September 3, 2009

Via facsimile 717-652-8018
and First Class mail

Donald Bailey, President
Atlantic Internet Group Corp.
5601 Morning Mist Drive
Harrisburg, PA 17111-3737

RE: Quarterback Draw Football classification opinion

Dear Mr. Bailey:

This is in response to your request for an opinion classifying Atlantis Internet Group's Quarterback Draw Football collection of games. I apologize for the delay in issuing this opinion and for any inconvenience that this may have caused. My staff and I have examined in detail the game descriptions you have submitted and the play of the games on a demonstration website. We have also participated in a demonstration held at the NIGC's Washington office, and we have exchanged e-mails, held meetings, and had telephone calls with you and other company representatives concerning the many details of the games and how they are played. It is my opinion that the quarterback football game itself and its associated sports board game, Bango Football Grid, are Class III. It is also my opinion that as originally presented, "Bango," the bingo game associated with the quarterback game, is Class III, but as revised, the game is Class II.

QUARTERBACK DRAW FOOTBALL

Quarterback Draw Football is a collection of three separate but related games, each requiring its own wager and paying its own prizes. The first is a football gambling game called the quarterback game that allows two players to participate in, and wager on, the outcome of a computerized football game. The quarterback game drives the other two games. One is a sports board game based solely on the scores produced in the football game. The other is "Bango," a bingo game for which the quarterback game functions as the ball blower.

All three of the games are wholly electronic, video games played on electronic player stations on Atlantis's proprietary network called the Casino Gateway Network,

which is also under review in this office. For the purposes of this opinion, I assume the Quarterback Draw Football games are played at a single Indian casino.

The Quarterback Game

The quarterback game gives two patrons the opportunity to play in, and bet on, a football-themed game. The game screen shows a bird's eye view of a standard 100-yard football field. There are two teams: red and grey. The football field is occupied by one toy-like quarterback token that is frozen into a single pose, a profile view, holding the football. This pose does not change with the action but the color of the token's uniform changes from red to grey and back again with team possession of the ball. The screen also displays:

a. A choice of four different action cards: pass, run, punt, and field goal/extra point. Kick-offs are provided by the game software when appropriate.

b. A scoreboard that tracks the plays, the downs, the score, the yard the ball is on, the yards needed for a first down, and the quarters of the game;

c. A result of the play display area that contains the yardage results of the play and the initials of the particular position player involved in making the play, quarterback (QB), tight end (TE), wide receiver (WR) etc.; and,

d. If the quarterback player is also playing Bango, the card or cards closest to a winning shape.

A play occurs when the quarterback player chooses one of the four action cards. Each of the action decks has a different number of cards, and each card contains a possible outcome of a football play. At the start of the game, the cards are placed in random order by a random number generator (RNG). The different kinds of plays and outcomes on the cards were selected so that the play of the quarterback game approximates the action in, and ebb and flow of, a real football game. Since passing and running are primary football actions, there are more of these cards than others; 54 cards or outcomes are in both the passing deck and in the running deck. The punt deck and field goal/extra point decks have 26 cards each. Kick-offs have 32 possible outcomes.

Each action card picked shows the result of a football play and a number of yards gained or lost from 0 to 50. As in an actual football game, the yards gained or lost will move the player from the line of scrimmage closer to or farther away from the team's goal line. The new yardage location of the quarterback and the football will be calculated and displayed on the scoreboard and the token player image will move to this new position.

Each player is the only player on his or her team and always plays offense. There are 32 plays in a quarter, 64 plays in a half, and 128 plays in a complete game. The game

ends after 128 plays unless overtime is required. The quarterback player has an opportunity to reshuffle the action cards periodically during play and at the end of each quarter. This appears to provide some control for the player, but according to Atlantis, it actually contributes nothing but sheer enjoyment to the play.

Scoring occurs just as it does in actual football. Six points for a touchdown, 1 point for a point after touch down, 2 points for a two-point conversion or a safety, and three points for a field goal. At the end of the game, the player with the highest football score wins the designated prize.

Atlantis represents that there is no skill involved in the quarterback game and the outcome is based entirely upon chance. Assuming the player has some understanding of football and wants to play the quarterback game in a manner similar to football, it appears as if knowledge of the game helps the player make a score. For example, the idea of passing on a third down to avoid a possible turnover, or accepting a yardage penalty instead of losing a down, or deciding whether to try for an extra kick or a two-point conversion make football strategy appear to be involved. However, the game will appear to play like an actual football game regardless of the use of effective football strategy, and the use of such strategy, or lack thereof, will not affect the outcome of the game.

