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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**EP-99-CV-320-KC**
	§	
YSLETA DEL SUR, ET AL.	§	
	§	
Defendants.	§	

ORDER TO SHOW CAUSE

On this day, the Court considered Plaintiff State of Texas's ("Plaintiff") Fifth Amended Motion for Contempt ("Motion for Contempt"), ECF No. 423, Defendants' Motion for Summary Judgment ("Motion for Summary Judgment"), ECF No. 468, and Defendants' Motion to Exclude, ECF No. 471. For the reasons set forth below, the Court finds that Plaintiff has presented sufficient evidence for the Court to order Defendants to appear and show cause why Defendants should not be held in contempt of the Court's Order Granting Summary Judgment and Injunction ("Permanent Injunction"), ECF No. 115. Defendants' Motion for Summary Judgment is therefore **DENIED**. The Court also **HOLDS** Defendants' Motion to Exclude **IN ABEYANCE** to be ruled on at the hearing.

I. DEFENDANTS' MOTION TO EXCLUDE EVIDENCE

On August 11, 2014, Defendants filed their Pueblo Defendants' Motion to Exclude Evidence Offered by Plaintiff in Opposition to Motion for Summary Judgment ("Motion to Exclude"), ECF No. 471. Defendants moved to exclude all testimony, evidence and argument in

Plaintiff's Response to Pueblo Defendants' Motion for Summary Judgment ("Response to Motion for Summary Judgment"), ECF No. 469, and Plaintiff's Response to Proposed Undisputed Facts, ECF No. 469-57, stemming from "unauthorized clandestine undercover criminal operations conducted on Pueblo lands . . . ." Mot. to Exclude 3.[1] It is not in dispute that Lieutenant Tom Loper ("Lt. Loper") and Sergeant James Ferguson ("Sgt. Ferguson") engaged in undercover operations on Defendants' lands. *See* Pl. Texas' Resp. to Pueblo Defs.' Mot. to Exclude Evidence ("Response to Motion to Exclude"), ECF No. 473.[2] Because this evidence is central to Plaintiff's Motion for Contempt, the Court addresses Defendants' Motion to Exclude first.

Defendants urge the Court to exclude "all testimony, evidence, questioning and argument derived from or based upon unauthorized clandestine undercover operations conducted on Pueblo lands, beyond the authority of the State of Texas, without the knowledge or consent of the Pueblo, and in violation of governing Court orders and federal law." Mot. to Exclude 9. In support of their contention, Defendants assert that the tribe's inherent power to exclude non-Indians from tribal lands extends to State peace officers acting outside the State's jurisdiction. *Id.* at 6. Defendants further argue that the Court's order granting monthly inspections restricted Plaintiff's right to conduct undercover operations on Pueblo territory. *Id.* at 7-8.

In response, Plaintiff argues that by treating "Texas criminal law relating to gambling as surrogate federal law," the Restoration Act of 1987 (the "Act"), 25 U.S.C. § 1300g et seq., allows Texas peace officers to conduct operations in a manner permitted under Texas criminal

[1] Citations to documents filed on record refer to the page numbers superimposed upon them by the Court's electronic docketing system.

[2] Defendants' Motion to Exclude originally asserted that the evidence collected by Sgt. Ferguson should also be excluded. Defs.' Mot. to Exclude 3. However, it appears now that Defendants accept Sgt. Ferguson's evidence was collected during an approved inspection and is admissible. Pueblo Defs.' Reply in Support of Mot. to Exclude Evidence, ECF No. 477 at 7.

procedure. Resp. to Mot. to Exclude 6-7. Plaintiff additionally argues that the "record [granting Plaintiff the right of monthly inspection] is silent as to any counter-sanction being imposed against Plaintiff Texas which would limit in any way its use of undercover inspectors acting as private citizens." *Id.* at 10.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, --- U.S. ----, 134 S. Ct. 2024, 2030 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "As dependents, the tribes are subject to plenary control by Congress." *Id.* (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). "Courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2031 (citing *United States v. Dion*, 476 U.S. 734, 738-39 (1986)). "[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). "This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ." *Id.* at 144.

The Court first rejects Plaintiff's argument that the Act's incorporation of Texas gaming law "as surrogate federal law" supports the notion that the Act also incorporated the standards of Texas criminal investigatory procedure. It is true that the Fifth Circuit has recognized that Texas gaming law "functions as surrogate federal law" under the Act. *Ysleta del Sur Pueblo v. State*, 36 F.3d 1325, 1335 (5th Cir. 1994). Texas gaming law does so, however, only to the extent that it "govern[s] the determination of whether gaming activities proposed by the Ysleta del Sur

Pueblo" are legal under the Act. *Id*. The Court does not read the Fifth Circuit's decision as standing for the proposition that, by extension, Texas criminal procedure and civil investigatory powers also serve as surrogate federal law. To the contrary, "[n]othing in [§ 1300g-6] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b).

Nor does the Act's granting Plaintiff the right to bring an action to enjoin illegal gambling also confer a right to investigate outside its jurisdiction. "There is a difference between the right to demand compliance with state laws and the means available to enforce them . . . ." *Bays Mill*, 134 S. Ct. at 2031 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998)). While Congress undoubtedly granted Plaintiff the right to demand compliance with Texas gambling statutes, Congress also undoubtedly restricted Plaintiff's means of enforcement to bringing an action in the federal courts. *See* 25 U.S.C. § 1300g-6(b)-(c). Plaintiff must do so in a manner that respects both federal law and Defendants' inherent tribal sovereignty.

Furthermore, this Court likewise did not "grant [Plaintiff] either regulatory or enforcement authority over [Defendants] when it authorized state agents to conduct inspections of [Defendants'] gaming records." *State v. Ysleta del Sur Pueblo*, 431 F. App'x 326, 331 (5th Cir. 2011). "[S]tate agents are only empowered to *inspect* those records." *Id*. "Then, if they should find any irregularities, the State [must] return to the district court for further action." *Id*.

Turning to Defendants' arguments, the Court does not believe that the prior order allowing monthly inspections necessarily negated Plaintiff's right to enter public areas of Defendants' entertainment centers, if Plaintiff otherwise had the right to do so. The Court's

order stated that Defendants must "allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to all books and records relating to the conduct of gaming to ensure continued compliance with the terms of the injunction." Mem. Op. and Order Granting Mot. for Contempt ("2009 Contempt Order"), ECF No. 281 at 9. As the Fifth Circuit stated, this grant of access was "analogous to discovery." *Ysleta del Sur Pueblo*, 431 F. App'x at 331. The Court understands its grant of inspection rights to allow Plaintiff, once monthly, unhindered access to Defendants' gaming operations to which it would not otherwise have access without petition to the Court. The Court does not, however, understand the previous order to necessarily restrict Plaintiff's ability to visit the public areas of the entertainment centers if otherwise permitted to do so.

The Court agrees with Defendants that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands . . . ." *Jicarilla Apache*, 455 U.S. at 141. Neither party, however, has sufficiently briefed the Court on what actions Defendants took to communicate any terms of exclusion to Plaintiff or Plaintiff's investigators prior to the undercover operations. Further, there is no indication that Plaintiff's agents went anywhere in the entertainment centers not open to the public or otherwise illegally seized evidence from Defendants. The only evidence offering insight into this inquiry is Lt. Loper's testimony that officers wore "button" cameras during the undercover operations. Resp. to Mot. for Summ. J. Ex. 19, Dep. of Lt. Loper ("Loper Dep."), ECF No. 469-42 at 6-7. The Court notes in relation to Lt. Loper's statement that Plaintiff complains of an August, 27, 2013, letter from Defendants' counsel refusing Plaintiff the right to videotape or photograph the premises during its inspections. Mot. for Contempt 18. It

appears, however, that Lt. Loper's testimony refers to undercover operations conducted in 2012, prior to the receipt of the letter. Loper Dep. 6. The Court also notes that there is evidence of a sign at an entertainment center prohibiting public photography. Mot. for Summ. J. Ex. 2, Decl. of Karl Maahs ("Maahs Decl."), ECF No. 468-3 at 17. There is no evidence, however, indicating the sign was hanging at the time of the undercover investigations. Without further evidence on these issues, the Court is unable at this time to determine if the evidence stemming from the undercover operations is, or even should be, excludable as Defendants contend.

