

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

STATE OF TEXAS,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	No. 9:01-CV-00299
	§	
ALABAMA-COUSHATTA TRIBE OF TEXAS,	§	
<i>Defendant.</i>	§	

**PLAINTIFF TEXAS’S SECOND AMENDED MOTION FOR CONTEMPT AND
MOTION FOR ORDER TO SHOW CAUSE**

Plaintiff, the State of Texas (“Plaintiff” or the “State”), respectfully submits this Second Amended Motion for Contempt and Motion for Order to Show Cause. As explained below, Defendant Alabama-Coushatta Tribe of Texas (“Tribe”) is in violation of this Court’s injunction prohibiting the Tribe from engaging in gaming activities that are impermissible in Texas. The State therefore requests that the Court order that the Tribe show cause why it should not be held in contempt of the Court’s injunction. The State further requests that the Court enjoin the Tribe’s impermissible gaming operations following the bench trial in this matter scheduled for March 1, 2021.

BACKGROUND

Defendant Alabama-Coushatta Tribe of Texas is governed by the Restoration Act, 25 U.S.C. §731 *et seq.*, which federalizes Texas’s gaming laws and regulations. In 2002, this Court issued a permanent injunction prohibiting the Tribe from “operating, conducting, engaging in, or allowing others to operate, conduct, or engage in gaming and gambling activities on the Tribe’s Reservation which violate State

law.” *Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d 670, 678–79 (E.D. Tex. 2002) (“2002 Injunction”). The Fifth Circuit upheld the injunction, 66 F. App’x 525 (5th Cir. 2003), and the Supreme Court denied certiorari, 540 U.S. 882 (2003) (mem.).

In 2016, the State learned of the Tribe’s intent to open the Naskila Entertainment Center (“Naskila”). The Tribe and the State then entered into a Pre-Litigation Agreement in early May 2016, where the Tribe agreed to provide notice of Naskila’s opening, and to allow the State to perform a physical inspection of the premises after it opened. See Exhibit A, Pre-Litigation Agreement, at 1.

Pursuant to the Pre-Litigation Agreement, Texas conducted a physical inspection of Naskila on June 15, 2016, with the Tribe’s permission. The State observed hundreds of one-touch gaming machines on offer to the public at Naskila. The machines—which the Tribe has referred to as “electronic bingo” machines—function as follows: to begin a game, a player inserts cash or a ticket directly into the machine. See Exhibit B, Declaration of Captain Daniel Guajardo ¶ 5; Doc. 99, Defendant’s Motion for Partial Summary Judgment ¶ 8. Once the machine registers the credits, the player may commence a game play when the server to which the machine is connected recognizes a sufficient number of players—no less than two, but sometimes three or more—who have connected to the server. Doc. 99 ¶ 9. The server randomly generates numbers, which are automatically daubed on the player’s bingo card. *Id.* ¶¶ 13–15. In every game, there is a designated game-ending pattern where the first player to cover the predesignated pattern “wins,” which ends the game. *Id.* ¶ 15. During and after the game, the machines display reels and other sounds and

images that resemble slot machines. Ex. B, Civil Investigation Report ¶ 1.43. The entire process of a completing each game play takes approximately 5-10 seconds. Exhibit C, First Deposition of Keith Sherer, as a Corporate Representative of the Tribe, at 41:20-24.

There is no limit on the number of games a player can play or the amount a player can win on the machines at Naskila. *Id.* at 43:25-44:1-5; 60:1-4. When the player no longer wishes to play any more games, they receive a voucher from the machine to exchange for their cash winnings (if any). Ex. B, Civil Investigation Report ¶ 1.28. These cash prizes may be nominal, or may reach “Texas size”—well into the thousands, and potentially, hundreds of thousands. Exhibit D, Second Deposition of Keith Sherer, as a Corporate Representative of the Tribe, at 24:2-8. Naskila is open to the public at all hours. *Id.* at 25:19-21.

Because the gaming being operated at Naskila is impermissible in Texas, the State filed a motion for contempt of the 2002 Injunction. Doc. 74. The parties initially briefed and presented argument on a threshold issue: whether the Restoration Act applies, as the State contended, or whether the Indian Gaming Regulatory Act (“IGRA”) applies, as the Tribe contended. This Court held that the Restoration Act governs, Doc. 129, and the Fifth Circuit affirmed. *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 449 (5th Cir. 2019). The gaming operated at Naskila remains substantively unchanged today. Doc. 153 ¶ 4; *see also* Exhibit E, Defendant’s Objections and Responses to Plaintiff’s Second Set of Interrogatories, at 4 (stating that there is no difference in the manner in which the electronic bingo at Naskila

functions from the filing of Defendant's partial motion for summary judgment to the present).

A bench trial is scheduled for March 1, 2021. At that setting, the State will provide evidence to the Court demonstrating the Tribe's continued engagement in gaming that is illegal in Texas, and thus, violates the Restoration Act and this Court's 2002 Injunction.

STANDARD OF REVIEW

"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)).

"The clear and convincing evidence standard is higher than the 'preponderance of the evidence' standard, common in civil cases, but not as high as 'beyond a reasonable doubt.'" *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (citation omitted). In the contempt context, clear and convincing evidence is "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Id.* (cleaned up). If a movant proves a *prima facie* case that an order was not complied with, the respondent then bears the burden to show mitigating circumstances, substantial

compliance with the order, or every reasonable effort to comply, such that the court might withhold exercising its contempt power. *See Whitfield v. Pennington*, 832 F.2d 909, 914 (5th Cir. 1987).

ARGUMENT

The Restoration Act—which conferred the Tribe with its federally recognized status—provides that “[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe.” 25 U.S.C. § 737(a). The State is authorized to file suit in federal court to “enjoin violations of” this gaming provision. *Id.* § 737(c). Under the Restoration Act, Texas’s gaming laws and regulations “operate as surrogate federal law.” *See Ysleta del sur Pueblo v. Texas (“Ysleta I”)*, 36 F.3d 1325, 1334 (5th Cir. 1994) (construing substantively identical Restoration Act provision applicable to the Ysleta del Sur Pueblo Tribe); *Alabama-Coushatta Tribe of Texas*, 918 F.3d at 448 (“[T]his court was left with ‘the unmistakable conclusion that Congress—and the Tribe—intended for Texas’ gaming laws and regulations to operate as surrogate federal law on the Tribe’s reservation in Texas.” (quoting *Ysleta I*, 36 F.3d at 1334)); *State v. Ysleta del Sur Pueblo*, 955 F.3d 408, 415 (5th Cir. 2020) (“Like the district court, we conclude that, under *Ysleta I*, ‘the [Pueblo] is subject to Texas’s regulations,’ which function as surrogate federal law.”).

Following a 2002 bench trial in this matter, the Court found that the Tribe was engaged in gaming in violation of Texas law and, consequently, the Restoration Act. *Alabama-Coushatta*, 208 F. Supp. 2d at 681. Consistent with the Restoration Act, the Court thereafter enjoined the Tribe from “conducting, engaging in, or allowing others

to operate, conduct, or engage in gaming and gambling activities on the Tribe's Reservation which violate State law." *Id.* As discussed below, the Tribe today is in violation of Texas's gaming law. Accordingly, the Tribe is in violation of the Restoration Act and the 2002 Injunction.

A. The Tribe is in violation of Chapter 47 of the Texas Penal Code.

Article III § 47(a) of the Texas Constitution provides that "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State," subject to limited exceptions. TEX. CONST. art. III, § 47(a). Under Texas law, a lottery is defined as "any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value," regardless of whether such procedure is called a lottery or some other name. TEX. PENAL CODE § 47.01(7). Thus, the three essential elements of a lottery are: 1) the offering of a prize, 2) by chance, and 3) for consideration. *See id;* *see also City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936).

The electronic bingo at Naskila meets the definition of an illegal lottery under Texas law. After inserting cash or vouchers, players have the chance to be awarded cash prizes based upon a machine's random generation of numbers. Therefore, the elements of prize, chance, and consideration are all present here. Ex. B, Declaration of Captain Daniel Guajardo ¶ 5.

In accordance with Article III's constitutional mandate, the Legislature has prohibited a number of gaming activities through Chapter 47 of the Texas Penal Code. *See* TEX. PENAL CODE § 47.01-.10; *see also* TEX. CONST. art. III, § 47(a). Because the Tribe is using the machines at Naskila to conduct an illegal lottery, it is in

violation of at least four of these gaming prohibitions, including: 1) gambling under Texas Penal Code § 47.02; 2) promotion of gambling under Texas Penal Code §§ 47.03(a)(1) and (a)(5); 3) keeping a gambling place under Texas Penal Code § 47.04(a); and 4) possession of gambling devices or paraphernalia under Texas Penal Code §§ 47.03(a) and (c). Ex. B, Declaration of Captain Daniel Guajardo ¶ 6.

Accordingly, the Tribe's continued operation of gaming at Naskila is in direct violation of § 47 of the Texas Constitution and Chapter 47 of the Texas Penal Code. In fact, the Tribe has already conceded that its gaming activities violate provisions of the Texas Penal Code. Ex. E, Defendant's Interrogatory Responses at 7. The Tribe contends, however, that the Bingo Enabling Act provides a defense to offenses under Chapter 47. *Id.* (citing, *inter alia*, TEX. OCC. CODE § 2001; TEX. PENAL CODE § 47.02(c)). For the reasons discussed below, the Tribe cannot avail itself of this defense, because the Tribe is also violating the Bingo Enabling Act.

B. The Tribe is in violation of the Bingo Enabling Act.

One exception to the State's constitutional prohibition on gambling is charitable bingo. TEX. CONST. art. III, § 47(a)-(b). This exception allows certain bingo games to be conducted by a "licensed authorized organization," which means an "authorized organization that holds a license to conduct bingo." TEX. OCC. CODE § 2001.002(14). Under the Texas Constitution, a "church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs" is eligible to apply for a license to conduct charitable bingo. TEX. CONST. art. III, § 47(b). The Texas Constitution makes clear that the "charitable bingo" exception was created

exclusively to support the charitable purposes of these organizations. *See id.* § 47(b)(1). To that end, the Texas Penal Code provides an affirmative defense to Chapter 47 offenses if the conduct is “authorized” under the Bingo Enabling Act. *See id.* § 47.09(a); TEX. OCC. CODE § 2001.001 *et seq.* All charitable bingo in Texas must comply with the requirements of the Bingo Enabling Act; subject to very limited exceptions, it is a third-degree felony to conduct bingo in Texas without a license issued under the Act. TEX. OCC. CODE § 2001.551(c).

Charitable bingo can only be played during a bingo occasion, which “is a single gathering or session, at which a bingo game or a series of bingo games, including selling and redeeming pull-tab bingo tickets, are conducted on the day and at the times listed on the license issued to a licensed authorized organization.” *Id.* § 2001.002(6). A bingo occasion may not exceed four hours, and a licensed authorized organization may not conduct more than three bingo occasions per calendar week. *Id.* § 2001.419(a)-(b). A prize for a single game of bingo cannot exceed \$750, and the aggregate value of prizes awarded during a bingo occasion cannot exceed \$2,500 (except games of pull-tab bingo and bingo games that award prizes of \$50 or less). *Id.* § 2001.420.

Texas allows the use of card-minder systems to aid players during bingo occasions. These are electronic or computerized devices “interfaced with, or connected to, equipment used to conduct a game of bingo.” 16 TEX. ADMIN. CODE § 402.321(2).

But the Bingo Enabling Act prohibits the use of card minders:

- 1) to generate or determine the random letters, numbers, or other symbols used in playing the bingo card played with the device’s assistance;

- 2) as a receptacle for the deposit of tokens or money in payment for playing the bingo card played with the device's assistance; or
- 3) as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for the bingo card played with the device's assistance.

TEX. OCC. CODE § 2001.409(a).

Lottery Commission regulations also prohibit the use of card-minders to track and store, replay, or credit winnings. 16 TEX. ADMIN. CODE § 402.323(m)(1)-(3). The Bingo Enabling Act further prohibits: (1) bingo played 24 hours a day, 7 days a week, with no durational limits on bingo occasions, TEX. OCC. CODE § 2001.409; (2) bingo that does not strictly limit the prize money that can be awarded, *id.* § 2001.419; and (3) bingo conducted by an unauthorized and non-licensed organization, *id.* § 2001.551(c). The Bingo Enabling Act also establishes strict requirements on the handling and use of bingo proceeds. *See, e.g.*, TEX. OCC. CODE §§ 2001.451, .060, .151.

The Tribe's gaming operations violate each of these provisions. Naskila is open at all hours; there is no limit on the prize money that is awarded, and some prizes significantly exceed what is allowed under Texas law; and the machines serve as receptacles for cash and dispense payment of tickets that can be redeemed for cash prizes. The Tribe is thus in violation of the Bingo Enabling Act, as well as Texas Lottery Commission regulations. Accordingly, the Tribe's gaming is not authorized under the Bingo Enabling Act, which provides an additional basis to find the Tribe in contempt of the 2002 Injunction.

C. The Tribe is in violation of the Texas Civil Practice and Remedies Code.

Finally, Texas's Civil Practice & Remedies Code prohibits illegal lotteries as a common nuisance. TEX. CIV. PRAC. & REM. CODE §§125.001(a)(1), 125.041(1). The State has conclusively demonstrated that the Tribe's gaming activities constitute an illegal lottery under Texas law. Thus, the Tribe is also in violation of state nuisance law.

CONCLUSION

For these reasons, the State respectfully requests that the Court order the Tribe to show cause why the Tribe should not be held in contempt for failing to comply with the 2002 Injunction. The State further requests that, following a hearing, the Court issue an order finding the Tribe in contempt of the 2002 Injunction and ordering the Tribe to:

- A. Cease all electronic bingo operations at Naskila Entertainment Center; and
- B. Remove all computers, software, hardware, and any other equipment the Tribe currently uses as a gambling device from the Naskila Entertainment Center that relate to any game with cash prizes or cash equivalent prizes.

The State further requests that:

- C. Upon the entry of the contempt order, the Court assess a penalty for any day of operation beyond the date of the order; and,
- D. The Tribe only should pay costs to the State of the June 15th investigation conducted in this case, as well as any Court costs and attorneys' fees incurred after June 15, 2016.

Respectfully submitted.

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**ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF CONFERENCE

I hereby certify that undersigned counsel has complied with the meet and confer requirement in Local Rule CV-7(h). The conference required by this rule has been conducted via an initial phone call on September 30 and a follow-up written exchange on October 6 between counsel for Plaintiff and Defendant.

Defendant opposes the relief requested in both motions (i.e., the second amended motion for contempt and the motion to show cause), but Defendant does not oppose the filing of the motions or the request that the matters therein be taken up at trial.

Discussions have thus conclusively ended in an impasse, leaving an open issue for the court to resolve.

/s/ Michael R. Abrams
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CERTIFICATE OF SERVICE

I hereby certify that on this the 9th day of October, 2020, 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.

/s/ Anne Marie Mackin
ANNE MARIE MACKIN
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