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Tejas Vending, LP
PO Box 1628
Round Rock TX 78680

RE: Sweepstakes Promotions

To the partnership:

I have been requested to put in writing my analysis of the electronic sweepstakes in which Texas Vending, LP (“Tejas”) engages. My analysis is based upon the information that has been provided to me by Tejas regarding: (a) the nature of Tejas’s operations and agreements; and (b) the characteristics of the software utilized. This letter is intended solely for the benefit of Tejas, and no other person or entity should rely upon the analysis and opinions set forth herein.

Sweepstakes allow a person to reveal a prize associated with a sweepstakes entry ticket. Electronic sweepstakes are sweepstakes that are created by computer and then operated by use of computers. The electronic sweepstakes program operated by Tejas is used to promote donations to various charitable organizations, such as American Legion and Veterans of Foreign Wars (“VFW”) posts, and to promote the sale of various items offered by the location at which the sweepstakes computers are located, such as alcohol.

Tejas licenses the use of charitable sweepstakes promotional software from a software company pursuant to a written agreement. Tejas then distributes that software (along with computer terminals and other equipment) to locations who have contracted with Tejas to allow Tejas to run the charitable sweepstakes promotion in their location. Typical locations are bars and VFW posts. The computer program allows a player to reveal the results of their sweepstakes entry ticket through the use of a video display on a computer terminal. The video display may consist of casino-style themes or graphics, including blackjack or poker themes. A person may, however, choose to reveal the results of their entry ticket (and whether they have won a prize) by simply pressing a button to reveal the results, rather than having the casino-style theme or graphics displayed.

These graphics or themes have no relationship with the content of the entry, that is, whether the entry is a winning entry and the amount of the prize, if any. The display of the casino-style theme or graphics has no relation to whether the entry is a winning entry. In other words, the player’s interaction with the casino-style theme or graphics on the computer has no effect on the determination of whether that player’s entry is a winning entry. The casino-style themes or graphics are merely entertaining and visually pleasing ways in which to reveal whether the entry is a winning entry.

This is because the computer program, prior to the start of the sweepstakes, creates a

finite pool of sweepstakes entries, determines which entries are winning entries, and sets the prize associated with each winning entry. The computer stores this information and then reveals the results of the participant's entry to the sweepstakes participant. Whichever method is used, the content of the entry is the same and cannot be changed. The computer simply reads and then displays the content of the entry.

There is no cost to enter or participate in the sweepstakes. A participant may receive entries free with a donation. Participants may also receive 100 free entries per day simply by asking at the location without making any donation. Finally, participants may receive an unlimited number of entries without making any donation by requesting entries by mail in accordance with the sweepstakes rules. The chances of winning a prize are the same whether the participant makes a donation or not. There is no difference, in terms of chances of winning, between a free entry and one obtained by making a donation, and the making of a donation does not increase or otherwise affect the chances of winning.

There has been some concern raised by some law enforcement officials regarding whether electronic sweepstakes constitute illegal gambling. Proof of illegal gambling in Texas has consistently required three elements: (a) consideration; (b) chance; and (c) a prize. Tex. Penal Code §§ 47.01(4), .02(a)(3); *see also Brice v. State*, 242 S.W.2d 433, 434 (Tex. Crim. App. 1951) (listing elements for offense of gambling). While just about every sweepstakes contains the elements of chance and a prize, properly run sweepstakes eliminate the consideration element, typically by providing the opportunity for free entries. Specifically, the legitimate availability of free entries shows that the contestant is not required to provide any consideration for the opportunity to enter the sweepstakes. When a person may participate without buying a product or paying a fee, there is no consideration and no criminal violation. *Brice*, 242 S.W.2d at 434; *State v. Socony Mobil Oil Co.*, 386 S.W.2d 169 (Tex.Civ.App.—San Antonio 1964, writ ref'd n.r.e.)(bingo cards were being given away; no consideration present).

There have been many legitimate sweepstakes used to promote commerce in the State of Texas and throughout the country. The Texas Attorney General has specifically approved a soft drink company's sweepstakes promotion using bottle caps as the entries, so long as bottle caps were available without a purchase. Tex. Att'y Gen. Op. M-67 (1967). The availability of the free entries removed the element of consideration, thus ensuring that the promotion was not illegal gambling.

More recently, the Texas Attorney General has approved a promotion for an automobile dealership that entered contestants in a drawing for a prize so long as that contestant took a test drive in one of the dealer's vehicles. Tex. Att'y Gen. Op. JC-0174 (2000). The Texas Attorney General determined that there was no consideration even though the participant had to travel to the dealership and had to test drive one of the dealer's vehicles. According to the Attorney General, consideration in the gift enterprise context is something more than what is required under contract law. *Id.*

Another recent example is the popular McDonald's Monopoly sweepstakes. Players receive game pieces when purchasing certain food or drink items. Players may also receive free game pieces by simply sending a written request to the sweepstakes program address. Players

then use their game pieces to create “monopolies” which result in prizes being awarded to the players.

The fact that in the electronic sweepstakes the entries are revealed via display on a video monitor via a computer (and sometimes via the entertaining casino-style themes or graphics) does not change the analysis. With regard to consideration, there simply is no distinction between the sweepstakes mentioned above and the electronic sweepstakes operated by Tejas. Free entries are available for the asking, and unlimited free entries are legitimately available via mail.

With regard to the computer terminals, an essential element of the definition of a “gambling device” is that the player only gets to use the device “for a consideration.” Tex. Penal Code §§ 47.01(4)(a) “gambling device” is a contrivance that “for a consideration” affords the player an opportunity to obtain something of value). The “gambling device” statute does not exist separately from the consideration requirement for a gambling offense.

The Texas Legislature has, on more than one occasion, considered and rejected bans on “video sweepstakes.” The Texas Sweepstakes Act passed in the 77th Legislature (House Bill 2530). The engrossed version of the bill contained a prohibition on the use of “video sweepstakes,” which were defined as “a coin-operated machine with a video interface operated for pleasure that dispenses as a reward for play money or items redeemable for money or merchandise.” The final version of the bill, the enrolled version, did not contain that provision or any reference to “video sweepstakes.” In the 78th Legislature in 2003, House Bill 1468 was introduced which would have made video sweepstakes illegal except when operated at a facility of a nonprofit veterans organization. That bill failed adoption. Moreover, again in the 78th Legislature in 2003, House Bill 977 was proposed that would have amended the definition of a “gambling device” in the Penal Code to include “slot machines,” “video slot machines,” and “video sweepstakes machines.” Again, that bill was not adopted.

On three different occasions bills have been proposed in the Texas Legislature to ban video sweepstakes, either by banning video sweepstakes or by defining video sweepstakes machines as gambling devices. None of those proposals have been adopted by the Texas Legislature. The failure of these bills indicates the Legislature’s rejection of the proposal. *In re Marriage of Roach*, 773 S.W.2d 28, 32 (Tex.App.—Amarillo 1989, writ denied)(“The deletion of a provision in a pending bill discloses a legislative intent to reject the proposal, *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex. 1980), and Courts should be slow to put back that which the legislature has rejected. *Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334, 338 (Tex. 1979).”).

Finally, even at the trial court level, some prosecutors and courts have recognized that electronic sweepstakes are not illegal gambling. For example, in *State v. Crawford*, Case No. M 0437-09, in the 66th Judicial District Court of Hill County, Texas, the State moved to dismiss the charge against the defendant of keeping a gambling place. Article 32.02, Texas Code of Criminal Procedure, sets out the requirements for dismissing charges against a criminal defendant. It states that “The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case

setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.” In that case, the State’s Motion to Dismiss (the “Motion”) set forth the reasons for such dismissal. In the Motion, the State averred that the attorney representing the State had “personally met with the case agent and . . . reviewed the evidence and the reports of law enforcement officers.” Additionally, the Motion stated:

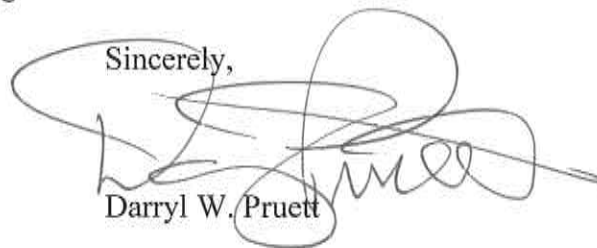
extensive legal research has been undertaken to ascertain the current state of the law regarding the activity undertaken by the defendant and others involved in the events giving rise to the case.

Based upon the above, the undersigned believes that the activity referred to by officers as ‘gambling’ is in fact a ‘sweepstakes’ under the definitions set forth in Texas law. That is, the defendant did not, for consideration, solicit or otherwise induce individuals to enter a “game of chance” as that term is used in the law. Rather, a predetermined and fixed number of winners and losers in a finite pool existed in which individuals could purchase an entry in the sweepstakes, or could receive a free entry upon proper request. Furthermore, the odds of winning or losing were pre-set, and cannot have been altered by the participant nor the business. This sort of game is allowed under Texas law so long as the contest is conducted strictly in compliance with the applicable sections of the Texas Business and Commerce Code. It appears that both the software and physical elements of the contest in this case comply with the Code.

The Motion went on to recognize the Legislature’s failure to make electronic sweepstakes games unlawful, as set forth above. The Motion also referred to a decision of the magistrate judge for the United States District Court for the Western District of Texas determining that electronic sweepstakes were lawful as long as they were conducted in compliance with the Texas Business and Commerce Code. Finally, the Motion referred to *In the Matter of \$1,189.51*, in the 107th District Court, stating that the Court, in an “exhaustive opinion,” reasoned similarly to the federal magistrate judge.

While it is not possible to guarantee that someone involved in electronic sweepstakes will not be challenged by an overzealous local prosecutor, I believe that there are very strong arguments to make that Tejas’s operations are not illegal gambling. Based on the above analysis, I do not believe that the electronic sweepstakes operated by Tejas would be considered illegal gambling or use of a gambling device.

Sincerely,

A handwritten signature in black ink, appearing to read 'Darryl W. Pruett', is written over a circular stamp. The signature is fluid and cursive, with a large loop at the end.

Darryl W. Pruett