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FORMAL OPINION

OF

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This opinion, requested by Laura L. Manning, Director of the Division of Gaming of the Colorado Department of Revenue (the "Division"), addresses the legality under Colorado law of sweepstakes offered at internet cafes, cyber cafes, and other similar establishments ("sweepstakes cafés").

QUESTIONS PRESENTED AND SHORT ANSWERS

Question 1: Do the games offered for play at sweepstakes cafés in Colorado comply with Colorado's legal requirements for sweepstakes?

Answer 1: No. Section 6-1-802(10), C.R.S. expressly defines "Sweepstakes" to exclude any activity that is "otherwise unlawful under other provisions of law." Because games offered for play at sweepstakes cafés constitute illegal gambling activity, they do not qualify as a sweepstakes by definition.

Question 2: Do the games offered for play at sweepstakes cafés in Colorado constitute illegal gambling?

Answer 2: Yes. Under Colorado law, gambling activity is defined as "[R]isking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event ... over which the person taking a risk has no control...." § 18-10-102(2), C.R.S. Colorado courts have not yet directly considered whether the activity offered at sweepstakes cafés would meet this standard. However, every state court that has directly considered this question has found that, under comparable definitions, the activity offered at sweepstakes cafés

constitutes illegal gambling. Similarly, under existing Colorado law, the activity offered at sweepstakes cafés constitutes illegal gambling activity.

Question 3: Would an amendment to the Colorado constitution be required to authorize Internet-based or on-site server-based games offered for play at sweepstakes cafés in Colorado?

Answer 3: Yes. Because the activity engaged in at sweepstakes cafés constitutes gambling, such activity could only be authorized by constitutional amendment. Such activity would be an expansion of gambling beyond what is currently authorized by Article XVIII, Sections 2 and 9 of the Colorado Constitution.

BACKGROUND

Article XVIII, Section 2 of the Colorado Constitution ("Section 2") prohibits lotteries and other games of chance, except for non-profit bingo or lotto and a state-supervised lottery.[1] Notwithstanding Section 2, in 1990, the voters approved Section 9, authorizing limited gaming in three locations in Colorado.[2]

In 1992, the voters approved a referred amendment to Section 9 requiring a local vote in favor of limited gaming in any city, town, or county which is granted constitutional authority on or after November 3, 1992 to conduct such gaming.[3] In 2008, the voters approved an initiated amendment to Section 9 which authorized local elections in the cities of Central, Black Hawk, and Cripple Creek to revise existing limits on the hours, types of games, and wager amounts involved in permissible limited gaming.[4]

Under current Section 9, the use of slot machines, the card games of blackjack and poker, and the games of roulette and craps may lawfully occur only within the commercial districts of the cities of Central, Black Hawk, and Cripple Creek.[5]

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[1] Colo. Const. art. XVIII, § 2(1)-(4), (7); *see also* § 18-10-101, et seq., C.R.S. (generally prohibiting gambling and related conduct).
[2] Colo. Const. art. XVIII, § 9(1), (3)(a), (4)(b).
[3] Colo. Const. art. XVIII, § 9(6).
[4] Colo. Const. art. XVIII, § 9(7).
[5] Colo. Const. art. XVIII, § 9(3)(a), (4)(b), (7)(a)(II).

With respect to the expansion of limited gaming beyond that authorized in the original amendment, Section 9 imposes two requirements. First, an expansion must be approved by a statewide vote amending the constitution.[6] Second, any such expansion must be approved by an affirmative vote of the majority of the electors of the city, town, or county in which limited gaming will occur.[7] To date, only the cities of Central, Black Hawk, and Cripple Creek have been granted constitutional authority for limited gaming.[8]

On December 13, 2013, the Colorado Attorney General issued Formal Opinion No. 13-02 which concluded unequivocally that an amendment to the Colorado Constitution would be required to authorize any on-line/Internet gambling in the state of Colorado.

