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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.

Trend Gaming Systems, L.L.C, a Texas limited liability company,

Counterclaimant,

vs.

Gametech International, Inc., a Delaware Corporation,

Counterdefendant.

No. CIV 01-540 PHX-LOA

ORDER

This matter arises on Trend Gaming System's ("Trend") Motion for Partial Summary Judgment: Improper Termination based upon Pricing. (document # 68) Gametech opposes this motion. (document # 145) Pursuant to FED.R.CIV.P. 56, Trend seeks partial summary judgment on Count I of the First Amended Counterclaim. After considering the pleadings in this matter and arguments of counsel during an April 24, 2003 hearing, the Court denies Trend's Motion for Partial Summary Judgment.

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1 **BACKGROUND**

2 Gametech International, Inc. ("Gametech") is a Delaware corporation in the business of
3 designing, manufacturing, and marketing electronic bingo equipment. (RSOF 74^{1/}) Trend is
4 a Texas limited liability company in the business of distributing electronic bingo equipment in
5 the state of Texas. The Court has jurisdiction over this matter under 42 U.S.C. §1332. The
6 parties agree that Arizona law governs the interpretation of the 1999 Distribution Agreement
7 (SOF 73) and that Texas gaming law governs the parties' bingo endeavors in Texas.

8 In 1995, the parties began their business relationship whereby Trend agreed to act as an
9 exclusive Gametech distributor in Texas. Specifically, Gametech manufactures bingo
10 equipment which it leases to Trend, a distributor, which leases the devices to third parties for
11 use in bingo halls. On November 1, 1999, the parties entered into a Distribution Agreement
12 (the "Agreement") governing the distribution of electronic bingo equipment in Texas. (RSOF
13 14 and Exhibit A to attachment 2)

14 In this litigation, Gametech argues that Trend breached the 1999 Distribution Agreement
15 by: (1) providing pricing proposals which did not meet Gametech's minimum return; and (2)
16 executing contracts which failed to specify the placement of Gametech products.^{2/} On July 22,
17 2002, Gametech notified Trend in writing that in view of Trend's alleged breaches of the
18 Agreement, Gametech planned to terminate the Agreement or remove bingo equipment unless
19 Trend cured the breaches. To prevent Gametech from terminating the Distribution Agreement,
20 Trend sought a temporary restraining order.

21 On August 26 and 27, 2002, the Court conducted a hearing on Trend's Application for
22 Temporary Restraining Order. On August 27, 2002, the Court denied the Application finding
23 that Trend failed to meet its burden of proof. (document # 50)

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25 ^{1/} Citations to "RSOF" are to Gametech's Controverting Statement of Facts and Additional
26 Facts in Support of [Gametech's] Response. (document # 146)

27 ^{2/} Gametech asserts the right to terminate the Distribution Agreement based upon Trend's
28 use of "generic" contracts with Trend's customers. Trend's motion for partial summary
judgment does not address this issue. Therefore, the Court will not consider this issue at this
time.

1 Later that same day, Gametech notified Trend in writing that it was terminating the
2 November 1, 1999 Distribution Agreement based on Trend's "unauthorized" pricing to its
3 customers. (SOF 39^{2/}).

4 In the pending motion, Trend asserts that Gametech's termination of the Distribution
5 Agreement was improper because Texas gaming law prohibits Gametech from controlling or
6 influencing the price Trend charges its customers. The Court will consider this claim after
7 discussing Texas gaming law.

8 TEXAS GAMING LAW

9 To analyze the issues in this matter, the Court will first address Texas gaming law.
10 Under Texas law, a manufacturer, such as Gametech, must be licensed and may only sell or
11 lease bingo equipment to a licensed distributor. TX OCC. § 2001.551(b)(3),(4). Similarly,
12 distributors, such as Trend, must be licensed and may only distribute electronic bingo
13 equipment. Id. at § 2001.207, 207(6). Under Texas law, only a licensed charitable organization
14 (a "conductor") may conduct a public bingo game where prizes are awarded. Id. at § 2001.101-
15 .107. A licensed conductor may only acquire bingo equipment from a licensed distributor, and
16 may not acquire bingo equipment directly from a manufacturer. Id. at § 2001.407(e).

17 Significantly, Texas law also prohibits a manufacturer and a distributor from acting in
18 concert to establish the price of bingo equipment. TX OCC § 2001.556. Texas OCC §
19 2001.556 (b) states that: "The price of bingo supplies and equipment in the competitive
20 marketplace shall be established by the manufacturer, distributor, or supplier and *may not be*
21 *established in concert* with another manufacturer, distributor, or supplier." Id. (emphasis added)

22 The court could find no Texas cases interpreting this statute. However, the Texas Attorney
23 General has issued two opinions interpreting the statute which provide guidance on the
24 relationships between a manufacturer, distributor, and a conductor.

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^{2/} Citations to "SOF" are to Trend's "Statement of Facts in Support of Motion for Partial
Summary Judgment: Improper Termination Based upon Pricing" (document # . . .)

1 The Texas Attorney General has opined that § 2001.556(b) requires that "each
2 manufacturer, distributor, and supplier must act independently in setting prices" and that
3 "Section 2001.556 prohibits all express and implied price fixing agreements, regardless of their
4 effect." Tex. Atty. Gen. Op. JC-0296 (hereinafter the "2000 Opinion"). In the 2000 Opinion,
5 the Attorney General concluded that a contract between a manufacturer and a distributor
6 agreeing to the price at which the distributor will sell or lease bingo equipment would violate
7 § 2001.556. Id.

8 In so finding, the Attorney General noted that although § 2001.556's prohibition against
9 "price fixing" is reminiscent of antitrust law, antitrust law does not guide the interpretation of
10 § 2001.556. The 2000 Opinion explains that the language of § 2001.556 is not modeled on
11 Texas antitrust law which generally looks to the economic effect of an agreement. Section
12 2001.556, on the other hand, prohibits all express and implied price fixing agreements
13 regardless of their effect. Id. The statute "is concerned less with free enterprise and
14 competitive pricing than with strict regulation of manufacturers and distributors of bingo
15 equipment, and their relationship with persons who conduct bingo." Id.

16 Finally, the Attorney General noted that the limitation set forth in § 2001.556 extends
17 to any "contract provision that prohibits unilateral discounts, credits, and allowances - terms that
18 affect the ultimate price paid by the consumer." Id.

19 In a 2002 opinion, Tex. Atty. Gen. Op. JC-0450 (hereinafter the "2002 Opinion"), the
20 Texas Attorney General again considered § 2001.556 and concluded that "[a] revenue-share
21 leasing agreement violates section 2001.556 of the Occupations Code . . . if under the agreement
22 the manufacturer controls the price that the distributor charges to bingo-game conductors for
23 leasing equipment." Id. The Attorney General explained that § 2001.556 does not prohibit all
24 revenue share leasing agreements. Rather, § 2001.556 prohibits revenue-share lease agreements
25 in which the manufacturer and distributor agree on the price that the distributor will charge the
26 conductor. Id.

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1 bingo supplies and equipment . . . may not be established in concert with another manufacturer,
2 distributor, or supplier.")

3 Accordingly, in 2000, the TLC brought charges against Trend and Gametech alleging
4 that they had violated the Bingo Enabling Act by conspiring to fix the price at which bingo
5 equipment or supplies may be sold. (RSOF 85) During a January 2002 hearing, representatives
6 from Trend and Gametech testified regarding the meaning of the challenged contractual
7 provisions. Gametech testified that the "jointly established pricing" provision under Article 5
8 meant that "Gametech and Trend will come to an agreement as to what Gametech is going to
9 recover per unit." (SOF 52, Exhibit 3 to TRO SOF at p. 357 line 15 - p. 358 line 3; RSOF 50)
10 With respect to the use of Gametech approved pricing information under § 3.2 of the
11 Distribution Agreement, Gametech testified that "[w]hat we've approved is an agreed upon price
12 that Gametech is to be paid by Trend for the use of its units." (SOF 50; Exhibit 3 to TRO SOF
13 at p. 356 lines 5-10) Trend testified that § 3.2 of the Distribution Agreement was used to
14 determine Gametech's return. (SOF 51, Exhibit 3 to TRO SOF at p. 280 line 24- p. 281 line 5)
15 Gametech testified that it had not instructed Trend what to charge a bingo conductor. (SOF 55;
16 RSOF 51) Gametech also testified that it had not instructed Trend as to any minimum floor
17 price that Trend must charge bingo conductors. (SOF 47) Gametech also testified that it does
18 not have knowledge of, nor does it have to approve, every price arrangement that Trend
19 proposed to its customers. (SOF 58; RSOF 50)

20 On May 10 2002, the Administrative Law Judge ("ALJ") entered a Proposal for
21 Decision. (RSOF 86, Exhibit C to attachment 2) The ALJ found that Gametech and Trend had
22 agreed upon the amount of compensation that Trend would pay Gametech for the use of the
23 equipment. (Id.) The ALJ found that Trend sets the price to be charged to a bingo conductor
24 that would cover the agreed upon compensation that Trend would pay Gametech for the
25 equipment. Id. The ALJ also found that Gametech did not instruct Trend on the price to be
26 charged its customers. Id. The ALJ ultimately concluded that neither Gametech nor Trend had
27 fixed prices in violation of the Texas Bingo Enabling Act. (Exh. C to RSOF, attachment 2 at
28

1 p. 11) On June 10, 2002, the TLC entered an order adopting the ALJ's Findings of Fact and
2 Conclusions of Law. (RSOF 88, Exhibit D to attachment 2)

3 Gametech argues that the TLC's decision collaterally estops Trend from arguing that
4 Gametech's insistence upon a required rate of return violates the Bingo Enabling Act. (document
5 # 145 at 14) Gametech asserts that the issue of whether the parties' relationship comports with
6 Texas law was fully litigated and resolved and is binding on this Court. See, Coalition of Cities
7 for Affordable Utility Rates v. Public Utility Comm'n of Texas, 798 S.W.2d 560, 563-64 (Tex.
8 1990)(stating that res judicata and collateral estoppel apply to administrative orders when the
9 agency is acting in a judicial capacity and resolved the disputed issues of fact properly before
10 it which the parties have had an adequate opportunity to litigate.); United States v. Utah Constr.
11 & Mining Co., 384 U.S. 394, 421-22 (1966)(same).

12 Gametech asserts that after the TLC's decision, it continued to conduct business in the
13 same manner that the TLC had reviewed and approved. Gametech further contends that the
14 TLC approved the October 22, 2001 price agreement.

15 As set forth below, after the TLC's decision, Trend did not continue to operate in the
16 same fashion. Rather, Trend began offering inventory pricing at a flat rate. Trend's conduct
17 prompted Gametech to send Trend a July 22, 2002 letter noticing Trend's alleged breach of the
18 Distribution Agreement. (SOF 71, Exhibit 45 to TRO SOF) The July 22, 2002 letter also
19 stated that Trend could cure the breach by amending or rescinding its contracts and providing
20 assurance that Gametech would receive its minimum rate of return. Trend asserts that the July
21 22, 2002 letter combined with the October 22, 2001 price schedule constitutes evidence that
22 Gametech was attempting to engage in price fixing. Trend also asserts that the October 22,
23 2001 price schedule was neither presented as evidence to the TLC nor considered by the TLC.
24 Because Trend's motion for partial summary judgment is based on facts which arose after the
25 TLC proceedings, Trend asserts that collateral estoppel does not apply.

26 The Court agrees with Trend. In 2000, the TLC initiated proceedings challenging the
27 1999 Distribution Agreement. Based on the evidence before the Court, it appears that the
28 record before the TLC was limited to the 1999 Distribution Agreement. (document # 149, Exh.

1 A) Moreover, Trend's motion for partial summary judgment is based on facts which arose after
2 the TLC's decision. Therefore, collateral estoppel does not apply and the Court, therefore, will
3 proceed to consider Trend's alleged breach of the 1999 Distribution Agreement and the pending
4 motion for summary judgment.

5 **TREND'S ALLEGED UNAUTHORIZED PRICING AND DEFAULT**

6 After the conclusion of the TLC proceedings, in approximately May of 2002, Trend
7 began offering conductors an inventory pricing plan at a flat rate of \$15.00 per week per unit
8 (the "Inventory Pricing"). Trend advised Gametech of this pricing plan after the fact. Gametech
9 contends that this pricing program was based on an unjustified interpretation of the October 22,
10 2001 pricing schedule. (document # 145 at 7) Gametech argues that under the October 22, 2001
11 price schedule, Gametech's minimum rate of return was to be calculated as the greater of a
12 percentage of customer revenue or a fixed sum per unit (i.e. the floor). (RSOF 91) Gametech
13 and Trend would then split the revenue which Trend collected either 84% - 16% or 78% -22%,
14 depending upon the customer.

15 Gametech contends that Trend's 2002 pricing scheme calculated Gametech's minimum
16 rate of return by multiplying the floor rate to the customer (\$2.00) by (i) 84% or 78%; (ii) nine
17 sessions; and (iii) a seventy percent utilization rate. (RSOF 94) Gametech contends that this
18 yielded a maximum payment to Gametech of \$9.83 per unit per week. (document # 145 at 8)
19 Gametech asserts that Trend's use of a fixed rate of 9 sessions in calculating Gametech's return
20 was not proper. (document # 145) Gametech also argues that Trend's use of a 70% utilization
21 rate was not a proper application of the 2001 price schedule. (Id.)

22 Based on its belief that it would not receive its required return from Trend, Gametech
23 advised Trend that its pricing scheme "provided . . . customers with Gametech products at
24 prices that generated revenues well below the minimum return to which Gametech was entitled
25 under the October 22, 2001 price schedule." (document # 145 at 6) Based on that belief, on
26 June 19, 2002, Gametech told Trend that "you cannot do an 'inventory deal' with your customers
27 on the basis of the October 2001 price schedule. (SOF 65; RSOF Exhibit H to attachment 2)
28 Specifically, in a June 19, 2002 e-mail, Gametech stated that:

1 According to a June 3 letter from Tres Grey [a Trend sales representative]
2 to John Milloy at Brush Country services, Inc., [a charity], you are offering
3 your customers the handheld units at a flat rate of \$1.07 per session and fixed base
4 units at \$2.00. The minimum pricing on TEDs in Gametech's October 2001 price
5 schedule is \$2.00 per session, and on fixed base units it is \$2.75. At a return
6 to Gametech of from 78% to 84 %, you are pricing below the cost of the product
7 to your company . . . Your letters to customers offering below cost pricing are
8 a misrepresentation of the terms that you are able to legitimately offer to them for
9 Gametech products.

10 (document # 145 at 11)(citing Exhibit H to RSOF Attachment 2)

11 On July 9, 2002, Gametech demanded that Trend either rescind or amend the two
12 Placement Agreements which used Inventory Pricing, or Gametech would "take such measures
13 as may be necessary to protect its rights in the Texas Market." (SOF 66 and 67; RSOF Exhibit
14 I to attachment 2) Gametech also stated that unless Trend first produced copies of placement
15 agreements which guaranteed Gametech its minimum rate of return, it would not provide any
16 equipment. (SOF 68; RSOF, Exhibit I to attachment 2)

17 Specifically, in a July 9, 2002 e-mail Gametech stated that:

18 You have proposed to customers an inventory price for the units based upon
19 a \$2.00 per use internal rate of return to Trend and Gametech, multiplied by
20 a 70% utilization rate. This renegade pricing scheme would yield a price to
21 the charity of \$1.07 per session at 14 sessions per week, and a payment to
22 Gametech of not better than .89 per session, about half the rate of return
23 required by our price schedule. Gametech has never agreed to accept a fixed
24 weekly return on its units calculated on that basis.

25 (document # 145 at 11)(citing Exhibit I to RSOF Attachment 2)

26 The July 9, 2002 e-mail further states:

27 You have had more than 30 days notice that this conduct is in violation of
28 your agreement with us. This is a deliberate material breach of the Distribution
Agreement. We demand that you provide written evidence to us within 24 hours
that you have either rescinded or amended those contracts, and further that your
pricing to all of your customers assures Gametech of the required minimum rate
of return on its products . . . If you fail to do so, Gametech shall take such
measures as may be necessary to protect its rights in the Texas market.

(RSOF Attachment 2, Exhibit I)

Thereafter, in letter dated July 22, 2002 ("Default Notice" or "Notice of Default"),
Gametech notified Trend that it was in "material breach" of the Distribution Agreement.
Gametech argued that Trend was in violation of Articles 3.2 and 5 of the Distribution
Agreement by making "pricing proposals for Gametech's products to existing and potential

1 customers on a scheme that does not provide Gametech with its required minimum rate of
2 return." (SOF 71, Exhibit 45 to TRO SOF) To cure this breach, Gametech stated that "Trend
3 must rescind or amend any such contracts" and enter into agreements with conductors that
4 ensure that Gametech receives its required minimum rate of return. (SOF 72, Exhibit 45 to
5 TRO SOF)

6 Trend neither amended nor rescind the contracts as Gametech requested. Thus, based
7 upon Trend's refusal to terminate or amend the Placement Agreements that offered Trend's
8 customers the alleged "renegade pricing plan," Gametech terminated the Distribution
9 Agreement on August 27, 2002. (SOF 39, Exhibit A)

10 Trend contends that the language of Gametech's July 22, 2002 Default Notice indicates
11 that Gametech was attempting to control the price that Trend charged its customers in violation
12 of Texas gaming law which prohibits price fixing between a manufacturer and a distributor of
13 bingo equipment. See, TX OCC § 2001.556. As previously stated, Texas gaming law prohibits
14 a manufacturer from controlling the price that a distributor charges a conductor for use of bingo
15 equipment. *Id.* Thus, Trend argues that it was improper for Gametech to terminate the
16 Distribution Agreement based on Trend's refusal to participate in what Trend characterizes as
17 price fixing.

18 Gametech, however, contends that the July 22, 2002 Notice of Default merely expressed
19 Gametech's concern that the pricing which Trend was offering its customers was insufficient
20 to provide Gametech with its required "minimum return." (document # 145 at 10; RSOF 110-
21 111) Gametech asserts that neither the October 22, 2001 price schedule nor the Notice of
22 Default constitute an attempt to control the price Trend charged bingo conductors for the use
23 of bingo equipment. (document # 145 at 11-12; RSOF 113, 114)

24 ANALYSIS

25 A moving party may, at any time, move for summary judgment on all or any part of a
26 claim. See, FED.R.CIV.P. 56(f) The Court may only grant summary judgment if the pleadings
27 and supporting documents, viewed in the light most favorable to the nonmoving party,
28 determines that "there is no genuine issue of material fact and that the moving party is entitled

1 to judgment as a matter of law." See, FED.R.CIV.P. 56(c); Celotex Corp. v. Catrett, 477 U.S.
2 317, 322-23 (1986). Substantive law determines which facts are material. Anderson v. Liberty
3 Lobby, Inc., 447 U.S. 242, 248 (1986). In considering the evidence, the Court is not to weigh
4 the evidence and determine the truth of the matter, but to determine whether there is a genuine
5 issue for trial. Anderson, 477 U.S. at 249.

6 Trend contends that the issue before the Court only involves the interpretation of the
7 terms and conditions of a contract which is a matter of law for the Court. Hadley v. Southwest
8 Properties, Inc., 116 Ariz. 503, 570 P.2d 190 (App. 1977). The Court disagrees. This matter
9 turns on whether Gametech was attempting to control the price which Trend charged its
10 customers. See, Tex. Atty. Gen. Op. JC-0296 (2000); Tex. Atty. Gen. Op. JC-450 (2002). This
11 is an issue of fact for the jury to decide. See, Lubbock Beverage Co., Inc., v. Miller Brewing
12 Co., 2002 WL 31011266, (N.D. Tex 2002)(unpublished)(denying plaintiff's motion for
13 summary judgment finding that plaintiff had failed to offer factual support for its claim that
14 manufacturer coerced plaintiff to engage in resale price maintenance in violation of § 102.75
15 of the Texas Alcoholic Beverage Code^{4/}); Moore v. Jas. H. Matthew & Co., 473 F.3d 328, 332
16 (9th Cir. 1973)(finding that limited proof regarding practice of excluding monuments other than
17 those of a particular manufacturer presented material issues of fact as to price-fixing conspiracy
18 precluding summary judgment).

19 The Court agrees with Trend that, under Texas law, Gametech may only control the price
20 to be paid by Trend. Gametech cannot make demands that affect the price to be paid by a
21 conductor. The parties, however, dispute whether Gametech was attempting to control the
22 price which Trend charged conductors or whether Gametech was merely concerned with the
23 price to be paid by Trend for the equipment.

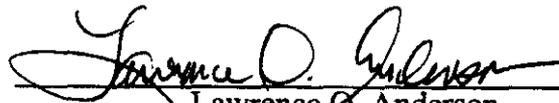
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25 ^{4/} In the 2000 Opinion, the Texas Attorney General compared § 2001.556 to § 102.75 of
26 the Texas Alcoholic Beverage Code which prohibits beer manufacturers from fixing or
27 maintaining the price at which a distributor may sell beer. See, Tex. Atty. Gen. Op. JC-0296
28 (2000). Although the Court could not find any case law interpreting section 2001.556, the Court
finds the 2000 and 2002 Attorney General Opinions, along with the Lubbock Beverage case
indicate that the determination of whether a manufacturer is exerting control over the price a
distributor charges is fact sensitive.

1 Trend agrees that Gametech is entitled to receive its "minimum return." Accordingly,
2 Trend states that if Gametech had notified Trend that the Inventory Pricing generated revenue
3 to Gametech that was, for example, \$1.00 less than Gametech's required minimum return and
4 demanded that Trend pay Gametech the difference, Gametech would have the right to terminate
5 the Distribution Agreement if Trend failed to pay the difference within the thirty-day cure
6 period provided in the Agreement. The Notice of Default states that Trend was in breach by
7 "using pricing proposals to customers on a scheme that does not provide Gametech with its
8 required minimum rate of return." (SOF 70) The notice of default also set forth the cure
9 acceptable to Gametech: rescind or amend the objectionable contracts with your customers, and
10 provide Gametech with assurances that the contracts will provide Gametech with its minimum
11 rate of return. (SOF 71) The parties dispute whether this demand constitutes evidence of
12 Gametech's attempt to engage in price fixing in violation of Texas law. (document # 145 at 12
13 citing RSOF at 114, 115, 116) Similarly, the parties dispute whether Gametech terminated the
14 Distribution Agreement based on Trend's refusal to participate in price fixing or based on
15 Trend's failure to provide Gametech with its required minimum rate of return. In view of these
16 material factual disputes, the Court will deny Trend's motion for partial summary judgment.

17 Accordingly,

18 **IT IS HEREBY ORDERED** Trend's Motion for Partial Summary Judgment (document
19 # 68) is **DENIED**.

20 DATED this 16th day of May, 2003.

21
22 
23 Lawrence O. Anderson
United States Magistrate Judge