Bango

While the two players are playing the quarterback game, any number of players can play Bango, a bingo-like game driven by the action in the quarterback game. The quarterback game functions as Bango's ball blower, and the end of the quarterback game is designed to coincide with the end of the Bango game.

Bango requires a minimum of two players and can accommodate as many as the operation would like and the Casino Gateway Network can support. The two quarterback players may also be Bango players. The idea, however, is to capitalize on group enjoyment of football, and so Bango players are aware of and are emotionally involved in the quarterback game as it occurs.

Before play begins, a Bango player pays a point-of-sale cashier who assigns the player to an electronic player station credited with the sale amount. The game software automatically chooses game cards for the player. Each card is unique in its configuration of numbers. No two players have the exact same card. The player may play as many cards as he or she wants to purchase, up to the maximum allowed by the gaming operation. Once the cards are purchased, a player may freely change cards before play starts.

The Bango card is similar to a standard bingo card. Instead of a range of numbers from 1 to 75 in five rows and five columns with one free space and letters spelling out B-I-N-G-O at the top, the Bango card has numbers that range from 1 to 50 without repetition, and there are no letter designations. For example, there is no B25, but rather only 25, and each number can appear anywhere on the card. There are no free spaces.

Numbers are chosen for Bango by the quarterback game using the line of scrimmage. For example, if after the opening kickoff, the ball is on the red team's own 20 yard line, the first number called in the Bango game is 20. If the next play is a gain of 14 yards, the next number called is 34. This creates a number of other differences between Bango and traditional bingo. Numbers can be drawn more than once in the same game, and it is not clear that each number is equally likely to occur at any given time, though Atlantis represents that over the course of the game the numbers occur statistically randomly.

The electronic player stations make different display screens available at the player's choice. One screen will have the most available football information with only one Bango card displayed. Another screen will display more Bango cards and some football information. The player may stay on one screen, or toggle between various screen displays, or tile various screen displays. For players with multiple cards, depending on the display screen chosen, the station will automatically display the card or cards closest to the winning shape. There will be at least one Bango card displayed at all times.

In the version of Bango Atlantis initially presented, the play of one game was defined as the completion of eight rounds, each having different cards with a different designated winning shape. The prize-winning pattern in round one is always an "L," round two a "T," round three an "H," round four a "Y," round five a "Bulls Eye," (four corners and a center), round six "Four Corners," round seven a "V," and round eight an "X."

When a number is drawn, the electronic player station automatically marks it on all cards on which it appears, turning the square a different color. There is no player action or involvement in the daubing.

As the eight-round game is defined, there is always a winner. That is, the player who covers the numbers in the shape of an "X" on the eighth card wins the game. Upon the drawing of the number that gives a player the game-winning shape, the game software clears all the numbers from every player's card except for the winning player's for verification. The prize is a jackpot that can be progressive or flat, at the choice of the gaming operation. Interim prizes based on shapes achieved before the game ending shape may be awarded.

There may or may not, however, be a winner in each of the first seven rounds. At the end of each quarter in the quarterback game, if no Bango player has yet achieved the designated shape for that round, there is no winner for that round. All cards are cleared, the prize rolls over into the prize for the next round, and the ball draw effectively begins again. There can be no rollover for round eight. If the quarterback game ends with no Bango winner as yet, the football play continues in "overtime" until a Bango player achieves the game-winning "X."

As a result of the automatic covering, a Bango player cannot "sleep" a winning number because the electronic player station will automatically notify the player and operator when a winning shape is achieved. The Bango player's role can be completely passive, requing no daubing or covering to win, or a player can mark a number manually, or monitor the card checker panel for drawn numbers. Whether or not players sleep, numbers continue to be drawn indefinitely until a player achieves the game-winning shape. When at least one winner is found, the game is paused for verification and the prize is paid to the player. A player may also chose to avoid any delay in play and accept prizes later. If more than one winner is found, the prize is then evenly split among the winners.

