

Attachment 1

FILED

STATE OF NORTH CAROLINA
 COUNTY OF ONSLOW
 ONSLOW COUNTY, C.S.C.

2013 NOV -4 PM 3: 34

IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 FILE NO. 13 CVS 3705

SANDHILL AMUSEMENTS, INC. AND
 GIFT SURPLUS, LLC,

Plaintiffs,

v.

SHERIFF OF ONSLOW COUNTY, NORTH
 CAROLINA, ED BROWN, in his official
 capacity; and DISTRICT ATTORNEY FOR
 THE FOURTH PROSECUTORIAL
 DISTRICT OF THE STATE OF NORTH
 CAROLINA, ERNIE LEE, in his official
 capacity,

Defendants.

ORDERS ON MOTIONS:
 (1) DISMISS
 (2) PRELIMINARY INJUNCTION

THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the regularly scheduled civil session of Superior Court in Onslow County, North Carolina, on Monday, October 7th, 2013, upon notice to all parties regarding Plaintiffs' Motion for Temporary Restraining Order.

PROCEDURAL BACKGROUND:

Upon the call of the case at the Monday, October 7th regularly scheduled civil session of Superior Court in Onslow County, North Carolina, the Defendants appeared in open Court and, through counsel, indicated that they were not prepared for hearing. By and with the agreement of all counsel and upon stipulation entered with the Court, the matter was continued to Friday, October 11th, 2013. Through stipulation of counsel and with the Court's consent, furthermore, the matter was set to be heard for Preliminary Injunction in lieu of a Temporary Restraining Order.

In the interim between Monday, October 7th and Friday, October 11th, Plaintiffs voluntarily dismissed their claim against the Honorable Ernie Lee, District Attorney for the Fourth Prosecutorial District.

On Wednesday, October 9, 2013, the Defendant filed a Motion to Dismiss.

At the commencement of the proceeding on October 11th (hereinafter, the "hearing"), the Court received evidence and heard arguments on the aforementioned Motion to Dismiss. Thereafter, the Court received evidence and heard arguments on the Motion for Preliminary Injunction.

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All matters were taken under advisement by the Court without objection, with the caveat that the status quo as of October 11, 2013 as to the various issues in controversy would be maintained by the parties hereto pending this Court's ruling.

NOW, THEREFORE, based on the evidence presented at the hearing, matters of record, contentions and briefs of counsel, North Carolina law, and all other matters properly before it, the Court makes the following

FINDINGS OF FACT:

A. Jurisdictional Findings

1. The Plaintiff Sandhill Amusements, Inc. (hereinafter, "Sandhill") appeared at the hearing by and through its President, Richard Frye, was represented by Kelly Daughtry, and presented evidence in this matter.
2. The Plaintiff Gift Surplus, LLC (hereinafter, "Gift Surplus") appeared at the hearing, was represented by George B. Hylar, Jr., and presented evidence in this matter.
3. The Honorable Ed Brown, Sheriff of Onslow County and Defendant herein (hereinafter, "Sheriff" or "Defendant"), appeared at the hearing, was represented by Lesley F. Moxley, Onslow County Attorney, and by S.C. Kitchen, and presented evidence.
4. Plaintiffs Sandhill and Gift Surplus are real parties in interest.
5. This action is not barred by the doctrine of sovereign immunity of the Defendant.
6. This Court has subject matter jurisdiction over this action, the issues presented and the parties hereto and, with the consent of all parties and as allowed by North Carolina law, is authorized to enter these ORDERS ON MOTIONS out of session and out of district.

B. Findings on Motion to Dismiss and Motion for Preliminary Injunction

7. Gift Surplus, LLC is a Georgia corporation, licensed to do business in North Carolina, which promotes various websites and e-commerce businesses. *Inter alia*, Gift Surplus utilizes sweepstakes to promote sales, particularly via e-commerce. Gift Surplus operates www.giftsurplus.com and thirteen other affiliated websites, including but not limited to: www.AmericanGreats.net, www.Great-Goods.com, www.Late-at-Night.com, www.Right2U.net, www.Sweet-Shopping.com, and www.SweetSouthern.net.
8. Plaintiff's Exhibit 1, a stand-alone computer kiosk created by Gift Surplus, was admitted into evidence (hereinafter, a "kiosk" or "machine").
9. Evidence showed that kiosks are sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business.
10. Gift cards can be used to purchase consumer goods through www.giftsurplus.com and its affiliated websites.

¹ The Motions before the Court and these combined ORDERS ON MOTIONS are not related solely to the particular kiosk admitted into evidence but to all identical kiosks which are or may be marketed/promoted by Sandhill and Gift Surplus.

