Bill as Introduced

SB 127 – AS INTRODUCED

2003 SESSION

03-0856
08/10

SENATE BILL ***127***

AN ACT authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

SPONSORS: Sen. Martel, Dist 18; Sen. Green, Dist 6; Sen. Gallus, Dist 1; Rep. Dickinson, Carr 4; Rep. J. Brown, Straf 67; Rep. Belanger, Rock 76; Rep. Eaton, Ches 24

COMMITTEE: Ways and Means

ANALYSIS

This bill authorizes the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

03-0856
08/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter; Multi-Hall Linked Bingo. Amend RSA by inserting after chapter 287-F the following new chapter:

CHAPTER 287-G

MULTI-HALL LINKED BINGO

287-G:1 Definitions:

I. "Bona fide member" means a person defined in RSA 287-E:1, III.

II. "Central computer operator" means an entity licensed by the sweepstakes commission to operate a central computer to which multi-hall linked bingo games are electronically linked.

III. "Charitable organization" means an entity defined in RSA 287-E:1, V.

IV. "Commercial bingo hall" means a location licensed by the commission under the provisions of RSA 287-E:4, II-a and RSA 287-E:5, VI.

V. "Commission" means the state sweepstakes commission.

VI. "Gross machine income" means all cash or other consideration used to play a multi-hall linked bingo game on a multi-hall linked bingo machine.

VII. "Multi-hall linked bingo" means any game, by whatever name called, played on an electronic card marked into squares containing numbers in a predetermined design, for that purpose, and linked to other such electronic cards by a central computer, in which a prize is offered to one or more players playing against each other first covering squares in a bingo game at the same or multiple licensed locations.

VIII. "Multi-hall linked bingo game machine" means an electronic bingo system in which players play multi-hall linked bingo games against other individuals utilizing electronic player stations that display no more than 15 bingo cards on each station for each game played, and which are electronically linked by a central computer.

IX. "Net machine income" means all cash or other consideration remaining after deducting prizes from gross machine income.

X. "Prizes" means all cash or other consideration paid to players of multi-hall linked bingo.

287-G:2 Administration and Enforcement. The sweepstakes commission shall administer and the commissioner of safety shall enforce this chapter relating to multi-hall linked bingo.

287-G:3 Rulemaking. The commission shall adopt rules, pursuant to RSA 541-A, relative to:

I. The application procedure for multi-hall linked bingo licenses.

II. Information to be required on license applications.

III. The application procedure for distributor and manufacturer licenses under RSA 287-G:10.

IV. The application procedure for multi-hall linked bingo game central computer operator.

V. Procedures for a hearing following the revocation of a license.

VI. The operation of multi-hall linked bingo games.

VII. The price for a single card or play in multi-hall linked bingo games.

VIII. The rental of facilities and the leasing of equipment for use in multi-hall linked bingo games.

IX. Accountability controls to ensure game integrity, including, but not limited to, cash, attendance, prizes, income, expense and financial reporting, and record-keeping to be implemented by licensed charitable organizations.

287-G:4 Multi-hall Linked Bingo License.

I. A license to operate multi-hall linked bingo games issued by the commission shall authorize a charitable organization to conduct multi-hall linked bingo as defined in RSA 287-G:1.

II. The commission shall not allow more than 75 multi-hall linked bingo machines to be in operation at any one location, at any given time.

III. A commercial bingo hall licensed under the provisions of RSA 287-E shall also permit the operation of multi-hall linked bingo under the provisions of this chapter. Any facility used by a charitable organization to operate multi-hall linked bingo must be licensed as a commercial bingo hall under RSA 287-E unless the licensed charitable organization conducting multi-hall linked bingo at the facility is the owner of the facility.

IV. Multi-hall linked bingo licenses shall be issued only to charitable organizations which meet the requirements of RSA 287-E:5 and paragraph V of this section.

V. Multi-hall linked bingo licenses may be issued to a charitable organization to conduct bingo games only under the following conditions:

(a) No more than one license shall be issued to a charitable organization per calendar month, and the license shall permit no more than 10 game dates of multi-hall linked bingo in one calendar month. A charitable organization issued a license under this section may also be issued a license under RSA 287-E to conduct paper.

(b) The provisions of subparagraph (a) notwithstanding, a license may be issued to a charitable organization per fiscal year, and the license shall permit no more than 10 game dates of multi-hall linked bingo in one calendar month and no more than 120 game dates of multi-hall linked bingo in one calendar year. The license shall expire on the last game date authorized under the license. Charitable organizations electing to receive an annual license under this paragraph shall be ineligible to receive concurrently a monthly license under subparagraph (a), and charitable organizations licensed under subparagraph (a) shall be ineligible to receive concurrently an annual

license under this subparagraph.

(c) A license shall authorize games at specific times on specific dates at specific locations.

(d) No more than 2 licensed charitable organizations may conduct bingo games at any one location on any specified date.

(e) A license shall not be transferable.

(f) A license to operate multi-hall linked bingo shall allow the licensee to operate such games between the hours of 1:00 p.m. and the following 1:00 a.m. Monday through Saturday, and between the hours of 1:00 p.m. and 12:00 a.m. on Sunday.

287-G:5 Copies of Records. The commission shall forward copies of all records relating to multi-hall linked bingo licensing, taxes, and financial reports to the commissioner of safety.

287-G:6 Multi-hall Linked Bingo License Fees.

I. Each charitable organization shall pay to the commission a fee of $25 for each day the organization conducts multi-hall linked bingo, provided that if the organization conducts paper bingo as provided for in RSA 287-E on the same day that they conduct multi-hall linked bingo and has paid the fee required under RSA 287-E:4, I, the fee required under this paragraph shall be waived.

II. All funds collected by the commission under this section shall be deposited in the special fund established under RSA 284:21-j.

287-G:7 Operation of Multi-hall Linked Bingo Games.

I.(a) Only bona fide members of charitable organizations shall operate multi-hall linked bingo games; except that, if all bona fide members of a charitable organization are under 18 years of age, adult officers or directors of the charitable organization or parents or legal guardians of bona fide minor members, who have been authorized by the officers or directors of the charitable organization, shall operate the games. Proof of bona fide membership shall be required.

(b) Notwithstanding subparagraph (a), if, by reason of the established criteria for membership, all bona fide members of the charitable organization are physically or mentally disabled, or both, the officers, directors, or authorized officials of the charitable organization may designate individuals to conduct the operation of multi-hall linked bingo games on behalf of said charitable organization. Individuals so designated are subject to all applicable provisions of this chapter, and the designation of such individuals is subject to the approval of the commission.

(c) Notwithstanding subparagraph (a), all charitable organizations that conduct multi-hall linked bingo games for charitable purposes may allow spouses, sons, and daughters of bona fide members who are at least 18 years of age to assist with the operation of the multi-hall linked bingo games. A list of the names of the persons assisting shall be submitted to the department of safety prior to the scheduled bingo event.

II. No compensation shall be paid to operators of a bingo game. Compensation shall include, but is not necessarily limited to, money or any other thing of value. Operators of multi-hall linked bingo games may be reimbursed for their out-of-pocket expenses in an amount not to exceed $25 per

game date, provided that such expenses are itemized and submitted in writing to the charitable organization.

III. Notwithstanding paragraphs I and II, a charitable organization may designate non members to operate multi-hall linked bingo games during times when the charitable organization is not simultaneously conducting a paper bingo game licensed under RSA 287-E. Such non-member operators must be approved by the commission in advance and may be compensated by the owner or operator of the facility where the multi-hall linked bingo game takes place.

IV. Raffles permitted under RSA 287-A and RSA 287-D may be conducted at the same time and in the same place as a multi-hall linked bingo game licensed under this chapter.

V. All multi-hall linked bingo game equipment used in conducting multi-hall linked bingo games shall be subject to inspection and approval by the commission.

287-G:8 Limitations.

I. No one under the age of 18 years shall be admitted on the premises on which multi-hall linked bingo games are being conducted. Proof of age shall be produced upon request of the commission.

II. No bingo chairperson, bingo treasurer, or person who has leased out a facility or sold or leased bingo paraphernalia or related equipment to a charitable organization for use during multi-hall linked bingo games shall participate or play in any game conducted at that location on that date.

III. A person who volunteers to assist in the operation of a multi-hall linked bingo game may play bingo after assisting with the operation of the game; provided that once a person has played multi-hall linked bingo on a given date, that person may no longer assist with the operation of the bingo game on that date.

IV. No person who has been convicted of any criminal offense or who has violated any of the statutes or rules governing charitable gambling in this or any other state shall operate a multi-hall linked bingo game licensed under this chapter, or rent, lease, sublease, or otherwise provide any hall or bingo paraphernalia for the conduct of multi-hall linked bingo licensed under this chapter.

V. No charitable organization shall act as an agent for operating multi-hall linked bingo games when it is unlawful for the charitable organization's principal to conduct bingo or multi-hall linked bingo games.

VI. No fee shall be charged for admission to multi-hall linked bingo games.

287-G:9 Multi-hall Linked Bingo Machine Revenue Distribution.

I. Multi-hall linked bingo machines shall pay out to the players in prizes not less than an average of 80 percent of gross machine income, annually.

II.(a) In the event that the charitable organization licensee purchases the multi-hall linked bingo machines used by the licensee to play multi-hall linked bingo, and owns the property where the multi-hall linked bingo game is played, not less than 73 percent of net machine income each day shall be retained by the charitable organization licensee, less any fees paid under paragraphs III and

IV.

(b) Not more than 5 percent of net machine income each day shall be paid to a distributor licensed under this chapter for maintenance and distribution of multi-hall linked bingo machines.

(c) Not more than 20 percent of net machine income each day shall be paid to the central computer operator licensed under this chapter.

(d) Two percent of net machine income each day shall be paid to the state by the charitable organization licensee as an administration fee. The charitable licensee shall pay the state fee not later than 10 days after the game date at which the fee was collected.

III. In the event that the charitable organization licensee leases or rents the multi-hall linked bingo machines used to play multi-hall linked bingo from a licensed manufacturer or distributor, the licensee may pay the manufacturer or distributor a rent or lease fee not to exceed an amount equal to 20 percent of the daily net machine income received by the charitable organization from the conduct of multi-hall linked bingo.

IV. In the event the charitable organization licensee does not own the premises where the multi-hall linked bingo game is played, the licensee may pay a fee for use of the premises to play multi-hall linked bingo to an entity licensed for that purpose under this chapter, said fee shall not exceed 20 percent of the daily net machine income received by the charitable organization from the conduct of multi-hall linked bingo.

287-G:10 Distributors and Manufacturers of Multi-hall Linked Bingo Equipment; Central Computer Operator.

I. The commission shall license distributors and manufacturers of multi-hall linked bingo machines sold, leased, or rented in this state. A distributor with a current New Hampshire license for distribution of lucky 7 tickets shall be authorized to distribute multi-hall linked bingo machines, and shall not be required to file for licensing under this section. All multi-hall linked bingo machines shall be purchased, leased, or rented from a licensed distributor or manufacturer, and shall be manufactured by a licensed manufacturer.

II. All multi-hall linked bingo machines sold, leased or rented to charitable organizations by New Hampshire licensed distributors or manufacturers shall be recorded by serial numbers and listed on the charitable organization's invoices. A license shall be issued to a distributor or manufacturer under the following conditions, provided that the commission may, by rule, establish additional reasonable qualifications for licenses:

III The applicant for a distributor's license shall pay to the commission a fee of $10,000 per year or any part of a year. Such fee shall authorize the distribution and maintenance of multi-hall linked bingo machines within the State of New Hampshire. A distributor with a current New Hampshire license for distribution of lucky 7 tickets shall not be required to pay the additional licensing fee under this section.

IV. The applicant for a distributors license shall certify that neither the applicant nor any partner, officer, or director has been convicted of a felony, which has not been annulled by any court, within 10 years from the date of application.

V. Each multi-hall linked bingo distributor licensee shall post a bond in the amount of $50,000, conditioned upon the licensee's compliance with the rules of the commission. A distributor with a current New Hampshire license for distribution of lucky 7 tickets shall not be required to post the additional bond under this section.

VI.(a) The commission is authorized to issue a special license to manufacturers of multi-hall linked bingo machines leased, rented, or sold in the state. A manufacturer with a current New Hampshire license to manufacture lucky 7 tickets shall not be required to pay the additional licensing fee under this paragraph.

(b) The fee for such special license shall be $10,000 per year or for any part of a year.

(c) The applicant for a manufacturers license shall certify that neither the applicant nor any partner, officer, or director has been convicted of a felony, which has not been annulled by any court, within 10 years from the date of application.

VII. Each multi-hall linked bingo manufacturer licensee shall post a bond in the amount of $50,000, conditioned upon the licensee's compliance with the rules of the commission. A distributor with a current New Hampshire license for distribution of lucky 7 tickets shall not be required to post the additional bond under this section.

VIII.(a) The commission is authorized to issue a license to the operator of a multi-hall linked bingo central computer operator. The applicant for a multi-hall linked bingo central computer operator license shall provide evidence satisfactory to the commission that the applicant possesses the necessary expertise to operate the central computer system.

(b) The central computer applicant shall certify that neither the applicant nor any partner, officer, or director has been convicted of a felony, which has not been annulled by any court, within 10 years from the date of application.

(c) The central computer operator shall provide to the commission a report of daily accounting of all multi-hall linked bingo games linked by the computer operator. Such report shall include an accounting of all revenue received and distributed and any other information required by the commission. All information gathered by the central computer operator under the provision of this section shall be maintained by the operator for a period of at least three years.

(d) The fee for the central computer operator license shall be $10,000 per year or any part of a year, provided that if the central computer operator has paid any other fee required under this section no additional fee shall be required.

(e) The commission is authorized to require the multi hall linked bingo central computer operator and/or manufacturer's system to be certified by a nationally recognized independent testing laboratory selected by the commission, prior to the issuing of a license, and subsequently as the

commission deems necessary. The fees associated with such testing shall be paid by the central computer operator and/or the manufacturer.

287-G:11 Financial Reports and Inspection Required.

I. A charitable organization which has been licensed to conduct multi-hall linked bingo games shall submit a complete financial report to the commission for each license issued under this chapter within 15 days after the expiration of each license.

II. The financial report shall be completed by the treasurer of the charitable organization or a duly authorized officer, director, or official of the charitable organization who shall certify such accounting under oath.

III. The financial report shall include:

(a) A complete statement of revenues and expenses.

(b) A record of the amount of prizes awarded.

(c) The names and addresses of the members of the charitable organization who operated the licensed games.

(d) The names and addresses of any non-members of the charitable organization who were compensated for operating the licensed games in accordance with RSA 287-G:7, III.

(e) The name and address of any person, partnership, corporation or other entity from whom equipment used at the licensed games was rented or leased.

(f) The name and address of any person, partnership, corporation or other entity from whom premises were leased or rented to conduct the licensed games.

IV. All charitable organizations licensed under this chapter shall maintain a separate checking account for the deposit and disbursement of all income relating to multi-hall linked bingo, except cash prizes awarded at the games. All expenses shall be paid by check or electronic funds transfer, and all prizes of $500 or more shall be paid by check. There shall be no commingling of multi-hall linked bingo funds with other funds of the charitable organization. The organization shall retain all canceled checks or record of electronic funds transfers for the payment of expenses and prizes for at least 2 years. The organization shall not cash checks which it issues.

V. All financial reports filed by charitable organizations shall be maintained by the commission for a period of one year from the date of filing and shall be open to public inspection.

VI. All financial records pertaining to the operation of multi-hall linked bingo games shall be maintained by the treasurer of the charitable organization or other duly authorized director, officer or official of the charitable organization and shall be made available to representatives of the commission or of the commissioner of safety upon request.

VII. A charitable organization which has been licensed to conduct multi-hall linked bingo games shall maintain complete and accurate documentation of all revenues and expenses contained in the financial reports for at least 2 years from the date the financial report is filed.

287-G:12 Suspension and Revocation. The commission may suspend or revoke the license of any

licensee who violates any provision of this subdivision. Any licensee whose license is revoked shall not be eligible for licensure for a period of up to one year from the date of revocation.

287-G:13 Rehearing and Appeal. Any person aggrieved by a decision of the commission to deny suspend or revoke a bingo license may apply to the commission for a rehearing within 15 business days of the decision. Rehearings and appeals shall be governed by RSA 541.

287-G:14 Referendum.

I.(a) Any city or town desiring to adopt the provisions of RSA 287-G may do so by presenting the following question to the voters: 'Shall we adopt the provisions of RSA 287-G relative to the conduct of games of multi-hall linked bingo for charitable purposes'?

(b) The ballot containing the question shall include 2 squares next to the question allowing the voter to vote 'Yes' or 'No'. If no cross is made in either of the squares, the ballot shall not be counted on the question.

(c) If a majority of those voting on the question vote 'Yes', RSA 287-G shall apply within the city or town.

II. In a town, the question shall be listed in the warrant and placed on the official ballot, or a special ballot prepared by the clerk, upon a vote of the selectmen or upon submission to the selectmen of a petition signed by 25 registered voters or 1/6 of the registered voters, whichever is less.

III. In a city or town with a town council, the question shall be placed on the official ballot for any regular municipal election upon a vote of the city or town council or upon submission to the city or town council of a petition signed by 5 percent of the registered voters.

IV. Any city or town which has adopted RSA 287-G may put to the voters the question of whether to rescind its action upon the vote of the selectmen or council or upon the petition of voters as provided in paragraph II or III. The question shall be as provided in paragraph I, except the word 'adopt' shall be changed to 'rescind'.

V. In any city or town conducting bingo as of the effective date of this chapter, as provided for in RSA 287-E, the provisions of RSA 287-G shall apply unless rescinded as provided for in RSA 287-G:14, IV.

287-G:15 Penalties.

I. In addition to any other penalties provided for by law, any person who violates RSA 287-G shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

II. Each day on which a multi-hall linked bingo game is played in violation of RSA 287-G shall constitute a separate offense.

2 Department of Safety; Duties of the Commissioner. Amend RSA 21-P:4, VI to read as follows:

VI. Have the discretion to grant to bingo and lucky 7 inspectors within his department certain limited police powers as follows:

(a) Power to serve criminal process.

(b) Power to make arrests for violations of RSA 287-E, ***RSA 287-G,*** or any other laws or rules governing bingo, ***multi-hall linked bingo,*** and lucky 7 and to enforce and make arrests for violations of any criminal laws which they uncover incident to their enforcement of the bingo, ***multi-hall linked bingo,*** and lucky 7 law.

(c) Power to inspect premises that conduct bingo, ***multi-hall linked bingo,*** or lucky 7 or any records pertaining to bingo, ***multi-hall linked bingo,*** or lucky 7.

3 Division of Enforcement. Amend RSA 21-P:7, III to read as follows:

III. The division of state police shall be responsible for bingo, multi-hall linked bingo, and lucky 7 enforcement and any other duties performed by bingo and lucky 7 inspectors.

4 Rulemaking Authority; Commissioner of Safety. Amend RSA 21-P:14, II (q) to read as follows:

(q) Bingo, ***multi-hall linked bingo,*** and lucky 7 inspection and enforcement[~~, as authorized by RSA 106-A:3-b~~].

5 Sweepstakes Commission; Administrative and Rulemaking Provisions. Amend RSA 284:21-i to read as follows:

I. The sweepstakes commission shall be empowered to employ such technical assistants and employees to carry out the provisions of this subdivision as the governor and council shall authorize. Such assistants and employees shall receive compensation at rates to be established by the personnel commission. No employee of the commission shall have any pecuniary or other interest in any supplier or agent to the commission, or in any supplier or lessor of bingo equipment or halls, or in any officer of a bingo licensee licensed under RSA 287-E, ***RSA 287-G,*** or in any licensee licensed under this chapter.

6 Sweepstakes; Establishment. Amend RSA 284:21-j, I to read as follows:

I. The state treasurer shall credit all moneys received from the sweepstakes commission, and interest received on such moneys, to a special fund from which the treasurer shall pay all expenses of the commission incident to the administration of this subdivision [~~and~~], RSA 287-E, ***and RSA 287-G.*** Any balance left in such fund after such expenses are paid shall be deposited in the education trust fund established under RSA 198:39.

7 Effective Date. This act shall take effect January 1, 2004.

Committee Minutes

SENATE
WAYS AND MEANS
COMMITTEE

HEARING REPORT

FROM: Joshua Chamberlain
RE: SB 127 - authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.
DATE: March 12, 2003
ACTION: no action was taken

SPONSOR(S): Sen. Martel, Dist 18; Sen. Green, Dist 6; Sen. Gallus, Dist 1; Rep. Dickinson, Carr 4; Rep. J. Brown, Straf 67; Rep. Belanger, Rock 76; Rep. Eaton, Ches 24

WHAT THE BILL DOES: This bill authorizes the sweepstakes commission to license multi-hall linked bingo for charitable purposes

WHO SUPPORTS THE BILL: Bob Blais-American Legion Jutras Post, Mike McLaughlin-Association of Charitable Foundations, Gary Derosiers-Association of Charitable Foundations, Ray Nadeau-Alton American Legion, Kevin Craig-Cub Scout Pack, Dave Victor-Littleton American Legion, Betty Ward-Littleton Elks, Alan Houde-Milton Moose, Richard Higgin, Debra LeFebvre, Joe Carroll-American Legion

WHO OPPOSES THE BILL: Rep. Woods, Rep. Scott, Rep. Almy, Rep. Boyce, Bradford Cook-Diocese of Manchester, Herb Hansen-Coalition Against Gambling, Steven Wade-Brain Injury Association of NH, Ralph Doolan-Littleton, NH, Anne Rice-Attorney General's Office, Chief TimRussell-NH Association of Chiefs of Police, Arnold Alpert-American Friends Service Committee

TESTIMONY:
Senator Martel introduced the bill.

Rep. Dickinson said SB 127 is an improvement on HB 1450 from the 2002 session. HB 145 went to interim study and came out as SB 127. Dickinson said the bill will allow bingo games in the north to compete with bingo halls in the southern part of the state. Multi-hall linked bingo (MLB) is a 21st century game that will revitalize the game of bingo.

aut

Rep. Scott opposes the legislation which is an expansion of gambling, against his morals and is equivalent to a regressive tax on the less fortunate.

Rep. Nancy Ford opposes the legislation which will turn bingo halls into casinos. Ford said MLB is a gateway to slot machines, an incentive for corruption, will not produce a significant amount of revenue for the state. SB 127 also does not include sufficient state oversight. Ford said the bill does not require background checks, JLCAR has no say, the central computer will not be controlled by the state and the legislature has no control as described in SB 127.

Bob Blaine, American Legion, described a common concern of the charitable organizations, that charities are under pressure to continue to fund scholarships, ROTC and other community programs while attendance at bingo games is going down and bingo revenues continue to slide. Attendance is down and the charities need the help SB 127 would provide.

Gary Deroscher said bingo has to move forward with the technology. He said bingo is competing with casinos, which like bingo offer a form of entertainment. MLB will attract and retain players. The prizes offered by MLB are based on the amount of money in any particular game, the payout is not preset as in paper bingo. Deroscher acknowledged that SB 127 is an attempt to bail out a failing fundraising mechanism.

Ray Nadeau, American Legion, was one of many representatives of charitable organizations who said they had stopped bingo nights because attendance was so low they couldn't even sell enough Lucky 7 tickets to make ends meet.

Mike McLaughlin told the committee MLB is not equivalent to slots because MLB players plays against other players. McLaughlin also distributed two court decisions in other states that dealt with MLB and found the system to be a Class I gaming device. Standalone machines like slots are Class III gaming devices. He also said the MLB system provides real-time accountability.

Joe Carroll, American Legion, said MLB would generate more revenue for the host charity than paper bingo and that the charity will receive a profit of no less than 33& of net revenue.

Steven Wade, Brain Injury Association, opposes the legislation because it presents a conflict of interest with Lucky 7 games, for which bingo is a loss leader. Wade told the committee that MLB will hurt Lucky and therefore will be detrimental to their fundraising efforts.

Ralph Doolin said he opposes the legislation because MLB will as much as 77% of the money spent on the game in Littleton out of the community which will not help the restaurants and small businesses in the area. MLB will also hurt the paper bingo games which are important to the social climate of Littleton.

Anne Rice, Attorney General's Office, opposes SB 127 on the grounds that the bill represents an expansion of legalized gambling. Rice said the societal costs of gambling outweigh the financial benefits. The committee heard that the machines are capable of going nationwide and there is nothing in the bill to prevent them from doing that.

Chief Tim Russell, NH Association of Chief's of Police, said bingo is following the path slots and poker took of going electronic and that his association is opposed to the expansion of gambling.

Debra LeFay, Andres Institute of Art, is in favor of the legislation. She said paper bingo will never go away.

Richard Higgins, United Bingo Hall – Portsmouth, said MLB s the only idea he has seen that has the ability to add excitement and players to bingo games. Higgins said that he, as the owner of the bingo hall, would have to absorb the cost of the MLB machines.

The committee also learned that the MLB is currently only in operation on small Indian reservations.

SENATE WAYS and MEANS COMMITTEE
State House, Room 103
Concord, New Hampshire
Wednesday, March 12, 2003

SENATE BILL 127, AN ACT authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

Testimony of:

Sen. Andre Martel.....2
Sen. Howard Dickinson...5
Rep. David Scott.....6
Rep. Nancy Ford.....7
Rep. Laurie Boyce.....9
Mr. Brad Cook.....9
Mr. Bob Blais.....10
Mr. Kevin Craig.....11
Mr. Gary Desrosiers.....14
Mr. Ray Nadeau.....19
Mr. Michael McLaughlin.21
Mr. Dave Victor.....26
Ms. Betty Ward.....27
Mr. Alan Houde.....28
Mr. Joe Carroll.....28
Mr. Herb Hansen.....29
Mr. Steven Wade.....31
Mr. Ralph Doolan.....34
Ms. Ann Rice.....36
Mr. Wayne Lefebvre.....38
Mr. David Vincent.....39
Mr. Tim Russell.....41
Mr. Ed Naile.....43
Ms. Debra Lefebvre.....44
Mr. Richard Higgins.....47

CHAIRMAN D'ALLESANDRO: I'd like to open the hearing on Senate Bill 127. Before we do this, I'd ask that people not be repetitive. If you have something to say, we'll give you three minutes to say it and then move forward. We have an extensive list of speakers, and we want everyone to be heard. Is Sen. Martel here? He's the prime sponsor of the bill. We'll call upon Sen. Andy Martel to speak on Senate Bill 127, an act authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes. Sen. Martel, welcome.

ANDRE MARTEL, Senator, District 18: Thank you, Mr. Chairman. Thank you, members of the committee. Geez, I remembered my old track days there for a minute, Senator. I just went from 120 to 102 back to 120 and back over here after that and then went to 105A, so we're doing all right this morning.

SEN. GALLUS: All in 5.3 seconds.

CHAIRMAN D'ALLESANDRO: Well, that's the world's record and we wanted that noted for the permanent record. Sen. Gallus has commented that's a world's record.

SEN. MARTEL: For me, yeah, you're right.

CHAIRMAN D'ALLESANDRO: Thank you, Senator.

SEN. MARTEL: I'm proud to be the prime sponsor of Senate Bill 127, a bill to help charitable organizations, veterans clubs and other worthy groups that raise needy revenues.

This bill will allow qualified charitable organizations to use linked bingo. Linked bingo is played exactly the same way that paper bingo is played, except that the player uses a terminal screen and touches it to mark his electronic bingo card instead of using a dauber to mark a piece of paper.

Players in Claremont at the Elks are playing the same game in realtime as players at the Alton American Legion or the Assumption Greek Orthodox Church in Manchester. Except for using the latest technology as a tool, this game is the same old bingo that grandma played.

The bill is much better than previously introduced version, mainly because it has -- it is much more detailed and it's specific. The bill requires that charities will get no less than 33 percent of the net revenue generated by the game. Net revenue is defined in the bill as the revenue left over after all prizes are paid to the players. If a charity buys the bingo machine and owns the hall, they would get no less than 73 percent of the revenue. If the charity owns the hall where bingo is played and chooses to lease the machine, the bill puts a cap of 20 percent of net as the amount they can pay, according to the lease. In that case, the charity would get 53 percent of net.

If the charity leases the machines and rents the hall, their rental fee is capped by this bill at 20 percent of net, as well. Thus, leaving the charity with an absolute minimum profit of 33 percent. The remaining net revenue as provided for in the bill is 20 percent for central computer operators, 5 percent for distribution, 2 percent for the state as an administrative fee. This bill limits the number of bingo machines to 75 per location. This allows all cities and towns and all charitable organizations the opportunity to participate.

The bill provides for absolute accountability as it requires detailed reports be proved to the Sweepstakes Commission. The bill limits the hours of play to 12-hours a day, Monday through Saturday and 11-hours on Sunday, the same as current paper bingo.

This bill, of course, is clear that only bona fide charitable organizations are eligible for a license. I hope you will join me in supporting Senate Bill 127, a bill to help those who help us every day. I will be glad to try to answer any questions you may have. However, I don't know too much about it, other than the details that I just gave you, and there are many people who are

standing behind me and sitting behind me who are willing to testify on more details that they can give you. So, I'm willing to answer any questions and I thank you once again. I urge an ought to pass motion, if that's possible.

CHAIRMAN D'ALLESANDRO: Thank you, Sen. Martel. Any questions for Sen. Martel? If not, thank you -- Excuse me. Sen. Odell.

SEN. ODELL: Thank you, Mr. Chairman. Sen. Martel, a question on the halls or facilities that serve alcoholic beverages, can they do the same -- can they play and drink at the same time, so to speak?

SEN. MARTEL: That's one thing I don't know. I'd defer that to someone back there. Okay?

SEN. ODELL: Thank you.

SEN. MARTEL: I know soft drinks.

SEN. ODELL: I wasn't thinking of soft drinks.

SEN. MARTEL: No, I understand what you're saying. I'd really -- I'd let someone else behind me, I'm sure they can answer that question.

SEN. ODELL: Thank you.

CHAIRMAN D'ALLESANDRO: Further question, Senator? Thank you, Sen. Martel. Appreciate it.

SEN. MARTEL: You're welcome. Thank you very much, folks.

CHAIRMAN D'ALLESANDRO: Let me read a list of people who do not want to speak, so that we can get this out of the way. Brad Cook from the Diocese of Manchester is opposed to the bill.

BRAD COOK, Diocese, Manchester: I thought I said I did want to speak, Senator. If I checked the wrong box, I apologize.

CHAIRMAN D'ALLESANDRO: Okay. What did you was you checked opposed. So, you do want to speak?

MR. COOK: I do want to speak.

CHAIRMAN D'ALLESANDRO: Excuse me. Theresa Rosenberger from the Brain Injury Foundation is opposed to the bill, does not wish to speak. Arnold Albert of the American Friends Service Committee is opposed to the bill, but does not wish to speak. Rep. Susan Almy is opposed to the bill, but does not wish to speak. Phyllis Woods, Representative from District 69, is opposed to the bill, but does not wish to speak. I believe I've covered everyone. Russell MacCleery from Chichester is in favor of the bill, but does not wish to speak. That's everyone who is either opposed or in favor of the bill, but does not wish to speak.

Now, we'll go through the list. We, traditionally, take representatives first, and I notice there are some representatives who are sponsors on this bill, and we'll get to them and confine your comments to three minutes.

Rep. Dickinson is here, who is a cosponsor of the bill.

HOWARD DICKINSON, Representative, Carroll County, District 4: Thank you, Mr. Chairman. Mr. Chairman, members of the Senate Ways and Means Committee, my name is Howard Dickinson. I represent District 4, which includes the greater Mt. Washington Valley area.

I'm here as a cosponsor of House Bill 127 *[sic]*, and I'm in very strong support of it. It is an improvement over a bill I sponsored last year in the House, and that was House Bill 1450. HB 1450 was sent to interim study by the House Ways and Means Committee, worked on very hard. The people interested in this concept supplied us with an amendment or a new draft of a bill, which included -- in fact, answered all of the questions

which the House Ways and Means Committee had in the course of the hearing last year.

The House Ways and Means Committee reported the bill out by 8 to 4, recommending the bill for future legislation, and that's what you have here before you. It was thought that perhaps it was a good idea to introduce it in the Senate this time, and give you fellows a chance to work on the subject.

Very briefly, this gives the small bingo games, particularly those games in the North Country, an opportunity to participate with larger bingo games held in the south, and therefore revitalize, really, the opportunity for the service organizations to raise funds through bingo. And what we have here are basically it's 21st century technology, which is adapted to an 18th century game, which because of its very nature has fallen off in popularity, and we hope that this will revitalize it.

So, I hope you will see fit to support Senate Bill 127, because it will mean a lot for the Legions and the VFWs in the North Country. Thank you very much.

CHAIRMAN D'ALLESANDRO: Thank you, Rep. Dickinson. Any questions? If not, thank you for your testimony.

REP. DICKINSON: Thank you.

CHAIRMAN D'ALLESANDRO: Rep. Scott, from District 71.

DAVID SCOTT, Representative, Strafford County, District 71: Thank you, Mr. Chairman, members of the committee. My name is David Scott. I representative from District 71, which is Dover. I am here in opposition to the bill.

I think that expansion of gambling in New Hampshire is against my moral convictions. I think it's bad for the state. I think it's a tax on the least intelligent and the least -- with the lowest per capita income. Evidence of that is a study that Massachusetts has recently done that shows the biggest revenues

for their various lotteries comes from towns like Lawrence, New Bedford and Fall River, towns of the lowest per capita income. So, it's a very regressive tax.

In addition, gambling is addictive. You hear in Massachusetts on the radio an announcer saying, if you find yourself addicted to gambling, we can offer this help, so contact us. So, I'm against this because it's addictive and because it's a tax on the least intelligent and the lowest per capita income. Any questions?

CHAIRMAN D'ALLESANDRO: Questions? Thank you very much, Representative. Nancy Ford, representative from District 60.

NANCY FORD, Representative, Hillsborough County, District 60: Good morning, Mr. Chairman, members of the committee. My name is Nancy Ford, and I represent District 60, Nashua. As you may have guessed, I am here in opposition to Senate Bill 127.

This bill makes every place where bingo is played a potential casino. It allows a new form of gambling, which is a baby slot machine tailored for bingo, in which the player evidently does nothing and the machine does all the work. It is a fast and addictive way to separate the player from his money, enriching the machine leases a lot and the charities a little.

Other people are here to testify about the dangers of video bingo machines, so I would like to talk about what I feel is a crucial part of this argument. And that is the effect of these sophisticated methods of gambling on this, our legislature. From all over the country we have heard about legislatures being corrupted by the greed of the gambling industry. Corruption has come by bribing senators and representatives. We have a former governor in jail in Mississippi. We have heard of phony shadow companies to pay off legislatures and, you know, much more.

Corruption is not always from people who try to beat the machines, it is from the source. The votes needed and then from

the leasing and distributing of repair contracts. This bill hands over control to the Sweepstakes Commission. The Sweepstakes Commission is the home of the one-bid contract, $800 one-day trips to Vermont, and a constant revolving door to the gambling industry of some of our elected officials and Sweeps directors, and lobbyists and employees of the companies they have dealt with.

In every other video slot machine we have had, the Attorney General was required to make background checks, but not a mention in this one. This bill gives the commission sweeping powers to regulate how many bingo games are played, how high each bet can go and with exemption from the legislative rules committee oversight. The legislature has no control whatsoever. The bill already says that the machines can be played 12 hours a day and be operated by non-members who are paid undesignated sums of money. The central computer is not state-owned or operated by a state employee or subject to state auditing. It is a recipe for disaster.

Bingo in this state has gone from a friendly social gathering in church basements to big business in just a few years. It has grown and grown due to the indifference of this legislature. From 25 and 50 cent cards to $30 18-card machines, and bingo nights offering $9000 in cash prizes, winner-take-all games of 1500 each, and even free trips to Atlantic City. The church basement has turned into bingo halls where multiple charities fill the halls every night, and most players have no idea which charity is benefiting.

The revenues from this bill will be minimal for the state, questionable for the charities and will only profit the gambling industry. The expanded gambling will bring heartaches to families devastated by addictive and problem gamblers, who number, by Mr. Mandosa's figure, over 17,000 of our citizens.

Mr. Chairman and members of the committee, I ask you to find Senate Bill 127 inexpedient to legislate. Thank you.

CHAIRMAN D'ALLESANDRO: Any questions? Thank you very much for your testimony. We have one more representative. Rep. Laurie Boyce.

LAURIE BOYCE, Representative, Belknap County, District 31: Thank you, Mr. Chairman and members of the Senate Ways and Means Committee. My name is Laurie Boyce. I'm from District 31, which is the Lakes Region. But I'm speaking on behalf of the Brain Injury Association. I'm opposed to the mechanic bingo.

They're individuals, especially Steven Wade, the Executive Director of the Brain Injury Association, who will have more speak. But I was the bingo coordinator for the bingo -- the Brain Injury bingo when it started 13 years ago. I would travel one and half-hours each way, twice a week to make sure that the bingo was going okay. Then, my husband thought I was going too far so, I had to step down about five or six years ago.

But Mr. Wade is very worried the problems that this type of bingo would cause. But I want to -- I'm on page 2, and it's under multi-linked bingo. It says the commission shall allow == not more than 75 machines. Now, we have 320-350 people playing bingo twice a week. What are the 225 or 300 people going to do if they can't play on machines that they're used to playing on? The fact that it cover is that computerized bingo is just one step closer to slot bingo -- slot machines, and closer and closer to state gambling. Thank you very much.

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. Any questions? Thank you very much. We're going to run through the list now. All the representatives have been heard. As I say, please confine your -- we're running quite late, so don't be repetitive, confine your remarks to a couple of minutes, and we'll get through everyone on this list. Brad Cook, representing the Diocese of Manchester.

BRADFORD COOK, Diocese, Manchester: Good morning, Sen. D'Allesandro, members of the committee. My name is Bradford Cook. I'm a lawyer in Manchester. I represent the

Diocese of Manchester and the Catholic churches are sometimes associated with the word "bingo," and every time I've been here on a gambling bill I've been asked about bingo. The diocese thought it would be appropriate to say that it is not connected with or in favor of this bill.

You will hear much testimony in detail about the nature of the electronic process, which is exponentially different from individual bingo games. You will hear about how this sets up, in essence, a linked casino network in New Hampshire, which could be a precursor to the same thing being done in the non-charitable sector by introduction of these machines. And you have heard and will hear about how this preys on the most vulnerable people, because of the speed and ability to spend a lot of money. The diocese is against this. This has nothing to do with what the several parishes who have bingo games do. It is not thought up by us or supported by us. Thank you.

CHAIRMAN D'ALLESANDRO: Thank you, Mr. Cook. Any questions? Sen. Gallus.

SEN. GALLUS: Would the diocese consider getting out of the beano business altogether?

MR. COOK: I think if the choice was expand it or get out of it, the diocese would be in favor of getting out.

SEN. GALLUS: Thank you.

CHAIRMAN D'ALLESANDRO: Thank you, Senator. Thank you. Bob Blais.

BOB BLAIS, American Legion, Jutras Post: Thank you for getting me in here early, I really do have another appointment in Manchester. I'm with the American Legion. I've been there about 20 years. I'm the immediate past commander of Jutras Post in Manchester. I was here -- I testified last year or the year before when we had -- and things haven't really changed that much.

The charities are still hurting. We, you know, we hand out scholarships, we field baseball teams, we help out the Salvation Army, the ROT -- the junior ROTC at West High School, we go on -- and the list goes on and on. We cannot keep doing this with fundraisers or spaghetti suppers, because we just don't have the people to help us anymore.

And the bingo that we do have, the attendance is going down. So, without these organizations -- without this multi-linked bingo bringing in extra moneys, we're not going to keep going. As many of you people know, the American Legion's been around since 1919, and we've done an awful lot of good for the community. We would really like to continue doing so.

So, we do hope that you help us with this bill and go for this Senate Bill 127. We really do need your help. Thank you very much.

CHAIRMAN D'ALLESANDRO: Thank you. Any questions? Thank you very much for your testimony. Mike McLaughlin from the Association of Charitable Fundraising.

MICHAEL McLAUGHLIN, Lobbyist, Association of Charitable Fundraising: Senator, could I defer to Kevin Craig from Rochester, because he's got to get back to work?

CHAIRMAN D'ALLESANDRO: Okay, sure. Kevin Craig.

KEVIN CRAIG, Rochester: Good morning. I'm here on behalf of supporting bill 127. I'm right in with the American Legion, as far as what they do to support us.

A little bit of background about myself, and I'll make it brief. I'm married with six children, all boys. So, you can see the affiliation that I have with Boy Scouts of America is very important to me. We moved up here from Massachusetts three years ago to Rochester, New Hampshire. The first and foremost thing on my mind was education for the children. Comparing Massachusetts to New Hampshire, there was no comparison; this is where we wanted to be.

I've been involved with Boy Scouts of America for roughly four, five years now. And I can tell you that there's been a lot of good and a lot of support from the Legion and what we're doing there, for the boys. Our Cub Scout pack survives because of funding from many sources. One of those sources is the American Legion. I know that the American Legion uses bingo games to raise some of the money they in turn contribute to us, and they contribute quite a bit, they really do.

I also know that the bingo attendance has declined over the years, as has bingo revenue. I will not pretend to be an expert on the politics involved in passing this kind of legislation. I know that there are people who oppose any form of gambling, including the lottery, Luck 7 and current paper bingo. However, charitable gambling has been a very effective way for worthy organizations to raise money over the years. Whether it is bingo, raffle tickets or our state run lottery, we know that giving people a chance to win something helps to shake some money loose and makes it easier to get them to participate in charitable giving.

This bill will allow American Legions and others who use bingo to raise the money they use to help organizations like ours, while we survive mainly by the dedication of the many who volunteer for groups like ours, we need money to survive, as well. I hope you will see that this is a bill that will do much good.

I'd like to add one more thing before I close, and that is things that we do at Boy Scout level that we give back to the community, is -- it's impossible if we don't have the support from the Legions. And one of those major factors is we did a Scouting for Food, we do it every year in the month of November to help less fortunate people. And we collect canned goods, we put out bags on doors and then we go around the following and we collect that food. This year here we had the use of the facilities from the Legion. And it was a massive operation.

So, you know, it's a big circle and it, you know, it helps us and we help, we give back to the community, as well as does the Legion. Thank you for your time.

CHAIRMAN D'ALLESANDRO: Thank you. Any questions? Thank you very much. Oh, excuse me, Sen. Odell.

SEN. ODELL: Thank you, Mr. Chairman. I'm a product of the Boy Scouts, so I'm very appreciative of the work and the effort you put in.

MR. CRAIG: Thank you.

SEN. ODELL: Are you part of the Daniel Webster Council?

MR. CRAIG: Yes, I am.

SEN. ODELL: What's their policy on gambling?

MR. CRAIG: On gambling itself, our policy with Daniel Webster -- and I can't speak for them, I don't know the exacts. We do not have gambling as fundraisers. Our fundraisers are strictly the popcorn and if we had like raffles and stuff like that. Unfortunately, our competition against **the cookies of the world,** with Girl Scouts, doesn't go as well. So, as far as fundraising and gambling, we do not take a position on that. I would have to say that the three years that I've been involved up here with the Legion, and we're in the back, and we do use the bingo facility. And it's clean. The Legion has been very professional. We have had no instances of crimes or bad behavior, so to speak. Iit's run very well.

SEN. ODELL: Excuse me, but that's not the issue. The issue is the Boy Scouts, Daniel Webster Council; does it have a policy on gambling? And you're distinguishing the fact that you don't do it, but it's okay to take the money from gamblers?

MR. CRAIG: Well, I would have to say no.

SEN. ODELL: All right. What about the national headquarters in Texas?

MR. CRAIG: I believe -- if they do, I couldn't speak for them, it would be in place.

SEN. ODELL: Would you be speaking today for the Boy Scouts or as a citizen?

MR. CRAIG: I'm speaking for both, actually. I'm speaking for my involvement with the American Legion and as a citizen of Rochester. You know, and again, I said it's a circle that goes right around, you know, so. I do not -- these comments are not made by Daniel Webster, though; I will state that.

SEN. ODELL: Thank you, Mr. Chairman.

CHAIRMAN D'ALLESANDRO: Thank you, Senator. Further questions? If not, thank you very much for your testimony. Again, let's not be repetitive. We do have a number of speakers. Gary Desrosiers.

GARY DESROSIERS, Association of Charitable Fundraisers: Thank you, Mr. Chairman. I'll do my best to brief.

CHAIRMAN D'ALLESANDRO: Thank you.

MR. DESROSIERS: I read fast. My name is Gary Desrosiers. I'm the chair of the New Hampshire Association of Charitable Fundraisers. Our association is made up of over 70 charitable organizations throughout New Hampshire. They include the Assumption Greek Orthodox Church in Manchester, the Laconia and Alton American Legions, the Claremont Elks, the Newport Vets, the Hudson VFW and the White Mountain Animal League.

Many of our member organizations use bingo as a major fundraising source. Many of our members used to use bingo as a fundraiser but have had to give it up because of declining attendance and an inability to make any money from it. Like

anything else in this world, bingo needs to keep up with the times in order to remain competitive and viable as a fundraising source. The competition for today's entertainment dollar is fierce. Whether it is busloads of people going to Connecticut every day or people spending their money on video games and movies, we compete with all of that and more to bring people into our bingo game.

Bingo is, after all, and foremost, entertainment. We use it to raise money, but players play it for fun. The technology boom of the last decade or so has provided many new modern ways for people to spend their entertainment dollar.

Linked bingo merely takes a bingo card off a sheet of paper and puts it on a screen and then allows players across the state to play against each other in the same game at the same time. It adds a little spice to the game that, to some, may have become a little bland.

Multi-hall linked bingo will attract new players, keep some of our current players, and will, by law, be profitable for any charity who chooses to use it. Under the current practice of paper bingo, many charities actually lose money, because prize pay-outs are preset and if attendance is low they do not raise enough money to cover their prizes. This bill will make sure we make money, since prize pay-outs are based on the amount of money played. Also, the charity is guaranteed a minimum of 33 percent of the net revenue, and that's in the worst case scenario.

I hope you will not be fooled by those who, for whatever reason, try to blend this proposal with slot machines or other forms of gambling. I've even read where a former state senator, Mr. Jim Rubens, has said that he believes there is a magic switch that in the middle of the night will turn a bingo terminal into a slot machine. Bingo is not a slot machine, and there is no magic switch to make it so.

The only magic in this bill is the magic all of us who work with American Legions and other charitable organizations feel when we are able to help other people who need it. Senate Bill

127 will help us help them. Please join us by supporting this bill.

Mr. Chairman, if I just may. Wes Plante, who is the president of the Claremont Elks, wanted to be here today to testify. But, he is a school bus driver and was unable to be here. He asked me to pass on his best wishes to Sen. Odell, and to let you know that he and his organization strongly supports Senate Bill 127. Thank you, Mr. Chairman.

CHAIRMAN D'ALLESANDRO: Thank you very much. Thank you for your testimony. Sen. Odell, greetings from your constituent in Claremont. Thank you very much.

SEN. ODELL: Thank you. It's always nice to have the connection to the home district brought forward in a public hearing. I will say, Mr. Chairman, that Gary has been very attentive and very helpful in visiting with me on this.

The question I had earlier. How do you separate the liquor from the machines?

MR. DESROSIERS: The bingo halls do not serve alcohol. We just gave up our paper bingo at Rochester Legion because of the attendance problem. For instance, if this bill passes and we are chosen to be a facility, this would be in a segregated area of our facility that's accessible to the public, public only. It would work the same as if we rent our hall for a wedding. The doors that lead to our canteen area, if you will, must be secured. We could not jeopardize our own tax -- IRS tax status for that. And, of course, we wouldn't want to violate any liquor laws by having somebody coming from one facility into the other. So, there would be no alcohol served in that facility.

CHAIRMAN D'ALLESANDRO: Further question?

SEN. ODELL: If this is a fun thing, it sounds to me as if all the fun's kind of gone out of the he paper bingo -- although, as you and I talked, if you go to the Croydon Firehouse on Thursday nights, the place seems full, people seem to be having

a great time with paper bingo. I just have a question, having been to a few casinos myself, how much fun it would be at eleven o'clock in the morning to be the only guy in a club playing a bingo machine with some guy from Laconia that I don't see. And I don't understand the fun. It is truly gambling when you're talking about a machine versus being in a communal environment and kind of having that social aspect, with a meal function often associated with it.

MR. DESROSIERS: True. I strongly feel that the people that play paper bingo now are not going to change, they're going to continue to play their paper game. We're looking to attract -- re-attract some players that have left the state. For instance, in your area, they go right across the river to Vermont. The Moose has a bingo game there once a week, I believe. But unless they have a huge carryover prize everybody goes to Vermont.

CHAIRMAN D'ALLESANDRO: Further question?

SEN. ODELL: Last question.

CHAIRMAN D'ALLESANDRO: Sure.

SEN. ODELL: In sense, as with our gambling issues that come before us, we're being asked as a legislature to sort of bail out a business that's failing.

MR. DESROSIERS: I'm sorry.

SEN. ODELL: As with a lot of other gambling issues in the past, in a sense, this bill is asking us to help bail out a business that's failing?

MR. DESROSIERS: I would say yes, a business that's having a hard time to survive. There are some paper bingos that do great, and this is not going to be the answer for every single charity in the state. There's no charity that's required to participate in this. It's an option that's out there for charities that are currently eligible to play bingo to participate in a new venue.

SEN. ODELL: Thank you.

CHAIRMAN D'ALLESANDRO: Thank you. Further question? Sen. Boyce.

SEN. BOYCE: Yeah, I did have a question. And I, you know -- the comment about them not being slot machines, I just want to -- maybe I missed this in the time I was out of the room. But, these machines, how would they -- how would the person pay for playing the bingo game? Is there a bill changer on the machine, where you put money into the machine?

MR. DESROSIERS: No, there is not, Senator. They would have to go to a point of sale, an employee, if you will, who will accept their money and give them a receipt for it. That receipt will have an account number, if you will, on it. At that point, the player would go to any terminal that he wishes, because they're all showing the same thing. It is not device where you're playing against that machine, you actually play against people.

They would put in their account number. The screen would come up. More than likely, there would be a game in progress and they would have to wait until that game was done to log on. They could play anywhere from one card to 15 cards; it's the same price as paper bingo, 25 cents a card; and they would play until they've used up their credits or until they've won money and left and checked out. They'd log off the system, go back to the point of sale with their receipt, and then the person operating the cash register would pay them their prize money.

SEN. BOYCE: So, the only real difference between this and a cash operated machine is that instead of putting the cash in the machine, you're putting the cash into a cash register and then putting a number in the machine which represents the cash that you put in. So that, you're, I think, splitting hairs there maybe, saying that it's not a cash operated machine, because you have to have --

MR. DESROSIERS: Well --

SEN. BOYCE: You have to take money to play the game each time you want to play the game, whether it's putting coins or dollar bills in the machine or giving the money to somebody else and then playing the machine. You're in effect doing the same thing, the only difference is whether there's a money exchange at the machine or pa some place a little ways away from the machine.

MR. DESROSIERS: Well, I guess you could relate that to -- it probably wouldn't be any different than if you had a machine that dispensed paper bingo and to get that. Rather than having a person that you pay in a hall to sell you the sheets. You'd put the money into a dispensing system that would give you the sheets for whatever games of bingo you're playing or a lottery machine in a grocery store where you put money in and they dispense -- the machine dispenses the product rather than a person.

SEN. BOYCE: Thank you.

CHAIRMAN D'ALLESANDRO: Thank you so much. Thank you for your testimony. Ray Nadeau.

RAY NADEAU, Alton, American Legion: Good morning, Mr. Chairman, members. We play a very active role, I believe, in Alton. We support a lot of projects. We do that through our fund raising. Our number one project right now, for example, is raising $12,000 to buy uniforms for the high school band. Some people think Alton's a very wealthy community from a tax standpoint; in fact, it is not. And we're very proud of the fact that we're raising those uniforms.

And I don't mean to imply that we're going to raise them only if this bill is passed. We're raising the money with or without this bill being passed. But we feel this would really be an asset, passage of this bill would be an asset for nonprofit organizations in this state. And I urge your support. Thank you.

CHAIRMAN D'ALLESANDRO: Thank you. Any questions? Sen. Boyce.

SEN. BOYCE: Since you're from Alton.

MR. NADEAU: I know you are --

SEN. BOYCE: Now, when you were running the bingo, was the -- Were you successful at selling the Lucky 7 tickets, which is usually where bingo operations make their money, or was there a problem selling those, as well?

MR. NADEAU: We were successful in the -- Those of you who are familiar with Lucky 7 tickets, when you have a small group of people -- and some of our bingos, believe it or not, were down to 12 people. A large bingo for us was 60 people in the middle of the summer. In the winter, it very often dropped to 12, usually averaged about 14 or 15.

If you're selling Lucky 7 tickets and somebody gets a winner, you don't sell any more tickets that night. You have a very small audience. So, as a result your sales are way down. So, we made very little on the Lucky 7s. In the summer, of course, we would make more because we would have 60 people there. But overall we were losing money. We lost money in December, January, February and March, and then we discontinued it; this was last year.

CHAIRMAN D'ALLESANDRO: Further question?

SEN. BOYCE: On further. In the bingo games when, you know, you have a small crowd like that, 12, 15, 60 people, a small group. You play a bingo game, somebody in the room wins every game.

MR. NADEAU: Exactly.

SEN. BOYCE: Now, in this electronic process, you've got a couple of machines there, people play on the machines. Even

if you had 15 in the room, you're not going to have a winner on every game in that room. Somebody in Hudson or somebody --

MR. NADEAU: Somebody some place would win, exactly.

SEN. BOYCE: -- somebody will win. So, do you think that the players who played bingo before would be really interested in coming to play in a situation where they know that probably every game there's not going to be somebody in that room who's going to win. The excitement of being in the room and hearing somebody yell bingo, knowing that their friend over here two tables away won the money. Is that same excitement going to be there when they're playing on a computer terminal against people 100 miles away?

MR. NADEAU: Well, they certainly would be, if they were the one that won. Of course, there would only be one winner per game. And obviously, there would not be the excitement of the people there. But they are -- one thing we found when we had our bingos, particularly when the crowd shrunk, is they wanted to play for more than the $10 that we would offer or $15. So, they would hit road for the Weirs or someplace else. So, we couldn't offer them enough, so we feel this is a viable alternative.

SEN. BOYCE: Thank you.

CHAIRMAN D'ALLESANDRO: Further question? If not, thank you very much for your testimony.

MR. NADEAU: Thank you.

CHAIRMAN D'ALLESANDRO: Mike McLaughlin.

MR. McLAUGHLIN: Thank you, Mr. Chairman, members of the committee. My name is Mike McLaughlin. I'm an attorney and lobbyist in Concord. I represent Multimedia Games, which is a bingo -- manufacturer of linked bingo networks. I have some testimony, which I will hand in.

A couple of things I'd like to just go over briefly. One of the most thing and one of the biggest criticism we always hear of this program is that it's a slot machine machine. Sen. Boyce was asking before about playing the machines. You cannot play the machine. The machine can only be played when the network is up and running; meaning, a minimum of 12 people are playing at the same time. So, if you went in there and there's one person and you put the money in, nothing can happen; because until there's a game ready to go with a minimum of 12 players, it can't be played.

The second issue is about the excitement. One of the things about electronic bingo is it pays at a minimum 80 percent of the proceeds into the machine dollars prizes. So, there's not one prize. There is a won bingo every game, but there's corner prizes, go-along prizes, close-to-bingo prizes, many different prizes are available, so the participant in the game is excited, because he's looking for his third corner, his close to bingo. There's many, many different prizes available during the course of the game.

The game itself is a participatory game in that you don't sit there and watch the machine. Just like paper bingo -- in paper bingo you daub your card. If you daub your card and sleep a bingo, meaning you've got bingo and you miss it and somebody gets bingo on the next call, then you lose. The same thing with electronic; it's a linked bingo game. The balls are dropped -- and the balls cost the exact same amount as they do in regular bingo, 25 cents per drop, that's per ball. The cards are a dollar per card. As you go through, you have to tap the screen to daub the card, if you don't tap the screen you don't win. You don't automatically get bingo just because the numbers falls. It's just similar to paper bingo.

The slot machine argument is made on a regular basis. I delivered to the committee two court decisions, one from Oklahoma, one from California; district court and circuit court of appeals dealing exactly with the type of network that's proposed for New Hampshire. I don't expect anybody to have to go through these, but the bottom line is the United States Circuit

Court of Appeals for the Ninth Circuit and for the Tenth Circuit, ruled that the system, as proposed in Senate Bill 127, is a technological aid to bingo. That means it remains a class 2 gaming device, which is available for use by charities.

We all know that slot machines are class 3 gaming devices. That simply means they can be played as a standalone device. There is nothing in Senate Bill 127 that would allow this network to be used as a standalone or to allow this network to function with less than 12 players.

Some of the discussions on bingo always go on accountability. And I think it's interesting to note that this system provides realtime accountability. All the information is processed and delivered to the central computer, which also is running at the Sweepstakes' headquarters. Every day they know exactly what happened.

I'm looking at the report here from the Sweepstakes Commission, New Hampshire Game of Chance System Compilation of Financial Reports. The New Hampshire Brain Injury Association played bingo last year, and they were the number eight revenue raised in the state. They had $897,000 worth of bingo played, and they said their net profit -- they put in this report -- is minus $57,000.

Now, you've got to look at a report and say there's something wrong with the accounting. And you can go through the entire report, there are -- This is $800,000 worth of revenue showing a $57,000 loss. It's hard to explain. The explanation is the accounting is so complex that they pile all the expenses in one place and nobody knows what they're making.

With linked bingo you have a significant tracing of expenses, reports, income -- it's available all the time. No charity would be able to look down and say, gee, I wonder what we made or lost on bingo? They have no idea today. They simply lump all the expenses in, and they say, oh, look at the Lucky 7s, they're doing great. Because the Brain Injury Association sold $892,000 worth of Lucky 7 tickets, and they

had a $200,000 profit. It just -- the accountability is not in the system.

So, in rapid conclusion, the linked bingo system is available to New Hampshire charities only. The linked bingo system is an intrastate T1-based computer-driven touch terminal system that cannot be played by anybody outside New Hampshire, cannot be changed into a slot machine, and functions at the same prices that paper bingo does.

The key in this whole thing is we need more people to come and play. They're leaving. In the last ten years, attendance is down 800,000, from a million-eight to just over a million last year. I'll answer any questions.

CHAIRMAN D'ALLESANDRO: Any questions? Sen. Clegg.

SEN. CLEGG: Mike, are you leaving those quotations with us?

MR. McLAUGHLIN: I delivered these to the Chairman, and I think -- I left one for everybody. I'll leave another one.

CHAIRMAN D'ALLESANDRO: If I may. When did you do that? I don't --

MR. McLAUGHLIN: Last Friday.

CHAIRMAN D'ALLESANDRO: Okay, so last Friday.

MR. McLAUGHLIN: Yes.

CHAIRMAN D'ALLESANDRO: I haven't seen it. So, I have them, they're in my office?

MR. McLAUGHLIN: Yes, yes.