The current questions to be addressed in this opinion regard the legality of the activity taking place at sweepstakes cafés[9], whether those games are Internet based or whether such activity utilizes on-site servers. Essentially, a sweepstakes café operates as follows: the café nominally sells a product, such as a telephone calling card or minutes of Internet time. *See, e.g., United States v. Davis*, 690 F.3d 330 (5th Cir. 2012) *cert. denied,* 133 S. Ct. 1283 (U.S. 2013) and *cert. denied,* 133 S. Ct. 1296 (U.S. 2013) (internet time); *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001) (telephone cards). However, each unit of product purchased (e.g. each phone card) also includes an entry into a "sweepstakes." A pre-set fraction of these entries are pre-programmed as "winning entries." *Davis*, 690 F.3d at 333.

To reveal if a given sweepstakes entry is a "winner," customers have several options, such as asking the café staff to reveal their entry's status. *See, e.g., Lucky Bob's Internet Cafe, LLC v. Cal. Dep't of Justice*, 11-CV-148 BEN JMA, 2013 WL 1849270 (S.D. Cal. May 1, 2013). However, in what appears to be the vast majority of cases, patrons choose to reveal their entry's "winning" status via computer terminals that, to varying degrees, simulate, look, sound and operate like casino slot machines. *See, e.g., People ex rel. Lockyer v. Pac. Gaming Techs.*, 82 Cal. App. 4th 699, 700-01 (2000) ("The VendaTel looks like a slot machine. It acts like a slot machine. It sounds like a slot machine...In our view, if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck"). The "casino simulation"

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[6] Colo. Const. art. XVIII, § 9(6)(a).

[7] *Id.*

[8] Colo. Const. art. XVIII, § 9(1), (3)(a).

[9] This Opinion uses the term "sweepstakes café" for convenience, but the term includes any establishment offering the gaming activities addressed herein.

software that reveals the winning status may be housed on the local computer itself, or it may be housed on a remote terminal accessed via Internet connection. *See, e.g., G2, Inc. v. Midwest Gaming, Inc.*, 485 F.Supp. 2d 757, 773 (W.D. Tex. 2007). At times, these terminals also provide the option to engage in other non-gaming programs, such as access to social networking websites or email. *See Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599, 605 (Ala. 2006).

In either case, a sweepstakes café customer holding a winning sweepstakes entry is provided with a "credit" payout. This credit is redeemable for cash — or for more "reveals" at the café's terminals. *See, e.g., Trainer v. State*, 930 So.2d 373, 376 (Miss. 2006).

Notably, sweepstakes cafés almost always provide procedures by which the sweepstakes can be entered without making a purchase (or using the reveal terminal). In a typical example, customers are instructed that:

> To enter without a purchase: (a) ask the participating retailer for an official game piece request form and legibly hand print all the information requested on the form; or (b) call 800–603–3223 to request an official game piece request form; or (c) on a sheet of white paper no smaller than 3" by 5", legibly print your name, address, city, state, zip code, age, the name of the promotion for which you are requesting a game piece, and the name and address of the retail establishment at which you will redeem the game piece if it is a winning game piece.

Face Trading Inc. v. Dep't of Consumer & Indus. Servs., 270 Mich. App. 653, 657 (2006). However, such "non-purchase" participants are generally limited to a very small number of entries per day. *See, e.g., Midwestern Enterprises, Inc.*, 625 N.W.2d at 240 ("Midwestern offers one free Lucky Strike game piece per mailed request").

In recent years, states have responded to this phenomenon in different ways. Some, such as North Carolina[10] and Massachusetts,[11] have created statutory bans

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[10] N.C. Gen. Stat. Ann. § 14-306.4(b) ("....it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following: (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.")

specifically aimed at these sweepstakes cafés. Others, such as North Dakota,[12] California,[13] and Alabama,[14] have prosecuted these operators under existing anti-gambling laws similar to those currently in force in Colorado (discussed more fully in Part II).

As with much of gambling activity, this enterprise is constantly evolving. Accordingly, there are conceivable variations on this basic model.

ANALYSIS

I. Do the games offered for play at sweepstakes cafés in Colorado comply with Colorado's legal requirements for sweepstakes?

