For Publication

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, DEP'T OF FINANCE Plaintiff/Counterclaim Defendant, v. **JUST FOR FUN, INC.,** Defendant/Counterclaim Plaintiff.	**CIVIL ACTION NO. 00-0347-CV** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS MATTER was last before the Court for bench trial on April 12, 2004 and May 17, 2004, with closing arguments occurring Oct 5, 2004. The plaintiff was represented by Deborah L. Covington and Joseph L.G. Taijeron, Jr. and the defendant by G. Anthony Long. The Court, after reviewing all of the evidence in this case, and in consideration of the testimony of the witnesses called, documentary evidence submitted, and the briefs and arguments of counsel, now enter these Findings of Fact and Conclusions of Law, which shall serve as final judgment in this matter.

FINDINGS OF FACT

In 1983, the Commonwealth enacted the Lottery Act, 1 CMC § 9301 *et seq.* and thereby established a Lottery Commission that would organize and operate a public lottery.[1] The Commission was charged with operating in a manner that would "produce the maximum amount of revenue for the Commonwealth consonant with the general welfare of the people." § 9301. To do this, the Commission was given the power and duty to license private companies to operate various

[1] The Lottery Commission was abolished by Executive Order 94-3 and responsibility for administering the lottery was transferred to the Department of Finance.

parts of the lottery, including game design and retailing and enter into contracts for that purpose. 1 CMC § 9305(b) and § 9310.

It was under this contracting power that the Secretary of Finance ("the Secretary") issued Request for Proposal (RFP) 97-0131 in early 1997. The RFP sought proposals to operate a two-number lottery game in the CNMI. Three proposals were returned, one from Numbers International, Inc., one from Marianas Chain Marketing, Inc., and one from the defendant, Just for Fun, Inc. (JFF). Each proposed to operate a two-number lottery game generally referred to as Jueteng, a slang name used in the Philippines where the game is common. Numbers International was awarded the contract, in part because JFF had offered to pay an annual fee of only $25,000 while the RFP called for an annual payment of $150,000.

JFF was not deterred, however. After receiving notice that its bid had been rejected, JFF wrote to the Secretary, in a letter dated August 22, 1997, that it was willing to pay the $150,000 annual fee after all. The Secretary replied on September 4, 1997 that JFF's revised proposal was precluded by the exclusive license granted to Numbers International to operate a Jueteng game.

JFF then made another counteroffer on September 15, 1997, this time offering a 5% commission on sales, in addition to the $150,000 annual license fee and ordinary Business Gross Revenue tax. In the offer letter, JFF stated that Jueteng "is solely played by the non-resident workers. I am motivated to target not only to the Filipino Guest Workers but also targeting the Chinese Guest workers." The letter was signed by JFF's President, Juan M. Cabrera, who admitted during trial testimony that he was the author.

Apparently having concluded that Numbers International's "exclusive license" was not so exclusive after all, the then-Acting Secretary of Finance Delores Guerrero wrote to Mr. Cabrera to inform him that a license would be issued. On January 9, 1998 a contract was executed by Acting Secretary Guerrero and Mr. Cabrera and a lottery license issued. Under the terms of the contract, JFF was allowed to operate both one-number and two-number games, each with a daily drawing. In return, JFF was to pay $150,000 annually, in quarterly installments, as well 10% of gross sales from the two-number game and 5% of the gross sales from the one number game to the government.

The first 5% of these combined would be applied as an offset against JFF's general Business Gross Receipt tax.

Significantly, the contract required JFF to specifically target members of the Chinese and Filipino communities. Defendant's Exhibit "1" ¶ 5. It limited television advertising to channels "primarily intended to reach the Filipino and Chinese communities," *id* at ¶ 8 and required JFF not to "actively target business" outside these communities. *Id* at ¶ 20. The tickets were to be sold by "sellers who go to constructions [sic] sites, workers barracks and other locations where buyers are located...and from retail stores that cater primarily to Filipino and Chinese target customer groups." *Id* at ¶ 25. The idea of targeting Filipinos and Chinese appears to have originated with Mr. Cabrera, but it was embraced enthusiastically at Finance and the specific restrictions on sales were primarily the work of Department of Finance employees. The restrictions were designed to protect the interests of Tattersall's, an Australian company that had been the CNMI's exclusive provider of lottery services through a licensee called The Mail Service. Though it was not explicitly stated in the contract, Finance made it clear to JFF that excessive sales to persons outside the target groups could lead to revocation of JFF's license.

Shortly after JFF's license was issued, a new administration took over the governor's office. On February 9, 1998, the newly-appointed Secretary of Finance notified JFF by letter that Finance was challenging the legality of the Jueteng licenses issued to both JFF and Numbers International. The Secretary alleged that the licenses were invalid because Tattersall's held an exclusive lottery license and the Secretary therefore lacked the authority to issue any subsequent licenses. The Secretary began administrative proceedings to revoke JFF's license. During the hearing process, JFF vigorously, but unsuccessfully, defended the legality of its license. On July 15, 1998, the Hearing Officer annulled JFF's lottery license.

At this point, JFF could simply have accepted defeat and moved on. However, it apparently continued to believe that Jueteng could be a profitable enterprise, even with the marketing restrictions in place. So JFF appealed to the Superior Court, in *In the matter of Just for Fun, Inc.*, Civil Action No. 98-858, seeking a stay of agency action. Eventually JFF prevailed - with then

Associate Judge John A. Manglona reversing Finance's action and holding that there was no legal impediment preventing Finance from issuing multiple lottery licenses. The decision was issued June 14, 1999. No appeal was taken by either side.

During the time that administrative and judicial proceedings were ongoing, JFF continued to operate its games and pay its annual fees and per sale commissions. However, the business apparently began to lose money and JFF soon had a change of heart. It began claiming that the fees and commissions called for under the contract were improper or illegal. On March 20, 2000, JFF surrendered its lottery license. At the time, JFF owed Finance a prorated balance on the license fee of $17,083.33. After a number of attempts to collect this amount, Finance filed suit, seeking to collect this amount, plus fees, costs, etc. JFF countersued, arguing that it was damaged by the marketing restrictions and also that it was entitled to repayment of all fees and commissions paid pursuant to the allegedly-illegal contract.

CONCLUSIONS OF LAW

I. Finance has a Valid Claim against Just for Fun

The Department of Finance's claim against Just for Fun is for breach of contract. To prevail on such a claim Finance must demonstrate the existence of a contract, a material breach thereof, and damages.

A. The Contract between Finance and JFF is Binding

There is no serious dispute between the parties that a document, purporting to be and appearing to be a contract, was executed between the then Acting Secretary of Finance on the one side and the President of Just for Fun on the other. Furthermore, there is no dispute as to the wording of the purported contract. Finally, both sides performed their respective obligations under the contract from its inception to the time JFF surrendered it lottery license in March 2000, except for the final license fee payment that is at issue in Finance's claim. This is sufficient to create a presumption that a valid contract exists and the burden shifts to JFF to show some reason why this seemingly valid contract should not be honored.

JFF has attempted to meet this burden by arguing that certain provisions of the contract are

illegal. Specifically, it claims that neither the license fee or the "commissions" on sales charged were allowed under Commonwealth law.[2] Unfortunately for JFF, however correct it might be on the law this Court must conclude that they are estopped from raising such questions. Courts have long held that assertion of invalidity of a contract is nullified by subsequent acceptance of the benefits growing out of a contract. *See e.g., Baye v. Airlite Plastics, Inc.*, 618 N.W.2d 145, 150-151 (Neb. 2000). In this case, JFF sold lottery tickets under the contract terms at issue for more than two years and this contract apparently had enough profit potential that JFF fought hard in both administrative and judicial proceedings to preserve it. Having operated under the contract for so long and having received the benefits thereof, JFF can not now seek to revoke its past performance under the contract.[3] The plaintiff having established the existence of the contract and the defendant being estopped from challenging the validity thereof, the Court concludes that a binding contract did exist.

B. Finance has Proved Breach and Damages

Now that the existence of a binding contract has been established, the Court need only find a breach of that contract and damages in order to find for the plaintiff on its breach of contract claim. In this case, there is no doubt that a license fee payment for a period covering January 1, 2000 through March 20, 2000 was due and was not paid. Further, JFF has never questioned that the amount due was $17,083.33. Therefore, this Court must and does conclude that plaintiff has proven its claim of breach of contract and is entitled to recover $17,083.33, not inclusive of any fees, costs, or prejudgment interest to be awarded. However, JFF has filed a counterclaim, that as discussed below, will negate the amount awarded to Finance.

II. Just for Fun has a Valid Claim against the Department of Finance

Just for Fun alleges in its counterclaims against Finance that the ethnicity-based restrictions on marketing the games violated JFF's constitutional rights and that the license fees and

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[2] For example, 1 CMC § 9314(f) allows the lottery administrator to "impose fees for any licenses...in an amount provided by regulation." The license fee at issue here was not imposed pursuant to a regulation. Rather it seems to be a figure created out of thin air.

[3] Of course, the situation might well be different were JFF seeking to avoid future performance.

commissions charged were illegal, and should be refunded.

A. JFF is Entitled to Recover for Ethnicity-Based Restrictions on Marketing

1. The Restrictions on Marketing Violated Equal Protection Principles

As noted above, the contract between JFF and Finance contained a number of provisions that limited the marketing of JFF's lottery games to Filipino and Chinese persons. These provisions seem, on their face to violate the 1st and 14th Amendments to the United States Constitution and Art. I §§ 2 and 6 of our Commonwealth Constitution.

The equal protection clause of the Fourteenth Amendment requires strict scrutiny of any governmental classification based on upon race, alienage, or national origin. *City of Cleburne, TX v. Cleburne Living Center*, 473 U.S. 432, 440, 105, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313, 320-321 (1985). Accordingly, the privilege to do business cannot rest on racial grounds. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-224 and 227, 115 S.Ct. 2097, 2111 and 2112-2113, 132 L.Ed.2d 158, 179-180 and 182 (1995). Likewise, it has only long been held that business restrictions on the basis of race, ethnicity, or alienage are unlawful. *See generally, Examining Board v. Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356, 366 S.Ct. 1064, 30 L.Ed. 220 (1886). To withstand strict scrutiny, such a classification must meet a two-prong test: 1) does the statute serve a compelling state interest and 2) is the statute narrowly tailored to serve that interest. *Adarand Constructors*, 515 U.S. at 227, 115 S.Ct. at 2113, 132 L.Ed.2d at 182 (1982).

In this case, a couple of different government interests have been advanced. JFF has argued that the restrictions on marketing were designed to protect the business interests of Tattersall's. Finance has suggested they were designed to promote lottery play among groups that had not traditionally played the lottery in the CNMI, thus fulfilling the statutory mandate to maximize revenue. Neither of these is a compelling state interest sufficient to justify marketing restrictions that discriminate based on ethnicity, alienage and national origin, as the restrictions at issue here do.[4]

[4] This is not to say that the Department of Finance or its contractors could not design games to appeal to a particular ethnic group. It might even lawfully choose to target its marketing of such games. However, it may not make such targeted advertising mandatory where the target group is a suspect class, including a particular gender, race,

This lack of a compelling interest means that the restrictions violated the equal protection clause of the Fourteenth Amendment and N.M.I Const. art. I § 6 and could subject the government to a claim of damages by an injured party. However, as is described in more detail below, JFF has waived its right to recovery.

2. The Marketing Restrictions Violate Free Speech Principles.

Advertising is commercial speech subject to First Amendment protections. *Thompson v. Western States Medical Center*, 535 U.S. 357, 367, 122 S.Ct. 1497, 1503-1504, 152 L.Ed.2d 563, 573 (2002). In analyzing the restriction, this Court must apply the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*, 447 U.S. 557, 564-566, 100 S.Ct. 2343, 2350-2351, 65 L.Ed.2d 341, 349-351 (1980) to determine whether the particular regulation is constitutionally permissible. *Thompson*, 535 U.S. at 367, 122 S.Ct. 1503-1504, 152 L.Ed.2d 563, 573. The threshold inquiry is whether the commercial speech concerns unlawful activity or is misleading. If so the speech is not protected by the First Amendment. *Id.* If the speech concerns lawful activity and is not misleading, however, the inquiry is whether the asserted governmental interest is substantial. *Id.* If it is, then it must be determined whether the regulation directly advances the governmental interest asserted, and finally, whether it is not more extensive than is necessary to serve the interest. *Id.* Each of the latter three inquiries must be answered affirmatively for the regulation to be found constitutional. *Id.*

Applying this test, the Court first notes that there is nothing apparently misleading or unlawful about the speech in question - certainly straightforward advertising about a lawfully conducted lottery is acceptable. Therefore, the Court must consider whether a substantial interest is implicated in the advertising restrictions in question. According to the government, its interest in this case lies in promoting the lottery among groups, particularly Chinese and Filipino workers, who previously did not play the lottery. Assuming that this a substantial interest, and the Court questions whether it is, then the restrictions in question fail another part of the test, in that they are more extensive than is necessary because they completely ban marketing outside the target groups.

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ethnicity or national origin. Neither may it prohibit advertising targeted at such a class.

The interest in targeting a particular group can just as easily be accomplished by providing incentives to market toward the group (even including a requirement that a certain, reasonable, amount of advertising be direct toward that group) without a ban on advertising directed outside the target group. Because the provisions in question are more extensive restriction on free speech than is necessary to advance the government interest, they violate the First Amendment and N.M.I. Const. art. I § 2 and could subject the government to a claim of damages by an injured party. However, as is described in more detail below, JFF has waived its right to recovery.

3. In Agreeing to the Contract, JFF Waived its Rights

"A waiver is a voluntary relinquishment of a right, with the intent to do so [and] with full knowledge of all the facts." *N. Olmsted v. Eliza Jennings, Inc.*, 631 N.E.2d 1130, 1134 (Ohio, 1993). Waiver can be demonstrated by either words or conduct. *Id.* When a party conducts itself in a manner that clearly constitutes waiver, it cannot later claim it did not know its actions amounted to voluntary and intentional waiver, because one who consents to something cannot be wronged by it. *Tormaschy v. Tormaschy*, 597 N.W.2d 337, 340-341 (N.D. 1999). Waiver is generally applicable "to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy." *Sanitary Commercial Services, Inc. v. Shank,* 566 N.E.2d 1215, 1218 (Ohio 1991).

In this case, JFF, through its president, executed an agreement in which it contractually bound itself to the very marketing limitations that this Court has found violate the First Amendment, the Fourteenth Amendment, and N.M.I. Const. art. I §§ 2 and 6. JFF continued to operate under those rules without protest for more than two years. This is sufficient conduct to constitute voluntary and intentional waiver of its rights under the U.S. and Commonwealth Constitutions. Therefore, JFF cannot recover for its claim brought under those rights unless enforcing the waiver in this instance would "violate public policy." *Sanitary Commercial Service,* 556 N.E.2d at 1218.

4. Enforcing a Complete Waiver in this Case would Violate Public Policy

The Court finds the facts of this case very disturbing, because neither party behaved well. The Department of Finance wrote and executed a contract that required lottery games to be marketed

in a way that clearly violates principles of free speech and equal protection, both fundamental to our democracy. Giving these facts, the Court finds a significant public policy interest in dissuading Finance from taking similar actions in the future. This interest is sufficient to prevent JFF's waiver from being a complete bar to its claims. *See id.* (Waiver need not be applied when doing so violates public policy).

At the same time, JFF clearly does not have clean hands. JFF agreed to all the terms of the contract, including the marketing restrictions and it is clear from the evidence that JFF always intended to target its lottery games at the Filipino and Chinese communities, not other ethnic groups. Therefore, the Court is not inclined to grant a windfall recovery to JFF, just to dissuade and punish Finance. Furthermore, the Court does not believe that JFF suffered the minimum $600,000 in lost business it now claims or any number close to that.[5]

However, the Court does conclude that JFF has shown to a preponderance of the evidence that it did suffer some loss of business because of the restrictions; particularly toward the end of its time as a lottery operator, when losses in its primary business might have caused it to more actively seek new players outside the target communities, had it been permitted to do so. Having balanced the equities and considered the evidence, the Court concludes that JFF's recoverable losses total $17,083.33. To the degree that its actual losses exceed this amount, the Court concludes that public policy does not prevent JFF's waiver of rights from being applied to prevent recovery of those damages. Therefore, on JFF first cause of action in its counterclaim, for loss of business, the Court finds in favor of the defendant/counterclaim-plaintiff Just for Fun in the amount of $17,083.33.[6]

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[5] JFF has argued that the Court must accept JFF's $600,000 figure for lost-business damages because Finance has provided no alternate figure. The Court does not agree. JFF, as counter-claim plaintiff, has the burden of proof on this claim and the Court has concluded that JFF's evidence is simply insufficient to support damages in that amount, regardless of any evidence, or lack thereof, provided by Finance. However, as described in this section, the Court does conclude that JFF has established that it did lose some business.

[6] The Court is aware that JFF might also be said to be estopped from raising these constitutional claims for the same reason that it was estopped from raising its other claims, as is discussed below. However, an otherwise properly raised estoppel defense may not be applied where public policy dictates otherwise. *Congregation Etz Chaim v. Los Angeles, 371 F.3d 1122, 1133* (9th Cir. 2004). In this case, the same public policy that requires this Court not to apply waiver to JFF's constitutional claims also requires the Court not to apply estoppel.

B. JFF is Estopped from Challenging the License Fees and Commissions

As the Court noted in Section I.A., JFF's acceptance of the benefits of the contract in question have estopped them from now questioning the validity of the license fees and commissions contained in that contract. These claims comprise the second and third causes of action in JFF's counterclaim. Therefore, on JFF's second and third causes of action, this Court must and does find in favor of the Counterclaim Defendant, the Department of Finance.

CONCLUSION

On plaintiff the Department of Finance's sole cause of action, the Court finds in favor of the Department of Finance in the amount of $17.083.33.

On defendant Just for Fun's counterclaim first cause of action, the Court finds in favor of Just for Fun in the amount of $17.083.33.

On defendant Just for Fun's counterclaim second and third causes of action, the Court finds in favor of the Department of Finance.

The Court finding no cause to do otherwise, neither party shall pay prejudgment interest and each party shall bear its own costs.

Therefore, applying the judgment on plaintiff's successful claim and defendant's successful counter claim, the Court enters final judgment in the following amounts: to plaintiff Department of Finance, $0 and to defendant Just for Fun, $0.

SO ORDERED this 24th day of February 2005.

/s/_____
JUAN T. LIZAMA, Associate Judge