The second version of Bango differs slightly from the first, but the small differences are significant. The second Bango game also has eight "rounds" and has the same eight designated winning patterns for each as the first version. In the second version, however, a round does not end at the end of a football quarter. It ends only when a player achieves and actively daubs the designated winning pattern by touching a button or the screen. It is possible to sleep if a player fails to daub in a ten-second window. If a player sleeps, more numbers are drawn until there is a winner and the player daubs a winning pattern. Only then are the cards cleared and the next round begun. As in the first version, play ends when a player achieves the game-winning "X" on the eighth card.

Bango Football Grid, the sports board game

Bango Football Grid is a sports board game that Bango players and quarterback players may also play. No one except these players may purchase the numbered grids or spaces before the start of play. It is a typical sports board game. Players pay to pick a square on a 10 by 10 grid numbered from 0 to 9 across the top and one side. Each square is thus numbered by a unique pair of single-digit numbers. For example, the first square on the left of the first row is 0,0; the third square from the left in the fifth row is 4,3; the last square on the right of the last row is 9,9. A player wins a prize if his or her numbers match the last digits of the score of the quarterback football game at a designated time, say at the end of each quarter, half time, and the end of the game. There may or may not be a winner of this game depending on how many squares are sold and the location of the winning squares. If no one has purchased the winning squares, there are no winners.

ANALYSIS

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, divides the world of Indian gaming into three classes. Class I, which is not at issue here, encompasses "social games" played "solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II encompasses:

(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, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wages or pot sizes in such card games.

25 U.S.C. § 2703(7)(A)(i) - (ii).

Class III is a catchall category and includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Class III gaming also includes any electronic or electromechanical facsimiles of any game of chance and any house banking card game. 25 U.S.C. § 2703(7)(B)(i)-(ii); 25 C.F.R. § 502.4(b). Class III games may be played only pursuant to a tribal-state compact. See 25 U.S.C. § 2710(d)(l)(c).

Given these definitions, the classification of both the quarterback game and the Bango Football Grid sports board game is straightforward. In my opinion, they are both Class III games because by definition, neither is Class II. In particular, neither game is or was designed to be bingo, and neither is a form of pull-tabs, lotto, punch boards, tip jars, instant bingo, or even a game similar to bingo. The quarterback game involves a wager on the random outcome of a game of chance designed to mimic the look and feel of a football game. The sports board game is a wager on the quarterback football game, a form of simulated sports betting. Letter on sports board games from Penny Coleman, Acting General Counsel NIGC, to Christy Long (May 24, 2007).

The analysis of the Bango game is not quite so straightforward. As the game is designed to be bingo, its classification depends on whether it meets IGRA's definition of Class II gaming and, in particular, whether it meets the three elements of IGRA's definition of bingo.

I. *played for prizes ...with cards bearing numbers or other designations*

Both versions of Bango presented meet this first statutory element. The game is played for prizes (game-winnning or interim) and is played with one or more cards bearing numbers from 1 to 50. The fact that the cards are electronic and that the game is played with 50 instead of 75 numbers, as bingo is traditionally played, does not change the result.

Nothing in IGRA requires that bingo be played with paper cards. To the contrary, NIGC regulations specifically identify electronic bingo cards as permissible technologic aids, 25 C.F.R. § 502.7(c), and both the Ninth and Tenth Circuits found MegaMania, a bingo game played with electronic cards, to meet this requirement. *United States v. 103 Electronic Gaming Devices,* 223 F.3d 1091, 1095 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices,* 231 F. 3d 713, 719 (10th Cir 2000).

Similarly, nothing in IGRA requires that the game "commonly known as bingo" be played with 75 numbers, although it often is. In fact, IGRA does not even require that bingo be played with numbers. It may be played with "other designations" such as symbols or pictures. 25 U.S.C. § 2703(7)(A)(i)(I). Accordingly, the Office of General Counsel has previously opined that a bingo game played with cards of three squares and using only 29 numbers was a Class II game. Wild Ball Bingo (electronic version) classification letter from Kevin K. Washburn, NIGC General Counsel, to Frank Banyai, Cadillac Jack (March 22, 2001).

II. *covers such numbers ...when objects, similarly numbered ... are drawn or electronically determined* and

III. *the game is won by the first person covering a previously designated arrangement of numbers*

These last two statutory criteria for bingo, read individually and together, reveal essential characteristics of the game. First, a bingo game has to have a winner. This is a straightforward proposition that comes from the plain language of the third element: the game is won when the first player achieves the game-winning pattern designated before the game starts. 25 U.S.C. § 2703(7)(A)(i)(III). This, of course, accords with common experience of the game. You keep drawing numbers until someone wins, and someone has to win.

Second, read together, these elements show that a game is coextensive with a single ball draw, which also accords with the common experience of the game. After the cards are purchased and the prize-winning pattern or patterns designated, the game begins when the first "object, similarly numbered" is drawn. Players cover matching numbers on their cards, and the game continues until it is won by "first person covering a previously designated arrangement" that is the game-winning pattern. Whatever number allows the player to win is the last number drawn. Then and only then does a new game start with a new ball draw and new, unmarked cards.

Third, there have to be multiple players in the game who compete for prizes. Inherent in the language "first person covering," is an element of competition. IGRA's language is not "a person," not "any person," not "every person," but the "*first* person"—players must compete to be that "first person". Thus, the statutory language requires the game to have multiple players, and it requires them to compete with one another to be the first to cover or "daub" a particular pattern.

This reading of the "first person covering" language to require competition is not new. This office has previously opined:

> Bingo requires participation of some degree. Merely hitting a start button and having numbers covered would not comply with the degree of participation that the statutory language – "the first person to cover" – implies.

Reel Time Bingo classification letter from Penny J. Coleman, NIGC Acting General Counsel, to Clifton Lind, President and C.O.O. Multimedia Games at 8. (Sept. 23, 2003).

Fourth, in competing for prizes, players can "sleep." This describes the common occurrence in bingo halls where a player fails to cover one or more numbers on her card (or cards), with the result that she fails to cover a winning pattern before another player does. She would have won the game but for the fact that she was not paying attention or for some other reason did not cover the numbers on her card when they were called. "Sleeping" can also refer to a situation where a player has a winning combination on her card(s) but fails to recognize this and shout "BINGO!" to claim her win and her prize. The result is that another player who achieves a winning pattern and does claim her prize wins instead.

The possibility of sleeping a bingo, then, is an embodiment of the competition in the game and of the language in IGRA's definition of bingo that the winner is the "first person to cover." A small mistake or oversight can cost one player the game and enable another, more attentive player to win. Put somewhat less formally, competition is inherent in the game of bingo as defined in IGRA because "if you snooze, you lose."

With this understanding of the second and third statutory elements of bingo, it is my opinion that for two equally sufficient reasons, the version of Bango originally presented does not meet them, does not meet IGRA's definition of Class II bingo, and is therefore Class III.

On the one hand, the game described by the first version is not defined by, and is not coextensive with, one ball draw. As this Bango was designed, there are eight rounds, and while there has to be a winner in round eight, it is possible that some of the first seven rounds will have no winner. Depending on what happens in the quarterback game, in any of the first seven rounds, the cards may be cleared, a new ball draw may begin, and no prizes may be awarded. Put slightly differently, then, in this version of Bango, there can be ball draws without winners, something for which IGRA does not provide.

On the other hand, it is not possible to sleep in the first version of Bango. The game software automatically covers all matching numbers for players and claims and awards all prizes for the players. It is therefore possible that one or all players will be entirely inattentive to the game, but impossible for any of them to sleep. As such, the first version of Bango lacks the necessary element of competition between players required by IGRA.

By contrast, it is my opinion that the second version of Bango football presented does meet IGRA's second and third statutory requirements for bingo. This version breaks eight "rounds" into eight discreet games. Each game begins with a new card or cards for each player and a designated game-winning pattern—"L" in the first game, "T" in the second, "H" in the third, etc. Each game continues with a single ball draw until the game-winning pattern is achieved and the associated prize is awarded, together with any interim prizes earned. Each of the eight games must have a winner.

Further, it is possible for the players to sleep in the second version of Bango. When a player has achieved a game-winning pattern in any of the eight games, the player has ten seconds to touch the screen or a button to cover and claim. If a player fails to daub in the allotted time, the game continues with the draw of another number. The game will continue to draw additional numbers until a player covers and claims the game winning pattern. Then and only then will prizes be awarded, the cards cleared, and the next game begun. As such, the second Bango version has the required element of competition between multiple players. The second version describes a game that is a series of eight games, in each of which players "cover such numbers ...when objects, similarly numbered ... are drawn or electronically determined and the game is won by the first person covering a previously designated arrangement." 25 U.S.C. § 703(7)(A)(i)(II)-(III).

That the second version of Bango meets the three statutory elements of bingo, however, does not end the Class II analysis. Because the game, like all three games that are part of Quarterback Draw Football, is wholly electronic, the question arises whether the game is an "electronic or electromechanical facsimile of any game of chance," which IGRA makes Class III. 25 U.S.C. § 2703(7)(B)(ii). It is my opinion that the second version of the game as played on the Casino Gateway Network is not a facsimile.

Courts have adopted a plain meaning interpretation of the term *facsimile* and recognized a facsimile of a game is one that electronically replicates the characteristics of the underlying game. *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'"), *cert. denied*, 516 U.S. 912 (1995); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994)("[a]s commonly understood, facsimiles are exact copies, or duplicates").

For example, consider pull tabs. As traditionally played, that game is played with two-ply paper cards. *Cabazon,* 14 F. 3d 633 at 635. Cards are purchased from the

operator, which sells them from a set known as the "deal," and a typical deal contains up to 100,000 cards. When the top layer or "tab" of a card is removed, the bottom layer reveals symbols in winning or losing patterns. The typical card will have three tabs, each an opportunity to win, and a pre-determined number of winning cards are randomly spaced within the deal. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission,* 327 F. 3d 1019, 1024 (10th Cir. 2003).

In *Cabazon*, the D.C. Circuit considered a wholly electronic, wholly automatic version of pull tabs, one that involved no physical, tangible cards. Rather, the pull tabs were generated by a computer and displayed on a video screen. The court had no difficulty in finding that the game was a Class III facsimile:

> Because class II gaming does not include "electronic or electromechanical facsimiles of any game of chance," (25 U.S.C. § 2703(7)(B)(ii)), this … alone demonstrates that the video game is not in the class II category….As commonly understood, facsimiles are exact copies or duplicates. Although there may be room for a broader interpretation of "facsimile," the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of the game, and if that is not sufficient to make it a facsimile, we doubt, as did Judge Lamberth, that anything could qualify.

Cabazon, 14 F.3d, at 636.

In short, the court concluded that IGRA's "exclusion of electronic facsimiles removes games from the Class II category when those games are wholly incorporated into an electronic or electromechanical version." *Id. Accord*, *Sycuan*, 54 F.3d at 542-43; *See also*, *United States v. 103 Electronic Gambling Devices,* 223 F.3d 1091, 1102 (9th Cir. 2000) ("By deeming aids to bingo class II gaming in the text of IGRA, … Congress specifically authorized the use of such aids as long as the class II provisions of IGRA are complied with ….")(internal citations omitted).

By contrast, in *Diamond Game v. Reno*, 230 F.3d 365, 370 (D.C. Cir. 2000), the machine in question, the Lucky Tab II, sold and dispensed paper pull tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device, no matter how many bells and whistles it might have. The "game is in the paper rolls," the Court held, and the Lucky Tab II is "little more than a high-tech dealer."

Unlike the pull-tab game in *Cabazon* and more like the game in *Diamond Game,* the second version of Bango does not automate all of the essential elements of bingo. As discussed above, covering or "daubing" is an essential, statutory element of bingo. This element still must be performed by the player. He or she must touch a button or the

screen to cover and claim the game-winning pattern in each of the eight component games of Bango. Failure to do so within ten seconds results is sleeping and forfeiture of the win and the associated prize or prizes. As such, the second version of Bango is not an exact and detailed copy of bingo and is not an electronic or electromechanical version of a game of chance. It is my opinion that this second version of Bango is Class II.

CONCLUSION

For all of the foregoing reasons, it is my opinion that the quarterback game and Bango Football Grid are Class III, that the version of Bango originally presented is Class III, and that the second version of Bango presented is Class II.

This opinion is advisory in nature only, and may be superseded, reversed, revised, or reconsidered. Furthermore, if the game or play thereof fails to conform with, or differs from, the foregoing description and conditions, such differences might materially alter our conclusion. It is also my understanding that the Quarterback Draw Football set of games has been partially, but not completely, reviewed by an independent testing laboratory. This opinion should be relied upon only when an independent testing laboratory has fully reviewed Quarterback Draw Football and has confirmed that the games play as they have been described. Further, before Bango may be offered for use in a tribal casino as a Class II game, it must be tested for compliance with the requirements of NIGC's Technical Standards, 25 C.F.R. part 547, by an independent testing laboratory and approved for use by the relevant tribal gaming commission.

If you have any questions, please feel free to call Michael Gross, Associate General Counsel, General Law, at 202-632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel