas law and in a manner prohibited by the injunction issued September 27, 2001 and modified May 17, 2002." Order at p. 8. As a result, the Pueblo Defendants were *ordered* to cease from "…the operation of *gaming devices* in a manner that *rewards the player with cash* or the equivalent of cash…in violation of the Texas Penal Code and the injunction and modified injunction in this case." See Order at pp. 8-9. Here, it is undisputed that the Pueblo Defendants operate gaming devices that reward players with cash, and that they ignored this Court's previous July 30, 2009 Order, ECF 281, to do so.

D. Video displays simulating gambling evidence intent to gamble.

See discussion and authorities cited at Paragraph IV. A, above regarding the second *Jester/Davis* factor which is incorporated herein.

[50] The Pueblo Defendants fail to cite that McDonalds discloses its sweepstakes winners with an entertaining gaming device that simulates casino gambling in in their restaurants.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

JAMES "BEAU" ECCLES
Division Chief - General Litigation

s/ William T. Deane
William T. Deane
Texas Bar No. 05692500
Assistant Attorney General
General Litigation Division
David Glickler
Texas Bar No. 00787549
Assistant Attorney General
Criminal Prosecutions Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1534
(512) 320-0667 FAX
Attorneys for Plaintiff
bill.deane@texasattorneygeneral.gov
david.glickler@texasattorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via ECF and by e-mail on this the 25th day of July, 2014, to:

Mr. Randolph H. Barnhouse
Mr. Justin Solimon
JOHNSON BARNHOUSE & KEEGAN, L.L.P.
7424 4th Street, N.W.
Los Ranchos De Albuquerque, NM 87107
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

Mr. Richard Andrew Bonner
KEMP SMITH
221 N. Kansas, Suite 1700
El Paso, Texas 79901
rbonner@kempsmith.com,ycas@kempsmith.com,kramirez@kempsmith.com

/s/ William T. Deane
William T. Deane
Assistant Attorney General