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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gametech International, Inc., a Delaware Corporation, Plaintiffs, vs. Trend Gaming Systems., L.L.C, a Texas limited liability company, Defendant.	No. CV-01-540-PHX-LOA **ORDER**
Trend Gaming Systems, L.L.C, a Texas limited liability company, Counterclaimant, vs. Gametech International, Inc., a Delaware Corporation, Counterdefendant.	

This matter arises on Gametech's Motion For Order Requiring Exoneration Of Bond etc. (doc. # 504), filed on May 10, 2005. After review and consideration of the subject motion; Trend's Response (doc. # 511) in opposition to the exoneration and release of the cash preliminary injunction bond, initially posted on September 24, 2002; Gametech's Reply and attorney's affidavit; and the file as a whole, the Court concludes that exoneration at this time of the Rule 65(c) bond, required by law when the Court granted Gametech's request for a

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temporary restraining order ("TRO") and preliminary injunction creating a constructive trust, would have an adverse impact on Trend's potential claim for wrongful injunction in the event the Ninth Circuit affirms the jury verdict and Amended Judgment. Thus, the Court will deny the subject motion.

Gametech seeks the exoneration of a $450,000 cash bond[1] that was ordered posted "as security for the [TRO] pursuant to Federal Rule of Civil procedure 65(c)" in connection with the TRO and preliminary injunction initially granted by this Court on September 23, 2002 and amended thereafter. (documents # 75 and # 78) After a number of agreed-upon continuances and additional delay caused by Trend's filing a bankruptcy petition[2], the preliminary injunction hearing began on December 16, 2002. During this hearing, the parties reached several stipulations that were placed on the record which resulted in the Court's granting Gametech's Application Upon Notice For A Temporary Restraining Order and Preliminary Injunction. (document # 71) The TRO and preliminary injunction, as amended, imposed a constructive trust on roughly 80% of the "net revenue" money Trend had in its possession or received on and after September 23, 2002 for the use of Gametech's products by Trend's electronic bingo customers in the state of Texas. (document # 120, 3:8-19) As a result of the TRO and preliminary injunction, Trend was prohibited "from using, dissipating, wasting or otherwise spending" these specific monies. (document # 75, 2: 6-7) The Preliminary Injunction Order was to "remain in effect until final judgment is entered by this Court in this action, or upon further Order of the Court[.]" (document # 120, 5:1-4) Gametech's counsel informs the Court that the constructive trust possesses $605,858.69 in restricted bank accounts

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[1] The cash bond was initially set in the cash amount of $1,000,000. (document # 75) Later, the parties stipulated to, among other things, the bond's reduction to $450,000 and an exoneration of $550,000. See transcript of court hearing on December 16, 2004. The bond was formally reduced to $450,000 in the Preliminary Injunction Order jointly submitted and approved by all counsel and signed by the Court on December 20, 2002, and entered by the Clerk on December 23, 2002. (document # 120)

[2] See Notice of Termination of Automatic Bankruptcy Stay, filed on November 27, 2002. (document # 113)

with Harris Bank and Bank of America as of April, 2005 that continues to accrue interest. (document # 517, 5:13-14)

Gametech urges the Court to grant the subject motion because after losing the jury trial on the merits and judgment being entered in favor of Trend in the sum of $2,791,120.37, Gametech has timely posted a supersedeas bond in the sum of $3,350,000.[3/] Gametech argues that the amount of this bond "covers, *inter alia*, any harm Trend would suffer from the continued maintenance of the constructive trust[]" and the $450,000 preliminary injunction "[b]ond is no[w] duplicative in part of the coverage provided by the Supersedeas Bond, i.e., for maintenance of the constructive trust." (document # 504, 2:21-22; 3:1-2)(emphasis in original) Gametech contends that its motion should be granted because Trend "stipulated that the $3,350,000.00 Supersedeas Bond would be adequate to fully safeguard Trend's rights pending appeal. . ." and the money in the restricted bank accounts would fully cover Trend's unspecified damages if Trend is successful in eventually bringing a wrongful injunction claim. (document # 517, 1:21-22; 2, 1-3)

On the other hand, Trend requests that the subject motion be denied because (1) the cash bond was posted as security for Trend's damages if Gametech's appeal is unsuccessful and Gametech is subsequently held liable for obtaining a wrongful injunction, (2) the supersedeas bond does not adequately protect Trend for its damages arising from a wrongful injunction, and (3) exoneration and release of the cash bond would leave Trend without a remedy for wrongful injunction. (document # 511, 1-2) Trend points out that the language of Rule 65(c), FED.R.CIV.P., compels maintaining the $450,000 preliminary injunction bond in place until all appeals are resolved and this case becomes final. Trend's Response also discusses wrongful injunction claims in general with supporting authorities and argues that since this Court has maintained the preliminary injunction, over Trend's objection, on the constructive trust ($605,858.69) until this case becomes final, the Court ought to maintain the status quo on the preliminary injunction bond as well. See, Order, filed March 30, 2005, (doc. # 483, 5: 26

[3/] The supersedeas bond was posted on April 8, 2005. (document # 491)

to 6:4)("The Court concludes that both the balancing of the Rule 62(c) factors and the equities of maintaining the status quo and the restricted funds in interest bearing accounts suggest that the constructive trust should be maintained until the resolution of Gametech's appeal. Therefore, the constructive trust shall be preserved pending appeal to the Ninth Circuit. Fed.R.Civ.P. 62(b) and (c)."). The Court agrees with Trend that Gametech's $450,000 Rule 65(c) bond should not be exonerated until the Amended Judgment becomes final or upon further order of this Court or the Ninth Circuit Court of Appeals.

DISCUSSION

Federal Rule of Civil Procedure 65(a) and (b) deal with preliminary injunctions and temporary restraining orders, respectively. Rule 65(c) provides:

> (c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Rule 65(c), FED.R.CIV.P., (emphasis added.)

Federal case law confirms that Rule 65(c)'s bond requirement has several important purposes. First, a preliminary injunction bond provides a fund for the compensation of an incorrectly enjoined defendant who may suffer from the effects of an incorrect interlocutory order. National Kidney Patients Assoc. v. Sullivan, 958 F.2d 1127, 1134 (D.C.Cir.1991)("[T]he Rule imposes a requirement of security ('in such sum as the court deems proper') for the precise purpose of assuring compensation of the defendant for the resulting losses if the injunction proves to have been wrongfully granted."(citation omitted)). As a rule, courts presume damages against the bond if the preliminary injunction is wrongful. Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 210 (3rd Cir. 1990). Secondly, the bond provides the plaintiff with notice of the maximum extent of its potential liability since the amount of the bond "is the limit of the damages the defendant can obtain for a wrongful injunction, . . . provided the plaintiff was acting in good faith." Continuum Co., Inc. v. Incepts, Inc., 873 F.2d 801, 803 (5th Cir.1989)(citing Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1168 (9th Cir.1976), cert. denied, 431 U.S. 903, 97 S.Ct. 1694, 52 L.Ed.2d 387 (1977));

C. Wright & A. Miller, 11 Federal Practice and Procedure, § 2973, pp. 652-65. Another purpose of the bond requirement is to deter rash applications on tenuous grounds for interlocutory orders because the financial obligation encourages action with a cooler head and careful thought beforehand. Edgar v. MITE Corp., 457 U.S. 624, 649, 102 S.Ct. 2629, 2644, 73 L.Ed.2d 269 (1982)(Stevens, J., concurring)("Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully."); Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054 (2d Cir.1990). Perhaps most importantly, however, absent a different legal theory like malicious prosecution or unjust enrichment, a wrongfully enjoined party has no recourse for damages in the absence of a bond. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770 n. 14, 103 S.Ct. 2177, 2185 n. 14, 76 L.Ed.2d 298 (1983)("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond.")(citing Buddy Systems, Inc., 545 F.2d at 1167-1168)); C. Wright and A. Miller, supra, § 2973, p. 652, and nn. 38 and 39 (citing cases).

The Ninth Circuit has established "that a party has been wrongfully enjoined within the meaning of Rule 65(c) when it turns out the party enjoined had the right all along to do what it was enjoined from doing." Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir.1994), cert denied, 513 U.S. 822 115 S. Ct 85, 130 L. Ed2d 37 (1994). In a case of first impression in our circuit, the Nintendo Court adopted the majority rule and held that "there is a rebuttable presumption that a wrongfully enjoined party is entitled to have the bond executed and recover provable damages up to the amount of the bond."(citing National Kidney Patients Ass'n v. Sullivan, 958 F.2d 1127, 1134 (D.C.Cir.1992), cert. denied, 506 U.S. 1049, 113 S.Ct. 966, 122 L.Ed.2d 122 (1993)). In Nintendo, the Ninth Circuit concluded that the district court did not err when it found that the party which wrongfully enjoined the party which ultimately prevailed at trial did not rebut the presumption that damages would be

awarded from the bond and awarded the prevailing party $15 million for wrongful injunction, the amount of the Rule 65(c) bond in that case. 16 F.3d at 1039.

In the case at bar, Gametech obtained a preliminary injunction early on in this litigation enjoining Trend from using and spending certain money that the jury ultimately concluded Trend had a right to use and spend because, according to the jury, Gametech, not Trend, breached the parties' November 1, 1999 Distribution Agreement. Trend prevailed on all issues before the jury.[4] If the Ninth Circuit upholds the Amended Judgment (doc. # 506) and Special Verdict, Trend was wrongfully enjoined by Gametech. Were this Court to grant Gametech's motion at this time and exonerate the Rule 65(c) bond, it is quite likely that Trend would be denied a remedy for another wrong inflicted upon it by Gametech. W.R. Grace & Co, 461 U.S. at 770 n. 14, 103 S.Ct. at 2185 n. 14, 76 L.Ed.2d 298 (1983)("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond."); Buddy Systems, Inc., 545 F.2d at 1167 ("It is a well-settled rule that there can be no recovery for damages sustained by a wrongful issuance of a preliminary injunction in the absence of a bond.").

The Court finds it unnecessary to discuss the other issues raised by Gametech's motion to exonerate the Rule 65(c) bond. As the Court expressly indicated when it granted the preliminary injunction nearly three years ago, the preliminary injunction was to "remain in effect until final judgment is entered . . . ." (document # 120, 5:1-4) The Court finds nothing positive is gained by altering the status quo, including the preliminary injunction bond, until this case becomes final.

Accordingly,

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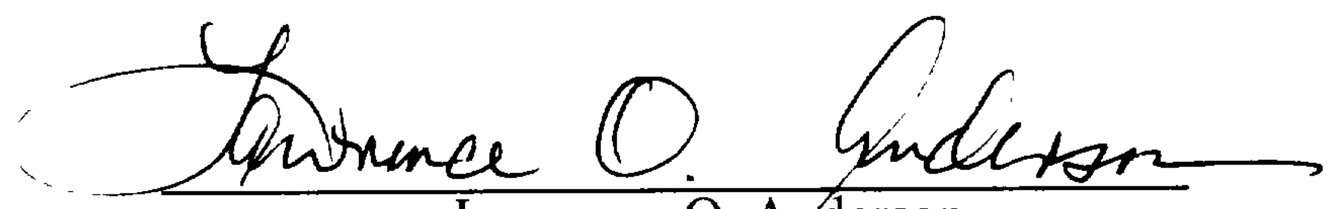
[4] As it has done throughout the post-verdict motions, Gametech continues to misrepresent the jury's findings through its interrogatories in the Special Verdict. Gametech's motion claims that "the jury, by Special Verdict, awarded Gametech compensatory damages for Trend's wrongful withholding of payments due and owing to Gametech in the amount of $735,648.09." (document # 504, 2:8-10) This is not correct. Interrogatory No. 3 clearly indicates that the jury found that the amount of money that Trend did not pay to Gametech from funds Trend collected from bingo conductors (charities) after August 27, 2002 was $735,648.09. (document # 391, 4:18-20) There is a significant difference between these two sentences in the context of this case.

IT IS ORDERED that Gametech's Motion For Order Requiring Exoneration Of Bond etc. (doc. # 504) is **DENIED**.

IT IS FURTHER ORDERED that Gametech's request for oral argument is **DENIED** for two reasons. First, the request was untimely made for the first time in Gametech's Reply. See, LRCiv 7.2(f), Rules of Practice of the United States District Court for the District of Arizona, as amended effective December 1, 2004. Secondly, the Court determines that oral argument is not necessary for the Court to decide Gametech's motion. Therefore, the Court declines to exercise its wide discretion in permitting oral argument even if untimely requested. Domegan v. Fair, 859 F.2d 1059, 1065 (1st Cir. 1988)("As we have stated with echolalic regularity, the district courts have considerable discretion in deciding whether or not to allow oral argument on a dispositive motion."); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 411 (1st Cir.1985)(discussing trial court's "wide latitude" on setting oral argument.).

DATED this 17th day of June, 2005.



Lawrence O. Anderson
United States Magistrate Judge