Thus, the Court reserves judgment on the admissibility of the evidence until after the scheduled hearing, at which the parties shall brief the Court on this issue. Accordingly, the Court **HOLDS** the Motion to Exclude **IN ABEYANCE** to be ruled on after the hearing. Therefore, the Court cites to the disputed evidence below for the purposes of deciding the Motion for Summary Judgment, but expressly notes it may reconsider the evidence's admissibility after the hearing.

II. MOTION FOR SUMMARY JUDGMENT AND MOTION FOR CONTEMPT

A. Background

The Court first recounts the procedural history of this protracted and tortuous litigation, then proceeds to describe the alleged current state of Defendants' gaming operation, and finally discusses the content of the operative Fifth Amended Motion for Contempt.

1. Procedural history

a. The Restoration Act

The underlying statute governing Defendants' rights to engage in gaming activities is the Act, which established full federal trust status between the Ysleta Del Sur Pueblo and the United

States. The pertinent section of the Act for the present order is § 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 lands of the tribe. Any violation of the prohibition in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.

25 U.S.C. § 1300g-6(a).

The Act grants Plaintiff express permission to bring an action to enjoin violations of the provisions of section (a). 25 U.S.C. § 1300g-6(c). Exclusive jurisdiction for such actions lies in the federal courts of the United States. *Id.*

b. Plaintiff's initial action for enjoinder

On September 27, 1999, Plaintiff filed its initial Complaint, ECF No. 1, seeking to enjoin Defendants from continuing a number of illegal gambling operations in violation of Texas law and 25 U.S.C. § 1300g-6(a).

On September 27, 2001, the Court issued its Permanent Injunction, enjoining Defendants from continued operation of the Casino. Permanent Inj. 2-5. The injunction had the "practical and legal effect of prohibiting illegal as well as legal gaming activities by the Defendants." *State v. Ysleta del Sur Pueblo*, 220 F.Supp.2d 668, 699 (W.D. Tex. 2001).

On October 12, 2001, Defendants filed a motion challenging the injunction on the ground that its prohibition of both legal and illegal gambling activity was overly broad. Order Modifying September 27, 2001, Injunction ("Modified Injunction"), ECF No. 165 at 5. The Court denied Defendants' motion on November 2, 2001, expressly opting not to allow legal activities until all illegal gaming activities ceased. *Id.* at 5. The Court provided, however, that once in compliance, Defendants could petition for a modification of the Permanent Injunction to permit participation

in legal gaming activities. *Id.* at 5-6; *State v. Ysleta del Sur Pueblo*, No. 02-50711, 2013 WL 21356043 (5th Cir. May 29, 2003) (upholding the Court's decision not to modify the injunction).

c. The Court's May 17, 2002, modifications to the permanent injunction

On March 1, 2002, Defendants submitted a motion for reconsideration seeking a declaration that use of certain "amusement devices" and operation of specified sweepstakes would not violate the Permanent Injunction. *See* Mot., ECF No. 160.

On May 17, 2002, the Court issued its Modified Injunction. With respect to the use of "amusement devices," the Court modified the Permanent Injunction to allow Defendants the use of such devices "to the extent that the Tribe adheres to all provisions of [Texas Penal Code] § 47.01(4), as well as other relevant Texas Penal Code sections." Modified Inj. 9. Moreover, the Court ordered that Defendants

> shall be permitted to offer eight-liners as an amusement device, but only to the extent that [they] strictly adhere[] to the prize limitations provided in § 47.01(4)(B). That is, the device must exclusively offer "noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less." *Id*. at 11.

The Court cautioned Defendants to strictly adhere to this language and the case law interpreting it. *Id.*

The Court next addressed Defendants' proposed sweepstakes. First, the Court noted that Defendants "permit[] national third party vendors to conduct contests on the reservation." *Id.* at 12. Examples of such contests included, among others, sweepstakes conducted by Nestlé Crunch, Mobil 1, Pepsi, Corn Nuts and Doritos. *Id.* Noting that the record did not include specific information about these sweepstakes, the Court presumed that they were "of a type that

[were] common at fuel stations and grocery stores across the country." *Id.* at 13. The Court modified the injunction "to permit these and other like-national third party vendor contests, provided that no specific contest violates Texas gaming law." *Id.* "To the extent any such contest violates Texas gaming law, it continues to be prohibited by the injunction." *Id.* The Court refers to this category of sweepstakes as "National Third Party Vendor Sweepstakes" throughout this order.

Defendants also petitioned the Court to permit Defendants themselves to "conduct sweepstakes activities in compliance with the provisions of Chapter 43 of the Texas Business and Commerce Code." *Id.* Defendants, however, offered no facts or descriptions of how they would operate such sweepstakes. *Id.* Accordingly, the Court found that "[w]ithout a specific proposal for a sweepstakes, legal under Texas law, before it, . . . [t]he Court [would] not modify the [Permanent Injunction] to permit the Tribe to conduct a sweepstakes absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law." *Id.* at 14. The Court refers to this category of sweepstakes as "Tribal Sweepstakes" throughout this order.

d. Defendants' first proposed sweepstakes

On September 9, 2003, Defendants filed their Second Emergency Motion for Clarification of Order Granting Summary Judgment and Injunction ("First Proposal"), ECF No. 177. The First Proposal sought approval to operate "a sweepstakes contest driven by the purchase of prepaid phone cards and the use of those cards in 'sweepstakes validation terminals.'" *See* Order ("October 20, 2003, Order"), ECF No. 179 at 5. Under the First Proposal, Defendants' customers would purchase a prepaid long distance phone card and, with the

purchase, would receive sweepstakes entry points. *Id.* After purchasing the initial $10 phone card, customers could purchase additional phone time in $1.00 increments up to $50.00 per card. *Id.* Customers received additional sweepstakes entry points with the purchase of additional phone time. *Id.* Purchase of a phone card was a requirement to play the sweepstakes terminals with the exception of one "free" sweepstakes entry per day. *Id*. at 6. Importantly, the language of the free entry rules provided that "*[t]his card* entitles the customer to ONE Free Entry." *Id.* (emphasis added).

On October 20, 2003, the Court rejected the First Proposal. *Id.* at 13. The Court first found that the "player's ability to obtain the cash [was] solely determined by the chance that symbols will appear consecutively in an eight-liner grid." *Id.* at 10. The "sweepstakes validation terminals" were, therefore, "unquestionably" illegal "gambling devices" under Texas law.[3] *Id.* "[T]he fact that [Defendants] offer[ed] one 'free' entry per day to a player [did] not purify the contest" because it was unclear if that entry was initially free. *Id.*

Furthermore, the Court noted that "[e]ven if the free entry is obtainable without payment of compensation, the free entries do not ameliorate the contest [as] [t]he machines are still available for paying players as well." *Id.* Additionally problematic was the fact that "a player using a free entry appears to be able to purchase more sweepstakes points upon validation of the free entry at the validation terminal." *Id.*

Relying on *Jester v. State*, 64 S.W.3d 553 (Tex. App. 2001), the Court rejected the First Proposal on the grounds that it was "geared towards inducing purchasers to participate in the sweepstakes contest so that the Tribe will receive financial gain." *Id.* at 12. "Even if part of the

[3] Section 47.01(4) of the Texas Penal Code 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."

card purchaser's motivation [was] to obtain the right to make long-distance telephone calls, the purchaser [was] also purchasing sweepstakes points." *Id.* "Such a purchase is sufficient to constitute consideration under the §47.01(7) definition of 'lottery.'" *Id.*

e. The Court's second order of contempt

On August 3, 2009, the Court issued its 2009 Contempt Order, in response to ongoing gaming activities on Defendants' reservation. *See* 2009 Contempt Order. At issue was whether or not Visa debit cards constituted "noncash merchandise" within the meaning of the § 47.01(4)(B) exception to the definition of "gambling device." *Id.* at 5. It was undisputed that sweepstakes winners could use the Visa debit cards to "purchase merchandise at any retail outlet that honors Visa cards." *Id.* Finding that "[t]he word 'cash' is not limited to coins and paper money," but also includes the "equivalent of money," the Court concluded that the Visa debit cards did not qualify as "noncash merchandise" under the exclusion in § 47.01(4)(B). *Id.* Therefore, Defendants' eight-liners constituted illegal gambling devices under Texas law and violated the Modified Injunction. *Id.* at 6.

f. Defendants' second proposed sweepstakes

On August 4, 2009, the Court issued its Order Regarding Defendants' Third Motion for Clarification ("Second Proposal"), ECF No. 282. Defendants argued that they had brought their eight-liner use within the law by replacing the issuance of Visa debit cards with "representations of value" redeemable for gasoline and "other non purchasable products" at Defendants' company stores. *Id.* at 2. The Court disagreed, finding the "representation of value" to be indistinguishable from Visa debit cards. *Id.* Accordingly, without more information, the Court

was unable to determine if Defendants were operating the eight-liner devices in a manner which fit within the exclusion contained in Texas Penal Code § 47.01(4)(B). *Id.*

Defendants next asked the Court to approve a sweepstakes program known as "Texas Reel Skills." *Id*. at 2-3. The sweepstakes was distinguished from the First Proposal "by the substitution of prepaid internet access cards for prepaid phone cards." *Id*. at 4. The Court found the substitution to be a "distinction without legal difference" and rejected the Second Proposal. *Id*. at 4-5.

g. Defendants' third proposed sweepstakes

On August 10, 2009, Defendants submitted their Defendants' Notice of Filing Defendants' Proposal as Requested in this Court's Order Granting Motion for Contempt ("Third Proposal Notice"), ECF No. 284. The proposal was based on a "nation-wide sweepstakes" aimed at "receiving donations from the public." Defs.' Proposal as Requested in this Court's Order Granting Mot. for Contempt ("Third Proposal"), Ex. 1, at 1-2, ECF No. 284-1. Customers would obtain entry into the sweepstakes through "various free methods or through a donation to [Defendants]." *Id.* at 2. Prizes would be "revealed through the use of various game terminals," but "customers" would also be able to "redeem their winning entries without engaging in a game should they so desire." *Id.*

"The sweepstakes [would] be administered by a third party vendor through a central database server which [would] hold the pre-determined sweepstakes prizes." *Id.* This "third party vendor" would "initiate a sweepstakes 'series' by generating a pre-determined number of entries and corresponding prizes in the aforementioned database." *Id.*

"Making a donation [would] not increase the participant's chance of winning a prize" and "[m]atching symbols [would be] displayed for entertainment benefits [only,] unlike gambling devices where symbols are randomly drawn and matching symbols determine prizes." *Id*. at 3, 5.

On October 18, 2010, the Court issued its Order Regarding Defendants' Motion to Approve Sweepstakes Proposal ("October 18, 2010, Order"), ECF No. 337. Initially finding that because Chapter 622 of the Texas Business and Commerce Code would not govern the sweepstakes,[4] the Court stated that "[t]he real issue . . . is whether the operation of a sweepstakes in the manner proposed by the Defendants would violate the Texas Penal Code." *Id.* at 2.

In that regard, the Court noted that "[g]enerally speaking, the element that distinguishes an illegal lottery from a legal sweepstakes is the element of consideration." *Id.* at 3. Therefore, "[i]f the sweepstakes offered . . . a legitimate free entry alternative, and if 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. "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 3-4 (*citing State v. Socony Mobil Oil Co.*, 386 S.W.2d 169 (Tex. App. 1964)). On these grounds the Court rejected Plaintiff's argument that the proposed sweepstakes would necessarily constitute an illegal lottery. *Id.* at 4.

However, Plaintiff's second argument, that the sweepstakes contemplated the use of illegal "eight-liners," was a "much closer question." *Id*. The proposal claimed that the eight-liners "[would] be used only as computer terminals to display winning entries in an 'amusing

[4] Chapter 622 of the Texas Business and Commerce Code only concerns sweepstakes (1) conducted through the mail and (2) with a most valuable prize over $50,000.00. Tex. Bus. & Com. Code §§ 622.051-.052. Because Defendants denied that the maximum prize would reach over $50,000.00, the Court found that the proposed sweepstakes would not be governed by Chapter 622. October 18, 2010, Order 2.

way.'" *Id*. Based on this description, the Court found that, if true, there appeared to be "nothing inherently illegal or improper in using a computer terminal to announce the results of a bona fide sweepstakes contest." *Id.* Nonetheless, taking consideration of Defendants' history of illegal use of eight-liners, the Court found that "[b]oth the State and the Court are entitled to further clarification regarding the use of the eight-liner devices before the Tribe's sweepstakes proposal [could] be approved." *Id.* at 5.

h. Summary of current state of the Court's injunction

In accord with the above-discussed orders, the Court finds that the state of the injunction against Defendants is as follows.

Pursuant to the original Permanent Injunction, Defendants were initially ordered to cease and desist from any and all gambling activities under Texas law, both legal and illegal. *Ysleta del Sur Pueblo*, 220 F.Supp.2d at 699. This absolute prohibition was later relaxed by the Modified Injunction to the extent that it allowed Defendants to use "amusement devices" and "eight-liners," as well as "National Third Party Vendor Sweepstakes" under limited conditions. *See* Modified Inj.

Under the Modified Injunction the use of "amusement devices" is permitted to the extent they strictly adhere to § 47.01(4) of the Texas Penal Code. *Id.* at 8-11. The use of "eight-liners" is likewise permitted to the extent that they strictly adhere to the prize limitations provided in § 47.01(4)(B). *Id*.

Furthermore, Defendants are allowed to "sell products associated with sweepstakes run by national third party vendors and typical of those at fuel stations and grocery stores across the country." October 20, 2003, Order 4. Defendants are also allowed to operate "other like-national

third party vendor contests," without prior judicial approval. Modified Inj. 12-14. "To the extent any [National Third Party Vendor Sweepstakes] violates Texas gaming law," it continues to be prohibited. *Id.* at 13.

Defendants, however, remain enjoined from conducting any Tribal Sweepstakes without submitting a detailed proposal showing compliance with Texas law. *Id.* at 13-14.

Furthermore, the following is clear from the Court's prior orders:

1) Visa debit cards and other "representations of value" which can be used to redeem goods at stores do not qualify as "noncash merchandise" under the § 47.01(4)(B) exception to the definition of "gambling device." 2009 Contempt Order 7; Second Proposal 2.
2) Sweepstakes offering "free" entry upon purchase of either prepaid phone cards or internet access cards violate the Modified Injunction as illegal lotteries where it is the purchase of the card that entitles the entrant to a free sweepstakes entry. October 20, 2003, Order 5; Second Proposal 4-5.
3) Sweepstakes offering a "legitimate free entry alternative," in which "the free entrant stands a chance of winning equal to that of the donor entrant" would not be viewed as an illegal lottery. October 18, 2010, Order 4.

B. Defendant's Current Gaming Operations

After a review of the evidence submitted by Plaintiff, the Court finds that the evidence on record tends to indicate the following regarding the current state of Defendants' gaming operations.

1. The sweepstakes methodology

"Beginning in [sic] approximately April 19, 2012, national third party vendors have operated sweepstakes . . . at the Speaking Rock Entertainment Center and the Socorro Entertainment Center . . . owned by [Defendants]." Mot. for Summ. J., ECF No. 468 at 9. Defendants' sweepstakes are operated by various software packages provided by the third party vendors. Mot. for Contempt Ex. 1, Letter From Diamond Game, ECF No. 423-1 at 1 ("DG Letter.");[5] Mot. for Contempt Ex. 2, Letter From Accelerated Marketing Solutions, LLC ("Accelerated Marketing"), ECF No. 423-2 at 1 ("AM Letter"); Mot. for Contempt Ex. 3, Letter From Winter Sky, ECF No. 423-3 at 1-2 ("WS Letter"). The exact nature of the software's functioning varies by vendor. Diamond Game and Accelerated Marketing provide electronic gaming kiosks that access computer servers to obtain entry results. DG Letter 1; AM Letter 3; Mot. for Summ. J. Ex. 7, Decl. of Randee Kerns ("Kerns Decl."), ECF No. 468-8 at 3. Winter Sky provides "sweepstakes system[s]" connected to "entertaining displays," but does not clarify if that system also uses a centralized server to distribute sweepstakes results. WS Letter 1-2.

Vendors' sweepstakes consist of a finite number of electronic tickets for each sweepstakes. DG Letter 1; AM Letter 1; WS Letter 1-2; Kerns Decl. 3; Mot. for Summ. J. Ex. 4, Aff. of Bart Hamm ("Hamm Aff."), ECF No. 468-5 at 2; Mot. for Summ. J. Ex. 3, Aff. of Jack Saltiel ("Saltiel Aff."), ECF No. 468-4 at 3; Mot. for Summ. J. Ex. 5, Decl. of Jason Queen ("Queen Decl."), ECF No. 468-6 at 3. The winning entries are predetermined prior to the start of the sweepstakes. AM Letter 3; WS Letter 2; Hamm Aff. 2; Saltiel Aff. 3; XCite Amusement, Inc.'s Mot. for Summ. J. Ex. 3, XCite Sweepstakes Rules ("XCite Rules"), ECF No. 457-3 at 1.

[5] Sweepstakes operator Blue Stone Entertainment employs the same software used by Diamond Games. Mot. for Summ. J. Ex. 6, Decl. of Mark Witschger ("Witschger Decl."), ECF No. 468-7 at 2; Mot. for Summ. J. Ex. 7, Decl. of Randee Kerns ("Kerns Decl."), ECF No. 468-8 at 1.

The sweepstakes software delivers electronic tickets to participants in a random fashion. DG Letter 1; AM Letter 1; WS Letter 2; Hamm Aff. 2; Kerns Decl. 3; Saltiel Aff. 3; Queen Decl. 4.

A customer may access sweepstakes results without engaging in the kiosks' gambling simulators. AM Letter 2-3; WS Letter 1; Kerns Decl. 4. Using the electronic kiosk to reveal results does not change the odds that any entry will be a winning ticket. AM Letter 2; WS Letter 2; Saltiel Aff. 3; Queen Decl. 4; XCite Rules 1. The evidence does not establish if Diamond Games' kiosks alter the odds of winning. *See* DG Letter.

The kiosks do not choose the content of a ticket to be issued or decide if it is a winning number. DG Letter 1; AM Letter 2; WS Letter 2; Hamm Aff. 3; Saltiel Aff. 3; Queen Decl. 4. Opening more or less than one entry at a time does not increase or decrease or otherwise change the prize associated with the entry. AM Letter 2; WS Letter 2; Hamm Aff. 3; Saltiel Aff. 3; Queen Decl. 4; XCite Rules 1. The evidence does not establish if opening more than one entry at a time changes the odds of winning a Diamond Games sweepstakes. *See* DG Letter; Kerns Decl.

The sweepstakes software contains security devices to prevent tampering with the fixed databases of entries. Queen Decl. 4; Kerns Decl. 3; Saltiel Aff. 3; Hamm Aff. 3.

2. Means of entering the sweepstakes

Plaintiff presents somewhat contradictory evidence regarding the means by which participants may enter the sweepstakes. It is undisputed that participants receive a sweepstakes entry upon making a "donation" to Defendants. DG Letter 1; AM Letter 1; WS Letter 1; Queen Decl. 3. Plaintiff's officers did not "see" any evidence of free play availability. Resp. to Mot. for Summ. J. Ex. 20, Dep. of Sgt. Ferguson ("Ferguson Dep."), ECF No. 469-43 at 3; Resp. to Mot. for Summ. J. Ex. 21, Dep. of Sgt. Martinez ("Martinez Dep."), ECF No. 469-44 at 8; Resp. to

Mot. for Summ. J. Ex. 19, Dep. of Lt. Loper ("Loper Dep."), ECF No. 469-42 at 5. There is significant evidence, however, that also indicates no donation is necessary to receive an entry. WS Letter 2; AM Letter 1; DG Letter 1; Hamm Aff. 2; Saltiel Aff. 3; Queen Decl. 4; Mot. for Summ. J. Ex. 6, Decl. of Mark Witschger ("Witschger Decl."), ECF No. 468-7 at 3; XCite Rules 1; Blue Stone Entertainment's Mot. for Summ. J. Ex. 6, Aff. of Veronica Cortez, ECF 455-6 at 2.

This evidence indicates free entries may be obtained either online, in person at the entertainment centers, or through the mail. DG Letter 1; AM Letter 1-2; WS Letter 2; Saltiel Aff. 3; Queen Decl. 4; Witschger Decl. 3; XCite Rules 1. The number of free entries available per customer per day varies by sweepstakes. *See* DG Letter 1 (no limit); AM Letter 2 (no limit on requests by mail); WS Letter 2 (100 free points per day); Maahs Decl. 4 (1,000 sweepstakes entries per customer per day). Signage is posted at various locations at the entertainment centers notifying customers that free entries are available. Mot. for Contempt Ex. 5, Decl. of Lt. Tom Loper ("Loper Decl."), ECF No. 423-5 at 2, 4; Maahs Decl. 3, 5-23; DG Letter 1; Loper Dep. 14; Hamm Aff. 3; Saltiel Aff. 4; Witschger Decl. 3; Kerns Decl. 4-5. The odds of winning, per entry, do not change according to how the entries are obtained. AM Letter 2; WS Letter 2; Hamm Aff. 3; Saltiel Aff. 3; Queen Decl. 4; Kerns Decl. 4; XCite Rules 1. Both free entry tickets and those obtained by donation are drawn from the same computer server. AM Letter 2; WS Letter 2; Kerns Decl. 4.

