IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

State of Texas,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 9:01-CV-00299
	§	
Alabama-Coushatta Tribe of Texas,	§	
Defendant.	§	

PLAINTIFF'S REPLY IN SUPPORT OF AMENDED MOTION FOR CONTEMPT

TO THE HONORABLE KEITH GIBLIN, UNITED STATES MAGISTRATE JUDGE:

Plaintiff Texas respectfully submits this reply in support of its Amended Motion for Contempt (ECF 74).

ARGUMENT

A. The Tribe agreed to the current procedural posture—namely, that the contempt motion and motion for relief from judgment would serve as the vehicles for resolving this dispute.

The Tribe's request that the Court "order the State to proceed in a separate action if it wants to enjoin the Tribe's bingo operations" comes as a surprise, given the Tribe's previous representations to Texas and the Court. ECF 103 at 4. As the Court is aware, the State and the Tribe have been proceeding in this ongoing litigation on competing motions: the State's Amended Motion for Contempt and the Tribe's Motion for Relief from Judgment. ECF 74, 76. The parties agreed to this posture beginning with a carefully negotiated pre-litigation agreement, in which the Tribe agreed to permit the State to inspect the Naskila Entertainment Center, aware that the State might later seek "injunctive, *contempt*, or other relief" if the activities inside violated Texas law. ECF 96-3 ¶ 5 (emphasis added). In exchange, the State consented "not to seek prior injunctive

relief to stop the initial opening of its gaming facility." *Id.* After that inspection and an evaluation rendered by Captain Daniel Guajardo, a Texas licensed peace officer, Texas concluded that the activities at Naskila violate Texas law—and thus, this Court's permanent injunction—and alerted the Tribe that it would seek contempt remedies in this Court. The Tribe and the State then filed a *joint motion* to realign the parties, representing that "[t]he parties have reopened this case to finally determine two principal questions: First, does IGRA apply to the Tribe, as the NIGC's October 2015 letter concluded, or does the Tribe's Restoration Act control, 25 U.S.C. §§ 731–737, as the State argues? Second, if IGRA controls, do the operations at Naskila consist of Class II gaming?" ECF 64 at 1–2.

> This agreed motion then set out the next procedural steps in this case:
>
> > The parties propose to answer these questions through two motions. The State intends to file the Contempt Motion on the grounds that the injunction previously entered by this Court bars the gaming at Naskila. The Tribe, for its part, intends to file a motion for relief from judgment asserting that, under administrative-law principles announced by the Supreme Court since entry of the injunction, this Court must give controlling effect to the NIGC letter concluding that IGRA applies to the Tribe.
> >
> > The parties agree that realignment of the parties will simplify the presentation of these issues. Because the resolution of both of these motions will require fact and expert discovery, as well as detailed briefing, neither party is seeking preliminary relief at this time. The parties will submit a joint proposed scheduling order for the Court's approval setting a proposed discovery and briefing schedule shortly after or contemporaneously with the filing of the State's Contempt Motion and the Tribe's motion for relief from judgment.

Id. at 2. With the parties in agreement on this streamlined approach, the Court approved the motion to realign and issued a scheduling order, with which both parties have complied. *See* ECF 71, 72. Texas's motion for contempt argues—unsurprisingly, given the foregoing—that the "injunction

previously entered by this Court bars the gaming at Naskila." ECF 64 at 2; 74 at 10 (setting forth the specific provisions of the Texas Penal Code that the electronic bingo at Naskila violates).

The Tribe now argues that, notwithstanding the significant discovery undertaken to date—five depositions, responses to requests for admission and interrogatories, and the exchange of thousands of pages of documents—not to mention the extensive briefing already on file, this procedural framework has been misguided all along. As the Tribe now tells it, Texas instead should have filed an entirely new action if it sought to enjoin the Tribe's bingo operations.

But a party need not file an entirely new action to enforce an existing injunction. The "power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). Courts, therefore, do not lose jurisdiction to find parties in contempt for failing to abide by the terms of an injunction. *See Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985) ("Courts possess the inherent authority to enforce their own injunctive decrees."); *cf. Locke v. United States*, 75 F.2d 157, 159 (5th Cir. 1935) ("Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court.") (citation omitted).

The primary case that the Tribe relies upon to assert otherwise, *Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320-KC, 2016 WL 3039991 (W.D. Tex. May 27, 2016), is far more helpful authority for Texas than it is for the Tribe. In that case, Judge Cardone eliminated a requirement in an existing injunction against the Ysleta Del Sur Pueblo of the Tigua Indian tribe—also a Restoration Act tribe. In particular, Judge Cardone concluded that the Tigua was no longer required to "submit proposals to the Court seeking prior authorization" to engage in gaming

activities. *Id.* at *1. It was this particular pre-approval process that Judge Cardone determined violated "the spirit, if not the letter, of the Restoration Act," not the injunction itself. *Id.* Indeed, Judge Cardone did *not* lift the permanent injunction.[1] *See id.* (denying Tigua's motion to vacate injunction). The thrust of the court's opinion, in fact, was that the Tigua's sweepstakes activities *violated Texas gambling laws*. *Id.* at *22–26. Judge Cardone therefore found the Tigua in contempt of the existing injunction. And most importantly for purposes of this case, the Court exhaustively considered—and rejected—the Tigua's argument that the NIGC's finding that it had jurisdiction over the Tigua's Class II gaming under IGRA was entitled to *Chevron* deference. *Id.* at *9–12.

The lynchpin of the Tribe's argument here is that the NIGC's administrative interpretation of IGRA as to the Tribe constitutes a change in the law that warrants the end of the 2002 permanent injunction. *See* ECF 103 at 4. As discussed above, Judge Cardone persuasively and unequivocally rejected the reasoning behind that argument. If this Court adopts the analysis in the *Ysleta* opinion—which Texas submits that it should—the Tribe should be found in contempt because the Restoration Act, rather than IGRA, governs gaming activities at Naskila.[2] Moreover, in light of the fact that Judge Cardone did not lift the injunction against the Tigua, *Ysleta* does not stand for the proposition that Texas should have filed a separate lawsuit to enforce the existing injunction against the Tribe. This is especially so given that the Tribe has consented to, and helped establish, the procedural framework of this case—even jointly re-opening this case with the State.

The Tribe's argument that the current procedural posture is inappropriate lacks merit and should be rejected.

[1] Indeed, the State has filed a subsequent motion for contempt against the Tigua for engaging in one-touch, fully automated electronic bingo. That motion is currently pending before Judge Cardone. *See State of Texas v. Ysleta Del Sur Pueblo*, No. 3:99-CV-00320-KC, ECF 615 (W.D. Tex.).

[2] This assumes, of course, that the Tribe cannot establish any affirmative defense to Texas's ban on illegal lotteries. *See generally* Texas's Reply in Support of Motion for Summary Judgment, filed contemporaneously herewith.

B. The Tribe's attack on the 2002 injunction is logically inconsistent, and wholly ignores the Court's underlying findings of fact.

The Tribe makes conflicting arguments in challenging Judge Hannah's 2002 opinion and permanent injunction. On the one hand, the Tribe argues that it is an overly broad and unenforceable "obey the law" injunction. ECF 103 at 8. On the other hand, the Tribe argues that the injunction must be read narrowly, and applies only to the Tribe's casino-style gaming activities of fifteen years ago. *Id.* at 5–7. This reasoning is flawed. The Court's 2002 opinion found, as a factual matter, that the Tribe was "committing violations of Texas Penal Code §§ 47.02(a)(1) & (3), 47.03(a)(1), (3), & (5), 47.04(a), and 47.06(a) & (c)." *Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d 670, 679 (E.D. Tex. 2002). These provisions against illegal gambling, gambling promotion, operation of a gambling place, and possession of a gambling device, respectively—all of which are substantively unchanged since 2002—are the same restrictions that the Tribe is violating today. *E.g.*, ECF 74 at 10. Indeed, Captain Guajardo concluded in his unchallenged expert report that "[t]he consideration of cash to play the games with the element of chance of winning money and the awarding of prizes in the form of cash or cashout voucher, supports a conclusion that Naskila Entertainment Center is operating as an illegal gambling facility and the slot machines are illegal gambling devices in violation of Texas gambling statutes." ECF 96-5 ¶ 1.43.

These elements of chance, prize and consideration have long been established in Texas law, even before they were statutorily defined. *See Jester v. State*, 64 S.W.3d 553, 557 (Tex. App.—Texarkana 2001, no pet.). And it is these elements—rather than the regulatory provisions of the Bingo Enabling Act—that are the critical underpinnings of the State's contempt motion and motion for summary judgment. *See* ECF 74 at 10; ECF 96 at 2 (framing issue presented as whether "the electronic bingo at Naskila violate[s] Texas law as an illegal lottery involving chance, prize,

and consideration[]"); *see also* TEX. PENAL CODE § 47.01(1) (defining an illegal bet as "an agreement to win or lose something of value solely or partially by chance.").[3]

Accordingly, the 2002 injunction is specific because it is tailored to the dispositive question of which law applies—IGRA or the Restoration Act—and then sets out the relevant Texas Penal Code provisions that the Tribe is forbidden from continuing to violate. Moreover, the Tribe is wrong to suggest that the injunction only prohibits the specific activities and machines in operation in 2002. The Court noted that "[a] change in the law, not an undoing of determinations made by the United States Court of Appeals for the Fifth Circuit, will allow the Tribe to conduct *gambling activities* on its Reservation." *Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d at 681. Read in conjunction with the Court's findings of fact, such gambling activities can only be those activities prohibited under the Texas Penal Code. As discussed above, the particular form that the gaming takes is not what matters. Instead, the key inquiry is whether the gaming involves chance, prize and consideration, because this type of gaming violates the Texas Penal Code provisions in this Court's 2002 findings of fact—namely, "Texas Penal Code §§ 47.02(a)(1) & (3), 47.03(a)(1), (3), & (5), 47.04(a), and 47.06(a) & (c)." 208 F. Supp. 2d at 679.

For all of these reasons, this Court's 2002 injunction is valid and enforceable.

C. The individuals named in the contempt motion are subject to the Court's injunction.

The Amended Motion for Contempt names members of the Tribal Council in their individual and official capacities. ECF 74 at 1–3. This is appropriate in light of two factors: (1) the Court's 2002 permanent injunction held that "the Alabama–Coushatta Tribe, its Tribal Council

[3] As Texas explains in the reply in support of summary judgment filed herewith, it does not move for contempt for violations of the Bingo Enabling Act. Instead, discussion of the Bingo Enabling Act was offered only in anticipation of the Tribe's potential defense that its activity complies with the Act—a defense the Tribe has apparently abandoned. *Cf.* ECF 99-2 at 165–79 (expert report of Richard LaBrocca contending that the electronic bingo at Naskila and the charitable bingo in Texas are both fundamentally bingo).

and all persons acting by, through or under the Tribe and its Tribal Council" are subject to the injunction, 208 F. Supp. 2d at 681; and (2) the State had previously sued two members of the Tribal Council in their official capacities, in addition to the Tribal Council itself. ECF 2 at 8. New members of the Tribal Council can thus be automatically substituted as parties under Federal Rule of Civil Procedure 25(d), which provides that when a party is sued in his or her official capacity and later ceases to hold the office, the "officer's successor is automatically substituted as a party." FED. R. CIV. P. 25(d). As the new individual respondents are indisputably members of the Tribal Council, they are subject to the Court's 2002 injunction, and were properly brought into this action to ensure their compliance therewith.

CONCLUSION AND PRAYER

For the reasons set forth above, Texas respectfully requests that the Court issue a Show Cause Order and hold an evidentiary hearing on the State's Amended Motion for Contempt at 2:00 p.m. on September 11, 2017, as scheduled. ECF 91. After the presentation of evidence at the September hearing, the State requests that the Court issue an order holding Respondents in contempt for violating the Court's 2002 permanent injunction, awarding costs, and awarding such other and further relief to which Texas may be justly entitled.

Respectfully submitted.

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