Section 6-1-802(10), C.R.S. defines "sweepstakes" as follows:

> (10) "Sweepstakes" means any competition, giveaway, drawing, plan, or other selection process or other enterprise or promotion in which anything of value is awarded to participants by chance or random selection that is *not otherwise unlawful under other provisions of law*; except that "sweepstakes" shall not be construed to include any activity of licensees regulated under article 9 or article 47.1 of title 12, C.R.S., or part 2 of article 35 of title 24, C.R.S.

§ 6-1-802(10), C.R.S. (emphasis added).[15] Further, section 6-1-803(16), C.R.S. provides that the prohibited practices associated with sweepstakes "are in addition to and do not limit the types of unfair trade practices actionable at common law or under other civil and criminal statutes of this state."

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[11] Mass. Gen. Laws Ann. ch. 271, § 5B(b) ("It shall be unlawful for any person to knowingly possess with the intent to operate, or place into operation, an electronic machine or device to: (1) conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize; or (2) promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.")

[12] See *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001) (holding that Sweepstakes Cafe-type device was an "illegal gambling apparatus").

[13] *People v. Nasser*, F066645, 2014 WL 906798 (Cal. Ct. App. Mar. 10, 2014), unpublished/non-citable (Mar. 10, 2014), review granted (June 25, 2014) *8.

[14] *Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599, 614 (Ala. 2006).

[15] It should be noted that Colorado's sweepstakes statute applies only to direct mail sweepstakes promotions conducted via the US mail. *See* § 6-1-802(5) and 802(9).

Thus, even if the activities of one of these cafés could arguably qualify as a "sweepstakes" under the above definition, it could still be illegal under other provisions of Colorado law. Notably, at least two other states' sweepstakes statutes include such "illegality clauses" in their definitions of a "sweepstakes": Alabama and California. California defines sweepstakes to mean:

> [A]ny procedure for the distribution of anything of value by lot or by chance that is *not unlawful under other provisions of law* including, but not limited to, the provisions of Section 320 of the Penal Code. Nothing contained in this section shall be deemed to render lawful any activity that otherwise would violate Section 320 of the Penal Code.

Cal. Bus. & Prof. Code § 17539.5(12).

Alabama defines a "sweepstakes" as "a *legal* contest or game where anything of value is distributed by lot or chance." Ala. Code § 8-19D-1(4).

As in Colorado, compliance with more specific sweepstakes requirements cannot save a contest that is illegal under another law. Because of this, it is unsurprising that neither Alabama nor California courts analyzed sweepstakes cafés under their respective sweepstakes codes; instead, both states looked solely to anti-gambling laws in their respective decisions to ban the cafés. *Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599 (Ala. 2006); *Lucky Bob's Internet Cafe, LLC v. California Dep't of Justice*, 11-CV-148 BEN JMA, 2013 WL 1849270 (S.D. Cal. May 1, 2013).

Moreover, in assessing the legality of sweepstakes cafés, we are aware of no state appellate court that has held that compliance with the technical requirements for a "sweepstakes" has rendered the activity legal. To the contrary, these states — most of which have elaborate sweepstakes requirements — uniformly decline to analyze compliance or non-compliance with such requirements. Instead, these states have looked to broader anti-gambling statutes to hold that the activity conducted at the sweepstakes cafés — whether or not it constituted a "sweepstakes" — is nonetheless illegal activity.

II. Do the Internet or on-site server-based games offered for play at sweepstakes cafés in Colorado constitute illegal gambling?

Even if sweepstakes cafés comply with some of Colorado's technical requirements for sweepstakes contests, the activity is illegal under the state's anti-

gambling laws. The General Assembly has declared a policy "to restrain all persons from seeking profit from gambling activities in this state." § 18-10-101(1), C.R.S. The provisions of the criminal gambling statute "shall be liberally construed to achieve these ends and administered and enforced with a view to carrying out [the enumerated policies]." § 18-10-101(2), C.R.S.

Gambling is defined as:

> [R]isking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event ... over which the person taking a risk has no control....

§ 18-10-102(2), C.R.S.