CHAIRMAN D'ALLESANDRO: I'll distribute them, Mike. I haven't seen them. Thank you. Sen. Odell has a question.

SEN. ODELL: Just a couple of quick questions.

CHAIRMAN D'ALLESANDRO: Sure. Of course.

SEN. ODELL: I've heard two numbers from two different people; 25 cents a card to a dollar a card.

MR. McLAUGHLIN: Oh, excuse me. It's a dollar a card, 25 cents a drop of a ball. So, you buy a card for a dollar and you can play up to eight cards on the screen.

SEN. ODELL: What's the maximum bet?

MR. McLAUGHLIN: The maximum bet is -- is 75 cents.

SEN. ODELL: No. How many cards can I buy at one time? What's the maximum I can put in one game?

MR. McLAUGHLIN: Fifteen, 15 cards.

SEN. ODELL: Fifteen, how many dollars?

MR. McLAUGHLIN: Fifteen dollars.

SEN. ODELL: Fifteen dollars. So, we're not talking 25-cent cards. We're talking a maximum of $15 cards?

MR. McLAUGHLIN: Correct.

SEN. ODELL: Okay. How many places is this in -- Follow up question.

CHAIRMAN D'ALLESANDRO: Further question.

SEN. ODELL: Thank you. How many places in the country is this in play now?

MR. McLAUGHLIN: The system that Multimedia Games developed is only available in the Indian Nations. There's

probably about 68 or 70 locations operating today in Oklahoma, California, Washington State. That network is linked throughout the country in the smaller Indian Nations.

SEN. ODELL: Last question?

CHAIRMAN D'ALLESANDRO: Further question.

SEN. ODELL: Thank you, Mr. Chairman. So, that means that we would be -- the example we would use would be the Indian Nations, but in that case just the small Indians?

MR. McLAUGHLIN: Right, because the large Indians have casinos.

SEN. ODELL: Thank you.

CHAIRMAN D'ALLESANDRO: Further questions? If not, thank you very much for your testimony. Dave Victor.

DAVE VICTOR, American Legion, Littleton: Mr. Chairman and members of the committee, good morning. My senator, Mr. Gallus. My name is Dave Victor and I'm here very much in favor of Senate Bill 127. I'm with the American Legion of Littleton up in the North Country.

Our post uses bingo to raise money to sponsor our programs that the American Legion sponsors to aid our veterans and their families. Our post over the years has seen a decline in attendance of bingo -- in bingo. One of our biggest problems is the difficulty we face in getting volunteers to run the games. A small post like ours in the North Country has to struggle much harder then our comrades down here in the southern part of the state. Linked bingo will allow us to offer prizes equal to or larger -- equal to the larger posts in the southern cities and then will attract players to our games and means more revenue for us. Linked bingo does not require the labor-intensive sacrifice that our paper bingo does. And while we still will offer paper bingo, the revenue enhancement from this game will be a godsend to our post. I hope you will vote in favor of Senate Bill 127.

CHAIRMAN D'ALLESANDRO: Thank you for your testimony. Questions? Thank you very much. Betty Ward.

BETTY WARD, Elks Lodge, Littleton: Chairman, members, my name is Betty Ward. I am with the Littleton Elks Lodge. I thank you for letting me come today and testify. I would also like to say hello to our Sen. John Gallus.

Our lodge was in very serious financial trouble, and up until recently we began running bingo and the revenue from the games has pulled us out, and we are now doing fine. So, the passage of this bill, 127, would certainly make an increase in our bingo revenue and would make completely the large games in the southern part of the state.

I do not see this as expanded gambling. It is just a way to play bingo that makes it more exciting to people accustomed to using electronic technology. Also, I am an avid bingo player. I'm an avid person who likes to go to Foxwood and Canada to play the slot machines. And I also have firsthand information on playing the electronic bingo. They have had a class where we went and we learned to play, and they are definitely not the same. There is a big difference between casino gambling and the bingo machines. Thank you.

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. Any questions? Sen. Gallus, you're probably the most popular man in America today. To know you is to love you.

SEN. GALLUS: Mr. Chairman?

CHAIRMAN D'ALLESANDRO: Yes, please.

SEN. GALLUS: As Mr. Boyce, I have to say something.

CHAIRMAN D'ALLESANDRO: Yes, of course.

SEN. GALLUS: I would like to thank the folks from Littleton for traveling down to testify here today. Thank you.

MS. WARD: It was our pleasure, and thank you.

CHAIRMAN D'ALLESANDRO: Thank you very much, Ma'am.

MS. WARD: You're welcome.

CHAIRMAN D'ALLESANDRO: Alan, is it Alan Houde?

ALAN HOUDE, Moose Lodge, Milton: Good morning, Mr. Chairman and members of the committee. My name is Alan Houde, and I'm with the Milton Moose Lodge.

And in order to keep this short and sweet, as you're running behind. My statement was basically the same as what we've been speaking of. We do a lot of things for the community. We try to do as much as we can. We donate to a lot of different programs. We're having a hard time. We're struggling right now. This would definitely help us out, so we're 100 percent in favor of Senate Bill 127, and we would like to try to urge you all to vote for it, give us a hand, so we can continue to do the things that we've done.

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. Any questions? Thank you. Joe Carroll.

JOE CARROLL, American Legion: Good morning, Mr. Chairman and members of the committee. My name's Joe Carroll. I'm an American Legion, District 3 commander from New Hampshire.

And the American Legion, District 3 includes over 17 posts in my district with over 5000 members. I am here to support Senate Bill and to allow the American Legions to choose to play multi-linked bingo within New Hampshire. I feel this is a tool that will help us in many charities to take advantage of today's

technology and raise the money that we need to do the good things that we do.

I am sure I do not have to list the many community functions American Legions perform each and every day. From providing scholarships for the needy high school students that are heading off to college. And to providing the support that we give the family members of our reserves and national guards who are being called up on to continue serving in this country long after we have been in service as we are still proud to be doing so.

Some of the funds that we raise, just a few to go over is that we, like I said, we do scholarships, oratorical, baseball, we support the DARE program; that's a big fundraiser for us, and many others that we do in raising funds. To perform these tasks is an every day challenge. Bingo is one way that over the years has helped us to meet these challenges. But times change and we have to be able to change with them. SB 127 does not expand gambling. It simply allows us to keep within the times while playing the same old game.

This bill guarantees a licensed charity sponsor to linked bingo will actually see the profit from the game. Certainly due to the declining attendance, many bingo games are now not profitable or provide very little revenue to the host charity. I like the fact that the law will mandate that the charity will keep and no less than 33 percent of the net revenue from the game. This bill truly makes bingo in New Hampshire a charity fund activity.

Please keep in mind that those who have expressed or opposed to this bill also oppose the lottery and would ban current paper bingo if they were given the chance. They offer no alternatives to raise the charitable revenue except to advocate the high taxes. We do not look forward to the government for an increased tax or a handout. We simply ask that you give us the tools to work with, the update so we can continue to do what we need to do. Thank you, Mr. Chairman for your consideration of this matter.

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. Any questions? Thank you, sir. Herb Hansen.

HERB HANSEN, Granite State Coalition Against Expanded Gambling: Good morning, Senator. Good morning committee members. In an attempt to be brief, I'm going to pass out copies of my testimony.

CHAIRMAN D'ALLESANDRO: Great. Appreciate that.

MR. HANSEN: And I'm only going to mention a few things from it, and a copy for you. For the record, my name is Herb Hansen. And I'm the cochairman of the Granite State Coalition Against Expanded Gambling.

The coalition was formed in 1991, and it's a nonpartisan group opposed to all forms of expanded gambling and is composed of hundreds of individual and 20 organizational members. Including the state's leading anti-tax groups, several leading church organizations, the Sheriffs Association, the Police Chiefs Association, the New Hampshire Lodging and Restaurant Association, the Citizens Alliance for Action, the Children's Alliance of New Hampshire, the League of Women Voters of New Hampshire, the New Hampshire Women's Lobby and the New Hampshire Retired Educators Association.

We oppose Senate Bill 127 and video bingo machines, gambling in any form. Even though it is being promoted to the 2003 legislature as a means to provide revenues to worthy New Hampshire charitable organizations, such as churches and veterans groups. You can read all the rest of this in here.

I do want to call your attention to our Web site, which is called noslots.com and it has everything you want to know about gambling of any type, in any state, in any city here in the United States. I want to call your attention to one comment on this paper for you, is I. Nelson Rose, the gaming law expert and video law school in Los Angeles, characterizes halls filled with video bingo machines as bingo-cinos. Rose describes bingo

played on video screens as virtually indistinguishable from video slots. Bingo players do not have to call out bingo or even press a win button. All they have to do is put their money in and start the game, which could be done by pulling a handle. The bingo machine will tell them whether they have won by showing symbols, such as three reels, and then will be winners automatically.

In Ohio video bingo has moved beyond churches and bingo halls into hundreds of bars and bingo storefronts, all sponsored by charities. Senate Bill 127 does nothing to prohibit this. An *Akron Beacon Journal* story on Ohio video bingo can be found on our Web site and will outline the problems that's happened in Ohio.

Currently, in the town of Botkins, Ohio with a population of 1200, they are facing a proposed $50 million 2-acre video bingo casino. A minor change to Senate Bill 127, if it was passed, would allow video bingo casinos in New Hampshire. We object to Senate Bill 127 and would like to recommend that the committee come out with an inexpedient to legislate vote on this bill. Thank you.

CHAIRMAN D'ALLESANDRO: Any questions? Thank you very much for your testimony. Steven Wade.

STEVEN WADE, Executive Director, Brain Injury Association of New Hampshire: Yes, Mr. Chairman, members of the committee. Good morning. My name is Steve Wade. I'm executive director of the Brain Injury Association of New Hampshire. And we have run -- our charitable organization has run a bingo game in Hudson for the past 13 years benefiting primarily families that are parts of the Brain Injury Association. Our support group network, our network of -- our toll-free help line, as well as our -- some of our prevention work in the high school.

And I'm here to speak on behalf of the organization as opposed to this bill, and for a variety of reasons. The main reason is that we think that it will basically dilute and take

revenue away from our existing Lucky 7 sales, which as you've heard testimony is the main source of revenue for -- at bingo games. And over the last ten years I've had almost every job down there in the bingo hall from caller, to ticket seller to upstairs ticket control to cash control. And Lucky 7 sales are very, very sensitive to a lot of different things. And anything that potentially can compete with Lucky 7 sales or compete with the different aspects of the bingo game, would really -- again, would really hurt our revenues.

As you've heard, typically, bingo was a lost leader. Bingo attracts people in to play the game, it brings out the crowd and we, as I think most charitable bingos, lose money on bingo. But again, the purpose of bingo and the way it's structured currently is it's the lost leader that brings people in. And then we can then in turn sell Lucky 7 tickets, the pull-tab tickets where there is a profit margin and where the charities, hopefully, can earn some revenue. Bingo, as it's structured is very labor intensive. It requires many volunteers, and it's -- as I say, it's just very -- the sale of Lucky 7 tickets tend to be very, very sensitive to anything and --

The feeling of our bingo committee and many of our volunteers is that the linked bingo will really be more competition than help. You've heard the argument that you're going to potentially attract more people. Well, I don't necessarily buy that. It's been very -- And again, in the past ten years I've been involved, it's been very, very difficult to attract new players. One of the only ways that has been tried to do that is to increase your pay outs and, of course, your pay outs are limited by state law. So, unless you're going to allow every bingo to compete on an even playing field, in terms of the pay out issue, it's really -- it wouldn't be fair competition.

I guess another aspect of this is just the nature of bingo, which tends to be very social. I know where our bingo hall is held, many of the same players play every night, and they've played for years and years. So, again, it's a great gathering for many people.

I also wanted to just point out a couple of things in the bill which -- basically, it significantly changes the rules of the game in terms of bingo and the state, and think oftentimes to the detriment of the other charities. And again, these changes would only apply to and only benefit, essentially, the linked bingos. One of -- is that a charitable -- and I'll just read here from the bill. A charitable organization may designate non-members to operate multi-hall linked bingo games and may -- it goes on to say, may be compensated by the owner-operator of the facility. Well, again, that's a major change. Currently, only the bona fide members of an organization can participate in the operation of a bingo, and they may not be compensated.

Again, I think when you see a disconnect between the charitable organization and the people who are running the bingo, you open up a whole can of worms. You also open up a lot of opportunities for conflicts of interest. I think that's one of the really key points we'd like you to consider.

The other aspect of the bill that talks about -- and again, I'll quote from the bill. Multi-linked bingo machines shall pay out to the players in prizes not less than an average of 80 percent of gross machine income annually. Again, that's quite a big change from current state law, as well. Again, current law limits the nightly pay outs to charities to $3500 maximum and not based on a percentage of recommended.

So, again, this bill really changes the rules of the game and it's not a level playing field, though. Again, it's to the benefit of the linked bingo's. So, again, just in terms of closing my remarks the main point I would like to make, and again, this is based on ten years experience down in Hudson. Any competition for Lucky 7 sales would really be to the detriment of a charity and would really hurt the only really source of revenue we currently have in bingo games. So, I'd be happy to answer any questions and thank you.

CHAIRMAN D'ALLESANDRO: Thank you. Sen. Boyce has a question.

SEN. BOYCE: Thank you. As past president of the organization and the president of the association while you were ramping up from a very small bingo operation to the very successful one you have now, I am familiar with the accounting. And there was a previous speaker had made reference to -- he thought it was somehow the accounting was bogus on the way the Lucky 7 and the bingo were accounted for. And I -- Isn't it true that most of the expenses that are attributed to bingo are related to the people have to come in and buy a package.

Once they buy the package that determines that they have to pay for the seat at the table which the hall charges. You also have to account for the paper that's purchased to play the game, so we -- and there's a tax on that to the state. And all the expenses for bingo are really truly devoted to bingo. And isn't it true that the Lucky 7 expenses are not tied to that one person walks in the door and buys a package, but are tied, in fact, to actually the tax on the tickets and dispensing them? And so there's a -- the accounting is not really -- the organizations don't play games with the accounting to make it look like bingo is losing money, but bingo really does.

MR. WADE: No, it really does lose money on it. Again, bingo is sort of the lost leader. It brings in the crowd, then you can sell Lucky 7 pull-tab tickets, which is really your profit margin. That's the way its been for, you know, many, many years.

SEN. BOYCE: Thank you.

CHAIRMAN D'ALLESANDRO: Thank you, Senator. Thank you very much for your testimony. Ralph Doolan.

RALPH DOOLAN, Littleton: My name's Ralph Doolan and I'm from Littleton, New Hampshire. And I usually say at this point in testifying on these kind of bills that I represent all small businesses in northern New Hampshire, but I'll modify that today and say most small businesses in northern New Hampshire. And I only speak to oppose this on economic grounds. I'll leave the moral and social issues to our leaders in that field.

Our small businesses feel that slot machines will, in northern New Hampshire, where our economy is very fragile, will suck up discretionary spending. Then that begins to effect small business, like restaurants are always the first. Paper bingo would certainly be affected. And as I read this bill over and have listened to the testimony here today, I feel like the paper bingo would be doomed, at least in northern New Hampshire. And it's an important -- I feel that the bingo games are an important part of our social structure up there. There's thousands of people that enjoy doing that, and it will just eat away at the paper bingo.

The thing that -- if we're concerned about economics in northern New Hampshire, the thing about paper bingo that we like, and also the Sweepstakes that we like, is everybody sits down on Sunday night and plays bingo. And they pass the money around the table, and at the end of the night the money is all still in town, whether it's Berlin or Littleton. It doesn't go anywhere. We buy our sweepstakes tickets on Friday night, a little hope, and they send the money all down to Concord. They do with it whatever they do with it down here. But most of it all comes back to our community and is still going round and round.

Once we introduce slot machines up north and we begin to put up these mini casinos in our clubs, which would be profitable for the clubs, then slot machines would tend, again take that discretionary money, but it would leave the North Country. I didn't hear any testimony yet on -- other than the club's going to get 33 percent of, as I understand it, the net. I didn't hear where the other 77 percent or whatever is going to go. And if it goes out of the North Country that's not going to help our restaurants and our small businesses.

My wife got me out of bed early this morning and encouraged me to go down here and testify, because she's a bingo player and she'd like to protect that game. And I'll close with that, because whatever the other people said against it, I also agree with it. And I encourage the committee to vote to -- vote the bill inexpedient to legislate.

CHAIRMAN D'ALLESANDRO: Any questions? Sen. Gallus.

SEN. GALLUS: Make it easy. I would just like to thank my good friend Ralph Doolan for coming down and testifying today. It seems like the whole town of Littleton is here. Thank you, Ralph.

MR. DOOLAN: We're watching you John.

CHAIRMAN D'ALLESANDRO: Actually, in truth, Sen. Gallus, you're quite a draw, and we ought to pay admission. It would help the budget. Wonderful.

SEN. GALLUS: For charity.

CHAIRMAN D'ALLESANDRO: Greg Lull please. Is Greg here? All right, Ann Rice.

UNKNOWN: He just stepped out of the room.

CHAIRMAN D'ALLESANDRO: Excuse me?

UNKNOWN: He just stepped out of the room.

CHAIRMAN D'ALLESANDRO: How about Ann Rice. Waiting patiently, Ann, thank you very much.

ANN RICE, Associate Attorney General, Department of Justice: Good morning, Mr. Chair and members of the committee. My name is Ann Rice. I'm an Associate Attorney General, and I appear on behalf of the Attorney General Peter Heed in opposition to this bill.

For at least 30 years the Attorney General has opposed any expansion of legalized gambling, which Senate Bill 127 proposes to do. Our opposition is not based on moral concerns; it is based solely on law enforcement concerns. And we are aware that state revenue is often the motivating factor behind most gambling

legislation, it does not seem that that's the motivating factor behind this bill, as a matter of fact. But it's important to weight those revenue demands against the societal costs. There are significant societal costs that are associated with expanded gambling, and we believe that those costs far outweigh the financial benefits that may stem from expanded gambling.

Those costs that we identify quickly are compounding the financial difficulties of many of our citizens. It's documented that members of low-income houses spend considerably higher percentage of their income on gambling than those in middle income houses. And those -- in essence, it's those who can least afford it are the ones that spend the most. And that leads to financial strains with well-documented results of bankruptcy, divorce, child abuse, domestic violence and increased crime rate, specifically theft and those sorts of crimes to obtain more money.

It also poses a substantial risk of increased addictive gambling behavior. The National Gambling Impact Study Commission Report, which was done by the United States government in June of 1999, documents well the consequences of exposure to increased gambling and the associated increase in addictive behavior.

And finally, this type of expanded gambling just simply adversely impacts the character of the state. New Hampshire is one of the safest states in the nation, if not the safest because of its low crime rate. And we believe that expansion of the legalized gambling will jeopardize both of those.

It's clear from the previous testimony that the purpose of this bill is to lure more people into gambling. I would like to focus or direct the committee's attention to the reports -- the court decisions that were provided by Mr. McLaughlin, because it talks about the nature of this kind of multi-linked gambling which can go nationwide.

I note in the bill that there's nothing that says this can't go nationwide, and that was certainly a concern. But the other thing

is that it changes the nature of the game. My understanding is that a person would pay for a card and then pay for every time that three balls come down. So, it's consistently putting more money into the machine, and you can't keep playing unless you pay more money. So, it's anteing up, and all of those are concerns for us.

So, I would urge this committee to find the bill inexpedient to legislate, and I'm happy to answer any questions.

CHAIRMAN D'ALLESANDRO: Any questions? If not, thank you very much.

MS. RICE: I also have written testimony for the committee.

CHAIRMAN D'ALLESANDRO: Thank you very much. Wayne -- is it Wayne Lefebvre?

WAYNE LEFEBVRE, Merrimack: Morning, Mr. Chairman, distinguished members. I guess everybody's given you all the facts about this, and I just want to say my piece. I support this bill wholeheartedly. I've been involved with the Children's Cancer Lifeline, Merrimack Athletic Association, the Andres Institute of Art, the volunteer fire department, and we've been raising money for those people for three years. And two of the groups, three of the groups had to drop out because of the volunteer situation. Now, if we had multi-linked bingo that we did, they would be able to get some sort of income to help them survive. And anything that increases the money to nonprofits is my business. That's all I do, since I retired, is I try to raise money for nonprofits.

And I just think that it's not -- I listened to the lady speak about the slot machines and gambling, and I remember -- I'm sure you know Betty Hall. When me and my wife got the petition to have bingo in Brookline, New Hampshire, Betty Hall got up and said, you're going to have prostitution, the Mafia's moving in, we're going to have increased gambling. And we said, no, this is bingo. I mean, we have bingo players who come

to our place, play bingo and then rush to get to the next bingo hall so they can play bingo again. I don't think it's going to corrupt anybody. I know people consider it gambling, but it's a fun game, it's very social. People -- we have like a very -- a family-type atmosphere where they call me and my wife and tell us, I'm not going to be there tonight, I'm too busy.

I mean, it's a nice thing and we enjoy doing it and we're raising money for some good causes. And you know -- I know you guys have all the details, so I don't have to go through that and repeat myself.

CHAIRMAN D'ALLESANDRO: Great.

MR. LAFEBVRE: But I support this bill wholeheartedly. Anything that will bring nonprofit organizations more money is in my opinion a good thing. Okay.

CHAIRMAN D'ALLESANDRO: Any questions?

MR. LAFEBVRE: Any questions?

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. We appreciate it. David LaMarre-Vincent.

DAVID LAMARRE-VINCENT, Executive Director, New Hampshire Council of Churches: Thank you, Mr. Chairman, and members of the committee. My name is David LaMarre-Vincent. I'm a resident of Concord, New Hampshire. I serve as the executive director of the New Hampshire Council of Churches, which is ten statewide Christian denominations that are orthodox, Roman Catholic and protestant with about 700 local congregations in our state. I also have served on the board of directors of several nonprofits, including New Hampshire Center for Nonprofits that represents the nonprofits sector within this state.

The New Hampshire Council of Churches joins with the Chiefs of Police, the Restaurant and Lodging Association and the most eclectic group of individuals and organizations in the state

who agree on only one thing, and that is that video gambling machines are bad public policy. You'll hear from others about crime or the regulatory problems, but I would like to address simply why a Council of Churches would oppose the expansion of gambling into video gambling machines.

We do not oppose the gambling that we know and love and live with. We oppose because there is a qualitative difference between having a Coca-Cola and having coke, cocaine. And one expert has drawn the analogy that video gambling machines are the functional equivalent of the crack cocaine of gambling. The premier medical group that studies the change in the brain, so that it mimics addictive behavior, is in Harvard Medical School. And they have scientifically shown the mechanism by which video gambling machines are different than paper games, Lucky 7 games. This is not a test of the hearing about nonprofits, American Legions, Boy Scouts, it's about video gambling machines.

Our opposition is that, one, it's the responsibility of this committee to recommend policy that's good for the climate of the State of New Hampshire. And we believe, as does Gov. Benson, in his inaugural address to you, that we should not be -- New Hampshire should not be just the way the United States used to be, as Meldrim Thomson said. New Hampshire should be the way the rest of the United States is led to be. And simply because a couple of tribal nations or because a couple of states have video gambling machines playing bingo, we should not follow them. Because Massachusetts has a sales tax or an income tax, we should not follow them.

The consequences of establishing this kind of gambling in New Hampshire is that it will draw money further away from the nonprofit sector. Sixth and highest per capita income in the nation, one of the lowest in per capita taxes in the nation is part of our New Hampshire advantage. Our low crime rate is part of our New Hampshire advantage. Our high volunteerism is part of our New Hampshire advantage. We will struggle with the problem of raising funds for our nonprofits.

Secondly, we oppose the expansion of gambling with video gambling machines because of the impact they have on individuals, women, men, mothers and fathers, and by extension, the children that are in those families. They typically are those who gamble the most, who chase their loses and you create a new class of addictive individuals. In that national study, it was clearly shown that the incidence of problem gambling behavior and pathological gambling behavior is a function of how close you live to an establishment with video gambling machines.

So, if there was, within your city or the town next to your city, 65 video gambling machines lined up one after another, you can guarantee that you will have problems with individuals spending all that they have, mortgaging their homes and then the consequent disruption in family and social life. On that basis, we oppose the expansion of gambling. We'll live with what we have, Senator.

CHAIRMAN D'ALLESANDRO: Thank you. Any questions? If not, thank you very much for your testimony. We've got three more people who wish to speak. Chief Tim Russell please.

TIM RUSSELL, Chief of Police, Henniker: Good morning. I can assure you I'll be brief.

CHAIRMAN D'ALLESANDRO: Thank you.

MR. RUSSELL: My name is Tim Russell. I'm the chief of police in Henniker, New Hampshire. I'm also a past president of the New Hampshire Association of Chiefs of Police. I'm honored to be the incoming president of the New England Association of Chiefs of Police. And last, but not least, I'm a very proud member of the American Legion.

I'm here today representing the New Hampshire Association of Chiefs of Police and to the surprise to nobody in this room we're absolutely opposed to the expansion of legalized gambling.

You know, not so many years ago slot machines at casinos were converted from the old one-arm bandits to electronic machines. In other words, instead of having to pull the arm, just press a button. Then came electronic poker. Instead of waiting for the cards to be dealt, press a button. Now, instead of covering a bingo card with tabs, press a button. One can only wonder what's next.

The conversion of electronic games of chance serve one purpose and one purpose only, to extract as much money as possible from the wallets of the players as fast as they can. More often than not these dollars come from the wallets of the elderly and the poor, the people that can least afford it.

The Chiefs Association urges you to vote this bill as inexpedient to legislate and I thank you.

CHAIRMAN D'ALLESANDRO: Questions? If not, thank -- Excuse me, Sen. Gallus.

SEN. GALLUS: Chief, the current paper bingo cards, would you consider that gambling?

MR. RUSSELL: I would. And I would just point out that the Chiefs Association is not opposed to gambling, we're opposed to the expansion of gambling.

SEN. GALLUS: Follow up?

CHAIRMAN D'ALLESANDRO: Further question.

SEN. GALLUS: Do you currently have one of these operations, a current bingo game going on in the Henniker area?

MR. RUSSELL: I think the community church does it every once in awhile, but it's not a regularly scheduled event.

SEN. GALLUS: And I was just curious as to what the average age of those people probably was, any idea?

MR. RUSSELL: I don't know. I'm just basing my testimony on studies from electronic gaming.

SEN. GALLUS: Okay. Thank you.

CHAIRMAN D'ALLESANDRO: Thank you, Senator. Further questions? If not, thank you very much, Chief. Thanks for your patience. Ed Naile.

ED NAILE, Chair, Coalition of New Hampshire Taxpayers: My name's Ed Naile. I'm the chairman of the Coalition of New Hampshire Taxpayers, and I'm here to oppose the bill. We're a nonprofit. We raise money in hand-to-hand combat like everybody else, the hard way, and we never have enough of it.

And when our board, a few years ago, looked at the expansion of gambling in New Hampshire, and we mulled it over for quite some time and, you know, being a bunch of skinflints it looks as though it's a nice revenue source, all set raising taxes. And the more you look at it and the more we talk with other organizations nationwide, it appears to be a little bit more complicated than that. So, our board is opposed to it.

I'm on the board of the Anti-Expanded Gambling Association and we're opposed to it for several different reasons. It brings a political aspect, this video gambling, linking it with a large corporation instead of it being a paper issue in small towns and a social event. It's now become a large corporate, conglomerate-associated activity that is -- once you've entered into this --

I'm looking at some of the parts of the bill, it says a multi-hall linked bingo machine shall pay out to the players in prizes not less than an average of 80 percent gross machine income annually. Our good friends to the south have one of the highest, I think, lottery pay outs in the country, and now they're looking at changing that from, I think it's 83 percent or 86 percent down percentage-wise until they can balance their budget from overspending. I don't see why this 80 percent -- if the company that you associate yourself with -- you give up the paper bingo

and go with this company. If they find it's not as profitable as they thought it would be, they may want to taper that down a little bit; you get less and less.

I think once you've entered into the multimedia video bingo, as opposed to the paper, traditional New Hampshire bingo that we're used to, you've crossed that line. If this doesn't work out financially for them and they leave, what are we going to crank paper bingo back up again, if it's in a diminishing situation now? I think your best bet is to vote this inexpedient to legislate.

As with all expanded gambling, New Hampshire has a unique position with its tax base to be basically the Mall of New Hampshire. We do very well because of our situation with the sales tax with the border communities, which we looked at in Vermont and surrounding states. We do very well with tourism, because we're a family-friendly state. I think this is the wrong way to go. I think we should just keep it the way it is, and I'm very proud of my board for coming to that conclusion. It took a lot of arm wrestling to do it.

So, I'll thank you guys for looking at it, and I hope you vote it inexpedient to legislate.

CHAIRMAN D'ALLESANDRO: Any questions? Thank you very much for your testimony. Debra Lefebvre.

DEBRA LAFEBVRE, ANDRES Institute of Art, Brookline: Good morning. I appreciate your hearing me speak today. I am speaking in favor of SB 127. I'm here representing the Andres Institute of Art, a nonprofit institution located in Brookline, New Hampshire.

First thing I would like to say, this is not a slot machine. I repeat, this is not a slot machine. It is very different. I've had the opportunity to play with these and to try to better understand them. Before I would speak in favor, I did want to know a little bit more about them myself. And I did not see a magic button anywhere. I looked everywhere, because I did hear about that.

And please keep in mind, you are playing against another person somewhere on another machine. You're not playing against that machine. You're playing against another person in another chair sitting somewhere else. That is a major difference that I see. And the money is going to a nonprofit organization, not to the casino hall owner, but to a nonprofit organization. Otherwise, I would not be in support of this.

It's not meant to replace paper. I don't think that will ever happen. There's still actually a shelf on the machine where you can still play your paper and play the machine at the same time. Some people are that fast that they do that.

