

NORTH CAROLINA

BURKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO: 10 CVS 568

2010 MAY 13 P 4:13

BURKE COUNTY C.S.C.

BY 

LARRY WALKER, d/b/a THE NEW SALEM)
GENERAL STORE; CHAD EARP, d/b/a)
TOBACCO BARN # 1; AJ AYKUMAR, d/b/a)
BRENDLE TOWN GROCERY, INC.; JERRY'S)
NEIGHBORHOOD STORE, INC.; BY PASS)
BEVERAGE; JT GROUP INC.; GREGORY)
ALLEN, d/b/a GA AMUSEMENTS; TAMELA)
COOK, d/b/a PEARSON'S TOY TRAINS;)
JEFF WHISNANT, d/b/a COUNTRY COUSINS;)
QUICK MARK 1; SHOP & SAVE # 4; ARCHIE)
BRADSHAW, d/b/a BRADSAHW SALVAGE)
& PRODUCE; and LINDA SIMMONS, d/b/a)
LINDA NEW IMAGE,)

Plaintiffs,

vs.

STATE OF NORTH CAROLINA; JAMES C.)
GAITHER, JR, DISTRICT ATTORNEY FOR)
25 JUDICIAL DISTRICT, which includes Burke)
Catawba and Caldwell Counties; JOHN T.)
MCDEVITT, BURKE COUNTY SHERIFF; CITY)
OF MORGANTON POLICE DEPARTMENT;)
CITY OF VALDESE POLICE DEPARTMENT;)
CITY OF DREXEL POLICE DEPARTMENT,)

Defendants.

**ORDER FOR
PRELIMINARY INJUNCTION**

THIS CAUSE coming on for hearing during the April 19th, 2010 Civil Superior Session in
Burke County before the Honorable Beverly T. Beal, Superior Court Judge presiding on Plaintiffs'
Motion for Preliminary Injunction against the Defendants with Leo Daughtry and Victor N.
Yamouti representing the Plaintiffs, Frank Webster representing the District Attorney for the 25th
Judicial District, Redmond Dill representing the Burke County Sheriff and the City of Drexel, Mark

Mitchell representing the City of Valdese Police Department; and the Court having examined the pleadings and other testimony and documentary evidence, and having heard oral arguments by Counsel, the Court determines:

FINDINGS OF FACT

1. The Plaintiff moved the Court to substitute the name of party Defendant "City of Morganton Police Department" with the "City of Morganton by and through its Department of Public Safety."

2. The Plaintiff moved the Court to substitute the name of party Defendant "City of Drexel Police Department" with the "City of Drexel by and through its Department of Public Safety."

For the purposes of this hearing, the Plaintiffs have made a preliminary showing as follows:

3. The named Plaintiffs are entities that do business in North Carolina. The Plaintiffs sell a product the purpose of which is to allow a consumer to purchase time on a telephone (telephone time) in the State of North Carolina.

4. Plaintiffs market their product using a sweepstakes system. The sweepstakes system is solely used for the purpose of marketing and promoting the sale of telephone time.

5. The sweepstakes system is not a server-based electronic game promotion.

6. The telephone time sales unit consists of two metal boxes that are bolted together. The customer does not and cannot insert any piece of money, coin, card or other object into either of the boxes. The black box is not connected to the terminal where the sweepstake results are revealed.

7. A customer who wants to play the sweepstakes game, indicates that to the employee/operator of the retail establishment who then activates the sweepstakes terminal.

8. Different card games can be played on the terminals to include pot of gold and keno.
9. The simulated game terminal is not and cannot be operated by the insertion of any piece of money coin or other object.
10. An individual can enter the promotional game without purchasing the phone time by mailing off a form provided by the Plaintiffs, requesting a "free-play". This information is clearly posted.
11. State and local law enforcement officials have and continue to take the position that the Plaintiffs' promotion system violates North Carolina laws (specifically N.C.G.S. 14-306 *et seq*) which prohibits the use of certain video gaming machines.
12. Plaintiffs contend that the promotional system is lawful in all respects.
13. On June 26, 2009 The Honorable Paul C. Ridgeway entered a preliminary injunction restraining, among others, the State of North Carolina; the North Carolina Department of Crime Control and Public Safety, Alcohol Law Enforcement Division; Director of Alcohol from taking any administrative or other enforcement action against the plaintiffs in that case, or any third party, for the possession, use or operation of a telephone time promotional and marketing system identical or substantially similar to the Plaintiffs' systems.
15. On March 26th, 2010 The Honorable John O. Craig entered an Order prohibiting any law enforcement authority, including but not limited to, any Sheriff, Chief of Police, Police Officer, or any other law enforcement officer acting on behalf of North Carolina; the Sheriff Burke County, and his agents and any other Law Enforcement Officials in Burke County from attempting to seize equipment or property or institute any criminal charges against anyone using the Hest Technologies, Inc. and Internet Technologies, LLC sweepstakes systems.

CONCLUSIONS OF LAW

1. The Defendant will not be prejudiced by the substitution of the name of party Defendant "City of Morganton Police Department" with the "City of Morganton by and through its Department of Public Safety." The substitution is fair and is solely to correct a misnomer. The Defendant will not be prejudiced by the substitution of the name of party Defendant "City of Drexel Police Department" with the "City of Drexel by and through its Department of Public Safety." The substitution is fair and is solely to correct a misnomer.
2. The Plaintiffs have satisfactorily demonstrated that if a preliminary injunction is not entered as to Plaintiffs' promotional and marketing system, the Plaintiffs will suffer irreparable harm;
3. The Plaintiffs have shown the likelihood of success on the merits of these claims at the trial of this matter;
4. Given that the Defendants are governmental entities there is no need for the posting of more than a *de minimus* bond.
5. This action is having a chilling effect on the ability of the Plaintiffs to sell and operate their telephone time using the promotional system in retail establishments in North Carolina and to generate revenue from the operation thereof.
6. This Order is intended to be consistent with and an application of the two preliminary injunctions entered by the Honorable Judges Ridgeway and Craig.

ORDER

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The name of party Defendant "City of Morganton Police Department" shall be substituted with the "City of Morganton by and through its Department of Public Safety."

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2. The name of party Defendant "City of Drexel Police Department" shall be substituted with the "City of Drexel by and through it Department of Public Safety."

3. The Defendants are restrained from taking any administrative or other enforcement action against Plaintiffs for the possession, use or operation of the promotional and marketing system as described both in the Complaint and in this Order;

4. The Defendants are restrained from compelling or attempting to compel, coerce or persuade any retail establishment in North Carolina to remove Plaintiffs' products and equipment associated with Plaintiffs' sweepstakes systems or refrain from selling or operating them;

5. The Defendants are restrained from warning or threatening any retail establishment or other alcoholic beverage licensee in North Carolina that it may be subject to criminal or administrative sanctions, such as the loss or suspension of an alcoholic beverage sales license, if it continues to display or sell Plaintiffs' products or operate equipment associated with Plaintiffs' sweepstakes;

6. The Defendants are restrained from citing or maintaining the prosecution of any retail establishment or other alcoholic beverage licensee, or their agents or employees, for criminal or administrative offenses or violations, or initiating any action to suspend or revoke alcoholic beverage licenses by reason of such establishment's display or sale of Plaintiffs' products or operation of equipment associated with Plaintiffs' sweepstakes;

7. The Defendants are restrained from making or issuing any statement outside of the proceedings in this case alleging or contending that Plaintiffs' products and equipment associated with Plaintiffs' sweepstakes systems constitute an illegal gambling arrangement, lottery, game of chance, slot machine or unlawful device;

8. Plaintiffs shall be entitled to the return of any and all property or equipment that has been seized, with the exception that if a District Attorney for any County in which charges were pending prior to the entry of this Court Order wishes, such District Attorney may retain a maximum of two pieces of equipment from each location as exemplars of seized equipment for purposes of forensic testing if and when the prosecution of such charges are permitted at the conclusion of this litigation;

9. The parties agree that each retail outlet shall only have four sweepstakes machines in the outlet.

10. As security for the granting of this Preliminary Injunction, Plaintiffs shall post a bond with the Clerk of Court in the amount of one hundred dollars (\$100.00).

EXECUTED AND ENTERED this 12th day of ~~April~~^{May}, 2010.

Beverly T. Beal

THE HONORABLE BEVERLY T. BEAL

A TRUE COPY
CLERK OF SUPERIOR COURT
BURKE COUNTY

Michael H. Lowman
Assistant Deputy Clerk Superior Court
CLERK OF COURT