To constitute gambling, the activity must involve three elements: (1) consideration exchanged ("risking any . . . thing of value"); (2) for a chance to win ("contingent . . . upon lot, chance, or the happening of an event); and (3) prize ("gain"). *Sniezek v. Colo. Dep't of Revenue*, 113 P.3d 1280, 1282 (Colo. App. 2005). Thus, in weighing the legality of the activity taking place in Colorado sweepstakes cafés, each of the three elements must be considered in turn.

Notably, the definition of gambling found in § 18-10-102(2)(c), C.R.S., includes an exception for an act or transaction "expressly authorized by law." However, the sweepstakes cafés generally and the activity offered at the sweepstakes cafés specifically are not expressly authorized anywhere in the Colorado Constitution or the Colorado Revised Statutes. Other activities, i.e. limited stakes gaming, non-profit bingo and a state-supervised lottery, are expressly authorized. Because gambling is illegal by constitution unless it is expressly authorized, such exception must be narrowly construed to any illegal activity until it has been so expressly authorized through an amendment to the constitution.

A. Consideration

The first question is whether the sweepstakes cafés feature the exchange of "consideration" for the chance at winning, that is "risking any. . . thing of value *for* gain contingent ...upon...chance." § 18-10-102(2), C.R.S. (emphasis added). The key inquiry here is whether the money paid by sweepstakes café users has been paid "for" the chance to gamble.

As noted, the basic premise of the activity offered at a sweepstakes café is that payment is being made not for the chance to gamble, but rather for a different product, such as Internet time,[16] phone cards,[17] or coupon books.[18] In other states, sweepstakes café owners have argued that the consideration element is lacking because customers are paying money in consideration for receiving the product. For example, they claim that the cafés are no different from the McDonald's or Pepsi sweepstakes, in which consideration is exchanged for soda or fast food, but customers are also given a "bonus" chance to win a prize.[19]

Courts have rejected this argument, finding that the activity taking place at the cafés constitutes the exchange of consideration for gambling — not for the underlying product. In reaching this result, courts have adopted a number of approaches. One of the most common perspectives is to focus on the substance, and look to whether the consumers were actually exchanging consideration for the product, or actually exchanging consideration for the chance to win. This inquiry has often been resolved on the basis of investigations or other fact gathering. In *U.S. v. Davis*, the Fifth Circuit considered whether the evidence that sweepstakes café activity constituted gambling was sufficient to uphold a criminal conviction. The Court concluded that it was. In doing so, it noted with approval that the trial court:

> [S]tated that "consideration regarding lotteries should be measured by the same rule as in contracts,"... and determined on the facts presented that a reasonable jury could have found the presence of consideration beyond a reasonable doubt, ...

Davis, 690 F.3d at 338,(internal citations omitted). The trial court explained that its decision turned on "whether the sweepstakes was intended to promote the sale of telephone cards or whether the telephone cards were there as an attempt to legitimize an illegal gambling device." *Id.* Driving the court's finding that the telephone cards were an attempt to legitimize an illegal gambling device, and that therefore the consideration requirement was satisfied, were the following facts: the telephone cards cost much more per minute than the market cost of telephone

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[16] *Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599, 604 (Ala. 2006).
[17] *Sun Light Prepaid Phonecard Co., Inc. v. State*, 360 S.C. 49, 50 (2004).
[18] *PJY Enterprises v. Kaneshiro*, (D. Haw., Apr. 30, 2014), Docket CIVIL NO. 12-00577 LEK-KSC, *3.
[19] *See, e.g., State v. Vento*, 286 P.3d 627, 630 (N.M. Ct. App. 2012) *cert. granted,* 296 P.3d 1208 (N.M. 2012) *cert. quashed,* 313 P.3d 251 (N.M. 2013).

time; there was testimony that the telephone cards did not work; there was evidence that players did not value the telephone cards, and that some players did not know they even were telephone cards; there was testimony that the employees were aware that the customers did not value the telephone cards; there were no signs on the outside of the building advertising or indicating that telephone cards were sold at the store; and no employee tried to sell customers on the telephone cards. *Id.*[20]

As the *Davis* opinion shows, a fact-based inquiry into the nature of the "product" ostensibly being sold indicated that even if the "form" of consideration was for the product, the substance was clearly for gambling.