3. The electronic kiosks

The electronic devices consist of "multi-reel, multi-line, video slot machines" and contain references to "Jackpot." Loper Decl. 3. The kiosks bear a variety of names, such as "Tribal Treasure," "Super Seven," "Robbin some Cash," "Fishing for Bucks," "Bustin Vegas," and

"Bucks for Bucks." Mot. for Contempt Ex. 4, Office of the Attorney General Criminal Investigations Divisions Report ("Investigative Report"), ECF No. 423-4 at 12-13, 16, 38, 53. The kiosks are "multi-game machines" that allow a player to start on one game and switch to another. *Id.* at 52. The Soccorro Entertainment Center contains roughly 400 such kiosks. *Id.* at 7.

Participants enter credits in the kiosks in one of two ways. First, kiosks are equipped with a "secure currency reader that reads currency from $1.00 up to $100 and gives credits based upon the dollar amount inserted." *Id.* at 11, 18. Kiosks are also equipped with "a secure voucher reader which reads previously obtained vouchers containing credits." *Id.* at 35, 38, 52. However, contradictory evidence states that the "machines had no slot for a gaming card and only accepted currency." *Id.* at 5.

Once credits have been inserted into the kiosk, participants then use an electronic display to "wager, double up or redeem or take the credits won." *Id.* at 12, 18, 24, 25, 28. A "MAX bet" varies depending on machine. *Id.* at 5. "Bets" range from a maximum of 500 credits ($5.00 donation on a "penny machine") to 45 credits on other machines. *Id.* After placing a "bet," the kiosk "spin[s] in the fashion of a slot machine" and "stop[s] on various combinations of symbols," including American eagles, stars, numbers, and bars. *Id.* at 5, 11, 18. If the participant obtains a winning result the prize is added to the participant's total credits. *Id.* at 5. If the "wager" loses, the number of credits is subtracted from the total. *Id*. As stated above, undisputed evidence indicates that the displays on kiosks merely reveal predetermined results for a sweepstakes ticket and do not alter the result of an entry. AM Letter 2; WS Letter 2.

Participants are able to win more than 10 times the amount wagered from a single play of the game. *See* Investigative Report.

4. The third parties

The third party "vendors" self-identify as either a "national vendor," DG Letter 1; Queen Decl. 2, a "national marketing and promotional firm," AM Letter 1, or a "national vendor of sweepstakes software." WS Letter 1. Diamond Games "manufactures and services games and gaming systems, and offers national promotional sweepstakes." DG Letter 1. Accelerated Marketing is a "software firm" that "provides systems to end users" "to enhance the marketing of products or donations." AM Letter 1. Winter Sky is a "national vendor of sweepstakes software" and "offers sweepstakes promotions to [Defendants]." WS Letter 1; Queen Decl. 2-3. Winter Sky also provides "marketing services" to Defendants in connection with the sweepstakes. Queen Decl. 3.

5. The entertainment centers' atmosphere

The entertainment centers' atmospheres consist of low lighting, multiple rooms and sounds similar to those heard in a Las Vegas Casino. Loper Decl. 2. Employees roam the premises providing refreshments as well as change for currency. *Id.* Staff indicate that a particular device is "hot" to induce participants to play. *Id.* at 3.

The sweepstakes designers admit that the promotions are "designed to provide the look and feel of casino games for entertainment purposes, without actually functioning in the same manner." Resp. to Mot. for Summ. J. Ex. 7, Blue Stone Entertainment Objection & Resp. to Pl.'s First Req. for Prod., ECF No. 469-30 at 4; Resp. to Mot. for Summ. J. Ex. 8, Resp't XCite Amusement, Inc.'s Resp. to Pl.'s First Req. for Admis., ECF No. 469-31 at 3.

C. The Motion for Contempt

Plaintiff's Motion for Contempt sets out a number of allegations that Defendants are in violation of the Court's previous orders. Though presented somewhat disjointedly, the Court believes that Plaintiff's allegations assert three distinct violations: (1) Defendants' sweepstakes do not constitute a National Third Party Vendor Sweepstakes and therefore require prior judicial approval under the Modified Injunction; (2) Defendants' electronic kiosks are illegal "gambling devices" that do not fit into any Penal Code exception; and (3) Defendants' sweepstakes are an illegal lottery under Texas law. The Court addresses each argument in turn.

1. Standard

"A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence (1) that a court order was in effect, (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order." *Seven Arts Pictures, Inc. v. Jonesfilm*, 512 F. App'x 419, 422 (5th Cir. 2013) (quoting *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992)). "In a civil contempt proceeding, the movant bears the burden of establishing the elements of contempt by clear and convincing evidence." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (citing *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 401 (5th Cir. 1987)). "[E]vidence is clear and convincing only if it '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' [which] 'enable[s] the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.'" *Oaks of Mid City Resident Council v. Sebelius*, 723 F.3d 581, 585 (5th Cir. 2013).

2. Whether the sweepstakes qualify as National Third Party Vendor Sweepstakes

Plaintiff argues that instead of appealing the Court's rejection of the Third Proposal, Defendants "simply renamed [their] previously denied gambling operations and tried to fit them into the category of 'third party-vendor national sweepstakes.'" Mot. for Contempt 9. The crux of Plaintiff's allegation is that Defendants' current sweepstakes are Tribal Sweepstakes disguised as National Third Party Vendor Sweepstakes under the meaning of the Modified Injunction. If found to be true, Defendants would be in contempt of the Modified Injunction, in which the Court stated it "[would] not modify the injunction to permit [Defendants] to conduct a [Tribal Sweepstakes] absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law." Modified Inj. 14. Defendants' most recent proposal was expressly rejected by the Court. *See* Third Proposal. No other order from this Court has permitted Defendants to conduct a Tribal Sweepstakes. Thus, if found to be conducting a Tribal Sweepstakes, even if legal under Texas law, Defendants would be in contempt of the Court's orders.

In support of its contention that Defendants are attempting to disguise a Tribal Sweepstakes, Plaintiff argues that "[t]here is no evidence that any of the Respondent Vendors in this litigation were one of those eleven vendors in 2001 described by name in the Order and who conducted the 'third-party giveaway contests' that 'are of a type that are common at fuel stations across the country.'" Mot. for Contempt 12. It is clear, however, that the Modified Injunction permits both sweepstakes conducted by the enumerated vendors *and* "other like-national third party vendor contests." Modified Inj. 13. The Modified Injunction did not limit such

sweepstakes to those conducted only by the specifically enumerated vendors. To the extent Plaintiff's Motion for Contempt asserts this as grounds for contempt, the Court rejects it.

Plaintiff additionally asserts that "[t]he Defendant Tribe and Respondent Vendors operate a joint venture to share illegal gambling proceeds through the use of their Promotional Sweepstakes Agreements with the Vendors." Mot. for Contempt 12. Regardless of the merits of this contention, Plaintiff has failed to attach evidence such as the Promotion Sweepstakes Agreements that it cites to substantiate this claim. Accordingly, Plaintiff has failed to meet its evidentiary burden on this argument and the Court rejects it as well.[6]

Plaintiff further complains that "[n]either Defendant Tribe nor the Respondent Vendors have a 'national' plan of donations to Defendant Tribe, nor any plan currently in place for these donations to be made at 'fuel stations and grocery stores across the country . . .'" *Id.* To the extent this argument relies on the proposition that a valid National Third Party Vendor Sweepstakes must incorporate a plan for participation through fuel stations and grocery stores, it is an argument without merit. The Modified Injunction permits "other like-national third party vendor contests" that are "of a type that are common at fuel stations and grocery stores across the country." Modified Inj. 13. The location of the sweepstakes is not the determinative factor in this analysis. Furthermore, the Modified Injunction does not require that the sweepstakes have a "national plan." Instead, the Modified Injunction requires that the *vendor* be a nation-wide third party.

[6] Defendant Winter Sky has submitted its Third Party Giveaway Contest Conducted by National Vendors Terms and Conditions of Participation, ECF No. 456-3, providing for Defendants to provide Winter Sky with 30% of "Sweepstakes Net Income" and 50% of "Community Prize Sweepstakes Payment." *Id.* at 1. This evidence is insufficient to establish Plaintiff's contention as a whole, was not presented by Plaintiff, and does not otherwise explain the merits of the argument.

Plaintiff's strongest argument lies in the fact that the evidence shows sweepstakes participants submit money only to Defendants themselves. Mot. Contempt 12. The Court agrees that this indicates the sweepstakes may fall outside the meaning of a National Third Party Vendor Sweepstakes. The evidence shows that the third party vendors provide only software, "sweepstakes promotions," and marketing assistance *to Defendants*. DB Letter 1; AM Letter 1; WS Letter 1. There is no evidence of a third party product sold in connection with the sweepstakes.

As the Court has previously explained, the Modified Injunction's National Third Party Vendor exception permits Defendants to "sell products associated with sweepstakes run by national third party vendors and typical of those at fuel stations and grocery stores across the country." October 20, 2003, Order 4. The Court fails to see how the third party vendors associated with the current sweepstakes qualify within this meaning. Not only does the evidence show that the third parties "vend" nothing in relation to the sweepstakes, they are also clearly distinguishable from, and incomparable to, the "vendors" considered by the Court in the Modified Injunction. *See* Modified Inj. 12-13 (listing Nestlé Crunch, Doritos, and Pepsi, among others); Witschger Decl. 3 ("Blue Stone has only been asked by the Tribe to promote charitable donations, and not the sale of products.").

The Modified Injunction clearly contemplated only sweepstakes attached to third party merchandise and conducted by third party vendors. It did not contemplate third party software vendors assisting Defendants to run a Tribal Sweepstakes selling "donations" to the tribe. That Defendants were aware of this interpretation is evidenced by the fact that they submitted the Third Proposal, which substantially resembles the current sweepstakes, for the Court's approval.

See Third Proposal. The Court's subsequent rejection of the Third Proposal was a further clear indication that the Court viewed the proposed sweepstakes as representing a Tribal Sweepstakes for which Defendants are required to seek prior approval. *See* Modified Inj.

The Court therefore finds that Plaintiffs have sufficiently alleged facts tending to show that Defendants have continued to operate a previously rejected Tribal Sweepstakes in direct violation of the Court's orders. *See* Modified Inj.; Third Proposal. Whether or not such an arrangement is legal under Texas law is a separate question. If Defendants are in fact operating unapproved Tribal Sweepstakes, whether legal or not, those sweepstakes would be in violation of the Modified Injunction. Accordingly, the Court orders Defendants to appear to show cause why Defendants should not be held in contempt.

3. Whether the "eight-liners" constitute illegal gambling devices

Plaintiff next asserts that the "gambling devices" operated by Defendants "do not fall within the limited exception of Penal Code § 47.01(4)(B)" because players are not "exclusively [rewarded] with noncash merchandise prizes, toys, or novelties" and the awards exceed the "$5 maximum and '10 Times (consideration) Rule.'" Mot. for Contempt 11-12.

As discussed above, the Modified Injunction permits Defendants the use of "amusement devices" "to the extent that the Tribe adheres to all provisions of § 47.01(4), as well as other relevant Texas Penal Code sections." Modified Inj. 9. Additionally, "the Tribe [is] permitted to offer eight-liners as an amusement device, but only to the extent that it strictly adheres to the prize limitations provided in § 47.01(4)(B)." *Id.* at 10-11.

Plaintiff reads the Modified Injunction to prohibit Defendants from using any device resembling an eight-liner if it rewards prizes outside the § 47.01(4)(B) exception. The Court does not agree that the prohibition is so restrictive. At issue in the Modified Injunction was

Defendants' proposal to use "amusement devices . . . solely for bona fide amusement purposes in compliance with [§] 47.01(4)(B) of the Texas Penal Code." *See Ysleta del Sur*, 220 F.Supp.2d at 702. The Court's analysis in allowing the eight-liners began with the assumption that the devices initially fell under the provisions of § 47.01(4). *See* Modified Inj. 9.

The Court recognizes, however, that the instant Motion for Contempt may present an entirely separate issue. Defendants' evidence indicates that though the kiosks are designed to look and feel like casino games, they may not even actually be eight-liners. "When a kiosk sends an entry request to the computer server, the server responds with a computer code that reflects the result . . . [and] generates and displays a graphic to match." Kerns Decl. 3. "[T]here are no actual 'multipliers' of prizes or 'bonus spins[,]' . . . [t]hose are purely different entertaining ways of revealing the predetermined result code." *Id.* "There is nothing the . . . kiosk can do to change the result code transmitted by the server." *Id.*

Plaintiff's evidence supports the description given by Mr. Kerns. DG Letter 1; WS Letter 2 (kiosks do not determine winning entries); AM Letter 3 (outcome predetermined). In fact, even looking only at Plaintiff's evidence, it appears entirely possible to participate in the sweepstakes without engaging with any display resembling an eight-liner. AM Letter 2-3; WS Letter 1. The evidence presented, therefore, indicates that the spinning eight-liner mechanisms may be nothing more than a façade to display a pre-determined result. In short, electronic display terminals designed to mimic gambling games may in fact not be eight-liners.

The Court notes, however, that the evidence regarding the kiosks' functioning and role in the sweepstakes' results does not clearly establish that each and every kiosk at the entertainment centers operate in the same fashion. Furthermore, the Court finds the evidence indicating the

extent to which the kiosks look and operate like eight-liners found in casinos across the country is alarming. In light of Defendants' history of operating illegal eight-liners at their entertainment centers, the Court finds that sufficient evidence has been presented to raise a serious question of fact on this issue. Accordingly, Defendants are ordered to appear before the Court to show cause that their eight-liner operations are in fact either (a) operated in conformance with the Modified Injunction or (b) not in fact eight-liners.

4. Whether the sweepstakes are illegal under Texas law

Plaintiff asserts that Defendants' sweepstakes amount to an "illegal lottery" under Texas law. Mot. for Contempt 13. The "essential elements" of an illegal lottery are: (1) a prize or prizes, (2) the award or distribution of the prizes by chance, and (3) 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 (Tex. Crim. App. 1951); s*ee also United States v. Davis*, 690 F.3d 330, 333 (5th Cir. 2012); Tex. Pen. Code § 47.01(4), (7). "If any one of these elements is removed, there is no gambling." *Am. Legion* 2; October 18, 2010, Order 3 ("[g]enerally speaking, the element that distinguishes an illegal lottery from a legal sweepstakes is the element of consideration").

"[T]here is no dispute that [Defendants'] sweepstakes offer prizes and employ games of chance . . . ." Mot. for Summ. J. 15. Therefore, the parties "agree that the issue of consideration is the 'central issue' to determine whether or not [Defendants'] sweepstakes [are] in fact an illegal lottery." Resp. to Mot. for Summ. J. 13. As stated above, there is a fact issue presented on the availability of a legitimate free entry alternative to the sweepstakes. WS Letter 2 (no donation necessary to enter); AM Letter 1 (same); DG Letter 1 (same); Hamm Aff. 2 (same); Saltiel Aff. 3

(same); Queen Decl. 3 (same); Witschger Decl. 3 (same); XCite Rules 1 (same). *But see* Martinez Dep. 8 (no evidence of free entry); Ferguson Dep. 3 (same); Loper Dep. 5 (same).

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" can lack the element of consideration. October 18, 2010, Order 4. Support for this proposition can be found in federal case law. In *G2, Inc. v. Midwest Gaming, Inc.*, 485 F.Supp.2d 757 (W.D. Tex. 2007), plaintiffs were a tribal nation corporation operating a "charitable sweepstakes." *Id.* at 759. The sweepstakes differed from traditional "sweepstakes methodology" in that it used "a computer to draw game pieces and a computer screen to reveal with audio and video images whether the entrant was a winner." *Id*. Much like Defendants' operations, the *G2* computers received the entry's results from a set of finite, predetermined results stored on a server. *Id.* at 762.

Furthermore, like Defendants' sweepstakes, *G2* participants could receive sweepstakes entries either through (a) purchasing merchandise at the Point-of-Sale ("POS") terminal, (b) making a donation to the organization through the POS terminal, (c) requesting entries at the POS terminal, or (d) by requesting entries through the mail. *Id*. at 760.

The court stated in dicta that "[e]ven though [the] 'charitable sweepstakes' may violate Texas public policy under its constitution, [G2] has seemingly sidestepped state law. In the absence of explicit prohibition under Texas statutory or common law, [G2's] 'charitable sweepstakes' is, in the opinion of this court, legal." *Id*. at 770-71. The Court finds this language, though stated in dicta, nonetheless persuasive as it is in line with decisions from Texas state courts.

In *American Legion Knebel Post 82 v. Tex. Alcoholic Beverage Comm'n*, No. D-1-GN-10-003084, 2011 WL 9198989 (D. Ct. Travis Cnty. Mar. 14, 2011),[7] plaintiffs operated a charitable sweepstakes that provided entry to participants who either (a) purchased an alcoholic beverage, (b) made a donation to the organization, or (c) requested entries without making a donation or purchase. *Am. Legion* 3.[8] The *American Legion* court expressly held 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.*

The court then went on to hold that "the Post 83 game . . . must maintain the following characteristics in order to avoid running afoul of Rule 35.31(b)[:]"[9] (a) there must be a finite number of entries and the prize assigned to each entry must be fixed at all times; (b) the entries delivered to participants must be randomly drawn from the same fixed finite pool of entries; (c) there must remain a means by which to request free entries, even if limited to one free entry per day; (d) the odds of winning, per entry, must not change according to how the entries are obtained; (e) all entries must be drawn from the same finite, fixed pool; (f) playing with the game graphics cannot change the content of the entries or whether the prizes are winning, but can only

[7] Plaintiff seeks to diminish the precedential value of *American Legion* on the grounds that the trial court's decision was "reversed" by the Court of Appeals. Resp. to Mot. for Summ. J. 13 (citing *TABC v. Am. Legion Knebel Post 82*, No. 03-11-00703-CV, 2014 WL 2094195 (Tex. App. May 16, 2014)). It is true that the Court of Appeals reversed to the extent that it found the summary judgment evidence insufficient to conclude that donations were not a requirement to enter the sweepstakes. *Id.* at *7. The Appellate Court, however, expressly stated that in doing so it neither addressed nor decided whether the availability of free entries eliminates the element of consideration. *Id.* Thus, the court's reversal centered solely on the issue of a factual dispute of whether "*someone* [could] play the Sweepstakes for free or whether payment is *required*." *Id.* (emphasis added). The Court accordingly does not read the *American Legion* appellate decision as reversing the lower court's legal reasoning on the issue of consideration.

[8] As the *American Legion* decision is not readily available in electronic legal databases, the Court cites to the page numbers superimposed by the Court's electronic docketing system on the copy of the case found at ECF No. 358-2.

[9] The decision in *American Legion* concerned a declaratory judgment action on whether or not the Legion's sweepstakes would violate Title 16, Section 35.31 of the Texas Administrative Code, which explicitly incorporates "any gambling offense described in Chapter 47 of the Texas Penal Code." 16 Tex. Admin. Code § 35.31(b), (c).

tell participants whether they won a prize and, if so, the amount; (g) opening more or less than one entry cannot increase or decrease or otherwise change the prize associated with entry; (h) using the game themes cannot change the odds that any particular entry will be a winning entry; and (i) the software must contain security to prevent tampering. *Id.* at 2-3.[10]

Nonetheless, despite the above cited decisions holding that a free entry alternative can negate the element of consideration, Plaintiff urges the Court to employ the "*Davis* pretextual analysis" to determine that the element of consideration is in fact present under Defendants' sweepstakes. Mot. for Contempt 15-17; Resp. to Mot. for Summ. J. 12-16.

In *United States v. Davis*, 690 F.3d 330 (5th Cir. 2012), the Fifth Circuit upheld the convictions of two defendants accused of operating an illegal lottery out of three internet cafés. *Id.* at 339-40. At first blush, the *Davis* sweepstakes appears substantially similar to that at Defendants' entertainment centers. Specifically, the sweepstakes: (1) utilized computer software to create a finite number of entries and designated particular entries as winning; (2) the software shuffled the universe of entries so that the winning entries were randomly distributed; (3) participants could obtain entries either through purchase of Internet time or free through requests in person and through the mail; and (4) participants could reveal results either through the cashier or by playing a variety of casino-like games on computer terminals. *Id.* at 333-34.

Despite the availability of the free entries, the *Davis* court found "legally sufficient evidence from which a reasonable fact-finder could infer that the sale of Internet time . . . was an attempt to legitimize an illegal lottery." *Id.* at 339. In support of this conclusion, the court pointed to evidence of hundreds of thousands of unused minutes of Internet time as indicating

[10] Plaintiff argues that the sweepstakes at the entertainment centers operate "similarly to the mechanics" in *Davis*. Mot. for Contempt 16. The Court notes, however, that the mechanics listed by Plaintiff were present in *American Legion* and many were expressly held as necessary to maintain the legality of the sweepstakes. *Am. Legion* 3-4. The Court accordingly does not find Plaintiff's mechanics argument persuasive.

that "customers did not value" their underlying purchase. *Id.* The Court also found relevant the fact that customers completely failed to use any of the other services offered by the cafés, as well as the fact that the defendants focused on the sale of Internet time to the exclusion of income derived from other sources. *Id.* These facts "could reasonably raise the inference that the defendants offered the other services merely as an attempt to make it appear that their sale of internet time was part of a full-service business, instead of a mechanism for legitimizing unlawful activity." *Id.*

This evidence, with consideration of the "casino-like atmosphere" of the cafés, was sufficient for a reasonable jury to conclude that the "main purpose and function of Davis's and Clark's Internet cafés was to induce people to play the sweepstakes, and that the Internet time sold by the cafés . . . was not the primary subject of the transaction, but instead a mere subterfuge." *Id.* at 339-40.

The Fifth Circuit's decision in *Davis* relied heavily on the Texas Court of Appeals' decision in *Jester v. State*, 64 S.W.3d 553 (Tex. App. 2001). The facts in *Jester* were substantially similar to those in *Davis.* In *Jester*, Defendants operated a sweepstakes in which participants received entries either with the purchase of a phone card or free by mail. *Id.*at 558. The evidence showed, however, that "most players do insert money into the machine in order to play the game," and the free entries were limited to a "nominal" 100 credits per day. *Id.* Furthermore, the telephone cards were sold at "much higher than the market price" and often did not work. *Id.* As in *Davis*, "players did not value the telephone cards" and "some did not [even] know the slips of paper emitted from the machines were telephone cards." *Id.* The premises further did not contain any signs outside indicating that telephone cards were sold, and no

employee made a sales pitch to any of the customers promoting the purchase of the phone cards. *Id.*

Finding that "[its] decision turn[ed] 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," the court held the evidence sufficient "to infer that the main purpose and function of the machines, and the business, was to induce people to play the game, agreeing to gain or lose something of value at least partially by chance, and not to promote telephone cards." *Id*. at 558-59. "[T]he telephone cards were not the primary subject of the transaction, but mere subterfuge." *Id*. at 559.

Relying on the logic in *Jester* and *Davis*, Plaintiff urges that "the 'donations' made in this *Ysleta* case are simply pretextual for the conduct of an illegal gambling operation." Resp. to Mot. for Summ. J. 14. The evidence, however, indicates important facts distinguishing Defendants' sweepstakes from those in *Davis* and *Jester*.

First, no evidence indicates that Defendants' customers do not value their donations or are otherwise unaware of their charitable purpose. Plaintiff's briefing contends that "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 . . . unaware that there might have been alternative entry by free play available." *Id.* at 7. As an initial matter, the Court is unaware of where in the record Plaintiff finds that figure, unless Plaintiff meant to refer to the 28% of respondents to Defendants' survey who had never "received" free play. Resp. to Mot. for Summ. J. Ex. 12, Autry Research, ECF No. 469-35 at 4. The fact that a respondent never received a free play does not indicate that they were "unaware" of its existence. Plaintiff's

argument further ignores the fact that 69% of respondents had received free plays. *Id.* The Autry research also indicates that 89% of participants knew that "proceeds of the Speaking Rock Entertainment Center are contributions that go to benefit the members of the Ysleta Del Sur Pueblo." *Id.*[11] Thus, the survey results, contrary to Plaintiff's contention, tend to show that the majority of Defendants' participants were both aware of the charitable nature of their donations and had received free entries.

Furthermore, Plaintiff's evidence does not show that Defendants' participants "completely failed" to use any of the other services offered at the entertainment centers. Nor has Plaintiff presented any evidence indicating that Defendants focus on the sale of sweepstakes entries to the exclusion of income derived from other sources. Though Sgt. Ferguson's testimony states that he "didn't see any other activity for anybody to do except play the machines," Ferguson Dep. 5, Sargeant Marcos Martinez testified that "there was entertainment," such as singers, as well as a restaurant. Martinez Dep. 7. The Autry research indicates that participants, in fact, patronize those services. *See* Autry Research 3 (61% used food service; 60% used beverage service; silent on usage of musical performances).

Nonetheless, the Court finds that Plaintiff's evidence raises a fact issue as to both the existence and legitimacy of a free entry alternative. Though the evidence shows the potential availability of free entry, the officers' testimony raises a serious issue regarding the use of free entries in practice. Ferguson Dep. 3; Martinez Dep. 8; Loper Dep. 5. The evidence further

[11] The Court notes that Plaintiff has submitted its Plaintiff Texas' Motion to Exclude Russell S. Autry, ECF No. 442, in which Plaintiff seeks to exclude the Autry research from evidence on the grounds that Mr. Autry lacks sufficient credentials to be an "expert" witness. *Id.* at 2. Oddly, despite this Motion to Exclude, Plaintiff itself cites to the Autry Research. The Court is uncertain then if Plaintiff wishes to exclude the evidence on which it relies. Nevertheless, the Court's citation to the survey in this order is not a decision on the merits of Plaintiff's Motion to Exclude. The Court cites to the Autry research only to the extent that Plaintiff itself relies on the survey for the purposes of the Motion for Contempt.

indicates that the "entertainment centers" are clearly designed to look and feel entirely like a casino. *See* Loper Decl. 2.

The Court notes that the degree to which the "casino-like" atmosphere should factor into the Court's analysis is in dispute. Plaintiff argues that the *Davis* court identified certain factors that are determinative of the issue of consideration," including a "casino-like atmosphere" which extends participants' stay on the premises. Mot. for Contempt 15. Defendants in turn argue that "Plaintiff . . . goes too far in asserting that atmosphere is the determinative factor for finding consideration." Mot. for Summ. J. 17. The Court agrees with Defendants that the "casino-like" atmosphere is not *the* determinative factor in finding the presence of consideration and cannot alone "make any activity illegal gambling." *Id.* at 19. Nonetheless, the casino-like atmosphere can be relevant to Defendants' true purpose at the entertainment centers. As the court in *Jester* stated, a casino-like atmosphere can show that it is Defendants' intent to "structure the business to entice players to exchange money for chances to play . . . and that the [donations] [are] not the primary subject of the transaction, but mere subterfuge." *See Jester*, 64 S.W.3d at 559. "[T]he fact that [a sweepstakes] is not *per se* gambling does not mean that it could not be implemented in a manner that might render it gambling." *American Legion* 4. Thus, the Court will consider evidence of the casino-like atmosphere to the extent that it sheds light on whether the legitimate intent of the entertainment centers is to promote donations to Defendants, or whether the donations are a mere subterfuge to promote the sweepstakes.

Therefore, in light of Defendants' history of operating illegal gaming activities, the Court finds the evidence on record raises a serious concern that "most players . . . insert money into the machine in order to play the game" and that the free entries may be limited to amounts that

are merely "nominal." *See Jester*, 64 S.W.3d at 558. Additionally, at least one sweepstakes operator has "reserve[d] the right to modify" the games, thus casting doubt on the implication that seemingly legitimate rules are legitimate in practice. *See* XCite Rules 2. As the Court previously stated, in order to stay within the bounds of the law the sweepstakes must offer a "bona fide and genuine 'free entry' as an alternative means of entering the contest." October 18, 2010, Order 3-4. Plaintiff has submitted sufficient evidence to require Defendants to provide further evidence that a free entry alternative exists and is legitimate, the sweepstakes operate based on non-modified rules, and the sweepstakes are designed to promote donations and are not a mere subterfuge for illegal gambling.

III. CONCLUSION

For the foregoing reasons, the Court finds that Defendants' Motion for Summary Judgment, ECF No. 468, should be **DENIED**.

Plaintiff's Motion for Contempt has raised sufficient evidence for the Court to order Defendants to appear on October 6, 2014, to show cause that they are not in contempt of the Court's Permanent Injunction. Specifically, the Court seeks further presentation of evidence on the following issues:

1. Evidence regarding how the current sweepstakes qualify as "National Third Party Vendor Sweepstakes" under the Court's previous orders.
2. A list of all kiosk vendors operating at the entertainment centers and specific information showing whether or not they operate in full compliance with the factors enumerated in *American Legion Knebel Post 82 v. Tex. Alcoholic Beverage Comm'n*, No. D-1-GN-10-003084, 2011 WL 9198989 (D. Ct. Travis Cnty. Mar. 14, 2011).

3. Evidence regarding whether Defendants' kiosks are (a) eight-liners and, if so, (b) whether they are operated in conformance with the Modified Injunction.
4. Evidence regarding the availability of free entries, participants' use of free entries in practice, and the comparative amount of donation based entries to free entries.
5. Evidence regarding the "casino-like" atmosphere, and particularly, whether the donations are a subterfuge to promote illegal gambling.
6. Evidence of non-gaming services provided at the entertainment centers and the rates of customer usage.
7. Evidence regarding whether the free entries are "nominal" within the meaning of *Jester v. State*, 64 S.W.3d 553 (Tex. App. 2001).
8. Evidence regarding Defendants' use of sweepstakes proceeds for charitable purposes.
9. Evidence regarding any communication excluding Plaintiff's peace officers from Defendants' lands prior to the undercover investigation, as well as evidence regarding any violations by Plaintiff's investigators of restrictions placed on the general public on Defendants' lands.

SO ORDERED.

SIGNED this 24th day of September, 2014.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE