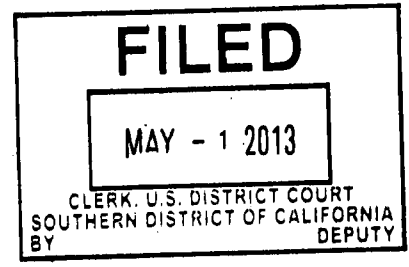


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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LUCKY BOB'S INTERNET CAFÉ,  
LLC,

Plaintiff,

vs.

CALIFORNIA DEPARTMENT OF  
JUSTICE; et al.,

Defendants.

STOCKTON ENTERPRISES, LLC; et  
al.,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF  
JUSTICE, et al.;

Defendants.

CASE NO. 11-CV-148 BEN (JMA)

**ORDER GRANTING  
DEFENDANTS CALIFORNIA  
DEPARTMENT OF JUSTICE'S,  
PAT FUNE'S, AND CHRIS  
ESPINOZA'S MOTION FOR  
SUMMARY JUDGMENT OR,  
ALTERNATIVELY, FOR  
SUMMARY ADJUDICATION OF  
ISSUES**

[Docket No. 68]

Presently before the Court is Defendants California Department of Justice's, Pat Fune's, and Chris Espinoza's Motion for Summary Judgment or, Alternatively, for Summary Adjudication of Issues. (Docket No. 68.) For the reasons stated below, the Motion is **GRANTED**.

1 **BACKGROUND**

2 Plaintiffs Lucky Bob's Internet Café, LLC and Stockton Déjà Vu Boutique,  
3 LLC—both internet cafes—operated a “sweepstakes.” Customers were given 100  
4 entries to the Sweepstakes for every \$1 of purchased internet time. (LaBrocca Decl.  
5 ¶ 3.) In addition, each customer was entitled to 100 free entries for every 24-hour  
6 period. (*Id.*) Customers were also able to mail a request for \$1 worth of sweepstakes  
7 entries to World Touch Gaming, but this option was never used. (Muscat Decl. ¶ 2,  
8 Exh. D, at 219.)

9 Purchased internet time was loaded onto a player card, which the customer  
10 swiped into an electronic card reader located at an assigned computer terminal.  
11 (LaBrocca Decl. ¶¶ 3-4.) The user would then select a method for revealing his  
12 winnings from the monitor located at the terminal. First, a customer could immediately  
13 reveal whether he won a prize. (*Id.* ¶ 4.) Second, a customer could play one of the  
14 seventeen casino-style games, then reveal whether he had won a prize at the end of the  
15 game. (*Id.*) Many of these casino-style games are commonly associated with slot  
16 machines. (*Id.* ¶¶ 5-9.)

17 Plaintiffs' equipment operated a sweepstakes gaming system that was  
18 manufactured and licensed by World Touch Gaming, Inc. (*Id.* ¶ 3.) The World Touch  
19 Gaming system predetermined prize outcomes based upon chance as set forth in pre-  
20 defined odds tables for the gaming system, prior to when customers revealed their  
21 game entries on player terminals. (*Id.* ¶ 11.) Based upon the odds tables, a game's  
22 overall financial outcome would be set at the time the pool of outcomes was generated.  
23 (*Id.*) The system would then sequentially assign entries to patrons from the pool. (*Id.*)  
24 Playing the casino-type games could not change the game entries' prize values. (*Id.*)

25 For every pool of 20 million game entries distributed by the World Touch  
26 Gaming database, there were a total of 433,412 winning game entries with cash prizes  
27 ranging from 10 cents to \$3,000. (*Id.* ¶ 12.) There was a prize payout return rate to  
28 customers of approximately 94.05% remaining in the pool for the system at Déjà Vu,

1 and 94% remaining in the pool for the system at Lucky Bob's. (*Id.* ¶ 13.) Players at  
2 both Lucky Bob's and Déjà Vu did not use the vast majority of internet time they  
3 purchased. (Kaseno Decl. ¶¶ 4-5.) At Lucky Bob's, a total of \$1,225,055 was spent  
4 for 204,176 hours of internet time and 97.375% of the total purchased internet time was  
5 unused. (*Id.* ¶ 4.) At Déjà Vu, a total of \$12,916,254 was spend for 2,152,709 hours  
6 of internet time and 99.735% of the total purchased internet time was unused. (*Id.* ¶ 5.)

7       The Bureau of Gambling Control, a bureau within the Department of Justice's  
8 Division of Law Enforcement, and local law enforcement investigated Plaintiffs. On  
9 June 24, 2009, Bureau of Gambling Control agents and local law enforcement seized  
10 and removed computers, servers, monitors, and related equipment at Déjà Vu.  
11 (Espinoza Decl. ¶¶ 3-12.) The Bureau of Gambling Control also assisted local law  
12 enforcement in the investigation and seizure of equipment at Lucky Bob's on June 24,  
13 2009. (Fune Decl. ¶¶ 3-7.) Defendants contend that the sweepstakes constituted  
14 unlawful illegal slot machines under the California Penal Code.

15       Plaintiffs originally filed suit in state court. This action was removed on January  
16 24, 2011. (Docket No. 1.) The Fourth Amended Complaint (the operative complaint)  
17 alleges seven claims: (1) injunctive relief (sweepstakes complies with state law) against  
18 all defendants; (2) declaratory relief (sweepstakes complies with state law) against all  
19 defendants; (3) declaratory relief (violation of First Amendment / property return)  
20 against all defendants; (4) injunctive relief (future First Amendment violation /  
21 property return) against all defendants; (5) declaratory relief (statutory vagueness /  
22 property return) against all defendants; (6) injunctive relief (future statutory violation  
23 / property return) against all defendants; and (7) damages (violation of constitutional  
24 rights) against Defendants Pat Fune, Chris Espinoza, and Brent Keys. (Docket No. 31.)

25       Presently before the Court is Defendants California Department of Justice's, Pat  
26 Fune's, and Chris Espinoza's Motion for Summary Judgment or, Alternatively, for  
27 Summary Adjudication of Issues. (Docket No. 68.)

28 ///



1 to operate. Customers operated the system by depositing cash into a sales terminal and  
2 receiving a coded card linked to the customer's game entries that could be revealed on  
3 a player terminal by swiping the card in the card reader. (LaBrocca Decl. ¶ 4.)

4 Plaintiffs argue that there could be no loss of money or other valuable thing  
5 attributable to the sweepstakes operation on the computer system because customers  
6 did not deposit any money or other consideration into the machines. As explained  
7 above, however, a customer swiped the pre-paid coded card loaded with the purchased  
8 internet time into a computer terminal to operate the machine. This constituted "the  
9 insertion of money *or other object* which causes the machine to operate."

10 Moreover, the fact that sweepstakes entries were free with the purchase of  
11 internet time does not change this result. The consideration element is satisfied when  
12 some customers by chance receive more than what they paid for. *Lockyer*, 82 Cal. App.  
13 4th at 707. Once the elements of chance and prizes are added, the consideration paid  
14 is no longer solely for internet time. Paying for the chance to win money, rather than  
15 the use of internet time, may be the customer's main focus. *See Trinkle v. Stroh*, 60  
16 Cal. App. 4th 771, 785-86 (3d Dist. 1997).

17 Second, the operation of the machines is unpredictable and governed by chance.  
18 The World Touch Gaming system provided customers with opportunities to win cash  
19 prizes in a manner that was unpredictable to the player. (LaBrocca Decl. ¶¶ 11-12.)  
20 The customers could not control or predict the distribution of cash prizes. (*Id.* ¶ 11.)

21 Plaintiffs argue that the operation of the machines was predictable because the  
22 sweepstakes entry results are sequenced in a pre-determined order, block loaded to the  
23 customer's account, and revealed to the customer sequentially. Plaintiffs compare the  
24 machines at issue here with the vending machine at issue in *Trinkle*. In *Trinkle*, a  
25 vending machine dispensed lottery tickets sequentially, which the court held made its  
26 operation predictable. 105 Cal. App. 4th at 1411. There, however, the vending  
27 machine simply delivered the finished product—the lottery ticket. Plaintiffs' operating  
28 system can be distinguished from the vending machine in *Trinkle* by the integrative

1 nature of its components. Here, the sweepstakes winnings necessarily involved the  
2 “value added” of each component of Plaintiffs’ integrative system—from the  
3 computers that read the magnetic strip card; the database server controlling the games;  
4 and the point of sale computer that allowed the employee to create the accounts, add  
5 internet time and sweepstakes entries and play out redeemed entries.

6 The system here is more similar to the vending machines at issue in *Lockyer*. In  
7 *Lockyer*, the vending machines dispensed pre-paid telephone cards, but also had a  
8 sweepstakes feature that randomly paid out money after playing visual and audio  
9 displays that mimicked a slot machine. *Id.* at 701-03. Winners were determined by a  
10 preset computer program, which decided “predetermined winners spread out over a  
11 period of time.” *Id.* at 702 & n.4. The court in *Lockyer* held that the vending machine  
12 was an illegal slot machine under Section 330. *Id.* at 707.

13 In addition, Plaintiffs argue that the casino-style games did not create an element  
14 of chance because the games had no impact on whether a customer received a  
15 sweepstakes prize. Even if the machines did not display the casino-style games before  
16 revealing whether the customer had won, the operation of the machine was still  
17 “unpredictable and governed by chance,” as explained above.

18 Third, customers became entitled to receive a thing of value by reason of the  
19 chance operation of the machine. Because customers could receive cash prizes of up  
20 to \$3,000, the World Touch Gaming system provided them with the opportunity to win  
21 a “thing of value.”

22 Plaintiffs argue that even if the element of chance were present, the World Touch  
23 Gaming system is lawful because it is missing the element of consideration.<sup>1</sup> While  
24 lack of consideration is a possible defense in lottery cases under California Penal Code  
25 § 319, it is not a defense in gambling device actions brought under Section 330b.  
26 *Trinkle*, 60 Cal. App. 4th at 780-81.

27 \_\_\_\_\_  
28 <sup>1</sup> Defendants object to Professor I. Nelson Rose’s Expert Opinion Report presented by Plaintiffs. (Docket No. 76-1.) Because the Court does not rely on the Expert Opinion Report, Defendants’ objection is **OVERRULED** as moot.

1 Plaintiffs' network of machines qualify as slot machines under Section 330b. As  
2 this issue is dispositive, the Court will not consider whether the network of machines  
3 qualify as an unlawful lottery under California Penal Code § 319. In addition, because  
4 the Court determines that the network of machines at issue here qualify as slot  
5 machines, Plaintiffs' claim for return of property necessarily fails. Accordingly,  
6 summary judgment is **GRANTED** in favor of the California Department of Justice,  
7 Fune, and Espinoza on the first and second claims.

8 **II. THIRD CLAIM: DECLARATORY RELIEF FOR VIOLATION OF FIRST**  
9 **AMENDMENT / PROPERTY RETURN AND FOURTH CLAIM: INJUNCTIVE**  
10 **RELIEF FOR FUTURE FIRST AMENDMENT VIOLATION / PROPERTY**  
11 **RETURN**

12 The third claim seeks declaratory relief for violation of the First Amendment and  
13 property return. The fourth claim seeks injunctive relief for future First Amendment  
14 violation and property return. These claims are based on the allegation that  
15 Defendants' interference with Plaintiffs' Sweepstakes was a "total ban on an entire  
16 medium of expression by suppressing access to, and display of, all constitutionally  
17 protected content as a consequence of overzealous efforts to eradicate access to, and  
18 display of, content purportedly related to unlawful gambling without compelling or  
19 substantial government interest." (FAC ¶ 30.)

20 The First Amendment provides that "Congress shall make no law . . . abridging  
21 the freedom of speech." U.S. CONST. amend. I. "The Constitution . . . affords a lesser  
22 protection to commercial speech than to other constitutionally guaranteed expression."  
23 *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

24 Defendants did not violate the First Amendment rights of Plaintiffs. According  
25 to Plaintiffs, Plaintiffs' internet access, video games, computer codes, computer  
26 algorithms, and computer programs were all protected by the First Amendment.  
27 Plaintiffs argue that because the seizure of the computer equipment constituted a prior  
28 restraint on prospective communication, the seizure should have been preceded by an

1 adversary hearing regarding possible gambling. In support of this proposition,  
2 Plaintiffs cite *Roaden v. Kentucky*, 413 U.S. 496 (1973), *Heller v. New York*, 413 U.S.  
3 483 (1973), *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and *Marcus v. Search*  
4 *Warrant*, 367 U.S. 717 (1961).

5 This line of cases, however, applies only when a seizure was made on the basis  
6 of content. See *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986) (“We have long  
7 recognized that the seizure of films or books on the basis of their content implicates  
8 First Amendment concerns not raised by other kinds of seizures.”). Plaintiffs do not  
9 allege that the seizure was based on any content related animus, as required. In  
10 addition, Plaintiffs do not allege that the equipment was seized to prevent Plaintiffs or  
11 its costumers access to the internet or because of the messages distributed via the  
12 internet.

13 Defendants did not violate the First Amendment rights of Plaintiffs.  
14 Accordingly, summary judgment is **GRANTED** in favor of the California Department  
15 of Justice, Fune, and Espinoza on the third and fourth claims.

16 **III. FIFTH CLAIM: DECLARATORY RELIEF FOR STATUTORY VAGUENESS /**  
17 **PROPERTY RETURN AND SIXTH CLAIM: INJUNCTIVE RELIEF FOR**  
18 **FUTURE STATUTORY VIOLATION / PROPERTY RETURN**

19 Plaintiffs allege that Section 330a is unconstitutionally vague both on its face  
20 and as applied. (FAC ¶¶ 25, 54, 58.) Specifically, Plaintiffs allege that key phrases  
21 such as “slot machines” and “staked or hazarded” are not defined in Section 330a, and  
22 the descriptions provided in related gaming statutes are insufficient. (FAC ¶ 26.)

23 To prove that Section 330a is unconstitutionally vague, Plaintiffs must show that  
24 the statute “(1) does not define the conduct it prohibits with sufficient definiteness and  
25 (2) does not establish minimal guidelines to govern law enforcement.” *United States*  
26 *v. Davis*, 36 F.3d 1424, 1434 (9th Cir. 1994).

27 Section 330a(a) states:

28 Every person, who has in his or her possession or under his or her control,

1 either as owner, lessee, agent, employee, mortgagee, or otherwise, or who  
2 permits to be placed, maintained, or kept in any room, space, inclosure, or  
3 building owned, leased, or occupied by him or her, or under his or her  
4 management or control, any slot or card machine, contrivance, appliance  
5 or mechanical device, upon the result of action of which money or other  
6 valuable thing is staked or hazarded, and which is operated, or played, by  
7 placing or depositing therein any coins, checks, slugs, balls, or other  
8 articles or device, or in any other manner and by means whereof, or as a  
9 result of the operation of which any merchandise, money, representative  
10 or articles of value, checks, or tokens, redeemable in or exchangeable for  
11 money or any other thing of value, is won or lost, or taken from or  
12 obtained from the machine, when the result of action or operation of the  
13 machine, contrivance, appliance, or mechanical device is dependent upon  
14 hazard or chance, and every person, who has in his or her possession or  
15 under his or her control, either as owner, lessee, agent, employee,  
16 mortgagee, or otherwise, or who permits to be placed, maintained, or kept  
17 in any room, space, inclosure, or building owned, leased, or occupied by  
18 him or her, or under his or her management or control, any card dice, or  
19 any dice having more than six faces or bases each, upon the result of  
20 action of which any money or other valuable thing is staked or hazarded,  
21 or as a result of the operation of which any merchandise, money,  
22 representative or article of value, check or token, redeemable in or  
23 exchangeable for money or any other thing of value, is won or lost or  
24 taken, when the result of action or operation of the dice is dependent upon  
25 hazard or chance, is guilty of a misdemeanor.

14 On its face, Section 330a is not unconstitutionally vague. “[W]e have not  
15 traditionally subjected every criminal and civil sanction imposed through legal process  
16 to ‘least restrictive means’ scrutiny simply because each particular remedy will have  
17 some effect on the First Amendment activities of those subject to sanction.” *Arcara*  
18 *v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). Traditionally, restrictions will apply  
19 only when: (1) it involved “conduct with a significant expressive element that drew the  
20 legal remedy in the first place,” or (2) “where a statute based on a nonexpressive  
21 activity has the inevitable effect of singling out those engaged in expressive activity.”  
22 *Id.* at 706-07.

23 Here, Section 330a does not implicate the First Amendment, but implicates only  
24 gambling. Section 330a is one part of an overall state statutory scheme to control  
25 gambling. *See* CAL. PENAL CODE ch. 10. It is not enough for Plaintiffs to allege that  
26 some First Amendment activity was limited. Because Section 330a does not implicate  
27 First Amendment protection, there can be no viable claim asserted on the basis that it  
28 is void for vagueness on its face. *United States v. Rodriguez*, 360 F.3d 949, 953 (9th

1 Cir. 2004).

2 As applied, Section 330a is not unconstitutionally vague. Plaintiffs argue that  
3 Section 330a consists of a “lengthy and convoluted” sentence, and that the terms “slot  
4 machine” and “staked” or “hazarded” are not defined. That Section 330a consists of  
5 a single, long sentence does not by itself make the statute unconstitutionally vague. In  
6 addition, Section 330a is one part of an overall state statutory scheme to control  
7 gambling. *See* CAL. PENAL CODE ch. 10. The varying sections address slot machines,  
8 other gambling devices, and gambling related endeavors. Multiple code sections  
9 within Chapter 10 are available to give Plaintiffs guidance regarding “slot machines”  
10 and whether Plaintiffs’ Sweepstakes is illegal gambling. “The existence . . . of more  
11 than one statute potentially applicable to particular conduct does not create an  
12 unconstitutionally indefinite standard of proscribed conduct.” *Merandette v. City &*  
13 *Cnty. of San Francisco*, 88 Cal. App. 3d 105, 112 (1st Dist. 1979).

14 Accordingly, Section 330a is not unconstitutionally vague, either on its face or  
15 as applied. Summary judgment is **GRANTED** in favor of the California Department  
16 of Justice, Fune, and Espinoza on the fifth and sixth claims.

17 **IV. SEVENTH CLAIM: DAMAGES FOR VIOLATION OF CONSTITUTIONAL**  
18 **RIGHTS**

19 The seventh claim seeks damages for violation of constitutional rights. 42  
20 U.S.C. § 1983 provides a federal cause of action against any person who, acting under  
21 color of state law, deprives another of his federal rights. However, “government  
22 officials are entitled to some form of immunity from suits for civil damages.” *Nixon*  
23 *v. Fitzgerald*, 457 U.S. 731, 744 (1982). To determine whether qualified immunity  
24 protects individual law enforcement officers from liability, a court determines: (1)  
25 whether the alleged facts show that the officer’s conduct violated a constitutional right;  
26 and (2) whether a constitutional right was clearly established in the particular context  
27 of the case. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). Courts may omit the first  
28 *Saucier* step and focus only on the second step. *Pearson v. Callahan*, 555 U.S. 223,

1 242 (2009).

2 The relevant inquiry in determining whether a right is clearly established is  
3 “whether it would be clear to a reasonable officer that his conduct was unlawful in the  
4 situation he confronted.” *Saucier*, 533 U.S. at 202. “This is not to say that an official  
5 action is protected by qualified immunity unless the very action in question has  
6 previously been held unlawful, but it is to say that in the light of pre-existing law the  
7 unlawfulness must be apparent.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal  
8 quotation marks and citations omitted). The “salient question” is whether the state of  
9 the law gave law enforcement officers fair warning that their actions were  
10 unconstitutional. *Id.* at 741. Qualified immunity “gives government officials breathing  
11 room to make reasonable but mistaken judgments about open legal questions,” and  
12 “protects all but the plainly incompetent or those who knowingly violate the law.”  
13 *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (internal quotation marks omitted).

14 Where the alleged Fourth Amendment violation involves a search or seizure  
15 pursuant to a warrant, the fact that a neutral magistrate issued the warrant is an  
16 indication that the officers acted with “objective good faith.” *United States v. Leon*,  
17 468 U.S. 897, 922-23 (1984). An exception allowing suit has been recognized when  
18 “it is obvious that no reasonably competent officer would have concluded that a  
19 warrant should issue.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The shield of  
20 immunity will be lost where the warrant was “based on an affidavit so lacking in  
21 indicia of probable cause as to render official belief in its existence entirely  
22 unreasonable.” *Leon*, 468 U.S. at 923 (internal quotation marks omitted).

23 Here, Oceanside Police Detective Brent Keys was reasonable in his investigation  
24 and had an objectively reasonable belief that illegal gambling activity was occurring  
25 at Lucky Bob’s. Keys performed an extensive and well-documented investigation that  
26 spanned approximately seven months. (Keys Criminal Trial Testimony at 164.) Keys  
27 first became aware of potential gambling activity due to a confidential informant.  
28 (Keys Dep. at 34-37.) He then entered Lucky Bob’s and observed first-hand the

1 computer terminals. (Keys Criminal Trial Testimony at 137-38.) Keys used the  
2 machines on at least three occasions. (*Id.* at 139-42.) He obtained a player card, set  
3 up an account, and played the games. (*Id.*)

4 Keys conferred with the Bureau of Gambling Control and worked with the  
5 California Department of Justice agents. (Keys Dep. at 20-22, 186-87, 190-92.) He  
6 spoke with the City's licensing department and learned about the City's zoning  
7 policies. (*Id.* at 130-32, 135-36.) Before presenting his investigation to the court, Keys  
8 presented the affidavit to a Deputy District Attorney, who interviewed Keys and  
9 approved the affidavit in writing. (Keys' Mot., Exh. 8.) While executing the warrant,  
10 Keys took only those items specified in the warrant and otherwise acted appropriately.  
11 (*Id.*, Exhs. 9-11, 15-21.)

12 First, Plaintiffs argue that Keys misrepresented two facts in his affidavit to the  
13 magistrate when seeking the warrant: (1) that craps games were played on the premises;  
14 and (2) that the machines were operated by currency and some of the machines  
15 provided credit slips when the operators won. Keys does not dispute these two  
16 statements are false. (Keys' Reply at 7.) Nevertheless, these errors were harmless.  
17 Although craps games were not played on the premises, eighteen different types of  
18 casino games were played. (Keys' Mot., Exhs. 8, 9.) Advertising on the premises  
19 displayed various gambling games and paraphernalia, including dice and poker chips  
20 and the exchange of money to purchase and redeem credits. (*Id.*) In addition, because  
21 there remains sufficient content in the affidavit to support probable cause despite the  
22 two misstatements, Keys' actions are protected by qualified immunity. *See Forster v.*  
23 *Cnty. of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990).

24 Second, Plaintiffs argue that at the time of seizure, a reasonable officer in the  
25 position of Keys, Fune, or Espinoza would have understood that the seizure of the  
26 computer equipment would disrupt a business engaged in First Amendment activity,  
27 and constitute a prior restraint which must be preceded by an adversary hearing. As  
28 determined above, however, the seizure of Plaintiffs' equipment did not violate

1 Plaintiffs' First Amendment rights.

2 The Court finds that Fune and Espinoza acted reasonably and had a good faith  
3 and reasonable belief that their actions were within the parameters of the law. They are  
4 entitled to qualified immunity. Accordingly, summary judgment is **GRANTED** in  
5 favor of Fune and Espinoza on the seventh claim.

6 **CONCLUSION**

7 For the reasons stated above, Defendants' Motion for Summary Judgment or,  
8 Alternatively, for Summary Adjudication of Issues is **GRANTED**. Summary judgment  
9 is granted in favor of the California Department of Justice on the first, second, third,  
10 fourth, fifth, and sixth claims. Summary judgment is granted in favor of Fune and  
11 Espinoza on the first, second, third, fourth, fifth, sixth, and seventh claims.

12 **IT IS SO ORDERED.**

13  
14 DATED: 5/11/13

  
HON. ROGER T. BENITEZ  
United States District Court Judge