Other examples of this substance over form based approach to consideration are manifest. In *Barber*, the Alabama Supreme Court held that:

> To be sure, MegaSweeps "delivers something of value," namely, cybertime, on the basis of something "other than chance." Upon the tender of a minimum payment, consumers invariably receive four minutes of cybertime, in addition to 100 MegaSweeps entries. The owners contend that the consideration is paid *for the cybertime,* and, consequently, that the MegaSweeps entries are *free.* This argument does not pass statutory muster, however, if, looking through the form of the operation to its substance, consumers are *paying for the entries, in whole or in part,* regardless of the cybertime acquired in conjunction with those entries. See § 13A–12–20(11) ("[*a*]*ny* money or property" paid or received is consideration). In other words, if they are paying to play the readers, rather than to acquire, *or in addition*

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[20] *See also id.* at 339-40 ("Here, as in *Jester,* there is legally sufficient evidence from which a reasonable fact-finder could infer that the sale of Internet time at the defendants' cafés was an attempt to legitimize an illegal lottery. Customers' receipts indicating over 300,000 minutes of Internet time remaining were evidence that the customers did not value the Internet time they had purchased. Further evidence that customers did not value their Internet time was the investigating police officers' uniform testimony that during each of their visits to a café, all of the people there were only engaged in playing the sweepstakes — not accessing the Internet or using any of the other services provided. In addition to the customers' apparent disregard for the value of Internet time, there was evidence which casts doubt upon the defendants' claim that they intended to be legitimate, full-service Internet, faxing, copying, and word-processing vendors.")

> *to acquiring,* cybertime, the element of consideration set forth in § 13A–12–20(10) and (11) is satisfied.[21]

Similarly in *Midwestern Enterprises, Inc.*, the North Dakota Supreme Court held that:

> Despite Midwestern's characterization of the Lucky Strike game as a promotional sweepstakes with the purpose to increase the sales of phone cards, people continued to play even when phone cards were available free of charge. People were not paying their dollars for phone cards but rather, were paying their dollars for a chance to win up to $500 in cash. The element of consideration is not missing from the Lucky Strike game.

Midwestern Enterprises, 625 N.W.2d at 240.

In *People ex rel. Lockyer v. Pac. Gaming Technologies*, a California appellate court considered a machine that looked significantly like a slot machine and gave users an opportunity to win a "sweepstakes" each time they purchased a phone card.[22] Here, the court looked to the California precedent of *Trinkle v. Stroh,* 60 Cal.App.4th 771, 70 Cal.Rptr.2d 661 (3d Dist. 1997). In *Trinkle*, the court examined a "Match 5" Jukebox; the Jukebox would play a song each time money was put in, but it would also afford a chance to win money if customers matched 5. Quoting *Trinkle*, the *Lockyer* Court observed that:

> [t]he owners insisted that their Match 5 Jukebox was exempt under section 330.5 "because in every case the customer gets what he or she pays for — songs." (*Trinkle v. Stroh, supra,* 60 Cal.App.4th at p. 781.) The ABC [Alcoholic Beverage Control], in turn, said the customers did *not* get what they paid for "'in every case,' because some customers got more than what they paid for — the jackpot." (*Id.* at p. 782.) *Trinkle* agreed with the ABC, adopting the trial court's finding that, "'once the elements of chance and prize are added to a vending machine, the consideration paid from the player-purchaser's perspective is no longer solely for the product.' " (*Ibid.*) Put another way, "[a]n otherwise illegal machine does not become legal merely because it plays music, gives a person's weight, vends food, etc." (*Ibid.*)

Lockyer, 82 Cal. App. 4th at 705.

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[21] *Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599, 611 (Ala. 2006).

[22] *People ex rel. Lockyer v. Pac. Gaming Technologies*, 82 Cal. App. 4th 699 (2000).

Based upon this precedent, the court concluded that because "[b]y the insertion of money and purely by chance (without any skill whatsoever), the user may receive or become entitled to receive money" in addition to the telephone card, the element of consideration is added and people are no longer paying just for the product; therefore, the VendaTel machine was an illegal slot machine under the plain language of the penal code. Id. at 703, 707.

Colorado courts have not directly considered this question. However, existing Colorado case law suggests that a "functionalist" view of gambling devices would be adopted, and thus that consideration would be found. In 1942, the Colorado Supreme Court considered the argument that because a set of pinball machines had a "non-gambling mode" that operators could elect, the machines were not "gambling devices." *Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke*, 110 Colo. 82, 86-87 (1942). Rejecting this argument, the Court held that:

> The flaw in this argument is that at the time the machines were seized and demonstrated in court they were set to function for gambling purposes. The test was not whether there was a possibility of their being used for amusement purposes, but their *reasonably intended use and their inherent tendency to stimulate the gambling instinct latent in many people.*

Id.

This logic suggests a functionalist definition — even if there is a "possibility" of workstations at sweepstakes cafés being used for non-gaming purposes (such as Internet time), the fact that they are "reasonably intended" to induce gambling behavior is sufficient to meet the consideration component.

In Sniezek v. Colorado Dep't of Revenue, 113 P.3d 1280 (Colo. Ct. App. 2005), a shop owner sued for the return of various "ad-tab" dispenser machines that had been seized by the state as gambling devices. For one dollar, patrons purchased paper tickets that contained a coupon on one side and a cash prize game on the other; the cash prize game contained a combination of symbols that were revealed when the purchaser opened the tabs; various combinations of symbols resulted in differing levels of prizes, with the prizes ranging from one dollar to five hundred dollars; the purchaser of a "winning" Ad–Tab could redeem the ticket for a cash prize by presenting it to an employee of the establishment where it was purchased; and a game piece could also be obtained from F.A.C.E. [the operator] by requesting one via the mail. *Id.* at 1281.

The Colorado Court of Appeals rejected the plaintiff's argument that because the Ad-Tab coupon had a cash value greater than one dollar, consideration had been exchanged for purchase of the coupon (as opposed to the chance to win a prize). The court was particularly struck by the fact that:

> [T]he items to be purchased with the coupons are not displayed anywhere near or on the machine, nor does a customer know what the coupon is for before purchasing the Ad–Tab. Thus, the customer does not know what product the coupon will enable him or her to purchase, what the price for the product will be, or whether more Ad–Tabs must be purchased to qualify. Hence, the customer takes a risk upon the purchase of the Ad–Tab. In addition, the machine advertises the chance to win money, and the emphasis in the advertisement is the "win cash" slogan, as opposed to the purchase of merchandise.[23]

The court then distinguished the ad-tabs from other, traditional "national promotions" such as the McDonald's sweepstakes, on the grounds that:

> [P]laintiffs' machines involve the promotion of a prize with the product being unrelated to their business as the promoter or distributor, and the customer does not know what product is being purchased. As noted above, plaintiff F.A.C.E. is not in the business of selling either merchandise or advertising. Accordingly, because the game feature on the Ad–Tabs does not promote another primary business of either plaintiff, it is not analogous to the specified types of national promotions.[24]

The court concluded that plaintiffs' machine was designed to promote the sale of the "win cash" feature of the Ad-Tab, not the coupon feature, and that the coupon was merely incidental to the game portion of the ticket. *Id.* Accordingly, the Court held that the devices at issue were, in fact, gambling devices under the meaning of Colorado's statutes.

Notably, the fact that sweepstakes cafés offer the possibility of free entries has not saved the sweepstakes in other jurisdictions. In *Midwestern Enterprises, Inc.*,[25] for example, the North Dakota Supreme Court considered the argument that "there is no consideration because there is no purchase necessary to play the game. Upon sending the postage-paid postcard or making a written request to the

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[23] *Id.* at 1282.
[24] *Id.* at 1283.
[25] 625 N.W.2d 234 (N.D. 2001).

address on the side of the machine, a person can get one free game piece per request."[26] However, the Court rejected this argument, finding that:

> the limited availability of free play does not exempt the Lucky Strike game from being defined as gambling. Sweepstakes that are commonplace as marketing promotion tools are significantly different than the Lucky Strike game. The high pay-out rate of the Lucky Strike game is a distinguishing feature because it goes to the true purpose of the game. Midwestern offers one free Lucky Strike game piece per mailed request and on this basis claims, because no purchase is necessary, it is as acceptable as a retail promotional sweepstakes. However it does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of sixty-five percent are immune from the definition of a lottery because they also offer limited free play. North Dakota has not established, by either legislation or judicial ruling, an exception to the gambling and lottery definitions for promotional sweepstakes. A number of states, rather than finding gambling is acceptable because it has one characteristic of limited free play in common with promotional sweepstakes, have concluded retail promotions violate gambling and lottery statutes despite the availability of limited free play.

625 N.W.2d at 239-40; *see also Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967); *Kroger Co. v. Cook*, 24 Ohio St.2d 170, 265 N.E.2d 780 (1970); *State ex rel. Schillberg v. Safeway Stores, Inc.*, 75 Wash.2d 339, 450 P.2d 949 (1969).

Similarly, in *Black N. Associates, Inc. v. Kelly*,[27] a New York appellate court noted that "petitioner contends that, because no purchase is necessary to participate, the sweepstakes do not constitute gambling activity." However, the court rejected this argument on the grounds that "the evidence establishes that, while the distribution of free promotional game pieces was limited to one per person per day "while supplies last," players of the Lucky Shamrock Vending Machine could increase their chances of winning by making multiple purchases. Indeed, the machine was designed to encourage such multiple purchases, since it accepted bills ranging from $1 to $20 and it did not give change.[28]

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[26] *Id.* at 239.

[27] 281 A.D.2d 974, 975 (N.Y. App. Div. 2001).

[28] *Id.*

Additionally, the location of the activity, whether on remote servers or "in-store," has yet to preclude a finding that the activity at sweepstakes cafés constitutes gambling.[29]

Likewise, in *Sun Light Prepaid Phonecard Co., Inc. v. State*, 360 S.C. 49, 56 (2004), the South Carolina Supreme court held that a phone card machine that gave users an opportunity to win a "sweepstakes" each time they purchased a card constituted a gambling device.

Such games induce gambling behavior and because consideration is given by a patron, at least in part, to participate in a chance for a larger payout, the games offered at sweepstakes cafés meet the consideration element for gambling under Colorado statute.

B. Chance

The next element, chance, turns on whether the gain sought is "contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event ... over which the person taking a risk has no control." § 18-10-102(2), C.R.S.[30]

Colorado's statute states that the test for "chance" turns on the perspective of the user, not the café operators. Even if the sweepstakes tickets have been pre-determined, this pre-determination is an outcome of an event "over which *the person taking* the risk has no control." § 18-10-102(2), C.R.S. (emphasis added).

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[29] *Telesweeps of Butler Valley, Inc. v. Kelly*, 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct. 10, 2012) *aff'd sub nom. Telesweeps of Butler Valley, Inc. v. Attorney Gen. of Pennsylvania*, 537 F. App'x 51 (3d Cir. 2013) ("finite pool of entries is predetermined in advance of the start of the game promotion and only stored in the [on-site] server for delivery to the PC); *Barber v. Jefferson Cnty. Racing Ass'n, Inc.*, 960 So.2d 599, 607 (Ala. 2006) (although the actual sweepstakes is determined by an off-site server, the café activity in question still constituted gambling); *People v. Nasser*, F066645, 2014 WL 906798 (Cal. Ct. App. Mar. 10, 2014), unpublished/non-citable (Mar. 10, 2014), review granted (June 25, 2014) (holding that a sweepstakes café constituted impermissible gambling even though it was part of an "integrated system that forms a network of computers and [off-site] servers").

[30] Many courts and litigants have simply assumed or asserted that "chance" is present within the simulated slot machine devices and not analyzed this point. In several courts, however, it has been argued that if the sweepstakes entries are pre-determined as winners or losers before the game has even begun, chance is inapplicable.

Thus, the language of the statute provides that chance would still be present, despite whether the tickets have been pre-determined.

This conclusion was also adopted by those courts that have considered the "chance" argument in detail. In *Telesweeps of Butler Valley, Inc. v. Kelly*, for example, a Pennsylvania appellate court noted that chance is defined from the perspective of the player, and that "'[f]rom the player's perspective, ... every outcome is a random outcome,' so a player would perceive a slot machine and an internet sweepstakes as the same."[31] Likewise, in *People v. Nasser*, F066645, 2014 WL 906798 (Cal. Ct. App. Mar. 10, 2014), unpublished/non-citable (Mar. 10, 2014), review granted (June 25, 2014), a California appellate court expressly found that "even though all sweepstakes entries were previously arranged in batches (or pools) that had *predetermined* sequences, that fact does not change our opinion of this issue (*i.e.*, the chance element) because the results would still be unpredictable and random from the perspective of the user."[32] In *Barber v. Jefferson County Racing Ass'n, Inc.*, the Alabama Supreme Court found that, even where computer terminals were merely "reading" predetermined results, "the element of chance is satisfied at the point of sale — before the readers are activated."[33]

Accordingly, the games offered for play at sweepstakes cafés in Colorado satisfy the "chance" prong of section 18-10-102(2), C.R.S.

C. Prize

The final element, prize or "gain," is also present in the sweepstakes café model. To date, every state court that has considered the question has found that the devices offer the potential for such gain, whether the prize is monetary or non-monetary,[34] and indeed, no sweepstakes café owner has disputed that gain is present.

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[31] *Telesweeps of Butler Valley, Inc. v. Kelly*, 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct. 10, 2012) *aff'd sub nom. Telesweeps of Butler Valley, Inc. v. Attorney Gen. of Pennsylvania*, 537 F. App'x 51 (3d Cir. 2013) (internal citation omitted).

[32] *People v. Nasser*, F066645, 2014 WL 906798 (Cal. Ct. App. Mar. 10, 2014), unpublished/non-citable (Mar. 10, 2014), review granted (June 25, 2014) *8.

[33] *Barber v. Jefferson County Racing Ass'n, Inc.*, 960 So.2d 599, 610 (Ala. 2006).

[34] *See, e.g., United States v. Davis*, 690 F.3d 330, 335 (5th Cir. 2012) *cert. denied,* 133 S. Ct. 1283 (U.S. 2013) and *cert. denied,* 133 S. Ct. 1296 (U.S. 2013) (noting cash prizes were won); *MDS Investments, L.L.C. v. State*, 138 Idaho 456, 464 (2003) (noting prizes were available); *Hest Technologies, Inc. v. State ex rel. Perdue*, 366 N.C. 289, 293 (2012) *cert. denied,* 134 S. Ct. 99 (U.S.N.C. 2013).

Because all three elements: consideration, chance, and prize are present, under Colorado law, the activity occurring at sweepstakes cafés in Colorado constitutes illegal gambling.

III. Would an amendment to the Colorado Constitution be required to authorize Internet-based or server-based games offered for play at sweepstakes cafés in Colorado?

An amendment to Colorado's Constitution would be required before Internet-based games or server-based games could be offered for play at sweepstakes cafés in Colorado. Article XVIII, Section 2 of the Colorado Constitution ("Section 2") generally prohibits lotteries and other games of chance, except for non-profit bingo or lotto and a state-supervised lottery.[35] A subsequent amendment, Section 9, requires that with the exception of the limited gaming cities of Central, Black Hawk, and Cripple Creek, any subsequent expansion of gambling must be approved by a statewide vote amending the constitution.[36] Any such expansion must also be approved by an affirmative vote of the majority of the electors of the city, town, or county in which limited gaming will occur. Thus, neither Internet-based games nor server-based games offered for play in sweepstakes cafés could be authorized in Colorado without a constitutional amendment.

CONCLUSION

Based on the foregoing analysis, I conclude that the activity occurring at sweepstakes cafés constitutes illegal gambling under Colorado law, whether Internet-based or server-based. Such activity is an unauthorized expansion of gambling, is illegal, and cannot be allowed without a state-constitutional amendment specifically authorizing such activity.

Issued this 9th day of October, 2014.

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Colorado Attorney General

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[35] Colo. Const. art. XVIII, § 2.
[36] Colo. Const. art. XVIII, § 9(6).