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

STATE OF TEXAS, *Plaintiff*,	§ § §	
v.	§	No. 03:17-CV-00179-PRM
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR, *Defendants*.	§ § § § §	

PLAINTIFF TEXAS'S REPLY IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

The Tribe's response focuses upon conduct that Texas did not ask the Court to enjoin at this preliminary stage: the use of card minding devices in tandem with live paper card bingo at Speaking Rock Entertainment Center. *Compare* Doc. 9, Application for Preliminary Injunction ("Application") *with* Doc. 17, Response in Opposition to Plaintiff's Application for Preliminary Injunction ("Response") at 7. While Texas explicitly reserved the right to seek injunctive relief against the Tribe's use of card minders, its request for *preliminary* relief targets the operation of one-touch "electronic bingo" machines that look, act and feel like Las Vegas-style slot machines—and glaringly violate Texas gambling laws. Doc. 9 ¶¶ 1, 5, 26. The Tribe offers no evidence or explanation otherwise, rendering injunctive relief necessary to prevent its blatant and continuing violations of Texas law through the use of one-touch "electronic bingo" machines.

ARGUMENT

A. The Restoration Act gives Texas authority to bring this action.

The Tribe asserts that Texas does not have regulatory jurisdiction over the Tribe under the Restoration Act. *See* Response at 2–3. But the scope of Texas's regulatory jurisdiction is irrelevant to the State's *statutory* right to sue in federal court to enjoin Tribal violations of the Restoration Act. 25 U.S.C. § 1300g-6(c). And, in any event, the Tribe contradicts itself when it contends that

this injunction should have been sought by a criminal district or county attorney enforcing criminal law—a regulatory function prohibited under the Restoration Act. Response at 5. Moreover, the Tribe's argument that the Attorney General lacks capacity to maintain this suit ignores that the actual Plaintiff in this case—the State of Texas—unquestionably has such capacity. 25 U.S.C. § 1300g-6(c); *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 676 (W.D. Tex. 2002) (holding that the Texas Attorney General can properly maintain suit against the Tribe to enjoin Restoration Act violations); Doc. 15, Texas's Response to Defendants' Motion to Dismiss at 9–10 (explaining that Texas has capacity to maintain this action, and the Attorney General—as Texas's chief law enforcement officer—has authority to bring this action in the name of the State).

Rulings in this case's prior litigation emphasize this. In the prior case, the Court established a procedure requiring the Tribe "to petition the Court directly to make an exception to the overall prohibition of gaming" contained in the court's original injunction. *State of Tex. v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *20 (W.D. Tex. May 27, 2016) (citing Order Regarding Third Clarification (Aug. 4, 2009)). In 2016, Judge Cardone eliminated this requirement, noting that it had required the court to "assume the role of a quasi-regulatory body." *Id.* at *21. Crucially, however, Judge Cardone did not lift the long-standing injunction prohibiting the Tribe from violating Texas gambling laws, nor did she imply that Texas could not enforce that injunction if the Tribe violated it. *Id.* at *27. Here, the Tribe did not seek "pre-approval" from Texas to operate one-touch electronic bingo machines. And Texas has not sought to reinstate that procedure. Instead, Texas is asserting its authority under the Restoration Act to enjoin violations of Texas gambling law, which the Restoration Act federalized. *See* 25 U.S.C. § 1300g-6(c); *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334–35 (5th Cir. 1994).

B. Discovery is not needed prior to a ruling on the Preliminary Injunction Application.

The Tribe argues that discovery is necessary before the court enjoins its violations of Texas gambling law. Response at 3–4. It claims, for example, that no entity operating bingo is named as a defendant. *Id.* at 4 n.4. But this ignores the fact that the Tribal Council, a named defendant, is the "governing body of the tribe," 25 U.S.C. § 1300g(5), and as such, makes all contracts on all reservation lands, 25 U.S.C. § 1300g-3(b), including Speaking Rock Entertainment Center. *See* Doc. 17-3, Declaration of Carlos Hisa, ¶ 3. Thus, any third party operating (by lease or otherwise) on the reservation would be in privity with the Tribal Council, and therefore bound by the injunction. Moreover, the Texas Penal Code independently prohibits the Tribe—as a landlord or otherwise—from offering a gambling promotion, keeping a gambling place, communicating gambling information, or possessing gambling devices. TEX. PENAL CODE ANN. §§ 47.03–47.06. The Court's injunction thus binds the proper parties. Moreover, sufficient evidence is already before the Court—including a lengthy video of the operations at Speaking Rock and an investigative report from a licensed peace officer, none of which are challenged in the Tribe's Response. Docs. 9-1, 9-2. With this evidence undisputed, there simply is no need for further discovery.

C. One-touch electronic bingo machines are prohibited under Texas law.[1]

The Tribe wrongly asserts that Texas seeks to preliminarily enjoin the operation of card-minder devices that reveal the results of live bingo games at Speaking Rock. Response at 8. Texas's Application specifically noted just the opposite: with respect to the card minders, "Texas intends to seek injunctive relief . . . *after* discovery in this cause." Application ¶ 8 n.9 (emphasis added). Texas seeks to *preliminarily* enjoin the operation of the hundreds of "one touch" electronic bingo

[1] Given the page limit on reply briefs, Texas addresses only its likelihood of success on the merits here, incorporating by reference its prior arguments in support of the remaining factors for injunctive relief. *See* Application ¶¶ 15–23.

machines. *Id.* ¶8. These machines—which, tellingly, receive scant discussion in the Tribe's response—allow players to complete an instantaneous bingo game with the single push of a button, while experiencing flashing lights, spinning wheels, and reel displays. *Id.* ¶¶ 8–9.

Texas's expert, licensed peace officer Captain Daniel Guajardo, concluded that these machines constitute an illegal lottery under Texas law. *Id.* ¶ 10 (citing Expert Report of Captain Daniel Guajardo, ¶¶ 1.17–1.18). The Tribe offers no competent evidence to the contrary. Its reference to an Attorney General opinion letter approving "video confirmation of a bingo result" is unhelpful, because that letter only addressed devices that did "nothing more than inform players of the winning numbers in a bingo game." Tex. Att'y Gen. Op. No. GA-0591, 2008 WL 171004, at *4 (2008). Indeed, the letter specifically noted that electronic pull-tab bingo, in which a player would "have very little to do, aside from occasionally touching a computer screen or swiping his card at a terminal," would violate the Texas Constitution's lottery prohibition. *Id.* at *3.

Patrons who participate in one-touch bingo at Speaking Rock have virtually *nothing* to do: the one-touch electronic bingo machines allow a player to insert cash directly into the machine and play games with a single push of a button for a chance to win a prize. Application ¶¶ 6–7. To the extent that the Tribe asserts that the one-touch slot machines are somehow linked to the live paper bingo games at Speaking Rock, Texas's videotaped evidence cleanly disproves this: Captain Guajardo played multiple one-touch games while a caller separately read out numbers for the paper card bingo game in an entirely separate part of the facility. *See, e.g.*, Doc. 9-1 at 28:00-29:37.

Neither Texas nor its citizens can operate one-touch electronic bingo machines without an election to amend the Constitution's prohibition of lotteries. TEX. CONST. art. III §47(a). The Bingo Enabling Act, which the Tribe cites, is an example of one such amendment. But the Bingo Enabling Act does not authorize the type of bingo at issue in the Application for Preliminary Injunction. By

contrast, in passing the Bingo Enabling Act, the legislature made plain that "'[n]othing in this Act shall be construed as authorizing any game using a video lottery machine or machines,'" and "describe[d] such a machine as an electronic video game machine, that upon the insertion of cash enables the player to play a game from which he may receive free games or credits that can be redeemed for cash." Tex. Att'y Gen. Op. No. GA-054, 2007 WL 1189841, at *4 (2007) (quoting Act of May 29, 1995, 74th Leg., R.S., ch. 1057, §§ 1, 10, 1995 Tex. Gen. Laws 5222, 5225).[2] The undisputed evidence shows that just such machines are operated by the Tribe at Speaking Rock.

D. Texas is not seeking an obey-the-law injunction.

Texas seeks carefully defined relief: an injunction against the operation of the one-touch electronic bingo machines at Speaking Rock. Application ¶ 26; Doc. 9-3, Proposed Findings of Fact and Conclusions of Law at 5–6 (proposing an injunction against the operation of "'electronic bingo' machines that resemble casino-style slot machines and that violate" the Texas Penal Code and the Restoration Act). This requested injunction is "sufficiently specific to give notice of its terms," and thus comports with Federal Rule of Civil Procedure 65. *See Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016). And contrary to the Tribe's suggestion that a reference to the Restoration Act renders the injunction overbroad, the Fifth Circuit has upheld injunctions that reference statutory requirements or prohibitions. *E.g.*, *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 517 (5th Cir. 1969) ("The fact that the decree includes specific references to sections of the Fair Labor Standards Act is not, as here used, inconsistent with the requirements of Rule 65(d).").

CONCLUSION

The Court should grant Texas's Application for Preliminary Injunction.

[2] To the extent the Tribe asserts that it is a charitable organization under the Bingo Enabling Act, this argument has been rejected. *Texas v. del Sur Pueblo*, 220 F. Supp. 2d at 706–07 ("Defendants have not shown that the Tribe is 'otherwise qualified' to participate in charitable bingo activities under Texas law. While the Tribe is not subject to the regulatory jurisdiction of the State, including the Commission, it is clear that the Tribe is subject to Texas law on all gaming matters, including participation in charitable bingo activities.") Nor is there evidence that the Tribe has a charitable bingo license—a Bingo Enabling Act requirement. *See* TEX. OCC. CODE ANN. § 2001.551(c).

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
MICHAEL R. ABRAMS
Texas Bar No. 24087072
BENJAMIN S. LYLES
Texas Bar No. 24094808
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4074 | FAX: (512) 320-0667
anna.mackin@oag.texas.gov
michael.abrams@oag.texas.gov
benjamin.lyles@oag.texas.gov

ATTORNEYS FOR PLAINTIFF
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on this the 18th day of September, 2017, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, causing electronic service upon all counsel of record.

Randolph Barnhouse
JOHNSON BARNHOUSE & KEEGAN, L.L.P.
7424 4th Street N.W.
Los Ranchos de Albuquerque, New Mexico

Richard Bonner
KEMP SMITH, L.L.P.
221 N. Kansas, Suite 1700
El Paso, Texas 79901

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General