11. The kiosks also feature a promotional sweepstakes function to enhance the sale of e-commerce products.

12. Customers insert money into kiosks in exchange for computer printouts which contain dollar-for-dollar credits.

- a. The credits can be used to purchase products at www.gift-surplus.com.²
- b. The credits cannot be cashed out for money.
- c. Credits also can be used for entry into sweepstakes games.³

13. Customers may obtain free entries into the sweepstakes by various methods described in the rules displayed on each kiosk, including but not limited to free sweepstakes entries available at www.nopurchaseneccessary.co.⁴

14. Uncontroverted evidence offered by Plaintiffs suggests that sweepstakes are one of the best ways to promote products and build websites; provided, however, that sweepstakes promoted via kiosks tend to work better when four or fewer machines are situate at any one locale.

15. Sandhill distributes Gift Surplus machines under contract with Gift Surplus in various local communities, including Onslow County.

16. On September 5th, 2013 Sheriff Ed Brown, Defendant herein, transmitted a letter to the owner of Sandhill, Richard W. Frye, advising that the Onslow County Sheriff's Office had "examined several video gaming machines associated with the website located at www.giftsurplus.com". That letter further stated, "it was determined these machines are in violation of NCGS 14-292, NCGS 14-293, NCGS 14-301 and NCGS 14-306.1a". The letter further advised Frye that "these machines will be seized as evidence and the person in possession will be criminally charged."

17. In direct response to the Sheriff's September 5th letter, Sandhill removed kiosks from two Onslow County locations. Sandhill also opted not to place kiosks in five other Onslow County business establishments where kiosk placement had been prearranged. Out of concern for prosecution, Sandhill has neither placed nor operated any kiosk in Onslow County since receipt of the September 5th correspondence from Sheriff Brown.

18. North Carolina Alcohol Law Enforcement Agent Kenny Simma testified that, in his opinion, the Gift Surplus kiosk is "illegal", apparently basing his opinion on his belief that a kiosk can make a cash payout. Agent Simma testified that he advised Sheriff Brown and District

² The computer printouts provide numbers and electronic ways to scan and purchase products from the www.gift-surplus.com catalog and website. The money inserted into a kiosk purchases an equivalent amount of credit to make purchases on the said Gift Surplus website.

³ A given kiosk features five different games.

⁴ To receive a sweepstakes entry, an entrant must provide some personal information. Such information is a valuable commodity in the e-commerce business. Gift Surplus receives and catalogues that information, which is consistent with other sweepstakes promotions in the State of North Carolina.

Attorney Ernie Lee that these kiosks are illegal. Agent Simma was not proffered as an expert witness, and did not testify as an expert.

19. Nick Farley (hereafter, "Farley") testified on behalf of the Plaintiffs. He was proffered and accepted as an expert witness in the field of gaming machines and software.⁵

20. Prior to trial, Farley conducted a review and examination of the computer software program, *Gift Surplus System v1-01.1*, developed by Gift Surplus, as well as the Gift Surplus computer kiosk, which resulted in a written report dated April 16, 2013 (a copy of which was received into evidence).

21. In Farley's uncontroverted opinion as evidenced by his report and testimony, the computer software program that operates the distribution of Gift Surplus sweepstakes entries and the video games used to reveal winning sweepstakes entries on the Gift Surplus Kiosk is a sweepstakes which operates in compliance with the generally accepted guidelines for operating sweepstakes in North Carolina and many other jurisdictions in the United States.

22. Farley testified that, based on his expertise honed through years of experience and his thorough knowledge of the gaming machines and software, he understands the meaning and interpretation of the words "skill" and "dexterity" as used by the industry in North Carolina and many other jurisdictions.⁶

23. In Farley's uncontroverted opinion as evidenced by his report and testimony, the *Gift Surplus System v1-01.1*, developed by Gift Surplus and used in the kiosk (Plaintiff's Exhibit 1) is dependent on skill or dexterity in order to realize any prize or entitlement from the sweepstakes entries.⁷

23. The Plaintiffs have suffered and will continue to suffer significant and irreparable harm if the Defendants are not enjoined enforcing NCGS 14-292, NCGS 14-293, NCGS 14-301 and NCGS 14-306.1a and NCGS 14-306.4.

24. The evidence shows that the Plaintiffs are more likely to prevail because they are selling valid products in e-commerce and promoting the sale of said products via a sweepstakes. The use of the games on the Gift Surplus Kiosk are dependent on skill or dexterity to reveal a prize in the Gift Surplus promotional sweepstakes.

⁵ Nick Farley is the owner of Nick Farley & Associates, Inc., d/b/a Eclipse Compliance Testing, based in Salon, Ohio. This is one of three firms in the country that provides technical consulting services for compliance of gaming machines with state and federal regulations. Eclipse Compliance Testing consults with and has been hired by law enforcement, tribal and government regulatory agencies in 245 jurisdictions, as well as by regulated device manufacturers, regarding device classification and regulatory compliance. The firm has been involved solely in the business of compliance and testing from 2000 to present. Mr. Farley has testified as an expert witness in these matters in federal, state and tribal courts both as a witness for the government and for the defense.

⁶ In preparation for his testimony at the hearing, Nick Farley was provided by counsel the definition of "skill or dexterity" in statutes in the United States. As noted in his testimony, Farley's testimony was based partially upon the statutory definitions used around the country.

⁷ Farley's report found that a participant's decision can be viewed as a strategic choice or tactic which will evolve into confidence with practice and experience. Participants familiar with revealing sweepstakes entries through the game theme will develop an aptitude or ability to quickly recognize the correct reel and the correct skill moves to reveal a prize winning sweepstakes entry. Experienced participants will demonstrate fluency in the execution of the learned past of recognizing and selecting the correct reel and making the correct skill move to reveal a potential winning outcome. Further, if the participant takes no action to effectuate the outcome of the game, the participant will not be able to realize any potential prize associated with the sweepstakes entry because these systems will never display a winning sequence on the first sweepstakes entry presented. Therefore, the kiosk games, per Farley, are dependent on skill or dexterity and not the element of chance.

Based on the foregoing Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW:

1. This matter is properly before the jurisdiction of the Court.
2. There is an actual and current controversy between the Plaintiffs and the Defendant.
3. As stated previously herein under "Jurisdictional Findings", this action is not barred by the doctrine of sovereign immunity of the Defendant.
4. Defendant has failed by the greater weight of the evidence to show that Plaintiffs' claim should be dismissed under Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the rules of civil procedure and NCGS 1-57.
5. The motions to dismiss filed by the Defendant on October 9th should be denied.
6. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law.
7. There is no evidence before the Court that Plaintiffs are not in compliance with the Credit Card Accountability Responsibility and Disclosure Act of 2009 regarding the sale of gift cards.
8. There is a likelihood that the Plaintiffs will prevail in that:
 - a. *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, conduct a valid sweepstakes within the applicable law.
 - b. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, in promotion of their sweepstakes are dependent on skill or dexterity as required under North Carolina statutory law.
 - c. The *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk operated by Gift Surplus, LLC, is a lawful promotional device for the sale of gift certificates and operation of their promotional sweepstakes.
9. The Plaintiffs will suffer serious, irreparable injury and harm if the Defendant is not restrained and enjoined from interfering with the operation of the kiosks/machines.

Based on the foregoing Findings of Fact and Conclusions of Law, it is now

ORDERED, ADJUDGED AND DECREED:

1. That Defendant's Motions to Dismiss are DENIED.

2. That Plaintiffs' Motion for Preliminary Injunction should be and hereby is GRANTED, and that Defendant Ed Brown, Sheriff of Onslow County is hereby:

- a. Restrained and enjoined from using North Carolina General Statutes Sections 14-292, 14-293, 14-301, 14-306.1A, and 14-306.4 to prohibit the Plaintiffs from displaying, selling, operating or promoting the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk and sweepstakes promotion of the www.giftsurplus.com website and gift cards; and,
- b. Restrained and enjoined from compelling or attempting to compel, coerce or persuade the Plaintiffs to remove the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and equipment associated with the kiosks and sweepstakes from any retail establishment in Onslow County; and,
- c. Restrained and enjoined from citing or prosecuting the Plaintiffs for criminal administrative offenses or violations by reason of such party's display, sale, operation or promotion of the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosks and sweepstakes promotions of the www.gift-surplus.com website and gift cards in Onslow County.


3. The Preliminary Injunction set out in "2" above is specifically enforceable only in those Onslow County places which are validly operating four or less *Gift Surplus System v1-01.1*/Gift Surplus computer kiosks at one location or on one site.

4. All matters herein, including the Findings of Fact and Conclusions of Law, are limited to this Order and shall have no force or effect beyond Onslow County, on any individuals or entities not a party hereto, or on the parties hereto upon the trial or ultimate disposition of this matter.

5. This matter shall be set for trial as determined in accordance with local rules and procedures in consultation with the Senior Resident Superior Court Judge and Trial Court Administrator in and for Onslow County, North Carolina.

6. The undersigned Special Superior Court judge retains no ongoing oversight of, or jurisdiction over, this case and specifically defers to the aforementioned Senior Resident Superior Court Judge and Trial Court Administrator, as well as the North Carolina Administrative Office of the Courts, for any future judicial commissions/assignments relevant to this case.

THIS the 4th day of November 2013.



Jack Jenkins
Special Superior Court Judge