

FILED

STATE OF NORTH CAROLINA

2008 MAR 16 PM 1:00
GUILFORD COUNTY, C.S.I.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
HIGH POINT DIVISION
08 CVS 457

GUILFORD COUNTY

HEST TECHNOLOGIES, INC. and
INTERNATIONAL INTERNET
TECHNOLOGIES, LLC,
Plaintiffs,

vs.

STATE OF NORTH CAROLINA ex rel.
MICHAEL EASLEY, GOVERNOR, in his
official capacity; NORTH CAROLINA
DEPARTMENT OF CRIME CONTROL
AND PUBLIC SAFETY; SECRETARY OF
CRIME CONTROL AND PUBLIC SAFETY
BRYAN E. BEATTY, in his official capacity;
ALCOHOL LAW ENFORCEMENT
DIVISION; DIRECTOR OF ALCOHOL
LAW ENFORCEMENT DIVISION DR.
WILLIAM CHANDLER, in his official
capacity.

PRELIMINARY INJUNCTION

Defendants.

This cause came on for hearing before the undersigned on March 14, 2008 on the motion of Plaintiffs Hest Technologies, Inc. ("Hest Technologies") and International Internet Technologies, LLC ("I.I.T."), each through their respective undersigned counsel, pursuant to N.C. Gen. Stat. § 1-485 and Rule 65 of the North Carolina Rules of Civil Procedure, for a Preliminary Injunction, and the Court having heard all testimony offered by the parties and considered all of the evidence offered by the parties and admitted by the Court, as well as having considered the pleadings, legal authorities, and argument from counsel, the Court, for the limited purpose of considering preliminary injunctive relief, makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. Plaintiffs each market and sell prepaid products, primarily long-distance telephone and/or high-speed internet service. Plaintiffs' respective products have substantial inherent value and such products are priced commensurate with their fair market value for the products being sold.

2. In connection with the marketing of its products, Hest Technologies has developed a sweepstakes system which it refers to as the *Prepaid Planet Sweepstakes Management System*. (hereinafter the "Hest System") Similarly, I.I.T. has developed a sweepstakes system hereinafter referred to as *I.I.T. Sweepstakes Promotional System*. (hereinafter the "I.I.T. System") (hereinafter the Hest and I.I.T.'s Systems will be collectively referred to as "both Systems").

3. The *Hest and I.I.T. Sweepstakes Systems* are server-based electronic sweepstakes. In each System, a database within the server contains a finite pool of sweepstakes entries. Upon creation of the sweepstakes entries, each entry is associated with a prize-value. These sweepstakes entries do not contain any symbols of any kind.

4. In each System, upon request and with no purchase necessary, participants can obtain free sweepstakes entries. Free entries are not treated any differently than entries accompanying a purchase.

5. In each System, whether through a request for free entries or through a qualifying purchase, a sweepstakes participant is given a magnetic stripe card containing a player account number associated with the sweepstakes transaction, which will enable the sweepstakes participant to reveal or open sweepstakes entries.

6. In each System, the sweepstakes entries can be opened at the point of sale terminal by requesting that the attendant open the entries and tell the participant what prizes were won. Alternatively, each System allows the participant to open the sweepstakes entries at a simulated game terminal.

7. In both Systems, the player account number has nothing to do with the content or value of any sweepstakes entry, nor does the player account number have any effect on a participant's chance of winning any prize. The player account number is simply a mechanism that identifies how many sweepstakes entries the participant is eligible to reveal.

8. In both Systems, the sweepstakes entries are selected from a predetermined finite pool of entries. After the sweepstakes entry has been drawn or selected, the program reveals the content of the sweepstakes entry, either at the point of sale terminal or at the simulated game terminal.

9. In both Systems, if the participant chooses to use the available simulated game terminal, the program reveals the content of the sweepstakes entry using different displays that simulate various game themes. All prizes that are revealed at the simulated game terminal are determined by the prizes associated with the sweepstakes entries, or tickets, all of which prizes had already been determined at point in time when the phone or internet time was purchased and the sweepstakes entered, or when the sweepstakes were entered without purchase of phone or internet time, as the case may be. In both Systems, the simulated game terminal cannot influence whether a prize was won or modify the value of a prize. These displays at the simulated game terminals are simply a mechanism that can be used to reveal to the participant the content of the sweepstakes entry or entries. Once a prize has been revealed to a customer, it is permanently removed, or flagged as drawn, from the finite pool.

10. In both Systems, the simulated game terminal will not function at all, and cannot be made to function without a connection to the server. When a participant purchases a phone card or internet time, the phone card or internet time has no cash value of any kind and it cannot be redeemed. Additionally, the simulated game terminal cannot be made to function by the insertion of money or any other thing of value. Rather, the only way that the simulated game terminals can be accessed is through sweepstakes entries, which are free by request or through the purchase of Plaintiffs' competitively priced products.

11. In both Systems, after the entries are revealed, either at the point of sale terminal or the simulated game terminal, any prizes won by the participant can then be redeemed by the participant. These simulated game terminals have no means to accept or dispense currency, nor is the software designed to determine a gaming outcome. To the contrary, the software utilized in the *Hest and I.I.T. Systems* will not permit the simulated game terminal to render a game result without obtaining the sweepstakes entries from the server.

12. The software utilized with the *Hest and I.I.T. Systems* does not create the game result as do video gaming machines, as previously described. The result presented to the player at the simulated game terminal is just an entertaining representation of the prize(s) associated with the results of the sweepstakes entries. These prize results are pre-determined and stored for delivery at the time the sweepstakes entry results are revealed.

13. The chance of winning any prize under either System is based solely on the selection of sweepstakes entries as described earlier. The displays in the various game themes have nothing to do with how much a participant might win in the sweepstakes. The graphic display of the sweepstakes entry result through the simulated game terminal is irrelevant to the

prize to be awarded, as the prize is determined by the sweepstakes entries issued to the participant.

14. The Systems are computerized sweepstakes drawings, for which no purchase is necessary to participate. Moreover, no payment of any kind is required to activate the various game themed displays on simulated game terminals.

15. The simulated game terminals of the *Hest System* or the GST of the *I.I.T. System* are differentiated from video gaming devices such as video poker, keno, or other eight-liner type games. First of all, a video gaming machine is driven by a random number generator with an infinite set of outcomes which determines the outcome of the game being displayed. Secondly, with a video gaming device, the user must stake something of value to get some outcome from the game.

16. The *Hest and I.I.T. Systems* employ finite pools of electronic sweepstakes entries. Neither the *Hest System* nor the *I.I.T. System* requires deposit of any coin or token, or use of any credit card, debit card, or any other method of payment to activate play of any of the game themed displays on the simulated game terminal.

17. Plaintiffs' prepaid products are marketed and sold at hundreds of convenience stores and other retail facilities in North Carolina. In the case of a patron who does choose to purchase long-distance phone time or high-speed internet time, whether the person chooses to participate in the sweepstakes promotion or not, that patron retains all of the prepaid time that they purchased. Additionally, whether or not the patron wins a prize in the sweepstakes promotion, they retain any and all prepaid time which they purchased.

18. Plaintiffs' Complaint asserts claims for declaratory and injunctive relief. In particular, Plaintiffs' Complaint seeks declaratory relief that the *Hest and I.I.T. Systems* are

lawful sweepstakes used to promote their respective products. Plaintiffs also seek declaratory relief that their Systems, and specifically the simulated game terminals, are not illegal slot or video gaming machines prohibited by N.C. Gen. Stat. §§ 14-306 and 14-306-1A.

19. At the hearing on Plaintiffs' Motion for Preliminary Injunction, Defendants indicated that they were not challenging the sweepstakes component of Plaintiffs' Systems. Rather, it is Defendants' position that Plaintiffs have combined a lawful sweepstakes with illegal slot or video gaming machines that are prohibited by N.C. Gen. Stat. §§ 14-306 and 14-306-1A.

20. The Court finds that the evidence presented at the hearing on this matter establishes that Plaintiffs are likely to succeed on the merits of their claims seeking declaratory relief. More specifically, the Court finds that Plaintiffs are likely to succeed on their claim seeking a declaration that their Systems constitute lawful sweepstakes in that the evidence shows that Plaintiffs are selling and promoting legitimate and competitively priced products, those being phone cards and internet time. The evidence also shows that Plaintiffs permit entry into their sweepstakes without purchase.

21. The Court also finds that Plaintiffs are likely to succeed on their claim seeking a declaration that the simulated game terminals do not constitute illegal slot or video gaming machines. The evidence shows that the simulated game terminals (1) do not result in the participants receiving or becoming entitled to anything, and (2) do not require or involve the insertion of any piece of money or coin other object. Moreover, the evidence shows that the simulated game terminals do not require any payment to activate play, and in fact play of the simulated games cannot be activated by any method of payment. Any payment made by participants is for the purchase of the products being sold and marketed by Plaintiffs and all entries to the sweepstakes are free and the result of either a request for an entry without a

purchase, or as the result of a purchase of a valuable product being promoted by the Plaintiffs' electronic sweepstakes.

22. ALE enforcement officers have been meeting with local law enforcement throughout North Carolina and have taken the position that the *Hest and I.I.T. Sweepstakes Systems* constitute illegal slot or video gaming machines. Moreover, ALE enforcement officers, either acting alone or in conjunction with local law enforcement, have visited numerous retail facilities in the state, including retailers in Guilford County, that display and sell Plaintiffs' products and have issued warnings and/or threatened criminal prosecution unless the retailers removed Plaintiffs' products and equipment associated with the operation of the sweepstakes systems.

23. ALE officers have participated in numerous raids of retail establishments in Stokes, Surry, Rockingham and Union Counties. Such raids have resulted in numerous persons being charged with criminal offenses arising out of ownership or operation of equipment related to the *Hest and I.I.T. Systems*.

24. Based on the Defendants' conduct as alleged herein, including the threats of prosecution numerous retailers have refused to sell or display Plaintiffs' products or operate Plaintiffs' sweepstakes systems and retailers who have previously sold and displayed Plaintiffs' products through their respective sweepstakes systems have discontinued offering such products for sale.

25. Defendants have raided establishments that sell Plaintiffs' products and that operate Plaintiffs' sweepstake systems and arrested or issued citations to persons owning or operating such establishments.

26. Defendants' conduct has impaired Plaintiffs' ability to engage in commerce in this State and as a result Plaintiffs will suffer substantial losses.

27. The Court finds that Plaintiffs will suffer irreparable harm by virtue of Defendants' action if such actions are not enjoined. The Court also finds that the amount of lost revenue and the costs of reestablishing relationships with retail facilities in the State would be incalculable. Also, regardless of the amount of damages assumed to be correct, the Court finds that Defendants most likely would not be subject to liability for Plaintiffs' losses based on a sovereign immunity defense. Consequently, the Court finds that, absent an order of this Court enjoining the actions of the Defendants, no adequate remedy at law by way of an award of monetary damages is available for the prevention of significant harm to Plaintiffs.

28. The Court finds that the relevant equities between the parties are best served by enjoining the activities of the Defendants relating to the effort to criminalize and prevent the sale and promotion of Plaintiffs' products.

CONCLUSIONS OF LAW

Based on the forgoing FINDINGS OF FACTS, the Court makes the following Conclusions of Law:

1. The Court concludes that Plaintiffs are likely to succeed on the merits of their claims seeking declaratory relief. More specifically, the Court concludes that Plaintiffs are likely to succeed on their claim seeking a declaration that their Systems constitute lawful sweepstakes and that Plaintiffs are selling and promoting legitimate and competitively priced products, those being phone cards and internet time.

2. The Court also concludes that Plaintiffs are likely to succeed on their claim seeking a declaration that the simulated game terminals do not constitute illegal slot or video

gaming machines in that, inter alia the simulated game terminals (1) do not result in the participants receiving or becoming entitled to anything, and (2) do not require or involve the insertion of any piece of money or coin other object. Moreover, the Court concludes that Plaintiffs are likely to succeed on the merits of their claims in that the simulated game terminals do not require any payment to activate play, and in fact play of the simulated games cannot be activated by any method of payment. Rather, any payment made by participants is for the purchase of the legitimate and competitively-priced products being sold and marketed by Plaintiffs and all entries to the sweepstakes are free.

3. The Court concludes that Plaintiffs will suffer irreparable harm by virtue of Defendants' action if such actions are not enjoined. The Court concludes that the amount of lost revenue and the costs of reestablishing relationships with retail facilities in the State would be incalculable. Also, even if the amount of damages could be calculated, the Court concludes that State most likely would not be subject to liability for Plaintiffs' losses based on a sovereign immunity defense. Consequently, the Court concludes that, absent an order of this Court enjoining the actions of the Defendants, Plaintiffs would have no adequate remedy at law by way of monetary damages to compensate Plaintiff for the significant harm caused by Defendants' conduct if not enjoined.

WHEREFORE, it is hereby ordered, adjudged and decreed that Defendants, their agents and representatives and all persons acting in concert with them are enjoined until the trial of this matter, from:

1. 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 to refrain from selling or operating them;

2. 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;

3. 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; and

4. 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.

It is FURTHER Ordered that:

1. Plaintiffs shall be entitled to reopen any locations that were in operation prior to the Court's ruling on March 14, 2008 but which had been closed or shut down as a result of the offering for sale or use or operation of Plaintiff's products;

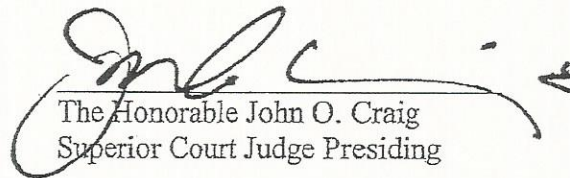
2. Plaintiffs shall be entitled to the return of any and all property or equipment that had been seized, with the exception that if a District Attorney for any County in which charges were pending prior to the entry of this Court's order wishes, such District Attorney may retain a maximum of two pieces 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; and

3, During the pendency of this action, I.I.T. shall be permitted to open an additional twelve locations with a maximum of thirty terminals in each, and Hest Technologies shall be permitted to open an additional fifty locations with a maximum of four terminals in each. In connection therewith, on or before the opening of any new location, counsel for the respective Plaintiffs shall provide notice in writing to counsel for Defendants identifying the new location that was opened.

Plaintiffs previously posted a bond in the amount of \$200 in connection with the entry of the temporary restraining order, and the Court finds that such bond is sufficient for security in connection with entry of this preliminary injunction.

It is FURTHER Ordered that, with the consent of all parties, that the undersigned shall retain jurisdiction of this action for all purposes and all future proceedings, including trial.

This the 16th day of April, 2008.


The Honorable John O. Craig
Superior Court Judge Presiding