Based on addiction, it is gambling, but it's charitable gaming. It's a fine line, and I won't deny that it's gambling. As far as addiction goes, you can go into many, many Websites right now and play bingo on the computer, via your charge card, and you can go on and on and on and on and play that. You don't have to go to a place to play bingo. It is a social thing, that's what we focus on is the social aspect of this.

Let's see. The pay outs, I think there's a pretty high pay out to the players. If you looked at what the State Lottery pays out on their instant tickets and their lottery tickets, I don't think you'll find it up in that bracket. I think it's a much lower percentage. So, I think it's nice to see more money getting back to the players via this multi-hall bingo versus a basic paper lottery ticket. There's no way near that amount of money gets paid out. I don't want to give you the numbers, because I don't want to misstate them. I always thought it was more on the 10 percent rate.

Attendance. Our players, we've been doing this for 10 months now. We stopped and we started again. Our attendance is actually growing. We're doing things a little differently. It's paying all of our bills for the institute right now, and I'm very happy to say that. I don't think this will increase our attendance either. I think it will increase the money that we make while people are there already, and I don't think it will make it grow. But I do very much appreciate the smaller halls, and I do see how

it's a struggle and I have seen organizations stop. And I think us getting involved will help these smaller organizations further up north or wherever they might be in helping them to make the money that they're not making.

I also manage the hall in Brookline that we run the bingo out of. And I will go on the record to state, there will be absolutely no alcohol served amongst these machines whatsoever. It's not allowed now in the bingo hall. It was through a previous management it was allowed, believe it or not, and I will not hear of it. It turned bingo players away, they don't like that. It won't be allowed.

And we're just very supportive of the community in general. We're a small town. We have a sculpture park of 148 acres. We incorporate the scouts, we incorporate the schools, we bring them up and we try to work together. We also at the hall try to -- we collect toys, Share program for food and a lot of other things. It's very community oriented and social event.

As far as the legal -- the enforcement issue of it. I see an inspector -- maybe in ten months I think I've seen them four times and -- cause I know they're busy. There's not too many inspectors and there's a lot of commercial halls out there. They can only be held in a commercial hall. Every time there's a clean record, I'm very familiar with the -- getting a food license, getting a liquor license and involved with the charitable trust in getting the bingo going.

There is nothing more stringent than the lottery commission, absolutely not. If there's any -- it's totally watched over. The paperwork is done with a fine-toothed comb. I mean, it's there on paper and this way it will be on the computer. I think that will make enforcement less -- not less for the paper part, but it won't add to it very much, because it's all on the computer.

I'm very much in favor of this, and I have so much here that I don't want to go on and make it more lengthy for you.

CHAIRMAN D'ALLESANDRO: Great.

MS. LAFAVE: And I appreciate your listening to me and are there any questions?

CHAIRMAN D'ALLESANDRO: Appreciate that. If none, thank you very much for your testimony.

MS. LAFAVE: Thank you.

CHAIRMAN D'ALLESANDRO: Is there anyone else who wishes to appear for or against Senate Bill 127? Yes.

RICHARD HIGGINS, Portsmouth: My name is Richard Higgins from Portsmouth. I am a general manager of a commercial bingo hall over there, the United Bingo Hall of Portsmouth. I have five different organizations running seven different nights. We're in favor of the bill only because it will enhance their income. It's not a replacement of, it's just a progression of the game.

I've been doing this for over 20 years. We've gone from hard card to paper. It's just moving into the 21st century. We've lost revenue over the last seven years. We don't know if this will bring -- recapture that revenue. All we're looking for is something -- this is the only thing that's come down the pipeline that has actually added some new spice or new life to the game.

Unless the committee could untie our hands, have Sweepstakes untie our hands to allow us to compete and recapture a lot of our players that we're losing then I think that that -- possibly this bill would help us recapture maybe not a lot of it, but some of the money that we're losing. Thank you.

CHAIRMAN D'ALLESANDRO: Sen. Odell has a question.

SEN. ODELL: If I may?

CHAIRMAN D'ALLESANDRO: Yes, of course.

SEN. ODELL: Thank you. You represent a commercial entity?

MR. HIGGINS: That's correct.

SEN. ODELL: So rather than being the Elks or the Moose, this is a business enhancement opportunity for you?

MR. HIGGINS: It would be more for the nonprofits than myself. The way this bill is written up, I absorb all of the costs of running these machines. All the organizations need to do is a representative there to purchase a license to place on the wall. I absorb the cost. It's really -- the enhancement for me is I may be able to sell an extra soda or a bag of popcorn or a hamburger. That's the only enhancement for me.

SEN. ODELL: This isn't helping any Moose or Elks in Portsmouth?

MR. HIGGINS: Yes, it is.

SEN. ODELL: But you're the commercial operator?

MR. HIGGINS: That's right.

CHAIRMAN D'ALLESANDRO: Further question?

SEN. ODELL: No.

SEN. CLEGG: I have one question.

CHAIRMAN D'ALLESANDRO: Sen. Clegg

SEN. CLEGG: Thank you. If you put these machines in your hall you receive no money from them whatsoever, is that what you're implying?

MR. HIGGINS: No, I would receive a lesser part of the income. Thirty-three percent, as you know, would go to the nonprofits.

SEN. CLEGG: I just wanted to clarify. I thought I misunderstood what you had said. Thank you.

CHAIRMAN D'ALLESANDRO: Sen. Boyce, you have a question?

SEN. BOYCE: Yeah. This is -- I guess it might be classified as a would you believe.

CHAIRMAN D'ALLESANDRO: Okay.

SEN. BOYCE: We were given testimony earlier about the Brain Injury Association, which I'm very familiar with. And if I recall the numbers correctly about 800,000 per year was what was wagered on the bingo and another 800,000 was on the Lucky 7s, out of which they currently make about 150,000 per year.

And I made an assumption and plugged in the total 1.6 million into the formula in this bill, and it appears that the organization -- if the legalized video bingo was to cannibalize just what's there in the Lucky 7s now -- In other words the player walks through the door with their $40 a night, 20 goes to bingo, 20 goes to Lucky 7s, if all of that money, that 1.6 was cannibalized into the bingo side, under this formula their revenue would go down by about $50,000 a year. In other words, for them to stay even, then they would have to increase the amount of money coming through their door by another $800,000 a year. Does that sound reasonable to you?

MR. HIGGINS: No, because you could still sell pull-tab tickets to the person playing the machine. To the person that comes in and plays the machine, if it's a new player or new income, now you have a new person buying into those pull-tabs. The person playing the paper game -- from what they're telling you, it's true. These 150 people or 175 people that show up every day to play a paper game are not the people that are going to play those -- those machines. Maybe they're going to toy around and see what it's like, but for the most part it's going to bring in --

Our average now is -- you get 60 percent of your people are elderly. We're looking to grab that 35 and younger group that are looking for that fast moving -- they don't come to bingo with their grandparents but once a month because it's not fast enough for them. This way you bring in a new younger crowd that will play faster and also have new money. And that's what we're looking for, we're looking for the new money to recapture what we're losing now. And I think that's what these machines will do. It's not in replacement of, it's enhancement of.

CHAIRMAN D'ALLESANDRO: Sen. Boyce, do you have --

SEN. BOYCE: I'm fine.

CHAIRMAN D'ALLESANDRO: Sen. Clegg has a question.

SEN. CLEGG: Just one more question. If I understand correctly, I'm hearing testimony that bingo is dying, and that these machines will help raise the revenues and help charitable organizations. But I also know that horse racing is dying too. So, is there any reason why we shouldn't put these same machines in all the racetracks?

MR. HIGGINS: Quite a question. I'm not saying that it's right or wrong, okay. I'm just saying that just like the Sweepstakes they went from the $1 scratch ticket up to $10 scratch ticket, because they need to compete, right. So, in my business where I need to compete, I need to enhance the game that I'm -- or my product that I'm trying to sell to the public. This is what I'm trying to do.

SEN. CLEGG: Thank you.

CHAIRMAN D'ALLESANDRO: Thank you very much for your testimony. If there is no one else to testify for or against Senate Bill 127 -- for a second time?

MR. MCLAUGHLIN: Mr. Chairman, may I make one correction.

CHAIRMAN D'ALLESANDRO: For a second time?

MR. MCLAUGHLIN: I made one mistake with Sen. Odell's question.

CHAIRMAN D'ALLESANDRO: Okay.

MR. MCLAUGHLIN: The game proposed for New Hampshire is eight cards per screen, 25 cents per card. So, the maximum bet would be $2. There's no charge as the balls drop. There are other versions which -- In Indian country it's different. The version that is proposed for the New Hampshire network is eight cards, 25 cents per card and the balls drop as part of the purchase of the card.

SEN. ODELL: Mr. Chairman, may I ask a question of clarification?

CHAIRMAN D'ALLESANDRO: Sure.

SEN. ODELL: Is that correct, what you told me?

MR. MCLAUGHLIN: Yes, sir, it is.

SEN. ODELL: Did I hear $14 at one point per play?

MR. MCLAUGHLIN: That was my mistake.

CHAIRMAN D'ALLESANDRO: Okay, let's not get into a -- Sen. Odell, is your question answered?

SEN. ODELL: It is.

CHAIRMAN D'ALLESANDRO: Yes.

MR. LAFAVE: I just had to comment about -- Betty Hall, as we said was against this. Well, now she thinks we're an asset to the community.

CHAIRMAN D'ALLESANDRO: Great. Thank you.

MR. LAFAVE: That's all I wanted to say.

CHAIRMAN D'ALLESANDRO: Thank you very much. I will close the hearing on Senate Bill 127 and thank you all for attending.

[Hearing closed]

Speakers

SENATE Ways And Means

Date 3/12/03 Time 9:15 AM Public Hearing on SB 127

authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

(Please print) ***Please check box(es) at left that apply.***

SPEAKING?	FAVOR	OPPOSED	NAME	REPRESENTING
X	☒	☐	SEN. ANDRE MARTEL	
X	☒	☐	Rep. H.C. Dickinson	Dist # 4
X	☒	☒	DAVID LAMARRE-VINCENT	GRANITE STATE COALITION AGAINST & NH COUNCIL OF CHURCHES EXPANDED GAMBLING
X	☐	☒	Rep. Susan Almy	HD 18
X	☒	☒	Rep Laurie Boyce	
X	☒	☒	David Scott	District 71 - Dover
X	☐	☒	Phyllis Woods	District 69
X	☐	☐	Richard Higgins	Portsmouth.
X	☐	☒	ARNOLD ALPERT	AMERICAN FRIENDS SERVICE COMMITTEE
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		
	☐	☐		

SENATE Ways And Means

Date 3/12/03 Time 9:15 AM Public Hearing on SB 127

authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

(Please print) **Please check box(es) at left that apply.**

SPEAKING?	FAVOR	OPPOSED	NAME	REPRESENTING
X	☑	☐	☑	BRADFORD Cook	Diocese of Manchester
X	☒	☒	☐	BOB BLAIS - American Legion - JUTRAS POST
X	☒	☒	☐	MIKE M'LAUGLIN - ASSOCIATION OF CHARITABLE FUNDRAISERS
X	☒	☒	☐	GARY DESROSIERS - " " "
X	☒	☒	☐	RAY MADEAU - ALTON American Legion
X	☒	☒	☐	Kevin CRAIG - CUB SCOUT PACK
X	☒	☒	☐	DAVE VICTOR - LITTLETON AMERICAN LEGION
X	☒	☒	☐	BETTY WARD LITTLETON ELKS LODGE
X	☒	☒	☐	ALAN HOUDE MILTON MOOSE LODGE
X	☒	☒	☐	JOE CARROL DISTRICT 3 COMMANDER AMERICAN LEGION
X	☒	☐	☒	Herb Hansen, Coalition Against Gambling
X	☑	☐	☑	Steven Wade, Brain Injury Assn of N.H.
X	☑	☐	☑	RALPH DOOLAN LITTLETON NH
X	☒	☐	☒	Greg Lull Hillsboro NH VBC Project Four
X	☐	☒	☐	Russell MacCLEERY, CHICHESTER
X	☐	☐	☑	Teresa Rosenberger Brain Injury Assn of NH
X	☒	☐	☑	ANN RICE Atty Gen's Office
X	☒	☐	☒	Nancy Ford Reg. Dist. 60 ✓
X	☒	☒	☐	mr & mrs Wayne Lefebvre

SB 127

Favor	Opposed	Speak	Name	Representing
X		X YES	CHIEF TIM RUSSELL	N.H. ASSOC. OF CHIEFS OF POLICE
X		X yes	ED NADEAU	Coalition of NH Taxpayers
X	X	yes	Debra Lefebvre	Andres Institute of Art
X	X	x	Richard Higgins	Concord

Testimony

TESTIMONY TO SENATE WAYS AND MEANS COMMITTEE

March 12, 2003

SENATE BILL 127

New Hampshire law, RSA 287-E, authorizes the use of the game of bingo to raise funds for charitable organizations in New Hampshire. Charitable organizations can be religious, civic, fraternal or veterans so long as the organizations income is exempt from federal taxes. In addition, an organization must have been in existence for at least 2 years before it may obtain a bingo license. Senate Bill 127 proposes a new section be added to RSA 287, namely section G, that will allow the New Hampshire Sweepstakes Commission to license multi-hall linked bingo for New Hampshire.

Charitable bingo raises funds for many purposes, scholarships, youth athletics, civic projects and funds to maintain the existence of such organizations as American Legion Posts, VFW Posts and Elks Lodges.

Over the past decade charitable bingo has suffered from the many forms of gaming competition. The number of bingo and Lucky 7 licenses issued to charitable organizations has dropped from 372 in 1995 to 260 in 2002. One Hundred and Twelve (112) charitable organizations have stopped using Bingo to raise money for their charitable purposes.

Bingo revenue in 1995 was $40,500,000.00. In 2002 bingo revenue was c. 30,400,000.00, a decline of $10,100,000.00 or 24.9%. Attendance at Bingo games has declined by 509,300 visits in the same period, a decline of 32%.

In addition to declining attendance and revenue charitable bingo has changed in character. The creation, and success, of so-called "Commercial Bingo Halls" has had a profound effect on how charities play bingo. There are seventeen (17) commercial halls that reported activity in fiscal 2001. Those seventeen (17) halls produced over 74% of the bingo revenue in New Hampshire.

There were 160 bingo licensees reporting activity in FY2001, of these 69, or 43%, were playing at commercial halls. In simple terms, less than half of New Hampshire charities produced 2/3rds of all revenue.

In 1998 New Hampshire revised its law to allow the New Hampshire Sweepstakes Commission to license "electronic bingo player systems", (RSA 287-E:8-a). The law was changed to recognize the availability of a newer, more efficient way for a player to participate in bingo. These devices electronically receive bingo numbers that are electronically generated, and track the progress of the bingo cards stored in the device. The idea behind such devices is to give a bingo player the ability to play more games with greater efficiency. The more play the more money a charity can raise.

Senate Bill 127 allows the New Hampshire Sweepstakes Commission to license a technology based system that will link New Hampshire charitable bingo halls together via the use of secure, dedicated, transmission lines and computer technology. Players in different locations will be able to play against players in other locations at the same time.

Accounting and security issues are solved as the games are controlled by a remote secure computer, funds are accounted for and transferred

electronically to the correct accounts, reports are issued each day and any cash anomalies are caught quickly. In addition, the New Hampshire Sweepstakes Commission will receive the information from the network on a "real time" basis", not weeks after a game has been completed.

Should the New Hampshire legislature look at this type of electronic bingo system as a way to enhance charitable bingo revenue? Yes!

New Hampshire has been innovative and creative in many of its policies. New Hampshire authorized the first state lottery and has been on the leading edge to stay competitive with much larger states, i.e. POWERBALL. An electronically linked system between several smaller states that has helped New Hampshire maintain its sweepstakes revenue.

The funds raised by charitable bingo in New Hampshire are funds the state does not have to raise. Needs are being met in communities all over the state with these funds, students receive scholarship aid, Veterans have place to call their own and in this time of National Guard and Reserve call-ups the American Legion is providing support services for the families left at home. If the funds continue to shrink the calls to the state for money will increase.

It is not inconsistent with the State's history of innovation to have the legislature look at linking bingo games in New Hampshire. The state added electronic bingo player systems in 1998. This is a next and logical step.

An electronically linked bingo system would be a product that would be licensed by the state and offered to charities. It is a product that can link charities in New Hampshire and help them continue their good works. Charities in Peterborough can play the same game at the same time as a charity in Manchester. The accounting and the proceeds are 100% tracked. The expenses involved are known in advance and the participating charity need not struggle with accurate accounting and reports, as they are part of the computer-based system.

An electronically linked bingo player system will not be exclusionary. The fact that a charity in Conway is playing will not keep out a charity in Jackson. Today the commercial hall can only allow two charities per day to play in their hall, RSA 287-E:6 II (d). If the commercial hall is operating at capacity it cannot accommodate any other charities. One of the unintended consequences of commercial bingo halls is that they put smaller bingo operations out of business or force them to raise their prize levels to attract customers, a practice that can be a financial disaster to a charity.

An electronically linked bingo player system will be licensed and regulated by the New Hampshire Sweepstakes Commission. It will be offered to charities as a product they can use or not use. The bingo played on an electronically linked bingo player system is the same game, at the same price, that is being played on paper. It is not designed to replace paper bingo but to offer another product that will attract new players, allow smaller charities to participate in this fund raising activity and provide safe, secure and accurate accounting to the participating charity and the state.

Is it innovative? Yes. Is it secure? Yes. Is it Bingo? Yes. We urge the committee to recommend that electronically linked bingo player systems be authorized by the passage of Senate Bill 127. It is an idea that can reverse the downward trends in charitable bingo.



Two Federal District Courts Rule
and
Two Federal Circuit Courts Confirm

That "MEGAMANIA" Multi-Hall Linked Bingo is:

1. Bingo, in accordance with Federal Statutes;
2. The Electronic Player Station (EPS) used to assist players in playing MegaMania "is" a Technological Aid to assist in the playing of Bingo;
3. The EPS "is not" a Johnson Act Device; plus,
4. All four Federal Court decisions provide guidance in determining what games are bingo.

See Enclosed:

I. Ninth Circuit

A. August 29, 2000 positive decision by the U. S. Court of Appeals for the Ninth Circuit, United States v. 103 Electronic Gaming Devices, 223 F.3d 1091 (9th Cir. 2000), confirming;

B. November 23, 1998 positive decision by the U. S. District Court for the Northern District of California, United States v. 103 Electronic Gaming Devices, No. C 98-1984 WL 827586 (N. D. Cal. Nov. 23, 1998)

II. Tenth Circuit

A. October 31, 2000 positive decision by the U. S. Court of Appeals for the Tenth Circuit, United States v. 162 MegaMania Gambling Devices, 2000 WL 1634741 (10th Cir. (Okla.)), confirming;

B. October 26, 1998 positive decision by the U. S. District Court for the Northern District of Oklahoma, United States v. 962 MegaMania Gambling Devices more or less, et al, No. 97-C-1140-K (D. Okla. Oct. 26, 1998).

III. D. C. Circuit

The November 3, 2000 decision by the U. S. Court of Appeals for the District of Columbia regarding Lucky Tab is included for its relevance in determining classification of games.

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 – (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 – (785) 256-6560

Ninth Circuit

August 29, 2000
U. S. Court of Appeals

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 – (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 – (785) 256-6560

Exit and Save | Home | Back to list

Office of the Circuit Executive

U.S. Court of Appeals for the Ninth Circuit

Case Name:
USA V 103 ELECTRONIC GAMING
Case Number: 99-15675
Date Filed: 08/29/00

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

103 ELECTRONIC GAMBLING
DEVICES, Located at the Red Fox
Casino, Laytonville Rancheria,

Mendocino County, California,

Defendant,

CAHTO TRIBE, SHODAKI COYOTE

VALLEY CASINO; GENEVIEVE
CAMPBELL; SHARP IMAGE GAMING,
INC.,
Claimants,

MULTIMEDIA GAMES, INC.,
Claimant-Appellee.

No. 99-15675

D.C. No.

CV-98-1984-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
June 14, 2000--San Francisco, California

Filed August 29, 2000

Before: Andrew J. Kleinfeld, A. Wallace Tashima and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

COUNSEL

Stephen C. Lewis, Catherine J. Depew, Special Assistant United States Attorneys, Tulsa, Oklahoma; Sean Connelly, Attorney, United States Department of Justice, Denver, Colorado, for the plaintiff-appellant.

10797

Layn R. Phillips, Gregory R. Smith, Theodore H. Frank, Irell & Manella, Los Angeles, California, for the claimant-appellee.

OPINION

BERZON, Circuit Judge:

This case poses the question, what is bingo? Cf. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Friendly, J., sitting by designation) ("The issue is, what is chicken?"). In particular, we determine whether an electronic game called MegaMania, manufactured and sold by Appellee Multimedia Games, Inc. ("Multimedia"), is "bingo" as that term is defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. SS 2701-2721.

Appellant the United States thinks not. The Government claims that the terminals on which MegaMania is played are "gambling devices" within the meaning of the Johnson Act, 15 U.S.C. SS 1171-1178. The Johnson Act prohibits the possession and operation of any "gambling device", as defined in the Act, id. S 1171(a), on Indian land, see id. S 1175(a), unless authorized by a tribal-state compact, see 25 U.S.C. S 2710(d)(6). Invoking the Johnson Act, the Government brought this forfeiture action against, inter alia, some twenty-odd MegaMania game terminals located at the Red Fox Casino, an Indian gaming facility in Northern California.

Under IGRA, however, bingo and electronic aids thereto are generally permissible in Indian country. See id. SS 2703(7)(A), 2710. Multimedia asserts that MegaMania is a bingo game, and that the use of the games at the casino was therefore legal.

10798

I. The Game

In MegaMania, players compete against each other in a single, interlinked electronic game via a network of individual computer terminals located at tribal gaming facilities throughout the country. At their respective terminals, players may make an initial purchase at 25 cents per card of up to four electronic game "cards," displayed on the video screens of each terminal.1 A participant may play up to four cards at a time.

MegaMania does not commence until at least twelve people begin playing a minimum of 48 cards collectively. Once the game begins the players start receiving a series of three-number draws displayed on-screen and announced through audio channels.2 For each three-number draw a player must pay 25 cents per card that he or she is playing (e.g., if a player has three cards on her screen, she must pay 75 cents per draw).3

---

1 Cards are randomly generated by computer. (The parties have not explained whether the individual terminals or a central computer outside the terminals generates the cards.) Before the game begins, players may keep their initial card(s), request different cards, or not play them at all. Once the game commences, however, a player cannot change cards but may drop them.

2 The numbers in each draw are generated by a machine which, until the Government seized it, was located at the Choctaw gaming facility in Arrowhead, Oklahoma. The machine "blows" approximately forty numbered ping pong balls (out of a pool of seventy-five balls) into a tube. A human operator keys into a computer the number of each ball in the forty-number sequence. The computer then feeds those numbers into the "game host", which in turn transmits the numbers three at a time to remote host computers at participating gaming facilities. Finally, the remote hosts transmit each three-number sequence to the terminals in their respective facilities.

3 To begin playing, a player opens an account with a cashier at a point-of-sale station. The player is then given a specific account number that permits him to track his funds and to log on to a MegaMania terminal. The current balance in the account is displayed at all times on the terminal while the player is in the game. The 25 cent payments are deducted, and any prize money won is added, automatically to the player's account.

This pay-per-draw style of play is called "ante up" bingo. After a set of numbers is drawn players must press a "Daub Cards" button ("daub button") to "cover " the called numbers on the cards. When a player presses the daub button, the computer automatically covers corresponding numbers on the player's cards. After each three-number draw is displayed a player has eight seconds to decide whether to continue playing the card(s) for another draw.

When a player covers a straight line either horizontally, vertically or diagonally and declares "bingo" (by pressing the daub button) on one or more cards, every player in every facility nationwide is notified of the bingo. Once a player (or players) get(s) bingo, this straight-line game ends. Each player with bingo wins a monetary prize, the amount of which is based on the total number of cards being played in the game, the number of balls drawn since the game began, and the number of players reaching bingo simultaneously. The top jackpot on the straight-line game is $5000, awarded for a bingo achieved after the first four numbers are drawn, the earliest point at which a player can get bingo.

In addition to the traditional straight-line game, there is a "corners game" (dubbed "CornerMania"). In the corners game, each player who covers two, three, or four corners of a card gets a prize. The corners game is played continuously until the straight-line game ends, so there can be one or more CornerMania winners on each draw after the first. If no corners game prize has been awarded before the straight-line game ends, additional numbers are drawn three at a time until

at least one corner prize is given out.

II. IGRA and its Implementing Regulations

In 1988, Congress adopted IGRA to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. S 2702(1). IGRA

10800

places games played on Indian land into three classes: class I consists of traditional Indian games or social games played for prizes of minimal value; class II includes bingo and games similar to bingo, plus certain card games; class III is comprised of all games not in classes I or II. See id. SS 2703(6)--(8). Only if a tribe has negotiated a tribal-state compact may it run class III games on its land. See id. at S 2710(d)(1)(C). At the time the Government brought this forfeiture action, no such compact was in place between the Cahto Tribe and the State of California. Thus, for our purposes the critical question is whether MegaMania and the MegaMania terminals are class II gaming under IGRA.

IGRA defines class II gaming in relevant part as follows:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
>
> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, ...

Id. S 2703(7)(A). IGRA, however, explicitly excludes from Class II gaming "electronic or electromechanical facsimiles of

10801

any game of chance or slot machines of any kind. " Id. S 2703(7)(B)(ii).

As part of its initiative to deal with tribal gaming, Congress created the National Indian Gaming Commission ("NIGC") to regulate tribal gaming. The NIGC's broad powers include inspecting tribes' books and records, approving tribal-state

pacts, levying and collecting civil fines, monitoring and even shutting down games, and promulgating regulations and guidelines it deems appropriate to implement IGRA. See 25 U.S.C. SS 2705-06, 2713.

The NIGC has developed regulations to refine the scope of class II gaming. One such regulation, 25 C.F.R.S 502.3, set out in the margin, for the most part adopts the language of S 2703(7)(A).4 Another defines "a game similar to bingo" as "any game that meets the requirements for bingo under [25 C.F.R. S 502.3(a)] and that is not a house banking game under [25 C.F.R. S 502.11]." 25 C.F.R.S 502.9. A "house banking game" is "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. S 502.11.

---

4 Section 502.3 defines class II gaming in relevant part as:

> (a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
>
> (1) Play for prizes with cards bearing numbers or other designations;
>
> (2) Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
>
> (3) Win the game by being the first person to cover a designated pattern on such cards;
>
> (b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo . . . .

25 C.F.R. S 502.3.

III. Procedural History

The Government filed two in rem civil forfeiture actions: one in the Northern District of Oklahoma, and five months later, this one.

The Government filed this in rem action in May of 1998, proceeding against 103 electronic game machines located at the Red Fox Casino, Laytonville Rancheria, Mendocino County, California, including 20 MegaMania machines. The Government's complaint alleged that the games were subject to forfeiture as illegal gambling devices under the Johnson Act. Multimedia, inter alia, filed a claim and answer for the MegaMania machines. Shortly thereafter, the Government and Multimedia each filed motions for summary judgment. The district court granted Multimedia's motion, concluding that the MegaMania terminal is not a gambling device under the Johnson Act, but, instead, is a class II technologic aid to the game of bingo under IGRA. See United States v. 103 Elec. Gambling Devices, No. C 98-1984 CRB, 1998 WL 827586, at *8, *10 (N.D. Cal. Nov. 23, 1998) ["103 Elec. Gambling Devices I"].

We now consider the Government's appeal. Reviewing the district court's interpretation of IGRA and its grant of summary judgment de novo, see Alexander v. Glickman, 139 F.3d 733, 735 (9th Cir. 1998); Balint v. Carson City , 180 F.3d 1047, 1050 (1999), and viewing the evidence in the light most favorable to the Government, see Balint, 180 F.3d at 1050,5 we conclude, in agreement with the district court, that under IGRA, MegaMania is a legal class II bingo game, and that the MegaMania terminal is a legal class II electronic aid to bingo.

5 Neither party contends there is a dispute of fact, material or otherwise.

IV. The Game of Chance Commonly Known as Bingo

A. Bingo in the Abstract

Before considering whether MegaMania satisfies the three criteria for a class II bingo game set forth in 25 U.S.C. S 2703(7)(A)(i)(I)-(III), we turn to the Government's argument that these three factors are not the only criteria a game must meet to be an IGRA class II bingo game: The Government maintains that because IGRA uses the phrase`the game of chance commonly known as bingo' before spelling out the three criteria, other features that have traditionally characterized bingo games are also pertinent in determining whether or not a game is a class II bingo game. The Government contends, specifically, that (i) traditional bingo games lack the ante-up feature MegaMania possesses, (ii) in a traditional bingo game, unlike CornerMania, earnings depend on those of other players, and (iii) MegaMania's "manic pace " and potentially high stakes are markedly different than the placid tranquility and token rewards and losses associated with a traditional bingo game, see Appellant's Opening Brief ("AOB") at 23 (citing Alice Andrews, Hooked on Bingo 11 (1988) ("There is a calm and peacefulness in playing Bingo. There is a get-away-from-it-all feeling, kind of like bamboo fishing.")).

[1] The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why

would Congress have included them if they were not meant to be exclusive?

Further, IGRA includes within its definition of bingo "pull-tabs, . . . punch boards, tip jars, [and] instant bingo . . . [if

played in the same location as the game commonly known as bingo]," 25 U.S.C. S 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. Cf. Merriam-Webster's Collegiate Dictionary 114 (10th ed. 1999) (defining bingo as "a game of chance played with cards having numbered squares corresponding with numbered balls drawn at random and won by covering five such squares in a row"). Instant bingo, for example, is as the Fifth Circuit explained in Julius M. Israel Lodge of B'nai Brith No. 2113 v. Commissioner, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. See id. at 192-93.

Moreover, S 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. S 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

[2] Finally, and critically, the NIGC's interpretation of both IGRA and the NIGC's primary IGRA implementing regulation, 25 C.F.R. S 502, rests on the proposition that neither Congress nor the Commission intended to "limit bingo to its classic form." Action for Final Rule 25 C.F.R.S 502 ("S 502 Action"), 57 Fed. Reg. 12382, 12382. A fuller version of the Commission's interpretation is set out in the margin.6 The

---

6 [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.

[Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N"

NIGC's conception of what counts as bingo under IGRA, as articulated in the agency's Final Action on S 502 a few years after IGRA was enacted, is entitled to substantial deference, for "[administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work as efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933) (Cardozo, J.).

We briefly address one of the Government's specific extra-textual arguments as to why MegaMania is not class II bingo. The Government contends that the "ante-up" feature of MegaMania "distinguishes [it] from the game commonly known as

> "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.
>
> . . . .
>
> . . . Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

S 502 Action, 57 Fed. Reg. at 12382, 12387.

10806

bingo, as historically played throughout this country and indeed even today in tribal bingo facilities," AOB at 18-19, observing that in a traditional (presumably church-hall style) bingo game, players pay a fixed price for a "session pack" of cards, which lets them play for an evening. But the Government invokes nothing other than tradition to explain precisely why the ante-up pricing method is proscribed by IGRA. As the district court noted, "there is nothing in the statute or the regulations that requires a player to pay one price up front to play the entire game." 103 Elec. Gambling Devices I, 1998 WL 827586, at *7. Given Congress's and the NIGC's apparent intentions not to supplement IGRA's bingo specifications, we reject the Government's challenge to the ante-up feature.

All told, S 2703(7)(A)(i)'s definition of "the game of chance commonly known as bingo" is broader than the Government would have us read it. We decline the invitation to impose restrictions on its meaning besides those Congress explicitly set forth in the statute. Class II bingo under IGRA is not limited to the game we played as children.

B. "The Game is Won by the First Person"

As stated, IGRA defines bingo as, inter alia, a game "(III) in which the game is won by the first person covering a previously designated arrangement of numbers . . . on such cards." 25 U.S.C. S 2703(7)(A)(i); see also 25 C.F.R. S 502.3. The Government contends the "continuous-win" feature (or "interim win", as Multimedia puts it) of CornerMania does not comply with IGRA's third requirement,[7] because (i) CornerMania can result in multiple payouts before the straight-line game ends; and (ii) each CornerMania payout does not depend on the number of other players receiving CornerMania prize money but rather on the number of corners covered on each draw and on the number of balls drawn since the game

---

7 The Government concedes that MegaMania satisfies the first two criteria of S 2703(7)(A)(i).

10807

began. For these two reasons, maintains the Government,

MegaMania is not "won by the first person covering a previously designated arrangement of numbers or designations on such cards," 25 U.S.C. S 2703(7)(A)(i)(III).8

[3] The question before us, though, is whether MegaMania, not one of its constituent components, satisfies IGRA's statutory criteria for class II gaming. Thus, MegaMania as a whole is "the game" to which S 2703(7)(A)(i)(III) pertains.

[4] Turning to the question of whether MegaMania satisfies S 2703(7)(A)(i)(III), as an initial matter, there is no reason that the "previously designated arrangement" to which the statute refers must be a straight line. Indeed, the statutory description just quoted quite clearly permits any pattern to yield a prize, as long as the pattern is "previously designated". Moreover, even if we were to resort for this purpose to the inquiry into "essential" bingo we have already rejected, we would not rule otherwise. As an affidavit submitted to the district court by an FBI racketeering investigator attests, "[i]n the game commonly known as bingo . . . . [e]xamples of predesignated winning patterns include the traditional straight line, four corners, letters X or L, or covering the full card."

[5] As for the ultimate question of whether MegaMania is "won" by the first person covering a previously designated arrangement, assuming that in a given game of MegaMania players win several rounds of CornerMania before the straight-line game ends, it would appear that each such player has "won" by "covering a previously designated arrangement." The first focus of this issue is nothing less than the meaning of the word "win": Can someone "win " a game even though the other players may also "win"? That is, does "win" necessarily mean "beat"?

---

8 The Government does not contend that the fact that more than one player can win the straight-line game runs afoul ofS 2703(7)(A)(i)(III).

The answer, according to Webster's II New College Dictionary, is that "win" can mean "beat" but need not: That dictionary's first definition of "win" is " `[t]o achieve victory over others in a competition or contest,' " Webster's II New College Dictionary 1264 (1995), while the second is" `[t]o receive [money] as a prize or a reward for performance.' " Id.; see also 20 Oxford English Dictionary 361 (2d ed. 1989) (giving as one definition, "[t]o gain by effort or competition, as a prize or reward, or in gaming or betting, as a wager, etc."). So, for example, in an instant lottery game, everyone whose scratch card entitles them to ten dollars "wins " a prize, with no effect on how many others may win or in what amount.

Because "winning" does not necessarily entail vanquishing one's opponents, the meaning of "win" in the statute is at worst ambiguous. In light of that ambiguity, we look for indications that Congress intended to preclude the award of multiple prizes in a single game of bingo.

The record in this case establishes that, in addition to the usual straight-line prize, some traditional live bingo games also make interim payouts to players who cover the corners of their cards; we presume those players believe that they

have "won" prizes, even though the game has not ended and others may "win" as much or more. Additionally, as already stated, IGRA explicitly designates instant bingo as a class II game if it is played "in the same location" as a bingo game. 25 U.S.C. S 2703(7)(A)(i). That Congress would permit this variant of bingo, yielding interim prizes while the main game is ongoing, indicates it did not intend to forbid interim prizes like those CornerMania awards during a game of MegaMania.

In light of the foregoing considerations, it is telling that IGRA does not state the game has to end when the first person wins anything. Had Congress intended to proscribe interim prizes, the statute could have been drafted to say that "the game ends" instead of "the game is won," or could have

included an express restriction that only one prize be given during the game.9

[6] The sum of the matter is that the IGRA requirement that a "bingo" game be "won" by the "first player" covering a pre-designated pattern does not mean the game must end when one player does so, so that everyone else wins nothing. We conclude, therefore, that MegaMania is "won by the first person covering a previously designated arrangement of numbers . . . on [his or her] cards," 25 U.S.C.S 2703(7)(A)(i)(III), within the meaning of IGRA.

C. House Banking Game

[7] IGRA's implementing regulations designate any house banking game as class III gaming. 25 C.F.R. S 502.4(a); see also id. S 502.9 ("Game similar to bingo means any game that meets the requirements for bingo under S 502.3(a) of this part and that is not a house banking game under S 502.11 of this part."). Recall that a house banking game is "any game of chance that is played with the house as a participant in the game, where the house takes on all players , collects from all losers, and pays all winners, and the house can win." 25 C.F.R. S 502.11 (emphases added). The Government reasons that MegaMania fits within this definition because Corner-Mania's payouts do not hinge on the success of other players but are instead based on a mathematical formula that ensures that over time the house will net fifteen percent of players' antes.

[8] In MegaMania, however, the house is not a participant in the game the way it is in blackjack, for example, where the house plays a hand, and the success of the players depends on

9 We note that there is no indication that the straight-line game is a mere sham supporting CornerMania. The record reveals that CornerMania pay-outs are generally less than those awarded for achieving a straight-line bingo.

the success of the house. And the mere fact that the house nets a percentage of the players' fees for playing certainly cannot define a "house banking" game. In any church-hall bingo

game, the "house" regularly nets some portion of the money it takes in, or there would be no point in sponsoring the game. Thus, while the house does indeed earn a fixed percentage of players' antes over time, that fact cannot shoehorn Mega-Mania into the definition of a house banking game set forth in S 502.11. Just because the house turns a profit on players' deposits doesn't make the house "a participant in the game" that "takes on all players" and that "can win".10

V. "Technologic Aid" or "Electronic Facsimile"

[9] Under IGRA, class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)", 25 U.S.C. S 2703(7)(A)(i), but specifically excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Id. S 2703(7)(A)(ii). The Government claims the MegaMania terminal is an "electronic facsimile", Multimedia, an "electronic, computer, or other technologic aid[ ]".

---

10 25 C.F.R. S 502.4, which defines class III gaming under IGRA, refers to keno, a game in which the house does not play a hand, as a house banking game. Shakopee Mdewakanton Sioux Community v. Hope, 16 F.3d 261 (8th Cir. 1994), holds that the NIGC's decision to classify keno as class III gaming is entitled to Chevron deference. See id. at 264 & n.4 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). We do not have in the record a description of keno sufficient to compare it to MegaMania for the purpose of applying to it the criteria of S 502.11. We do know, however, that keno may not have a winner at all, see S 502 Action, 57 Fed. Reg. at 12385; thus the house can win over all players. In contrast, in MegaMania, someone other than the house must win. No NIGC regulation, however, refers to MegaMania as a house banking game. The general criteria of S 502.11 control therefore the question of whether MegaMania is a house banking game, and under those criteria MegaMania clearly is not.

The distinction under IGRA between an electronic "aid" and an electronic "facsimile" is one that has been litigated and decided before. When the issue arose in Spokane Indian Tribe v. United States, the court looked to the Senate Report on IGRA to distinguish between the two. See 972 F.2d 1090, 1093 (9th Cir. 1992). The Senate Report states:

> [T]ribes should be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for the tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental charac-

> teristics of the bingo or lotto games . . . . In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

Senate Report at 9 (emphases added). Relying on the Senate Report, Spokane Indian Tribe noted that an "electronic aid" "enhance[s] the participation of more than one person in . . . Class II gaming activities." 972 F.2d at 1093; see also Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1995) ("[A]n `electronic aid' to a class II game can be viewed as a device that offers some sort of communications technol-

ogy to permit broader participation in the basic game being played, as when a bingo game is televised to several rooms or locations.") (citing Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633, 637 (D.C. Cir. 1994)). Because the Pick 6 game at issue in the case involved only "a single participant play[ing] against the machine," the court held that it was an electronic facsimile rather than an electronic aid. 972 F.2d at 1093; see also Sycuan Band, 54 F.3d at 542-43 (concluding that electronic pull-tab game in which one player played against machine was exact, self-contained, copy of paper version of game and was thus a class III electronic facsimile thereof); Cabazon Band, 14 F.3d at 636.

[10] The MegaMania terminal, in contrast, does "link[ ] participant players at various reservations whether in the same or different States [thereby] broaden[ing] the potential participation levels." Senate Report at 9; see also Spokane Indian Tribe, 972 F.2d at 1093; Sycuan Band, 54 F.3d at 543. As such, the MegaMania terminal is not a "facsimile of any game of chance," 25 U.S.C. S 2703(7)(A)(ii), or, indeed, a facsimile of anything. Rather, the terminal is merely an electronic aid to human players of bingo, something like electronic mail with a graphic user interface. And, while the government has argued that MegaMania resembles a slot machine in certain limited respects, there has been no argument that the terminal is a "slot machine", id., which it plainly is not. Unlike a slot machine, MegaMania is in truth being played outside the terminal; the terminal merely permits a person to connect to a network of players comprising each MegaMania game, and without a network of at least 12 other players playing at other terminals, an individual terminal is useless. Contrast with Spokane Indian Tribe, 972 F.2d at 1093 ("The player can participate in the game whether or not anyone else is playing at the same time."); Sycuan Band, 54 F.3d at 543; Diamond Game Enterprises, Inc. v. Reno, 9 F. Supp. 2d 13, 20 (D.D.C. 1998) (holding that a certain electronic pull-tab game was a

facsimile because it did not permit multiple players to participate at once).

The Government urges that in CornerMania players effectively do play against the machine because their winnings do not depend on those of other players. First, in CornerMania players are competing against each other either to be the first to get a corners prize (if the straight-line game has ended), or (if a corners prize has already been awarded) to get a corners prize before another player gets straight-line bingo. Second, while the Government's argument could have relevance were CornerMania a free-standing game, one cannot play CornerMania without playing the whole game--MegaMania--and MegaMania requires twelve players to play.

In short, the MegaMania terminal is just an electronic aid to bingo, because it "merely broaden[s] the potential participation levels." Senate Report at 9. As such, the MegaMania terminal is class II gaming under IGRA. See 25 U.S.C. S 2703(7)(A)-(B).11

---

11 Because we find that MegaMania is class II gaming under IGRA, we do not reach MegaMania's argument that the Government should be judicially estopped from arguing that MegaMania is an impermissible class III game. Attempting to distinguish the allegedly class III pull-tab game at issue in Diamond Game Enterprises, Inc. v. Reno , 9 F. Supp. 2d 13 (D.D.C. 1998), the Government's briefs in that case unambiguously characterized MegaMania as class II gaming. Multimedia claims that the Government's Janus-faced briefing merits judicial estoppel. Because we find on the merits that MegaMania is class II, we need not decide whether the Government could be estopped in this case from arguing otherwise.

Likewise, we find it unnecessary to address Multimedia's claim that a series of letters and advisory opinions issued by the NIGC dealing with the class II status of MegaMania provide independent grounds for affirming the district court's grant of summary judgment. For that reason, we deny MegaMania's motion to strike certain portions of the Government's reply brief making what MegaMania asserts are selective, misleading references to one of the NIGC letters.

VI. The Johnson Act

The Government maintains that the MegaMania terminal, although specifically authorized under IGRA, is nonetheless an illegal "gambling device" under the Johnson Act. The Johnson Act's definition of "gambling device" includes slot machines (statutorily defined in painstaking detail, see 15 U.S.C. S 1171(a)(1)), and also any other "machine or mechanical device" designed "primarily" for gambling that, when operated, either delivers money or property or entitles a player to receive the same "as the result of the application of an element of chance," id. S 1171(a)(1) & (2). The definition also includes "essential part[s] intended to be used in connection with any such machine . . . , but which is not attached." Id. S 1171(a)(3). In most circumstances, the Johnson Act prohibits the possession or operation of any gambling device on federal land and in Indian country. See 15 U.S.C. S 1175. As mentioned, IGRA explicitly repealed the application of the Johnson Act to class III gaming devices used pursuant to tribal-state compacts, see 25 U.S.C. S 2710(d)(6), but did not explicitly address the relationship between IGRA and the Johnson Act as applied to class II gaming.

We are not aware of any authority pre-dating IGRA that addresses how the Johnson Act applied to bingo aids. In any event, there is little point at this juncture in engaging in time travel to determine how the Johnson Act would have applied to bingo in Indian country in the absence of IGRA. 12 What

12 We note that at least some members of the Congress that passed IGRA thought the Johnson Act did not apply to bingo aids, for the Senate Report so states. Senate Report at 12; see alsoS 502 Action, 57 Fed. Reg. at 12386 (stating NIGC's conclusion that the Johnson Act does not apply to bingo). Relying on the Senate Report, two courts have determined that the Johnson Act does not apply to bingo aids. See Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 827 F. Supp. 26, 31 (D.D.C. 1993), aff'd, 14 F.3d 633 (D.C. Cir. 1994); United States v. Burns, 725 F. Supp. 116, 124 (N.D.N.Y. 1989), aff'd sub nom. United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).

10815

matters now is how the two are to be read together--that is, how two enactments by Congress over thirty-five years apart most comfortably coexist, giving each enacting Congress's legislation the greatest continuing effect.

[11] The text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids. The statute provides that bingo using "electronic, computer, or other technologic aids" is class II gaming, and therefore permitted in Indian country. 25 U.S.C. S 2703(7)(A)(i). Reading the Johnson Act to forbid such aids would render the quoted language a nullity. Why would Congress carefully protect such technologic aids through the text of S 2703(7)(A)(i), yet leave them to the wolves of a Johnson Act forfeiture action? We cannot presume that in enacting IGRA, Congress performed such "a useless act". 2B Norman J. Singer, Sutherland Statutory ConstructionS 49.11, at 83 (5th ed. 1992). By deeming aids to bingo class II gaming in the text of IGRA, see 25 U.S.C. S 2703(7)(A)(i), Congress specifically authorized the use of such aids as long as the class II provisions of IGRA are complied with. See 25 U.S.C. S 2710(a)-(c).

[12] In short, while complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA, cf. 25 C.F.R. S 502.8 (defining "electronic facsimile" under IGRA as "any gambling device as defined in 15 U.S.C. S 1171(a)(2) or (3) [i.e., the Johnson Act]"); Cabazon Band, 827 F. Supp. at 31 ("[I]t is plainly evident that IGRA's `facsimiles' are the Johnson Act's `gambling devices.' "), we hold that mere technologic aids to bingo, such as the Mega-Mania terminal, are not.13

13 The Government conceded as much at oral argument, asserting that the court should "read the two acts harmoniously; if it's a bingo aid, it's not a Johnson Act gambling device."

10816

By so holding, we maintain fidelity to two entrenched canons of statutory construction: (i) courts should give effect to

both of two statutes covering related or overlapping subjects, see Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235, 249-50 (1970) ("accommodating" the blanket prohibition on federal court strike injunctions in labor disputes contained in S 4 of the Norris-LaGuardia Act, 29 U.S.C.S 104, to the collective bargaining enforcement provision of the later-enacted S 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. S 185(a)), and (ii) a specific statute governs a general one. As the Supreme Court explained in reconciling the long-standing statutory employment preference for Indians in the Bureau of Indian Affairs, see 25 U.S.C. S 461 et seq., with the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103:

> . . . [T]he Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.
>
> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . ."

Morton v. C.R. Mancari, 417 U.S. 535, 550-51 (1974) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)); see also Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); Crawford Fitting Co. v.

J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987), superseded on other grounds by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Congress's most recent relevant word on gaming is that aids to bingo are legal in Indian country. Section 2703 of IGRA is a "specific provision applying to a very specific situation," Morton, 417 U.S. at 550, and we must accordingly give it effect here.

Finally, our decision carries out Congress's goal--expressed in the text of IGRA--of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. S 2702(1); see also Senate Report at 9 (describing Senate's aim of fostering tribes' use of modern technology in branching their class II gaming operations, thereby "enhanc[ing] the[ir] potential of increasing revenues").

MegaMania is class II bingo. Because the MegaMania terminal is a class II aid to bingo, we conclude that it is not an illicit gambling device under the Johnson Act.

CONCLUSION

For the foregoing reasons, Multimedia scores bingo; the judgment is AFFIRMED.

10818

Go to top

Ninth Circuit

November 23, 1998
U. S. District Court
Northern District of California

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 - (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 - (785) 256-6560

NOV 24 1998

ORIGINAL
FILED
NOV 23 1998

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

103 ELECTRONIC GAMBLING DEVICES,

Defendants.

MULTIMEDIA GAMES, INC., et al.,

Claimants.

No. C 98-1984 CRB

MEMORANDUM AND ORDER

This lawsuit presents the issue of whether the "MegaMania" electronic gaming device is a class II gambling device within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, et seq. Now before the Court are two motions for summary judgment by claimant Multimedia Games, Inc. ("claimant") and plaintiff's Federal Rule of Civil Procedure 56(f) motion. After carefully considering the papers submitted by the parties, and having had the benefit of oral argument on October 13, 1998, claimants' motions for summary judgment are GRANTED and plaintiff's Rule 56(f) motion is DENIED.

BACKGROUND

I. FACTUAL BACKGROUND

A. The MegaMania Game

The MegaMania system was developed by claimant Multimedia and is operated by, among others, claimant Cahto Tribe. It permits players at Indian gaming facilities nationwide to participate in a single, large, linked, simultaneous bingo game in which players compete against one another. The players participate in the game at electronic player station ("EPS") computer terminals. A MegaMania game will not begin unless there are at least 48 cards being played by at least twelve people and no player may play more than four cards at any one time. Each card the player plays costs an initial 25 cents. An additional 25 cents is charged, should the player wish to continue playing the card, each time three additional numbers are electronically determined. The parties refer to this aspect of the game as "ante up" bingo.

The numbers drawn are displayed by the individual EPS visually and announced through audio as well. After a sequence of three numbers are drawn and announced, the player must press a "daub" button on the computer screen to "cover" the called numbers on each card being played. The computer identifies the "called" numbers and automatically covers the numbers when the daub button is pressed. After each sequence of three balls are announced, the player is given eight seconds to make the option of continuing to play her or his card or cards for another three ball draws for an additional 25 cents per card, or dropping one or more of the cards from play. When the first player or players covers a straight line on a card and declares "bingo" on one or more cards, all players nationwide are notified of the existence of the bingo. Upon declaring the "bingo," the player wins a prize determined by the number of cards being played, the number of balls that have been drawn, and the number of players achieving bingo simultaneously. The player declares bingo by pressing the daub button.

Each player to cover two, three, or four corners of a card also wins a prize. The corners game is played throughout the game until the straight-line game is won. If the game

ends with no corner prizes having been awarded, additional balls are called, three-at-a-time until at least one corner prize has been awarded.

B. IGRA.

Congress adopted IGRA for the express purpose of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA divides Indian gaming into three classes: class I comprises traditional Indian games or social games solely for prizes of minimal value; class II includes bingo and games similar to bingo, as well as certain card games, and class III consists of all games that are not class I or class II. 25 U.S.C. § 2703(6),(7), (8). Class III games may be played on Indian lands only if the tribe and the state within which the Indian lands are located have negotiated a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C). It is undisputed that no such compact has been negotiated here.

IGRA also created within the Department of the Interior the National Indian Gaming Commission ("NIGC") to regulate and oversee gaming on Indian land. 25 U.S.C. § 2704. Congress specifically authorized the NIGC to "promulgate such regulations and guidelines as it deems appropriate to implement" IGRA. 25 U.S.C. § 2706(b)(10).

IGRA defines class II gaming in relevant part as follows:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> > (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> >
> > (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
> >
> > (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
>
> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, . . .

25 U.S.C. § 2703(7)(A). Class II gaming, however, specifically does not include "(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any

kind." 25 U.S.C. § 2703(7)(B)(ii).

The NIGC has issued regulations which further define class II gaming as follows:

> (a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
>
> (1) Play for prizes with cards bearing numbers or other designations;
>
> (2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and
>
> (3) Win the game by being the first person to cover a designated pattern on such cards;
>
> (b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo; . . .

25 C.F.R. § 502.3. A "game similar to bingo" means "any game that meets the requirements for bingo under § 502.3(a) of this part and that is not a house banking game under § 502.11 of this part." 25 C.F.R. § 502.9. Section 502.11 defines a house banking game as "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11.

C. The NIGC Opinion Letters

In February of 1996, Multimedia requested that the NIGC determine whether MegaMania is a class II game under IGRA. In July 1996, after requiring claimant to make certain modifications to the game, the NIGC advised claimant that MegaMania is a class II game. In 1997, the NIGC asked claimant to make additional changes to the game. Claimant complied and on July 23, 1997, the NIGC again advised claimant that MegaMania is a class II game.

II. PROCEDURAL HISTORY

A. The Northern District of California Lawsuit

The plaintiff federal government ("government") filed this *in rem* civil forfeiture action on May 14, 1998 to enforce the provisions of 18 U.S.C. § 1955 and 15 U.S.C. §§ 1171-1178 ("the Johnson Act"). The government seeks to forfeit 101 electronic gambling devices located at the Red Fox Casino, Laytonville Rancheria, Mendocino County,

For the Northern District of California

California. The government contends that the devices were used to conduct an "illegal gambling business," as defined in the Johnson Act, and that they were transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed or used in violation of the Act. Among the 101 electronic gambling devices sought to be forfeited are approximately 20 MegaMania devices owned by claimant. The government claims that the MegaMania devices do not qualify as class II gaming under IGRA.

On July 22, 1998, the government moved for directions pursuant to Supplemental Rule E(4)(d). After the government filed its motion, claimant filed its motions for summary judgment with an initial hearing date of August 28, 1998. Claimant contends that it is entitled to a judgment that MegaMania qualifies as class II gaming under IGRA and therefore is not subject to forfeiture. The Court subsequently ordered that the government's motion for directions and claimants' motions for summary judgment be heard together on September 4, 1998. At a hearing on August 12, 1998, and upon the government's representation that it needed additional time to conduct discovery to oppose claimants' motions, the Court continued the hearing on claimant's motions until October 13, 1998. The Court gave the government until September 29, 1998 to file its opposition. The government filed its opposition on that day and at no time prior to the October 13, 1998 hearing did it request a continuance.

The Court held the summary judgment hearing on October 13, 1998. Two weeks after the hearing the government filed a motion and affidavit pursuant to Federal Rule of Civil Procedure 56(f) to continue claimants' motions for summary judgment to permit further discovery. The government's motion, along with claimants' motions, are currently pending before the Court.

B. The Oklahoma Action.

Five months before the commencement of this action, the government filed a similar forfeiture action against 267 MegaMania devices in the Northern District of Oklahoma. The Oklahoma action raises the same issues presented here. In its opposition to claimants' motions for summary judgment, the government represented that it was going to file a stay of

this action pending resolution of the Oklahoma action in order to conserve judicial resources since claimants' summary judgment motion was currently pending there. The government, however, never filed a motion for stay and at oral argument on October 13, 1998 represented that it was not seeking a stay. In any event, by order filed October 26, 1998, the Oklahoma federal court granted judgment in favor of claimants. United States v. 162 MegaMania Gambling Devices, No. 97-C-1140-K (D. Okla. October 26, 1998). Both claimant and the government have provided the Court with a copy of the Oklahoma decision.

DISCUSSION

I. THE GOVERNMENT'S RULE 56(f) MOTION.

Federal Rule of Civil Procedure 56(f) provides that if a party opposing summary judgment demonstrates a need for further discovery in order to obtain facts essential to justify the party's opposition, the trial court may deny the motion for summary judgment or continue the hearing to allow for such discovery. In making a Rule 56(f) motion, a party opposing summary judgment "must make clear what information is sought and how it would preclude summary judgment." Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987). The party seeking additional discovery must also explain its inability to presently provide the evidence it seeks to discovery; that is, it must show that it previously exercised due diligence to obtain the evidence it now seeks a continuance to obtain. See Brae Trans., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1442-43 (9th Cir.1986); Schwarzer, Federal Civil Procedure Before Trial ¶ 14:116 (1997).

The government claims that it needs additional time to produce evidence in opposition to summary judgment on two issues: (1) the deference the Court should accord to the NIGC advisory opinions, and (2) that there is "no traditional game of ante up bingo." The government has failed to meet its Rule 56(f) burden for several reasons.

First, the motion is untimely. In the Ninth Circuit a Rule 56(f) affidavit must be filed, at the latest, one day before the hearing on the summary judgment motion. See Ashton-Tate Corp. v. Ross, 916 F.2d 516, 519-20 (9th Cir. 1990); see also Fed.R.Civ.P. 56(c) (stating that affidavits opposing summary judgment must be filed prior to the day of the hearing). The

United States District Court
For the Northern District of California

government filed its affidavit two weeks after the October 13, 1998 hearing and has not provided any reasonable explanation as to why it did not file the affidavit in a timely manner. As the Ninth Circuit observed, "the process of evaluating a summary judgment motion would be flouted if requests for more time, discovery, or the introduction of supplemental affidavits had to be considered even if requested well after the deadline set for the introduction of all information needed to make a ruling has passed." Ashton-Tate Corp., 916 F.2d at 520.

The government argues that its belated affidavit and request for additional time should be considered because it asked for a continuance at the October 13 hearing. At the hearing, however, the Court noted that it had not received a Rule 56(f) affidavit from the government and it specifically asked the government what material facts are in dispute precluding a ruling on summary judgment. The government responded "we feel there are no material facts in dispute that would cause the court to be unable to at the proper time issue a summary judgment ruling." Transcript of October 13, 1998 Hearing ("Tr.") at 7:9-11.

The government went on to add that it believes it should have the opportunity to develop a factual foundation on the issues of detrimental reliance on the NIGC advisory opinions and estoppel, issues which the government pointed out are not related to the MegaMania game or the play of the game. The government's belated Rule 56(f) affidavit, however, does not address the estoppel and detrimental reliance issues identified by the government at the hearing. Thus, even if the government's statement at the hearing that it wanted to develop a factual record on the issues of estoppel and detrimental reliance could somehow be considered a substitute for a Rule 56(f) affidavit, it could not substitute for a Rule 56(f) affidavit seeking time to develop discovery on issues other than estoppel and detrimental reliance.

At no time during the hearing did the government request a continuance to develop a factual record on the ante up issue. In fact, at one point, the government explained that it might have made a mistake by failing to submit the declaration of one of its experts. Tr. at 12:15-18. The clear import of this statement is that the government had the evidence but, for whatever reason, chose not to present it in opposition to claimants' motions for summary

For the Northern District of California

judgment.

Finally, in its opposition papers the government repeatedly states that there are no material factual disputes. See, e.g., Opposition at 5 (stating that "the government believes that, while there are some disagreements about matters of fact, most of the differences are ones of characterization and none present a genuine issue of material fact that would preclude summary judgment entered on behalf of the United States"). If the government believed there were disputes of fact that somehow precluded summary judgment for claimant, but not the government, it never identified those disputes in its opposition papers. Under these circumstances, where a party did not properly request a continuance at the summary judgment hearing, did not identify the material factual disputes at the hearing, and represented that there are no disputed material facts at the hearing and in its opposition papers, it would be fundamentally unfair, and indeed make a mockery of Rule 56(f) and the summary judgment procedure, to consider a Rule 56(f) affidavit filed two weeks after the motion has been taken under submission.

The government's motion fails for a second, independent reason -- the government has not shown that it has been diligent in obtaining the discovery it now claims it requires. The Court initially continued the summary judgment hearing upon the government's representation that it needed more time to conduct discovery in this case. Yet, it still has not conducted any discovery in this case. The government responds that it intends to rely on the discovery obtained in the Oklahoma action. It did not advise the Court of this when it requested the initial continuance and, more importantly, it did not advise the claimants in this action who are not parties to the Oklahoma action.

Moreover, with respect to the NIGC advisory opinion issue, the government took all the depositions it claims it needs at least two weeks before hearing. The government merely states that it did not have the transcripts of the depositions prior to the hearing. The lack of a transcript, however, would not prevent the government from submitting an affidavit from the lawyer(s) who took the depositions as to what was said which creates a material dispute of fact, or prevent the government from submitting a Rule 56(f) affidavit. The government also

United States District Courts
For the Northern District of California

claims it will obtain the declaration of Penny Coleman, a government witness. The government offers no explanation as to why in due diligence it could not obtain the declaration of its own witness prior to the hearing.

The same lack of diligence exists for much of the evidence the government seeks to develop on the issue of whether the "ante up" feature of MegaMania makes it a class III device. For example, it seeks to offer the declarations of Perry Hauser, Jay Whitecrow, Gary Watkins, SAE Jerome Simpson, a government agent, and Rocky Waddell, an agent with the Oklahoma Alcoholic Beverage Control Board, but again does not explain why it could not obtain these declarations prior to the hearing, especially the declarations of government agents. The same is true for the proposed declarations of its experts, Drs. Robert Hunter and Fred Preston.

The third reason the government's Rule 56(f) motion fails is that none of the evidence it seeks to add to the record defeats summary judgment. In reaching its decision herein, the Court will accord no deference to the NIGC advisory opinions. Thus, all of the government's proposed evidence to support its argument as to why the Court should not afford deference to the advisory letters is immaterial. Moreover, for the reasons discussed below, the proposed evidence as to the ante up issue likewise does not defeat summary judgment in favor of claimant.

II. THE CLAIMANT'S MOTIONS FOR SUMMARY JUDGMENT.

Claimant filed two motions for summary judgment. The first seeks a ruling that MegaMania is the game of bingo or a game similar to bingo within the meaning of IGRA as a matter of law. The second seeks an order that MegaMania is not an electronic or electromechanical facsimile of any game of chance or slot machines of any kind.

A. Whether MegaMania Is Bingo Or A Game Similar To Bingo.

The undisputed material facts demonstrate that MegaMania falls squarely within the statutory and regulatory definition of bingo, or a game similar to bingo. The regulations implementing IGRA define bingo as a game played for prizes with cards bearing numbers, players cover the numbers drawn or electronically determined, and players win by being the

first to cover a designated pattern on such cards. 25 C.F.R. § 502.3. That is all the statute and regulations require. MegaMania meets each of these requirements. It is played for prizes with electronic cards bearing numbers. The players cover the numbers electronically determined by pushing the "daub" button. Players win by being the first to cover a designated pattern on the cards. The government nonetheless argues that MegaMania does not qualify as bingo or a game similar to bingo for several reasons. Each argument is addressed below.

First, the government contends that because MegaMania automatically identifies the numbers that are electronically determined, and all the player has to do to "cover" the called number or numbers is push the "daub" button, rather than push a button corresponding to the relevant number on each card, MegaMania is not bingo. There is nothing in IGRA or its implementing regulations, however, that requires a player to independently locate each called number on each of the player's cards and manually "cover" each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered.

The government's argument that the "ante up" feature of MegaMania takes it out of the class II category is equally meritless. There is nothing in the statute or the regulations that requires a player to pay one price up front to play the entire game. If the NIGC or Congress want to add such a requirement they may do so, but it is not the role of the Court to legislate. Indeed, the NIGC specifically considered and rejected a requirement that players pay one up-front price to play an entire game:

> One commentator questioned whether the definition of bingo should require that all players participate on an equal basis. The commentator stated that in a traditional bingo game, all cards are purchased for a preset price, notwithstanding limited promotional discounts. The Commission believes that such considerations are marketing decisions and are outside the Act's purview. Therefore, the Commission rejected this suggestion.

57 Fed.Reg. 12382, 12383 (emphasis added).

The government's proposed evidence identified in its untimely Rule 56(f) motion does not alter the Court's analysis. Its proposed evidence (which, of course, the claimant has not had an opportunity to dispute) that "ante up" bingo is not played in traditional bingo halls,

and that the game which inspired the idea to develop MegaMania was neither "traditional" nor "ante up," are arguments that may be presented to the NIGC or Congress as to why the statutory or regulatory definition of bingo needs to be modified. The Court notes, however, that the NIGC specifically ruled that Congress did not intend "to limit bingo to its classic form." 57 Fed.Reg. at 12383. Thus, the proposed evidence does not create a genuine dispute as to whether MegaMania is a game of bingo as is currently defined by the applicable statute and regulations.

The government's description of ante-up bingo as "parimutuel" wagering is similarly unavailing. All forms of parimutuel wagering are, by definition, class III gaming. See 25 C.F.R. § 502.4. The government claims that MegaMania is parimutuel wagering because a player wins a larger prize for achieving bingo at an earlier stage instead of a fixed prize amount regardless of when bingo is achieved. The NIGC specifically considered and rejected this argument as well:

> The Commission believes that Congress' intent was to include jackpot or progressive bingo in Class II as long as: (1) There is eventually a winner (in other words, the house never takes the jackpot), and (2) in each game there is at least a winner of a consolation prize.

57 Fed.Reg. at 12382. The government does not, and cannot, argue that either of these requirements is not met by MegaMania. The government's claim that the house keeps the money (ie., the 25 cents) if a player does not win on any particular three-number draw is simply another way of making its ante-up argument, an argument which the Court has already rejected.

The government also contends that MegaMania is not won by the "first person to cover a previously designated arrangement of numbers" since several players can win at once and all win the same prize; therefore, argues the government, players do not compete against each other as in bingo. The players do compete against each other, however. Once one or several players simultaneously achieve straight-line bingo, the game ends and the other players win nothing. The players compete to see who is the first to achieve bingo. There is nothing in the statute or regulations that suggests that Congress intended that a class II game of bingo have only one winner per game. Moreover, as the court noted in the Oklahoma

action, it is difficult to understand how awarding each winner the same reward, rather than requiring them to share the reward and thus obtain a less valuable prize, transforms MegaMania into a class III game. See United States v. 162 MegaMania Gambling Devices, No. 97-C-1140-K, slip op. at 5-6.

Finally, the government asserts that the "corners game" which is played simultaneously with the straight-line game makes MegaMania a class III game. In the corners game, the first player or players to cover two corners of a card wins a prize. That win, however, does not end the MegaMania game. The first player or players to cover three or four corners may also win a prize. If there has been a "corners game" winner, the MegaMania game ends when there is a straight-line winner. If there is a straight-line game winner before there has been a corners game winner, the corners game continues until there is a winner. Thus, the MegaMania game cannot end until there is at least one winner of the straight-line game and one winner of the corners game.

The government first contends that the corners game is not bingo because the game is not "won by the first covering a previously designated arrangement of numbers or designations on such cards," 25 U.S.C. § 2703(7)(A)(i)(III), since the corners game continues until the straight-line game is won and since each player wins the same predetermined prize regardless of how many winners there are of the corners game.

The Court is not persuaded. The first player to win a previously designated arrangement of numbers -- the straight-line game -- does win. There is nothing in the statute or regulations which prevents the awarding of interim or consolation prizes. The government's characterization of the corners game as being wholly and separate from the straight-line game is misleading and incorrect. The player pays 25 cents for a three-ball draw which entitles the player to participate in the straight-line game and the corners game. The player does not have to pay "extra" to participate in the corners game and the player does not have the option of playing only the straight-line game or the corners game.

The government also argues that the corners game is a house banking game and therefore does not qualify as class II gaming. See 25 C.F.R. § 502.9. The NIGC

For the Northern District of California

implementing regulations define a "house banking game" as "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11. In MegaMania, however, the house never wins because it does not participate. There is always a winner of the corners game and always a winner of the straight-line game. The house does not play a bingo card that the players have to beat. As stated above, the government's characterization of the corners game as requiring a wager from the player that he will cover two, three or four corners is misleading because it implies that the player pays additional money to play corners. The player does not. The player pays 25 cents to continue to participate in the straight-line game which also gives the player the opportunity to win interim prizes by covering corners.

In sum, MegaMania is the game of bingo or a game similar to bingo within the meaning of 25 U.S.C. § 2703(7)(A) as a matter of law. The other proposed evidence submitted by the government in its untimely Rule 56(f) affidavit, for example, that MegaMania was designed to look like a slot machine, the odds involved, the gambling motivators the game was designed to tap into, and psychological analysis of the effect of MegaMania on the player, does not create a genuine dispute of fact precluding summary judgment. Under IGRA, none of those factors is relevant to the determination of whether a game is bingo or similar to bingo.

B. Whether The MegaMania EPS Is An Electronic Facsimile.

Claimants' second motion for summary judgment addresses the issue of whether the EPS is an electronic facsimile of a game of chance. Under IGRA, class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith)," but does not include . . . (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7).

The NIGC implementing regulations define "electronic, computer or other technologic aid" as follows:

> a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used --
>
> (a) Is not a game of chance but merely assists a player or the playing of a game;
>
> (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and
>
> (c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.7. The regulations define an electronic facsimile as "any gambling device as defined in 15 U.S.C. § 1171(a)(2) or (3) [the Johnson Act]." The Johnson Act makes possession of any gambling device illegal in Indian country illegal. 15 U.S.C. § 1175; see also Cabazon Band of Mission Indians v. NIGC, 827 F.Supp. 26, 31 n.16 (D.D.C. 1993) The Act defines "gambling device" as a "machine or mechanical device" designed "primarily" for gambling and that, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. § 1171(a)(1) & (2). Thus, machines that are gambling devices within the scope of the Johnson Act are class III games under IGRA and therefore lawful only if authorized by a Tribal-State compact. See Diamond Game Enterprises, Inc. v. Reno, 9 F.Supp.2d 13, 17 (D.D.C. 1998); 57 Fed.Reg. at 12385 (stating the NIGC's position that "machines that fall within the scope of the Johnson Act are class III games"). The issue then is whether the EPS is a technologic aid or a gambling device within the scope of the Johnson Act.

The Court concludes that the MegaMania EPS is not a gambling device within the scope of the Johnson Act and therefore is not a facsimile within the meaning of IGRA. First, the Court agrees with the Oklahoma court that while the EPS is a machine designed primarily for gambling, and when operated either delivers money or entitles the player to receive money, the EPS itself does not deliver the element of chance, as is the case with a slot machine. See United States v. 162 Megamania Gambling Devices, 97-C-1140-K, slip op. at 9. Rather, it is the game of bingo that is a game of chance. Even if the EPS were not used, and a player was participating in a church hall game of bingo, there would be an element of chance.

Second, and perhaps most importantly, bingo does not fall within the scope of the

For the Northern District of California

Johnson Act. The Johnson Act does not apply to devices used in connection with bingo or lotto. See Cabazon, 827 F.Supp. at 31 n.17 (quoting S.Rep. No. 446 at 12, 1988 U.S.Code Cong. & Ad.News 3082); see also Cherokee Indians v. Oklahoma, 927 F.2d 1170, 1179 (10th Cir. 1991) (quoting the Senate report); United States v. Burns, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) ("Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto"); 57 Fed.Reg. at 12386 (stating NIGC's opinion that the Johnson Act does not cover bingo). Accordingly, since the Court has held that MegaMania is bingo within the meaning of IGRA, it is not a gambling device within the scope of the Johnson Act.

At oral argument the government argues that the Johnson Act does not cover aids used in the play of bingo. The MegaMania EPS, however, is such an aid within the meaning of IGRA. As the court in Diamond Game Enterprises, Inc. v. Reno, 9 F.Supp.2d 13 (D.D.C. 1998) recently stated:

> Courts that have reviewed the legislative history of the IGRA have recognized an electronic, computer or technological aid to possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, Spokane Tribe of Indians v. United States, 782 F.Supp. 520, 523 (E.D.Wash.1991), aff'd, 972 F.2d 1090, 1093 (9th Cir.1992); and (2) the "aid" is distinguishable from a "facsimile" in which a single participant plays with or against a machine rather than with or against other players. Cabazon, 14 F.3d at 636-37; 1988 U.S.C.A.A.N. at 3079.

Id. at 19-20. MegaMania meets both of these requirements.

First, MegaMania broadens participation levels. MegaMania allows players from California to Oklahoma to New York to participate in the same game of bingo. Compare with Diamond Game Enterprises, Inc., 9 F.Supp.2d at 20 (concluding that the Lucky Tab II is a facsimile rather than a technological aid because it does not permit multiple players to participate in the game at one time).

Second, MegaMania participants play with or against each other rather than with or against a machine. A player cannot play MegaMania by himself; the game will not even begin unless there are at least twelve participants. There is always a human participant winner of the straight-line game and there is always a human participant winner of the corners game, unlike a slot machine. The fact that players compete against each other to win

United States District Courts
For the Northern District of California

distinguishes MegaMania from those cases that found a gambling device to be a facsimile. See, e.g., Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542-43 (9th Cir. 1994); Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); Diamond Game Enterprises, Inc., 9 F.Supp.2d at 20;.

In sum, the Court concludes as a matter of law that the MegaMania EPS is a technological aid to the game of bingo that does not fall within the scope of the Johnson Act and therefore qualifies as class II gaming under IGRA.

III. THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT.

On November 18, 1998, the government filed a motion for summary judgment. Any evidence submitted in support of its motion cannot be used to defeat claimants' motions for the reasons stated in the Court's discussion of the government's Rule 56(f) motion. Accordingly, the motion is DISMISSED as moot.

CONCLUSION

For the reasons set forth above, claimant's motions for summary judgment are GRANTED, the government's Rule 56(f) motion is DENIED, and the government's motion for summary judgment is DISMISSED as moot. The remainder of this action, C 98-1984 CRB, is hereby reassigned to the Honorable Claudia Wilken as related to other forfeiture actions filed by the government is this district.

IT IS SO ORDERED.

Date: November 23 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
For the Northern District of California

Tenth Circuit

October 31, 2000
U. S. Court of Appeals

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 – (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 – (785) 256-6560

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

F I L E D
United States Court of Appeals
Tenth Circuit
OCT 31 2000
PATRICK FISHER
Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. 162 MEGAMANIA GAMBLING DEVICES, sued as: 162 Megamania gambling devices, more or less, computers, servers, "smart" cards, and related equipment located at the Cherokee Nation Bingo Outpost and Cherokee Palace, Catoosa, Tulsa County, Oklahoma - Cherokee Nation Bingo Outpost - Cherokee Palace, 83 MEGAMANIA GAMBLING DEVICES, sued as: 83 Megamania gambling devices, more or less, computers, servers, "smart" cards, and related equipment located at the Seneca-Cayuga Bingo, Grove, Delaware County, Oklahoma - Seneca-Cayuga Bingo; 40 MEGAMANIA GAMBLING DEVICES, sued as: 40 MegaMania gambling devices, more or less, computers, servers, "smart" cards, and related equipment located at the Cherokee Nation Bingo Outpost, West Siloam Springs, Delaware County, Oklahoma - Cherokee Nation Bingo Outpost; AUTOMATED BINGO BLOWER MACHINE, sued as: Automated bingo blower machine, together with computers and related equipment located at the Choctaw Indian Bingo (Arrowhead Bingo), Choctaw Arrowhead Resort, Canadian, Pittsburg County, Oklahoma - Choctaw Indian	No. 99-5064 (N.D. Okla.) (D.Ct. No. 97-CV-1140-K(J))
Bingo - Arrowhead Bingo - Choctaw Arrowhead Resort; COMPUTERS, NETWORK SERVERS, MODEMS, SOFTWARE, DATABASES & COMPUTER PROGRAMS, sued as: Computers, Network Servers, Modems, Software, Databases and Computer Programs located at Multimedia Games, Inc., Tulsa, Tulsa County, Oklahoma which are used to support the play of MegaMania gambling devices in Indian Country - Multimedia Games, Inc.; DEPARTMENT OF JUSTICE; JANET RENO, Attorney General of the United States; STEPHEN C. LEWIS, United States Attorney for the Northern District of Oklahoma,	

Defendants, CHEROKEE NATION OF OKLAHOMA; CHEROKEE NATION ENTERPRISES; MULTIMEDIA GAMES, INC.; THE SENECA-CAYUGA TRIBE OF OKLAHOMA, Claimants - Appellees, ---------- STATE OF OKLAHOMA; CHEYENNE GAMING COMMISSION; ARAPAHO GAMING COMMISSION; NATIONAL INDIAN GAMING ASSOCIATION; CHOCTAW NATION OF OKLAHOMA; THE CHICKASAW NATION, Amici Curiae.	

Appeal from the United States District Court

for the Northern District of Oklahoma

(D.C. No. 97-CV-1140-K(J))

Sean Connelly (Stephen C. Lewis, United States Attorney; Catherine J. Depew, Assistant United States Attorney, Northern District of Oklahoma, Tulsa, Oklahoma, with him on the briefs), United States Department of Justice, Denver, Colorado, for Plaintiff-Appellant.

Tony M. Graham of Feldman, Hall, Franden, Woodard & Farris, Tulsa, Oklahoma, and Jess Green, Seneca Cayuga Tribe of Oklahoma, Ada, Oklahoma (Graydon Dean Luthey, Jr. of Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, Oklahoma, for MultiMedia Games, Inc.; John G. Ghostbear, Tulsa, Oklahoma, for Cherokee Nation of Oklahoma; Layn R. Phillips, Gregory R. Smith, and Theodore H. Frank of Irell & Manella LLP, Los Angeles, California, with them on the brief), for Claimants-Appellees.

Neal Leader, Senior Assistant Attorney General for the State of Oklahoma, Oklahoma City, Oklahoma, on the brief for Amicus Curiae State of Oklahoma; Gary S. Pitchlynn of Pitchlynn, Morse, Ritter & Morse, Norman, Oklahoma, for Amicus Curiae The Cheyenne and Arapaho Gaming Commission; Bob Rabon of Rabon, Wolf & Rabon, Hugo, Oklahoma, and John Tahsuda, General Counsel, National Indian Gaming Association, Washington, D.C., for Amici Curiae National Indian Gaming Association, Choctaw Nation of Oklahoma, and Chickasaw Nation.

Before **BRORBY**, **McKAY**, and **MURPHY**, Circuit Judges.

BRORBY, Circuit Judge.

The United States filed a civil complaint in the Northern District of Oklahoma seeking the forfeiture of "MegaMania" machines operated in Indian country. The government asserted the machines operating the game "MegaMania" are unlawful gambling devices operated in violation of the Johnson Act, 15 U.S.C. §§ 1171 - 1178.(1)

A district judge subsequently issued a warrant to seize the MegaMania machines. The machines are owned by the Cherokee Nation of Oklahoma and the Seneca-Cayuga Tribe of Oklahoma (the Tribes). The Tribes and Multimedia Gambling Devices, Inc. (Multimedia), the manufacturer of the machines, filed claims and answers seeking a declaratory judgment determining the machines are lawful under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 - 2721, and not illegal gambling devices under the Johnson Act.(2)

The district court granted summary judgment in favor of Multimedia and the Tribes, ruling the MegaMania machines are utilized for a "Class II" game permitted by the Indian Gaming Regulatory Act and are not illegal gambling devices under the Johnson Act. The district court subsequently denied the government's motion to alter or amend the judgment. The government appeals the decision of the district court. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

A. The Game

At the heart of this dispute is the nature of the game MegaMania. Thus, we begin our discussion with a description of this game, which the Tribes and Multimedia liken to bingo or a game similar to bingo. MegaMania is played on a machine called an electronic player station. These player stations are located on Indian lands in Oklahoma, California, and elsewhere. A person playing MegaMania begins the game by electronically selecting up to four cards with randomly generated numbers. The player must pay twenty-five cents per card to begin the game. A game will commence once at least twelve players nationwide purchase at least forty-eight cards. A bingo "blower" located in Indian country in Oklahoma selects three numbered balls, and a human operator transmits the numbers on the balls by computer to Multimedia's headquarters where they are sent through a computer network to each player station. The player then touches the corresponding space or spaces on the player's card appearing on the MegaMania station screen. To continue playing the game, a player must pay an additional twenty-five cents per card in exchange for the numbers on the next three balls. These numbers are transmitted in roughly ten second intervals. Consequently, the player must continue to pay twenty-five cents to one dollar every ten seconds to stay in the game.

With the purchase of these numbers, a MegaMania player simultaneously engages in two aspects of the game, namely "straight-line" bingo and "CornerMania." Straight-line bingo is won by the first player or simultaneous players to cover or "daub" five spaces in a straight line on the player's bingo card image displayed on the screen. Once one or more players cover five spaces in a row on a card, either horizontally, vertically or diagonally, the game terminates unless no player has won at CornerMania. The amount the straight-line winners take depends on a variety of factors: the number of cards played; the number of balls drawn; the amount of money carried over from prior games; and the number of simultaneous straight-line winners.

The object of the CornerMania portion of the game is to cover two, three or four corners of a card and win an interim monetary prize. CornerMania is played until the straight-line bingo is won. If the straight-line bingo ends with no CornerMania winner, additional balls, at three-ball increments, are

drawn until at least one CornerMania winner is announced. The amount a player wins at CornerMania is based on a fixed formula that depends solely on the number of corners covered and the number of balls drawn at the time the corners are covered.

On average, Multimedia and the Tribes retain fifteen percent of the amount taken in by the machines and the winning players receive eighty-five percent. In every game of MegaMania, there is at least one straight-line bingo winner and one CornerMania winner.

B. The Statutes

Two pieces of legislation are relevant to this case--the Johnson Act and the Indian Gaming Regulatory Act. Both pertain to gaming activities in Indian country. The Johnson Act makes it unlawful within Indian country to possess or use any "gambling device." 15 U.S.C. § 1175(a). A "gambling device" is defined as any slot machine, 15 U.S.C. § 1171(a)(1), and

any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. at § 1171(a)(2).

Following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon I*), which authorized gaming on federally recognized Indian lands, Congress enacted the Indian Gaming Regulatory Act (the Gaming Act), also known as IGRA, codified at 25 U.S.C. §§ 2701 - 2721.[(3)]

The Gaming Act classifies Indian gaming into three different categories: Class I, Class II, and Class III. 25 U.S.C. § 2703. Each of these categories is subject to different degrees of state and federal regulation. *See Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 827 F.Supp. 26, 27 (D. D.C. 1993), *cert. denied*, 512 U.S. 1221 (1994) (*Cabazon II*). The Tribes possess exclusive jurisdiction to regulate Class I gaming, which includes social games and traditional forms of Indian gaming connected to tribal ceremonies. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class I gaming is not at issue here.

The Gaming Act defines Class II games to include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, *and other games similar to bingo* ...." 25 U.S.C. § 2703(7)(A) (emphasis added). Class II games are regulated by the National Indian Gaming Commission (Commission) and can be operated on Indian lands without a tribal-state compact. *Id.* at §§ 2703(7), 2710(b). All other gaming activity is Class III gaming and is allowed only where a tribal-state compact is entered. *Id.* at §§ 2703(8), 2710(d). The central issues of this case are whether the MegaMania game is properly classified as a Class II or III game, and whether the MegaMania machines are illegal gambling devices under the Johnson Act.

II. DISCUSSION

We review the grant of a motion for summary judgment *de novo*, applying the same legal standard as the district court. *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 807 (10th Cir. 1998). As we have stated on numerous occasions:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the district court.

Id. (quotation marks and citations omitted). The facts in this case are not in dispute. The only question in this case is whether the district court correctly analyzed and applied the relevant statutes and regulations. We review the district court's interpretation of federal statutes and regulations *de novo*. *Id.*; *Eastern Inv. Corp. v. United States*, 49 F.3d 651, 657 (10th Cir. 1995).

In conducting our *de novo* interpretation of the statutes at issue, we apply the canons of construction germane to issues arising under Indian law. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quotation marks, citation, and alteration omitted). In issues arising under Indian law, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

In interpreting the Gaming Act, we look to the definitions of the terms and phrases contained therein as set forth by the Commission. Congress created the Commission, 25 U.S.C. § 2704, and gave it authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the Gaming Act]." 25 U.S.C. § 2706(b)(10). Thus, we afford the regulations promulgated by the Commission and published in the Code of Federal Regulations the deference prescribed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Maier v. United States Envtl. Protection Agency*, 114 F.3d 1032, 1040 (10th Cir.) (stating where Congress explicitly delegates authority to an agency, its legislative regulations are given deference by the courts), *cert. denied*, 522 U.S. 1014 (1997). When reviewing an agency's interpretation of a statute Congress charged it to administer, we ask two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If Congress has explicitly or implicitly delegated authority to an agency, legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 1040 (quoting *Chevron*, 467 U.S. at 842-44) (quotation marks and citations omitted).

We also consider the opinion letters issued by the Commission that interpret the Gaming Act and the interpretations of the Gaming Act set forth by the Commission in the Federal Register. Although we are not obligated to afford these informal pronouncements the same deference prescribed under *Chevron*, such opinion statements are "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662-63 (2000); *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 220 F.3d 1200, 2000 WL 1472451, at *7 (10th Cir. 2000). Under *Skidmore*, the weight to be afforded non-binding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

A. The Designation of MegaMania as a Class II Game Under the Indian Gaming Regulatory Act

The Gaming Act defines Class II gaming as:

(A)(i) the game of chance *commonly known as bingo* (whether or not electronic, computer, or *other technologic aids* are used in connection therewith)

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, *and other games similar to bingo*,

....

(B) The term "class II gaming" does not include

(i) *any banking card games*, including baccarat, chemin de fer, or blackjack (21), or

(ii) *electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.*

25 U.S.C. § 2703(7) (emphasis added). Thus, subsections A(i) (I), (II) and (III) set forth three explicit criteria for classification as a Class II game.

In this case, MegaMania meets these three criteria. Specifically, it is played with an electronic card that looks like a regular paper bingo card containing a grid of numbers, and the first persons to cover a previously designated arrangement of numbers in this case five straight-line spaces and the necessary corner spaces wins a monetary prize. The Ninth Circuit, in addressing the same issues connected with MegaMania, reached the same conclusion in *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1095 (9th Cir. 2000).

As it did before the Ninth Circuit, the government points to certain variations in the game MegaMania which it asserts make it a Class III game. Specifically, the government argues MegaMania fails to meet the statutory definition of a Class II "bingo" game because: 1) CornerMania is a house banking game, and thus is properly categorized as Class III gaming; 2) the CornerMania game is played concurrently with the straight-line bingo game and includes multiple winners per game; 3) the "ante up" feature fundamentally alters the game to the extent it is no longer a Class II game; 4) the MegaMania machines more closely resemble slot machines than the game commonly known as bingo; and 5) the MegaMania machines are prohibited electromechanical facsimiles of the game of bingo. We are not persuaded by these arguments for the following reasons.

In order to determine whether the game MegaMania is a Class II or III game, we turn for guidance to the definitions relating to Class II games set forth by the Commission as published in the Code of Federal Regulations. In § 502.3(a), the Commission defined Class II gaming as "bingo or lotto (whether or not electronic, computer, or other technological aids are used)" and followed the definition of bingo described in 25 U.S.C. § 2703(7).[4]

The Commission defined "[g]ame[s] similar to bingo" as "any game that meets the requirements for bingo under § 502.3(a) of this part and that is not a house banking game under § 502.11 of this part." 25 C.F.R. § 502.9. The phrase "house banking game" does not appear in the definition of bingo set forth in the Gaming Act. However, Congress specified Class II gaming does not include "(i) any *banking card games*, including baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B) (emphasis added). The Commission defined a "house banking game" as "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11. In determining whether MegaMania is a Class II game, we note the Gaming Commission expressed its opinion the variations of the game "commonly known as bingo" featured in the MegaMania game are minor, do not alter the fundamental characteristics of the game of bingo, and meet the criteria of the Class II game of bingo or a game "similar to bingo."

1. House Banking Game

The government asserts the availability of jackpot prizes and the "continuous win"[(5)]

feature of the CornerMania game render MegaMania a Class III house banking game because the house takes fifteen percent of the money paid in and "the house may have to pay out more in winnings than it receives in bets" in a "particular game or series of games." It also contends CornerMania is played against the house and not other players, and violates § 2703(7)(A)(i)(III), which it reads as requiring only one winner. We disagree.

In order to win at either straight-line bingo or CornerMania, the winners must defeat other players, not a machine. The house, in this case the Tribes and Multimedia, is not a "participant" because it does not play a bingo card which players must beat, nor is it ever a "winner" in the game. *See also 103 Electronic Gaming Devices*, 223 F.3d at 1099. As discussed in the next section, CornerMania is clearly an interim part of the game, similar to recognized variations of traditional bingo where more than one prize is allowed for filling in corners. Furthermore, even if the jackpot and CornerMania features make it possible for players to win more than the total amount wagered by all the players, the Commission recognized jackpots are permissible in Class II gaming provided the jackpot, as it does here, remains in place for players to win in future games.[(6)]

***See* Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. at 12,382, 12,382 (1992). Finally, nothing in the Gaming Act or in the regulation's definition of a "house banking game" prohibits a game where the house may on occasion pay out more than it takes in, or forbids the house from earning a profit. *See* 25 C.F.R. § 502.11; *see also 103 Electronic Gaming Devices*, 223 F.3d at 1099 (explaining "[i]n any church-hall bingo game, the 'house' regularly nets some portion of the money it takes in, or there would be no point in sponsoring the game."). We find the Commission's reasoning persuasive and thus conclude MegaMania is not a "house banking game" as defined by the Code of Federal Regulations. Our holding is reinforced by the following discussion specifically concerning the CornerMania aspect of the game.**

2. The Interim Win Feature of CornerMania

As part of its argument MegaMania is a "house banking game," the government contends CornerMania converts the game into a Class III game because a player does not have to be the first player to cover the designated pattern of numbers to win at CornerMania. The government points out a player can win at CornerMania at any time before a winner of the straight-line bingo

game is identified, and a player can win multiple prizes in CornerMania during one session of MegaMania. Thus, the government contends MegaMania fails to meet the criteria set forth in § 2703(7)(A)(i)(III) that a Class II game "is won by the first person 'covering' the designated arrangement of numbers."[7]

The Commission Chairman addressed these same issues in an opinion letter written to the President of Multimedia, who requested a determination as to whether MegaMania is a Class II game. Regarding CornerMania, the Chairman noted a number of bingo handbooks, manuals and catalogues describe interim win games where a player in a traditional bingo game may win an interim prize by being the first player to cover a predetermined corner pattern of numbers "while playing toward a regular predetermined pattern on the bingo card." Accordingly, the Chairman concluded CornerMania "conforms to these pregame prizes which are a part of the game commonly known as bingo."

In addressing the government's argument, the district court correctly pointed out nothing in the Gaming Act or regulations prohibits more than one winner or "interim prizes" during a game of bingo. The Ninth Circuit reached the same conclusion, holding "winning" does not necessarily mean "vanquishing" all other opponents, and identifying Congress' intent to permit interim prizes, given that some traditional variants of bingo allow them. *See 103 Electronic Gaming Devices*, 223 F.3d at 1098-99. Moreover, nothing in the Act or regulations outlines what configuration the predetermined numbers or pattern must be in, i.e., in a straight-line, a corner configuration, or both. *Id.* at 1098. Thus, the language in the Act concerning the "first person" to win is not limited to a straight-line game and should not be read in isolation from the traditional variations of bingo that allow interim prizes and simultaneous winners. For these reasons, we agree with the Chairman, the district court, and the Ninth Circuit in concluding CornerMania does not affect the designation of MegaMania as a Class II game.

3. The "Ante Up" Feature

The government further contends MegaMania is not the game commonly known as bingo or a game "similar to bingo" because instead of paying one up-front price for a bingo card, a MegaMania player must continuously feed money into the machine to receive bingo balls and to continue playing the game. The parties refer to this as the "ante up" feature of the game. The district court determined the ante up feature did not fundamentally alter the game, relying on the following comment made by the Commission during the adoption of the regulations governing the Gaming Act:

F. Players Participating on Equal Basis

One commenter questioned whether the definition of bingo should require that all players participate on an equal basis. The commenter stated that in a traditional bingo game, all cards are purchased for a preset price, notwithstanding limited promotional discounts. The Commission believes that such considerations are marketing decisions and are outside the Act's purview. Therefore, the Commission rejected this suggestion.

57 Fed. Reg. 12,383.

The Acting General Counsel of the Commission also concluded MegaMania is properly categorized as a Class II game not subject to state regulation, stating in an opinion letter to the President of Multimedia:

Finally, a question has been raised about the ante up feature of your game. While I am cognizant of the similarities between such a feature and slot machines, this feature is not essential to the MegaMania game nor does it appear to impact negatively on our analysis of the statutory and regulatory criteria for "bingo" or a game "similar to bingo." The feature is essentially similar to the paper card "speed bingo" or "chip up bingo" games played in halls where the player antes up money for each number called. Therefore, while not traditional bingo, the ante up aspect does not change the game so fundamentally that it prevents me from ultimately determining that this is a game similar to bingo.

We begin our discussion on this issue by noting, as did the Ninth Circuit, that nothing in the Gaming Act or the Commission's regulations explicitly or implicitly prohibits the "ante-up" or "pay as you go" system for Class II games. *See 103 Electronic Gaming Devices*, 223 F.3d at 1097. When the Commission commented that the preset price feature in traditional bingo games concerned a marketing decision and was outside the Gaming Act's purview, it implicitly recognized the Act's silence on this matter. While the Commission may or may not have contemplated the "ante-up" scenario before us, its legal counsel directly addressed the matter in the opinion letter. Although succinct, we find this opinion consistent with the Commission's earlier determination that price-setting features for Class II games are beyond the scope of the Act. *See Skidmore*, 323 U.S. at 140. The Commission's counsel's reasoning that the "ante-up" feature does not change the statutory criteria for bingo is sound and supported by the explanation that certain other forms of bingo hall games use "ante-up" features. *Id.* (holding more weight may be given to well-reasoned non-binding agency interpretations.) Given the Act's silence on the pricing system for Class II games, and our agreement with the Commission's reasoning, we hold the "ante-up" feature does not change MegaMania's Class II status. Any perceived ambiguity concerning the Act's silence on this matter is resolved by applying the canons of construction which require us to construe ambiguous statutes in favor of the Indians. *See Blackfeet Tribe of Indians*, 471 U.S. at 766. If Congress wants to add a pricing or payment requirement to the definition of bingo or games "similar to bingo," it will do so.

4. MegaMania's Similarities to a Slot Machine

The government also contends MegaMania more closely resembles a slot machine than the game commonly known as bingo. The government points out the MegaMania machines are designed to resemble slot machines, are faster-paced than traditional or manual bingo, require more investment by the participants than bingo, and cause the individual player to run a greater risk of loss than the average bingo player in a traditional bingo parlor. While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed. Moreover, as the Ninth Circuit pointed out, "[u]nlike a slot machine, MegaMania is ... being played outside the terminal; the terminal merely permits a person to connect to a network of players comprising each MegaMania game, and without a network of at least 12 other players playing at other terminals, an individual terminal is useless." *103 Electronic Gaming Devices*, 223 F.3d at 1100. We therefore reject the government's argument that MegaMania stations are similar to slot machines.

For all the reasons set forth above, we conclude the MegaMania game challenged here meets the statutory criteria for a Class II game in the Gaming Act, 25 U.S.C. § 2703(7)(A)(i). We proceed to analyze whether MegaMania falls within the definition of those games specifically excluded from Class II characterization under 25 U.S.C. § 2703(7)(B) and therefore constitutes an illegal gambling device prohibited by the Johnson Act.

B. Whether MegaMania is an Electromechanical Facsimile of the Game of Bingo and a Gambling

Device Under the Johnson Act

In addition to the criteria for Class II games set forth in § 2703(7)(A)(i) of the Gaming Act, Congress specifically excluded from Class II characterization as games that are house "banking card games" or "electromechanical facsimiles" of such games. 25 U.S.C. § 2703(7)(B).[(8)]

Electromechanical facsimiles are defined in the Code of Federal Regulations as "any gambling device as defined in 15 U.S.C. §§ 1171(a)(2) or (3) [the Johnson Act]." 25 C.F.R. § 502.8. Thus, the definition of electromechanical facsimile incorporates the Johnson Act's definition of a gambling device. A gambling device is defined in the Johnson Act as:

any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a)(2). However, the Gaming Act explicitly permits "electronic, computer, or other technologic aids" for use in bingo. 25 U.S.C. § 2703(7)(A)(i). An electronic, computer or other technologic aid is defined in the Code of Federal Regulations as:

a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used--

(a) Is not a game of chance but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.7.

The Tribes and Multimedia contend MegaMania is not an electromechanical facsimile of the game of bingo, but rather is merely a technological aid to playing bingo, and as such, is properly classified as a Class II game under § 2703(7)(A)(i) of the Gaming Act. Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, *see Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) the "aid" is distinguishable from a "facsimile" where a single participant plays with or against a machine rather than with or against other players. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, 636-37 (D.C. Cir.), *cert. denied*, 512 U.S. 1221 (1994) (*Cabazon III*). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'" (quoting Webster's Third New Int'l Dictionary 813 (1976)), *cert. denied*, 516 U.S. 912 (1995); *Cabazon II*, 827 F.Supp. at 32 (same); *Cabazon III*, 14 F.3d at 636 (stating "[a]s commonly understood, facsimiles are exact copies, or duplicates.").

In the present case, the district court determined the MegaMania machines act as aids to the game of bingo rather than unlawful electromechanical facsimiles. We agree. First, the MegaMania machines link up many different players, thus broadening the participation level of the traditional game of bingo. Second, because each player competes against other players to achieve a "bingo" rather than with or against a machine or the "house," the machines are an aid to bingo, rather than a facsimile. We are not persuaded by the government's argument the CornerMania game renders MegaMania an electronic facsimile of the game of bingo because more than one person may win at CornerMania. As discussed above, this is an interim game that is a traditional part of the game of bingo and specifically approved by the Commission. Finally, although MegaMania satisfies the statutory criteria for a Class II game, it cannot fairly be described as an exact copy or replica of the traditional game of bingo, as required to satisfy the plain-meaning definition of "facsimile." We therefore conclude MegaMania is not an electronic facsimile of, but is an aid to, the game of bingo as defined in the Code of Federal Regulations. Accordingly, MegaMania is not excluded from the Gaming Act's definition of a Class II game.

We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid. *See 103 Electronic Gaming Devices*, 223 F.3d at 1101-02 (holding "[t]he text of [the Gaming Act] quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."); *Cabazon II*, 827 F.Supp. at 31-32 (concluding the Johnson Act does not apply to aids to Class II games, and a narrow interpretation of the Johnson Act's definition of a gambling device is appropriate); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D. N.Y. 1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA. Thus, the IGRA makes 15 U.S.C. § 1175 ... inapplicable to class II bingo and lotto gaming."), *aff'd sub nom.*, *United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991).(9)

We conclude the Johnson and Gaming Acts are not inconsistent and may be construed together in favor of the Tribes. *See also 103 Electronic Gaming Devices*, 223 F.3d at 1102 (concluding the Acts must be read together, giving each "the greatest continuing effect."). For these reasons, we join the Ninth Circuit in concluding MegaMania is not a gambling device as contemplated by either Act, but rather an electronic aid to bingo or a game "similar to bingo."(10)

C. Judicial Estoppel

The Tribes and Multimedia contend the government should be judicially estopped from claiming MegaMania is anything other than a Class II game. In another case, *Diamond Game Enter., Inc. v. Reno*, 9 F.Supp.2d 13 (D. D.C. 1998), the government used MegaMania as an example of a valid Class II game to support its argument another game, Lucky Tab II, utilized an illegal gambling device under the Johnson Act. The Tribes and Multimedia point to the apparent irony of the government's reliance on *Diamond* in contesting MegaMania's Class II classification in this case. (11)

"Judicial estoppel bars a party from adopting inconsistent positions in the same or related litigation." *Rascon v. U. S. West Communications, Inc.*, 143 F.3d 1324, 1330 (10th Cir. 1998) (quotation marks and citation omitted). However, this circuit has expressly rejected the principle of judicial estoppel. *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1242 (10th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986). Although we recognize this circuit takes a minority viewpoint on this issue, it is well-established a three-judge panel of this court may not overrule circuit precedent. *United States v.*

Marquez-Gallegos, 217 F.3d 1267, 1270 (10th Cir. 2000), *cert. denied*, ___ S. Ct. ___, 2000 WL 1203826 (U.S. July 31, 2000) (No. 00-5447). "The proper avenue for raising this issue lies in a petition for en banc review." *Id.* (quotation marks, alterations and citation omitted).

III. CONCLUSION

For the reasons set forth above, we conclude the MegaMania game challenged here is a Class II game under the Indian Gaming Regulatory Act, and its machines are not illegal gambling devices operated in violation of the Johnson Act. We AFFIRM the district court's grant of summary judgment in favor of the Tribes and Multimedia.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

1. The Johnson Act is also known as the Gambling Devices Act. *See Diamond Game Enter., Inc.*, 9 F. Supp. 2d 13, 16 (D. D.C. 1998).

2. The parties agreed the machines could remain in use on Indian lands pending the resolution of the case.

3. The purpose of the Gaming Act is:

(1) to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

4. The Commission's definition of Class II games, which is almost identical to § 2703(7)(A), states:

Class II gaming means:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

(1) Play for prizes with cards bearing numbers or other designations;

(2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and

(3) Win the game by being the first person to cover a designated pattern on such cards;

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo;

(c) Nonbanking card games ....

25 C.F.R. § 502.3.

The Commission also clarified Congress's definition of Class III games as follows:

Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to:

(a) *Any house banking game*, including but not limited to

(1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);

(2) Casino games such as roulette, craps, and keno;

(b) *Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance*;

(c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or

(d) Lotteries.

25 C.F.R. § 502.4 (emphasis added).

5. We note the government provides no definition of the term "continuous win." We assume "continuous win" means multiple winners and/or prizes awarded during one game of MegaMania, including CornerMania.

6. When promulgating the regulations governing the Gaming Act, the Commission addressed this very issue, and concluded bingo games with guaranteed prizes, jackpot prizes or progressive bingo fall within Class II if a player eventually won *i.e.*, the house never took the jackpot and a player won a consolation prize in each game. 57 Fed. Reg. at 12,382. Some commenters argued bingo itself is a house banking game. In response to this argument, the Commission concluded "whether a game is a house banking game ... is not relevant to the classification of games that Congress expressly placed in class II: Bingo, lotto, pull-tabs, instant bingo, and tip jars." *Id.* at 12,388. *See Shakopee Mdewakanton Sioux Community v. Hope*, 798 F.Supp. 1399, 1405-06 (D. Minn. 1992).

7. In support of its position, the government relies not only on the quoted language, but a section of the Federal Register which states "in Keno there may be many winners or no winners, whereas in bingo there is generally one winner, the first person to call 'bingo.'" *See* 57 Fed. Reg. at 12,385. We nevertheless conclude Class II games are not limited to one winner for the reasons stated.

8. Class III gaming is defined in the Code of Federal Regulations in part as "electronic or electromechanical facsimiles of any game of chance." 25 C.F.R. § 502.4.

9. The State of Oklahoma, as *amicus curiae*, argues the district court's determination MegaMania is not a gambling device under the Johnson Act creates a dangerous precedent under which "all electronic slot machines and similar devices could be converted into non-gaming devices by simply networking them with a separate computer or device which provided part or all of the element of chance." Our decision rests on our determination the MegaMania game is bingo or a game "similar to bingo" and the MegaMania machines meet the statutory definition of an "aid to bingo." Our holding in this case therefore is limited to the MegaMania form of bingo currently at issue.

10. The Ninth Circuit concluded MegaMania is "bingo." *See 103 Electronic Gaming Devices*, 223 F.3d at 1102. Having determined MegaMania is a Class II game, we see no reason to go any further, and leave the specific question whether MegaMania is bingo or a "game similar to bingo" for future resolution.

11. The Tribes and Multimedia also assert an independent ground for relief claiming their reliance on the government's past advisory opinions and apparent approval of MegaMania as a Class II game should preclude the government from now attacking it. Having ruled on the merits of the claims presented, we decline to address this alternative argument.

| Keyword | Case | Docket | Date: Filed / Added | (71175 bytes) (61667 bytes)

Comments to: WebMaster, ca10@law.wuacc.edu.
Updated: November 1, 2000.
HTML markup Copyright © 2000, Washburn University School of Law.
URL: http://lawdns.wuacc.edu/ca10/cases/2000/10/99-5064.htm.

Tenth Circuit

October 26, 1998
U. S. District Court
Northern District of Oklahoma

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 – (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 – (785) 256-6560

ENTERED ON DOCKET

DATE 10-26-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97-C-1140-K
	)	
162 MEGAMANIA GAMBLING DEVICES MORE OR LESS, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of the Motion by Claimants Multimedia Games, Inc., the Cherokee Nation, and the Seneca-Cayuga Tribe, for Summary Judgment against Plaintiff United States of America.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Claimants and against the Plaintiff.

ORDERED THIS 23 DAY OF OCTOBER, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

29

ENTERED ON DOCKET
DATE 10-26-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA Plaintiff, vs. 162 MEGAMANIA GAMBLING DEVICES MORE OR LESS, et al., Defendants.	)	No. 97-C-1140-K

ORDER

Before the Court is the motion of the claimants for summary judgment. This lawsuit commenced as a forfeiture action against certain alleged gambling devices on Indian land. Claimants, (the Cherokee Nation, the Seneca-Cayuga Tribe, Multimedia Games, Inc.), have challenged the forfeiture and seek a ruling that the devices are appropriate and not subject to government seizure and forfeiture. The parties have reached a "standstill" agreement whereby the devices remain on Indian land pending disposition of this case.

In claimants' view, two issues are presented for the Court's resolution: (1) whether the seized MegaMania game is a Class II game under the Indian Gaming Regulatory Act, and (2) whether the Electronic Player Stations (EPSs) that aid play of MegaMania are legal equipment (i.e., electronic aids) rather than illegal gambling devices (electronic facsimiles). The Court will treat the two questions as distinct for purposes of discussion.

As background to decision, the Court must address the interplay of two statutory schemes. The Johnson Act makes it unlawful, within Indian country and elsewhere, to "possess" or "use" any "gambling device". 15 U.S.C. §1175(a). The Johnson Act defines "gambling device" as a "machine or mechanical device" designed "primarily" for gambling and that, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. §1171(a)(1) & (2).[1]

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. §2701-2721. Under the IGRA, "Indian gaming activities are divided into three classes, each of which is subject to differing degrees of tribal, state, and federal jurisdiction and regulation." Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 179-80 (10th Cir.1993). Class I gaming involves social games for prizes of minimal value and traditional forms of Indian gaming. Id. at 180; §2703(6). Class II gaming, as relevant here, includes "bingo. . . and other games similar to bingo." §2703(7)(A). Class III gaming is "all forms of gaming that are not class I gaming or class II gaming". §2703(8).

The IGRA established the Indian Gaming Commission ("the Commission") as an agency within the Department of the Interior. 25 U.S.C. 2704(a). The Commission's "principal responsibilities" involve Class II gaming. Cabazon Indians v. National Indian Gaming Commission, 14 F.3d 633, 634 (D.C.Cir.), cert. denied, 512 U.S.

[1]Any "subassembly or essential part" intended to be used in connection with such a machine or device also meets the definition. 15 U.S.C. §1171(a)(3).

1221 (1994). Congress has granted the Commission the authority to promulgate such regulations and guidelines "as it deems appropriate" in performance of its duties. §2706(10). In a recent decision involving these two Acts, the District Court for the District of Columbia held that "Congress did not intend for the IGRA to implicitly repeal the Johnson Act". Diamond Game Enterprises, Inc. v. Reno, 9 F.Supp.2d 13, 17 (D.D.C.1998)(footnote omitted).[2] Thus, the interplay of the two Acts must be addressed, in view of the fact that Class II gaming is permitted by an Indian tribe within such tribe's jurisdiction only if "not otherwise specifically prohibited on Indian lands by federal law." 25 U.S.C. §2710(b)(1)(A).

The government contends that MegaMania bingo ("MegaMania"), the machines seized, does not meet the definition of Class II gaming and therefore, by definition, is Class III gaming. The lawful operation of Class III gaming devices requires a tribal-state compact. 25 U.S.C. §2710(d)(1)(C) & (d)(6). Without such a compact, the use of such devices is unlawful. It is undisputed that no such tribal-state compact exists between claimants and the State of Oklahoma covering the defendant machines.[3]

The IGRA sets forth the following definition:

---

[2]Claimants in the case at bar have not advanced a "repeal by implication" argument, but this Court notes the argument's recent rejection, with which this Court agrees.

[3]The legal fiction underlying civil forfeiture characterizes them as proceedings in rem against "offending inanimate objects" as defendants. United States v. $39,000 in Canadian Currency, 801 F.2d 1210, 1218 (10th Cir.1986).

> The term "class II gaming" means-
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)--
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

25 U.S.C. §2703(7)(A). See also 25 C.F.R. §502.3.

Claimants argue that MegaMania has all three elements and therefore is Class II gaming. The record reflects that MegaMania consists of two electronic games played simultaneously: a "straight-line" game and "CornerMania". Each will be addressed separately. The "straight-line" game appears to be what one would think of as "traditional" bingo. Numbers are drawn until a player fills a complete predesignated "straight line" on a playing card.

The government argues that the "straight-line" game does not meet the statutory definition because MegaMania has an "ante up" feature. That is, a player does not pay a single charge and play without further charge, but rather must pay $.25 for each 3-ball draw to continue playing their card or cards. The government states in conclusory fashion that this creates a "wager" between the house and the player and is not bingo.

The Court sees nothing in the statute which prohibits an "ante

up" feature. If there is an unchanging Platonic "form" of bingo, it is not affected by whether the game operators charge a single (presumably higher) price at the beginning, or establish a "pay as you go" system. When promulgating its regulations in this regard, the Commission determined that whether a card is purchased for a "preset price" or on an ante-up basis is a "marketing decision. . . outside [IGRA's] purview." 57 Fed.Reg. 12383. The Court agrees.

Next, the government makes the following argument: in MegaMania, if a player fails to achieve a bingo on a 3-ball draw, the house "keeps" the money on that draw. Then, when a player achieves a bingo, his winnings are determined based on a "parimutuel" formula. Thus, the government concludes, there is no "prize" awarded in MegaMania. If the government is arguing that, in order to comply with the IGRA, a gamemaster must award to a winning player all money which has been bet, the Court sees no such requirement. Since the purpose of permitting bingo on Indian land is to generate revenue for the Tribes, this would be an odd requirement indeed.

Third, the government asserts that, in MegaMania, the player does not actually "cover" the numbers, but merely presses a lighted "daub" button, and the machine itself does the covering. This argument is too weak to bear additional discussion.

Fourth, the government argues that the straight-line game is not won by the "first person" to cover a pattern. The basis for this argument is that in "traditional" bingo, if a $10,000 prize is announced and four players achieve bingo on the same draw, then

$10,000 is divided among the four players. In MegaMania, the government asserts, the identical situation results in each winning player receiving $10,000 and the house is out $40,000. The Court is unable to discern how paying winning players more money transforms a game into non-bingo. This argument is rejected.

Fifth, the government addresses an argument which claimants have not made, that MegaMania may be considered a game "similar to bingo" and come within the statute. Under the reasoning already stated, the Court sees no need to rule upon this argument.

As stated, MegaMania apparently involves a second game, CornerMania, played simultaneously with the straight-line game. The parties' briefs are not completely clear, but apparently the first player to cover two corners of the playing card wins a "prize" of some sort. CornerMania does not cease at that point, but a player may also win a prize for covering three corners or four corners of a card. Apparently, if there has been a CornerMania winner, the game ceases when there is a straight-line winner. However, if there is straight-line winner before there has been a CornerMania winner, CornerMania continues until there is a winner.[4] The claimants describe CornerMania prizes as "interim wins" and assert that "the game" cannot end until at least one player has won the straight-line game and at least one player has won the corner game.

The government contends that CornerMania is not bingo. The

[4]As a matter of mathematical probability, it would seem rare that a player could achieve a straight-line bingo before another player has covered two corners, but the possibility exists.

government concedes that one pattern of traditional bingo is "Four Corner Bingo", but that two-corner or three-corner bingo are not according to Hoyle, so to speak. The Court is not persuaded. The Commission has stated that it "does not believe Congress intended to limit bingo to its classic form". 57 Fed.Reg. 12383. Nothing appears in the statutory language or the regulations dealing with a "corner bingo" game.

However, the government also argues that the "first player" to win CornerMania does not end the game, arguably violating 25 U.S.C. §2703(7)(A)(i)(III). Claimants respond that indeed the first person to achieve two corners "wins" and there is no statutory or regulatory requirement that additional players cannot win. Claimants quote a statement of the Commission which appears to indicate that, so long as "in each game there is at least a winner of a consolation prize", there is nothing problematic about interim-win games. 57 Fed.Reg. 12382. The Court agrees, seeing nothing in the statutory language prohibiting the operation of two games simultaneously.[5]

The Court now turns to the second question raised by claimants' motion, regarding the proper characterization of the equipment used in MegaMania. The IGRA provides that the term "class II gaming" does not include "electronic or electromechanical

[5]As a subsidiary argument, the government asserts that CornerMania is a "house banking game", which is classified as Class III gaming under 25 C.F.R. §502.4(a). The Court is not persuaded. The record does not make clear that "the house is a participant" in CornerMania, which is part of the definition of "house banking game" under 25 C.F.R. §502.11.

facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. §2703(7)(B)(ii) (emphasis added). Thus a distinction is drawn between "aids" to games in §2703(7)(A)(i) and "facsimiles" of games as quoted above. Not surprisingly, the parties argue for opposing characterizations.

The regulations set forth definitions. 25 C.F.R. §502.7 states:

> Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used-
>
> (a) Is not a game of chance but merely assists a player or the playing of a game;
>
> (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and
>
> (c) Is operated according to applicable Federal communications law.

25 C.F.R. §502.8 provides:

> Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3) **[sic]**.

Thus, the regulations expressly incorporate the Johnson Act on this point. The subsection discussed by the parties, 15 U.S.C. §1171(a)(2), provides that a gambling device means

> any other machine or mechanical device **[i.e., other than a "slot machine" or similar device]**. . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money

or property. . .

The government asserts that the plain language of this statute demonstrates that the MegaMania equipment is a "gambling device". In a broad sense, a machine designed for electronic bingo, as is a MegaMania player station, is a machine designed primarily for use in connection with gambling. It also seems clear that, by operation of the machine, a player may become entitled to receive money as the result of the application of an element of chance. These are the essential elements of a gambling device. See Citizen Band of Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir.1993). However, the MegaMania player station does not itself provide the element of chance, even though such would be the case in a "self-contained" gambling device like a slot machine. The IGRA itself describes bingo as a "game of chance". 25 U.S.C. §2703(7)(A)(i).

Further, "standard principles of statutory construction do not have their usual force in cases involving Indian law." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Ambiguous statutes should be construed in favor of the Indians. Id. The canons of construction applicable are "rooted in the unique trust relationship between the United States and the Indians." Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). Here, the ambiguity arises from the interplay of the Johnson Act and the IGRA. In 1962, when Congress enacted the present definition of "gambling device", it clearly did not contemplate the advance of computer technology which has taken place since then. The use of

the terms "machine" and "mechanical device" almost certainly reflect congressional concern with slot machines and similar self-contained means of gambling. Only in the crudest sense are the MegaMania computer software and monitors properly termed a "machine . . . designed and manufactured primarily for use in connection with gambling." In light of the IGRA, the Court is not persuaded that such an interpretation is appropriate.

Tribes have objected in other litigation to the effect of the interpretation presented by the government in the case at bar, asserting that it sweeps within the definition of "gambling device" any device that might be used in gambling. The objection has been rejected, based on a narrowed interpretation.

> This interpretation **[i.e., the broad interpretation]** of the Johnson Act is incorrect. As several cases have held, Congress has acknowledged, and the Commission has noted in the preamble to its rules, the Johnson Act applies only to slot machines and similar devices (including the pull-tab games here in issue), not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear.

Cabazon Band of Mission Indians v. National Indian Gaming Commission, 827 F. Supp. 26, 31 (D.D.C.1993), aff'd, 14 F.3d 633 (D.C.Cir.), cert. denied, 512 U.S. 1221 (1994)(footnotes omitted).

The Court finds this narrowed definition correct, and necessary to reconcile the statutory language and case law. Despite the apparently broad sweep of 15 U.S.C. §1175 and 25 C.F.R.

§502.8, the Ninth Circuit stated "the dictionary meaning of `facsimile' is an `exact and detailed copy of something'". Syucan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir.1995). See also Cabazon, 14 F.3d at 636 ("[a]s commonly understood, facsimiles are exact copies, or duplicates"). MegaMania is not an exact copy or duplicate of the game of bingo. The game of bingo is not wholly incorporated into each MegaMania machine. MegaMania does not draw numbers in a self-contained fashion. Instead, while numbers are drawn at a single location, MegaMania allows a large number of players to participate in a less cumbersome way than traditional bingo. Accordingly, MegaMania is not itself a "game of chance" and is "readily distinguishable" from the playing of a game of chance on an electronic facsimile. 25 C.F.R. §502.7. MegaMania thus appears perfectly appropriate under the statutory scheme, given the obvious congressional solicitude for bingo as it relates to Indian tribes.[6]

Claimants also rely upon the Diamond Game decision, which states that two characteristics of an "aid" are (1) it must operate to broaden the participation levels of participants in a common game and (2) it must be distinguishable from a "facsimile" in which a single participant plays with or against a machine rather than with or against other players. 9 F.Supp.2d at 19-20. Clearly, MegaMania broadens the participation levels of participants in a

---

[6]In the Senate Committee Report on the IGRA, the intent is stated that "tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." Diamond Game, 9 F.Supp.2d at 19 (emphasis added).

common game, and it is also clear that players are playing against other players as opposed to against the machine in MegaMania. Both characteristics of an "aid" are present.

The government cites the Commission's statement that it "rejects the arguments that Congress intended to classify machine versions of class II theme games within class II gaming." 57 Fed. Reg. 12386.[7] However, in the Court's view, MegaMania is not a "machine version" of bingo. The software does not permit a player to play a game of bingo in "stand-alone" fashion. Rather, the software is being used to broaden the participation levels of live bingo, which is being played with manual ball drawing or calling of the balls in real time. Therefore, MegaMania does not alter the "fundamental characteristics" of the game of bingo. See Diamond Game, 9 F.Supp.2d at 19 (quoting Senate Committee Report).

In sum, the Court finds it an absurd result that Congress would classify "paper" bingo as Class II gaming, but classify electronic bingo, at least as embodied by MegaMania, as Class III gaming. Aside from the "ante-up" and "interim win" features, against which this Court finds no statutory prohibition, nothing apparently distinguishes MegaMania from electronic bingo on tribal lands across this nation. A clearer statement from Congress is required if all such games are to be termed illegal. In the

---

[7]At various points in this Order, the Court has quoted explanatory commentary from the Commission published in the Federal Register when the regulations were issued. The Court is aware that such commentary is of no binding effect upon the Court, but it has been quoted for its persuasive value when the Court finds the reasoning sound.

Cabazon decision by the District of Columbia Circuit and the Ninth Circuit decision in Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 543 (9th Cir.), cert. denied, 516 U.S. 912 (1995), both cited by the government, the courts found electronic pull-tab games to be unlawful facsimiles. However, unlike MegaMania, electronic pull-tab games are self-contained. The player plays against the machine and not other players. In MegaMania, the software and monitor provides the player with a bingo "board", and the ability to "daub" the numbers. The numbers themselves are drawn elsewhere, and are announced to all players simultaneously. Contrary to the government's argument, MegaMania is not the game of bingo, as old style "video bingo" (comparable to video poker) is. Rather, it is an electronic aid to playing the game of bingo, and therefore lawful.

It is the Order of the Court that the motion of the claimants for summary judgment (#58) is hereby GRANTED. All other motions are declared moot.

ORDERED this 23 day of October, 1998.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

D. C. Circuit

November 3, 2000
U. S. Court of Appeals
District of Columbia

Multimedia Games, Inc., 8900 Shoal Creek Blvd., suite 300, Austin, Texas 78757 – (512) 371-7100
Kansas Office: 1920 S. W. West Union Road, Topeka, Kansas 66615 – (785) 256-6560

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 7, 2000 Decided November 3, 2000

No. 98-5516

Diamond Game Enterprises, Incorporated and
The Cheyenne and Arapaho Tribes of
Oklahoma Gaming Commission, on behalf of the
Cheyenne and Arapaho Tribes of Oklahoma,
Appellants

v.

Janet Reno, Attorney General, et al.,
Appellees

Consolidated with
99-5345

Appeals from the United States District Court
for the District of Columbia
(No. 97cv00452)

James E. Townsend argued the cause for appellants. With him on the briefs were David W. McElroy, Munford Page Hall, II, Virginia W. Boylan and Stephen A. Lenske. Philip Baker-Shenk entered an appearance.

Leander Bergen, Geoffrey M. Standing Bear and Andrew W. Baldwin were on the brief for amici Pueblo of San Juan, et al.

John T. Stahr, Attorney, U.S. Department of Justice, argued the cause for the Federal appellees and Jonathan A. Glogau, Special Counsel, State of Florida, argued the cause for the State appellees. With them on the joint brief were Lois J. Schiffer, Assistant Attorney General, U.S. Department of Justice, David C. Shilton and Edward J. Passarelli, Attorneys, and Sara J. Drake, Supervising Deputy Attorney General, State of California. Jared A. Goldstein, Attorney, U.S. Department of Justice, entered an appearance.

Before: Ginsburg, Randolph and Tatel, Circuit Judges.

Opinion for the Court filed by Circuit Judge Tatel.

Tatel, Circuit Judge: This case requires us to determine whether a gambling machine known as the Lucky Tab II, an electromechanical device that dispenses paper pull-tabs and then displays their contents on a video monitor, should be classified under the Indian Gaming Regulatory Act as a Class II "aid" or a Class III "facsimile." The Act prohibits Indian tribes from operating Class III facsimiles without first negotiating a compact with the state. Applying the statute's plain language, guided by our only relevant precedent, Cabazon Band of Mission Indians v. NIGC, 14 F.3d 633 (D.C. Cir. 1994), and proceeding without any views from the agency charged with the Act's implementation, we conclude that the Lucky Tab II is a Class II aid.

I

The Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. s 2701-19, regulates gambling operations run by Indian tribes. The Act's purpose is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of

promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. s 2702(1).

The Act divides Indian gaming into three classes, each requiring a different level of authorization. Class I gaming consists of social games played solely for prizes of minimal value as well as traditional forms of Indian gaming. See 25 U.S.C. s 2703(6). Indian tribes may operate Class I games as they wish. See 25 U.S.C. s 2710(a)(1).

Class II gaming includes bingo, and if conducted in the same hall as bingo, it also includes lotto, punch boards, and tip jars, as well as pull-tabs, the game at issue here. See 25 U.S.C. s 2703(7)(A). In language central to the dispute in this case, the Act allows the use of "electronic, computer, or other technologic aids" in connection with Class II games, 25 U.S.C. s 2703 (7)(A)(i), but prohibits the use of "[e]lectronic or electromechanical facsimiles of any game of chance." 25 U.S.C. s 2703 (7)(B)(ii). Tribes may conduct Class II gaming if the state in which they are located permits such forms of gambling and if the governing body of the tribe adopts a gaming ordinance that is then approved by the Chairman of the National Indian Gaming Commission, the agency created by Congress to implement IGRA. See 25 U.S.C. ss 2710(b), 2704.

Class III gaming includes all gambling not covered by either Class I or Class II, including "facsimiles" of Class II devices. See 25 U.S.C. s 2703(8). In order to conduct Class III operations, tribes must obtain state approval through negotiation of a tribal-state compact. See 25 U.S.C. s 2710(d)(1).

Commission regulations define Class II aids and Class III facsimiles. An aid is "a device ... that when used ... [i]s not a game of chance but merely assists a player or the playing of a game [and] is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile." 25 C.F.R. s 502.7. A facsimile is "any gambling device as defined in [the Johnson Act]." 25 C.F.R. s 502.8. Predating IGRA by more than 30 years, the Johnson Act prohibits the use of gambling devices on federal land.

in interstate commerce, and in "Indian country." See 15 U.S.C. ss 1171-78 (1953). Both the Commission's regulations and this Court have interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal-state compacts. See Cabazon, 14 F.3d at 635, n.3 (noting that IGRA repealed the Johnson Act with regard to Class III devices subject to a tribal-state compact but that there is no other repeal of the Johnson Act in IGRA, implying that Class II aids, permitted under IGRA, do not run afoul of the Johnson Act).

This case concerns a game known as pull-tabs. A small, two-ply paper card, a pull-tab bears symbols and patterns similar to tic-tac-toe that appear when players peel off the pull-tab's top layer. The pattern of the symbols determines whether the player wins a prize. In the traditional pull-tabs game, bingo hall clerks sell pull-tabs from counters or mobile carts, and winners present the tabs to either clerks or cashiers to collect prizes. Pull-tabs are sold from large pools known as "deals." Containing anywhere from 1200 to 100,000 pull-tabs, deals have a fixed number of winners and losers.

At issue in this case is the proper classification of a gambling device known as the Lucky Tab II, an electromechanical dispenser of paper pull-tabs. The machine dispenses pull-tabs from a roll containing approximately 7500 tabs. About 100 rolls comprise a deal, within which winning pull-tabs are randomly distributed. The machine cuts the pull-tab from the roll and drops it into a tray. A bar code scanner inside the machine automatically reads the tab and then displays its contents on a video screen. A placard on the machine informs players that "[v]ideo images may vary from actual images on pull tabs. Each tab must be opened to verify." To collect prizes, players must present the actual winning tab to a clerk. In many bingo halls, players purchase pull-tabs either from a Lucky Tab II or from clerks; in such cases, machines and clerks cut pull-tabs from rolls that are part of the same deal.

In 1994, the Kickapoo Traditional Tribe of Texas and Diamond Game Enterprises, the manufacturer of the Lucky Tab II, asked the Commission to classify the machine as a Class II aid. Two years passed without Commission action. In August 1996, the Kickapoo Tribe began operating approximately 100 Lucky Tab II machines. At this point, the record becomes complicated and, to say the least, confusing. As far as we can tell, the following events of significance to this case transpired: The Commission's Director of Enforcement advised the Tribe that the machines were Class III gambling devices that could only be operated pursuant to a tribal-state compact. See Diamond Game Enterprises, Inc. v. Reno, 9 F. Supp. 2d 13, 15 (D.D.C. 1998). Notwithstanding the Director's action, the members of the Commission were apparently divided over the proper classification of the Lucky Tab II, some thinking it an aid and others a facsimile. Because of this disagreement, the Commission sought advice from the Department of Justice, but DOJ lawyers were themselves divided over the proper classification of the machine. See Memorandum from Deputy Assistant Attorney General Richard Shiffrin to Associate Deputy Attorney General Seth P. Waxman, at 1 (June 13, 1996) (noting that the Office of Tribal Justice and the Criminal Division had reached opposite conclusions on the appropriate classification of the Lucky Tab II--the former concluding that it falls under Class II and the latter concluding that it belongs in Class III). The Commission never formally responded to the request to classify the Lucky Tab II.

According to the Tribe and Diamond Game, certain members of the Commission recommended that the Tribe and the company file a declaratory judgment action in federal court to resolve the issue. Acting on that advice, they filed this action in the U.S. District Court for the District of Columbia seeking, among other things, a declaratory judgment that the machine qualifies as a Class II aid. The Cheyenne and Arapaho Tribes of Oklahoma intervened as plaintiffs. Alabama, California, and Florida intervened as defendants.

The parties filed cross motions for summary judgment. Finding that the Lucky Tab II "performs all the functions that a player of the traditional pull-tab game would have performed," the district court found the machine to be a Class III facsimile and granted summary judgment to the government. See Diamond Game, 9 F. Supp. 2d at 20. Subsequently, Diamond Game and the Tribes filed a Rule 60(b) motion, claiming that the company had made technical changes to the Lucky Tab II. Finding that the modifications were not new evidence, the district court denied the motion.

II

Unlike the legal issues presented in this case, the policy questions are both interesting and challenging. In determining the proper classification of the Lucky Tab II, how do we further Congress' objective of allowing Indian tribes to use gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. s 2702(1), while at the same time "shield[ing] [Indian tribes] from organized crime and other corrupting influences," 25 U.S.C. s 2702(2)? Will the Lucky Tab II enable tribes to "take advantage of modern methods of conducting class II games"? S. Rep. No. 100-446, at 9 (1988). Or does the machine increase the risk of corruption or excessive gambling losses, concerns that government counsel told us at oral argument require its classification as a Class III device? To resolve such issues, Congress created the National Indian Gaming Commission, headed by a Chair appointed by the President and confirmed by the Senate presumably for his or her expertise on Indian gaming. Yet whether because of bureaucratic gridlock or, as the tribes allege, because of congressional interference, we have no idea what the Commission thinks about the policy questions presented by the Lucky Tab II. Not only does this leave us with no agency position to which we might defer, see Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"), but the Commission's IGRA

regulations provide no assistance in interpreting the statute. Boiled down to their essence, the regulations tell us little more than that a Class II aid is something that is not a Class III facsimile. We mention this not to escape our duty to decide this case--to the contrary, because we have jurisdiction, we must determine how the Lucky Tab II should be classified--but to highlight the fact that we have no choice but to proceed without the benefit of a Commission position, a situation we expect Congress neither anticipated nor would appreciate. That said, we turn to the parties' arguments about the classification of the Lucky Tab II. See Everett v. United States, 158 F.3d 1364, 1367 (D.C. Cir. 1998) ("We review a grant of summary judgment de novo.").

Diamond Game and the Tribes contend that the Lucky Tab II acts as a permitted "electronic aid" to the Class II game of pull-tabs. They emphasize that the machine's operation depends entirely on pre-printed paper pull-tabs that can be (and in fact are) played without the mechanical dispenser. The Lucky Tab II, in other words, cannot function without rolls of paper pull-tabs. The Tribes also emphasize that despite the fact that the Lucky Tab II presents a video image of the contents of the pull-tabs it dispenses, the machine does not give the player the final word on the game: players must still peel off the top layer to verify its contents and present it to a clerk to receive their winnings. For all of these reasons, they argue, the Lucky Tab II cannot be considered a facsimile of the paper game of pull-tabs.

According to the government, because the machine mirrors the traditional game played by purchasing cards from clerks, it is a Class III facsimile, not a Class II aid. The government embraces the district court's description of the Lucky Tab II: "When the participant plays the Lucky Tab II, she is not playing the pull-tabs inside the machine; she is engaging the machine that replicates the functions of the traditional pull-tab game." Diamond Game, 9 F. Supp. 2d at 13, 20. As to the possibility that the information on the video screen might be inaccurate, the government says mistakes are rare and for all practical purposes, the Lucky Tab II is a duplicate of the paper version.

Both sides claim support from Cabazon Band of Mission Indians v. NIGC, 14 F.3d 633 (D.C. Cir. 1994). There, we held that a video pull-tabs game was a "computerized version" of pull-tabs and therefore a Class III facsimile. The machine "randomly selects a card for the gambler, pulls the tab at the gambler's direction, and displays the result on the screen. The computer version, like the paper version, has a fixed number of winning cards in each deal." Cabazon, 14 F.3d at 635. Finding that video pull-tabs "exactly replicate[s]" the game of pull-tabs in computer form, Cabazon concluded that it amounted to a facsimile of the game. See id.; see also Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 541-42 (9th Cir. 1994) (holding that a self-contained unit containing a computer linked to a video monitor and a printer constitutes an electronic facsimile of pull-tabs).

We think the Lucky Tab II is quite different from the machine at issue in Cabazon. To begin with, the Lucky Tab II is not a "computerized version" of pull-tabs. Although the Lucky Tab II has a video screen, the screen merely displays the contents of a paper pull-tab. Instead of using a computer to select patterns, the Lucky Tab II actually cuts tabs from paper rolls and dispenses them to players. In other words, the game is in the paper rolls, not, as in the case of the Cabazon machine, in a computer. Indeed, players using the Lucky Tab II often play a deal simultaneously with other players in the same hall who have chosen to purchase pull-tabs from clerks. For players using the Lucky Tab II, the machine functions as an aid--it "helps or supports," or "assists" the paper game of pull-tabs. Webster's Third New International Dictionary 44 (1993). Without the paper rolls, the machine has no gaming function at all. It is, in essence, little more than a high-tech dealer. Viewed this way, the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it is paper pull-tabs.

Another difference between the Lucky Tab II and the video machine at issue in Cabazon reinforces our belief that the Lucky Tab II should be classified as a Class II aid. The

Cabazon machine plays the game of pull-tabs in its entirety, dispensing receipts for players to redeem winnings. By contrast, the Lucky Tab II dispenses actual paper pull-tabs that players must peel and display to a clerk before they can obtain prizes. Although the machine's scanner apparently commits few errors when reading paper pull-tabs, the fact remains that unlike the Cabazon machine, the Lucky Tab II is technically not final. It is, in other words, an aid to the game of pull-tabs.

Notwithstanding the differences between the Lucky Tab II and the machine at issue in Cabazon, the government insists that the Lucky Tab II is a Class III device. At oral argument, the government even asserted that removing the video screen would not convert the Lucky Tab II into a Class II aid. Asked what in the government's view would be an aid, counsel pointed us to an electronic scanner called the "Tab Force Validation System." As we understand this device, after a clerk dispenses a paper pull-tab, instead of peeling off the top layer, the player inserts the pull-tab into the machine, which scans the bar code and displays the results on a video screen. The Commission has issued advisory opinions classifying the Tab Force and other similar machines as Class II aids, concluding that the systems "simply read the pull-tabs and display whether or not they are winners.... [They] cannot change the outcome of the game." See NIGC Advisory Opinion, at 2 (June 8, 1998).

We see no principled difference between the Tab Force and the Lucky Tab II. Both devices electronically "read" paper pull-tabs and display their contents on a screen, and neither can "change the outcome of the game." Unlike the machine involved in Cabazon, neither contains an internal computer that generates the game. Rather, both machines facilitate the playing of paper pull-tabs. They are thus Class II aids.

The government makes two additional arguments in support of its position that the Lucky Tab II is a Class III facsimile. First, like the district court, it relies on language from a Senate Indian Affairs Committee report describing a Class II aid as a device that enables tribes to "take advantage of modern methods of conducting class II games" by, for

example. "join[ing] with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues." S. Rep. No. 100-446, at 9 (1988). Class II aids are thus limited to devices that "merely broaden the potential participation levels and [are] readily distinguishable from ... electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." Id. Unlike computers, cables, or telephone lines that connect bingo games on different reservations--examples the Senate Report gives of aids that expand participation--the Lucky Tab II, the government argues, neither increases participation levels nor enhances competition among players. Second, the government claims that the Lucky Tab II makes it easier for players to play pull-tabs, thus increasing the potential for players to "lose the rent money."

These statutory interpretations, resting as they do on the policy underlying IGRA, are interesting and might even be worthy of Chevron two deference had they been offered by the Commission. But they come only from appellate counsel--indeed the "lose-the-rent" argument surfaced for the first time at oral argument. Moreover, nothing in the Senate Report suggests that an electronic device must link players on different reservations to qualify as a Class II aid. Accordingly, because of the similarities between the Lucky Tab II and the Tab Force Validation System, which the Commission has found to be a Class II aid, and because of the differences between the Lucky Tab II and the Class III device at issue in Cabazon, we reverse the district court and remand with instructions to enter summary judgment for appellants. In view of this disposition, we have no need to address the district court's denial of the Rule 60(b) motion.

So ordered

Good morning, Mr. Chairman and members of the Committee:
My name is Nancy Ford and I represent District 60, Nashua

As you may have guessed, I am here in opposition to SB 127.

This bill makes every place where bingo is played a potential casino. It allows a new form of gambling, which is a baby slot machine tailored for bingo, in which the player evidently does nothing and the machine does all the work. It is a fast and addictive way to separate the player from his money, enriching the machine leasers a lot and the charities a little.

Other people are here to testify about the dangers of video bingo machines, so I would like to talk about what I feel is a crucial part of this argument, and that is the effect of these sophisticated methods of gambling on this, our legislature. From all over the country we have heard about legislatures being corrupted by the greed of the gambling industry. Corruption has come by bribing senators and representatives; we have a former governor in jail in Mississippi; we have heard of phony shadow companies to pay off legislators, and, as you know, much more. Corruption is not always from the people who try to beat the machines; it is from the source--the votes needed, and then from the leasing and distributing and repair contracts, where the real money is made. From the first dollar put into these video bingo casinos, we become a partner in the gambling business, taking money from our people and giving it to a greedy and corrupt industry.

This bill hands control over to the Sweepstakes Commission. The Sweepstakes Commission is the home of the one-bid contract, $800 one-day trips to Vermont, and a constant revolving door to the ~~"big boys" of~~ the gambling industry of some of our elected officials and Sweeps directors as lobbyists and employees of the companies they have dealt with. ~~Each year, $325,000 of our lottery money, which should go to education, is shifted to the racetracks with not a word of opposition from the Sweepstakes Commission~~.

In every other video slot machine bill we have had, the Attorney General was required to make background checks, but not a mention in this one. This bill gives the Commission sweeping powers to regulate how many video bingo games are played, how high each bet can go, with exemption from the Legislative Rules Committee oversight. The legislature has no control whatsoever. The bill already says the machines can be played twelve hours a day and be operated by non-members who are paid undesignated sums of money, and obvious loophole. It is a recipe for disaster.

Bingo in this state has gone from a friendly social gathering in church basements to big business in just a few years. It has grown and grown due to the indifference of this legislature. From 25 and 50 cent cards to $30 18 card packages, bingo nights are offering $9,000 in cash prizes, winner take all games at $1500 each, and even free trips to Atlantic City. The church basement has turned into bingo halls where multiple charities fill the halls every night and most players have no idea what charity is benefiting. Last year we had a bill asking that 80% of the money remain in the state rather than fly out-of-state, and it was defeated.

The revenues from this bill will be minimal for the state, questionable for the charities, and will only profit the gambling industry. The expanded gambling will bring heartache

to families devastated by addictive and problem gamblers, who number, by Mr. Mendoza's figures, over 17,000 of our citizens.

Mr. Chairman and members of the Committee, I ask you to find SB 127 Inexpedient to Legislate. Thank you.

Granite State Coalition Against Expanded Gambling
NoSlots.com
PO Box 3931, Concord, NH 03302-3931
Contact: Jim Rubens (603) 643-6059, JimRubens@aol.com

Why we oppose SB-127, legalizing Video Bingo Machines

GSCAEG, formed in 1991, is a non-partisan group opposed to all forms of expanded gambling and is composed of hundreds of individual and 20 organizational members, including the state's leading anti-tax groups, several leading church organizations, the Sheriffs Association, the Police Chiefs Association, the NH Lodging and Restaurant Association, Citizens' Alliance for Action, the Children's Alliance of NH, the League of Women Voters of NH, the NH Women's Lobby and the NH Retired Educators Association.

The Coalition opposes SB-127 and video bingo machine gambling in any form. Video Bingo Machine gambling is being promoted to the 2003 legislature as a means to provide revenues to worthy New Hampshire charitable organizations such as churches and veterans groups.

Video Bingo Machine gambling is very similar to Video Slot Machine gambling and very unlike traditional paper bingo. Video Machine Bingo offers dramatically faster play and far larger cash prizes, making it significantly addictive, unlike paper bingo. Gambling addiction is associated with a long list of harms to affected individual gamblers and large social and economic costs to the state. Research on these costs and harms can be found on the Coalition's website, www.NoSlots.com. The Coalition does not oppose currently legal paper bingo.

The force behind SB-127 is the network systems, software and equipment provider for Video Bingo, Multimedia Games, Inc., (MMG) of Austin, Texas. Multimedia Games describes itself as follows on its website, www.multimediagames.com:

> "Multimedia Games is the recognized leader in developing, implementing and supporting high-speed interactive gaming ... Multimedia Games is the preeminent supplier of gaming technology and interactive games to the Native American community ... In the legal battles over gaming rights, Multimedia Games fought alongside the tribes to win the court decisions that confirm the rights of Native Americans to offer interactive Class II games [specifically, video bingo]."

MMG's MegaNanza and Reel Time video bingo require only about one minute per game to play and allow multiple on-screen bingo "cards" to be played simultaneously. SB-127 contemplates use of this addictive form of video bingo by allowing up to "15 bingo cards on each station for each game played," (287-G:1, VIII). The bill also contemplates larger (more addictive) prizes, setting no limit on amount paid per card or game and no limit on prize size, leaving those determinations to sweepstakes commission rulemaking (287-G:3, VII).

MMG says this about its MegaNanza and Reel Time video bingo in its SEC 10-K for the year ending September 30, 2002:

> "We believe [these games'] faster pace ... enhances the entertainment and gaming experience of our end users, resulting in an overall increase in the number of end users playing our games and in a higher spending rate per end user ... Each [video bingo machine] has a screen that at all times displays the bingo cards being played and the bingo numbers drawn. Depending upon the end user's entertainment preference, an additional display can be selected that minimizes the size of the bingo card display and shows other graphics that can take many forms, including graphics that simulate spinning reels similar to video slot machines."

MMG's MegaNanza video bingo is currently embroiled in litigation, the US Department of Justice asserting some forms of the game constitute Class III (i.e., video slots) gambling.

I. Nelson Rose, gaming law expert at Whittier Law School in Los Angeles, characterizes halls filled with video bingo machines as "bingosinos." Rose describes bingo played on video screens as "virtually indistinguishable from video slots ... Bingo players do not have to call out, `Bingo!' or even press a `Win' button. All they have to do is put their money in and start the game, which could be done by pulling a handle. The bingo machine will tell them whether they have won by showing symbols, such as three reels, and will then pay winners automatically."

In Ohio, video bingo has moved beyond churches and bingo halls into hundreds of bars and bingo storefronts – all "sponsored" by charities. SB-127 does nothing to prohibit this. An Akron Beacon Journal story on Ohio video bingo: http://noslots.com/video_bingo_in_ohio.htm.

Current events in Ohio demonstrate that legalized video bingo will lead to video bingo casinos. Botkins, Ohio, population 1,200, now faces a proposed $50 million, 2 acre video bingo casino. A minor change to SB-127, if it passed, would allow video bingo casinos in New Hampshire.

The Coalition's additional objections to SB-127:

- All towns where paper bingo is currently allowed must also allow video bingo, unless rescinded by referendum (287-G:14, V). This would allow an unlimited number of video bingo casino locations into a town or city without prior voter approval. (How many towns?)
- The bill allows up to 75 video bingo machines per bingo hall (287-G:4, II) and up to 20 games per day (287-G:4, V(a) and V(d).
- The bill removes the requirement under paper bingo that charitable organizations provide volunteers to operate video bingo games. The charitable organization need do nothing other than allow its name to be used. The charitable organization may also designate non members to operate the games, without any limit to what those non members are paid for their services. This creates the potential for very large conflicts of interest (287-G:7, III).

Granite State Coalition Against Expanded Gambling opposes SB-127 and recommends an Inexpedient to Legislate vote from this committee.

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

PETER W. HEED
ATTORNEY GENERAL

STEPHEN J. JUDGE
DEPUTY ATTORNEY GENERAL

WRITTEN TESTIMONY SUBMITTED BY
ASSOCIATE ATTORNEY GENERAL ANN RICE
RE: SB 127
March 12, 2003

Thank you for the opportunity to address this Committee.

For at least 30 years, the Office of the Attorney General has opposed legalized gambling. I appear today on behalf of the Attorney General to reiterate that opposition with regard to SB 127.

There may be a perception that as the state's financial pressures have increased, the public support for expanded gambling has become more favorable. Even if that were true, the Attorney General's position is founded on law enforcement considerations, and is unwavering. As the chief law enforcement agency in the state, the Office of the Attorney General has an obligation to protect the public order, and to give its advice on matters traditionally associated with public order. That advice should be weighed carefully against opposing viewpoints and, with respect to this bill, should tip the balance against the proposed expansion of legalized gambling.

The gambling industry has been vigorous in its pursuit of expanded gambling in this state. With its strong financial base and public relations skills, it has been successful in getting its message out. In the face of that effort, it is imperative that we restate the position of the law enforcement community -- that expanded gambling will increase the State's exposure to criminal activities, compound the financial difficulties of many of its citizens, lead to an increase in addictive gambling behavior, and adversely impact the character of this State.

We do not dispute that many people engage in gambling as a form of adult recreation, without any serious consequences. For others, however, gambling leads to serious problems. Studies have shown that those in low incomes households spend a considerably higher percentage of their income on gambling than those in middle and upper income households. In other words, in relative terms, those who spend the most are the ones who can afford it the least. The resulting financial strains can lead to a variety of well-documented consequences, including bankruptcy, divorce, child abuse, domestic violence, and the irretrievable pawning

of personal property.

Beyond that is the problem of addicted or compulsive gamblers -- people who are unable to control their urge to gamble, regardless of the consequences. Not only do these individuals and their families suffer the financial and emotional strains stemming from such an addiction, compulsive gamblers are often forced to commit crimes as a means of supporting their habits.

In addition to these personal crises, expanded gambling would come at a cost to the community as a whole. Studies of states with large scale gambling facilities, whether it be casinos or video gambling, have documented that the introduction of such facilities is traditionally followed by an increase in crimes of all types. The prospect of large cash flows, which may seem attractive as a new source of revenue, is equally tantalizing to swindlers, thieves, and organized crime syndicates. With its low crime rate, New Hampshire is currently one of the safest states in the nation. That safety would be fundamentally jeopardized by an expansion of legalized gambling,

For whatever financial benefit it might bring, expanded gambling would come with significant societal costs of concern to law enforcement. It is those costs which compel the Office of the Attorney General to oppose any effort to expand legalized gambling in this state.

SHEEHAN
PHINNEY
BASS +
GREEN

PROFESSIONAL
ASSOCIATION

SPBG

ATTORNEYS AT LAW

1000 ELM STREET
PO BOX 3701
MANCHESTER
NEW HAMPSHIRE
03105-3701
603-668-0300
FAX 603-627-8121

143 NORTH MAIN STREET
SUITE 103
CONCORD
NEW HAMPSHIRE
03301-5089
603-223-2020
FAX 603-224-8899

TOLL FREE:
1-800-625-SPBG

WORLD WIDE WEB SITE:
http://www.sheehan.com

Writer's Direct Dial
(603) 627-8110
Fax (603) 641-2343
bcook@sheehan.com

March 12, 2003

Hon. Lou D'Allessandro, Chair
Ways and Means Committee
New Hampshire Senate
Room 103—State House
Concord, New Hampshire 03301

Re: SB 127

Dear Senator D'Allessandro and Members of the Committee:

On behalf of the Diocese of Manchester, I am writing to express its opposition to SB 127 and all expansion of gambling in the state of New Hampshire. As you know from prior testimony, the Diocese believes reliance on gambling as a major revenue source to be inappropriate public policy.

Specifically, SB 127 which would allow electronic bingo and the linking of sites offering it, would create exponential increases in the amount of gambling individuals could undertake and would change the nature of bingo fundamentally. While certain parishes in New Hampshire have bingo games, this bill in not the idea of or supported by the Diocese and is unrelated to such activities. While the bill mentions charitable connection for the bingo games, it will benefit operators of large bingo halls and the manufacturers of the equipment, while at the same time threatening those who can least afford it with opportunities to squander their money.

The Diocese of Manchester respectfully asks you to report this bill "inexpedient to legislate."

Thank you for your consideration and your service to the people of New Hampshire.

Sincerely,

Bradford E. Cook
Legislative Representative

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: {Type FLOOR DATE}

THE COMMITTEE ON Ways and Means

to which was referred Senate Bill 127

AN ACT authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

VOTE: 3-1

Having considered the same, report the same with the following resolution:
Resolved, that it is: **INEXPEDIENT TO LEGISLATE.**

Senator Robert Clegg, Jr.
For the Committee

SB127 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: authorizing the sweepstakes commission to license multi-hall linked bingo for charitable purposes.

Date	Body	Description
1/30/2003	S	Introduced and Ref. to Ways & Means; SJ 3, Pg.36
2/14/2003	S	Hearing; March 12, 2003, Room 103, SH, 8:45 a.m.; SC10
3/28/2003	S	Committee Report; Inexpedient to Legislate, [04/03/03]; SC16
4/3/2003	S	Inexpedient to Legislate, MA, VV === KILLED ===; SJ 11, Pg.264

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations