



February 4, 2020

VIA FIRST CLASS MAIL & EMAIL

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PCI Tribal Gaming Commission
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Re: KGM/Alfastreet's Bingo-R – Game Classification Advisory Legal Opinion

Dear Messrs. Field and Cohen:

On January 4, 2019, you requested an advisory legal opinion concerning whether KGM/Alfastreet's Bingo-R constitutes a Class II game under the Indian Gaming Regulatory Act ("IGRA") and NIGC regulations. Thank you for the written, photograph, and video submissions, which were received on January 4, March 29, May 30, June 14, and October 29, 2019 and January 23, 2020.¹

After careful review and consideration of the materials provided, the Office of General Counsel's opinion is that Bingo-R is Class III. Neither the main game nor the secondary game satisfy the criteria for bingo or a game similar to bingo. Neither game requires a winner, because when players fail to *call-to-win* no one wins the game and the game ends. Alternatively, when the auto-daub is used, there is no player participation in the game. Additionally, the secondary game may be played by one player alone, not requiring competition among players.

I. Game Description

Bingo-R consists of two separate but related games - a main game and a secondary game. Each require a distinct wager and pay a prize when won. The main game allows a minimum of

¹ In making the same request on February 19, 2019, Mr. Jessie Kingston, a compliance officer of KGM Gaming, submitted a technical manual, a compliance testing report, two flow-charts, and other written materials.

two (2) and a maximum of thirty-seven (37) players. Once a wager is made on the main game, players may – but do not have to – place one or more wagers in the secondary game, which allows a minimum of one (1) player and the same maximum number as the main game.² Both are electronic games played on electronic player stations, requiring a game winning pattern of a horizontal line of two (2) numbers and using electronic bingo cards and KGM/Alfastreet’s proprietary Bingo-R software and hardware. Beyond the difference in the minimum number of players, the distinction between them is that in the secondary game, players place wagers on bingo cards through one of three roulette layouts (table, wheel, or race). To play, a player first buys and adds credits to the player station either by: 1) depositing banknotes into the machine’s bill acceptor; 2) inserting a barcode ticket into the machine; or 3) purchasing the credits from a host.³ A detailed description of the games is set forth below.

A. *Main Card game*

Each player’s main card is unique with seventy-four (74) of seventy-six (76) numbers.⁴ The card is long and narrow, three spaces across and thirty-seven rows down with a wild/free space in the middle of each horizontal row.⁵ A “pool of seventy-six (76) numbers is used to populate the non-free space positions on the Bingo cards.”⁶

After receiving the first prompt of *Place Your Bets, Please*, a player places a wager on the main card by touching the display of it on the right side of the player station screen.⁷ The wager must always be a dollar (\$1.00)⁸, and a player may only win a dollar (\$1.00) or a dollar and a cent (\$1.01), depending upon which setting the gaming facility chooses.⁹

Once two (2) players have placed dollar wagers on main cards, they have the option of participating in the secondary game by placing wagers on the electronic roulette graphics, but that option is not required – and the game(s)¹⁰ automatically begin.¹¹ A random number generator (RNG) “will begin drawing numbers, one at a time, from the pool of seventy-six (76) numbers,” “will evaluate all Bingo cards to determine if a game ending pattern has been achieved after each ball has been drawn,” and “will continue drawing Bingo balls and evaluating results until a game ending pattern is achieved by one (1) or more players on their [*Main*] Bingo cards.”¹² A game ending pattern is two numbers in a horizontal line on the main card.¹³ The results are then transmitted to the player stations with either the players calling for a win by

² Email from Jason Cohen, Executive Vice President, KGM Gaming, to Jo-Ann M. Shyloski, Of Counsel re: Bingo-R, Questions – Follow-up (Jan. 23, 2020).

³ Alfastreet R1SL-M3-23-2 Technical Manual at 1.

⁴ Class2 Bingo R User Manual, Alfastreet gaming, § 1.2 *How To Play*, at 5.

⁵ Gaming System Report, Alfastreet Bingo R System with Playing Station v1.59 and v2.3.48 (Apr.1, 2013) at 2.

⁶ *Id.* at 3.

⁷ Class2 Bingo R User Manual, *supra* § 1.2 at 5; KGM/Alfastreet’s Answers to Questions (Jan. 4, 2019) at 1.

⁸ KGM/Alfastreet’s Answers to Questions (May 30, 2019) at 1.

⁹ *Id.* at 3.

¹⁰ Meaning the main game only or both the main game and secondary game.

¹¹ Alfastreet Software Bingo-R User Manual, Multigame – User Manual v1.10 § 2 (3.2) *How To Play*, at 4; KGM/Alfastreet’s Answers to Questions (Jan. 4, 2019) at 1; KGM/Alfastreet’s Answers to Questions (Mar. 29, 2019) at 3 & 5.

¹² Gaming System Report, *supra* at 3.

¹³ Game Play Photograph – 4 (“If two numbers in line are part of drawn numbers the main card will win.”).

pressing the call button within a specified period of time¹⁴ or the player stations automatically daubing the winning bingo patterns.¹⁵ If, however, the auto-daub is not used and no player with a winning card pushes the call button within the specified time, the win disappears and there is no winner for the game.¹⁶ On the player stations, the winning numbers are displayed as lit bingo balls.¹⁷ “Each main card game [is] designed to achieve a win on 37 of 38 possible 2 number combinations....”¹⁸

B. Secondary game

Participating in the main game is required to participate in and place wagers in the secondary game, which uses electronic roulette graphics. After placing a wager on the main card, a second prompt occurs, indicating - *Minimum Bet Placed*. A player may then choose one of three roulette betting fields - *table*, *wheel*, or *race* - by touching a button of the same name on the player station screen.¹⁹ These distinct layouts change the point of view of the secondary game and also modify the selection of potential wagers, as all wagers are not available in all layouts.²⁰ Specifically, all layouts offer the following roulette-style wager types: wagers on any numbers from 0, 00 to 36, sectors,²¹ neighbors,²² straight, dozen, column, low/high, red/black, and even/odd.²³ The four different sector wagers allow preset wager combinations to be placed.²⁴ As does the neighbors wagers, which place wagers on either side of a specific number as such numbers are positioned on a roulette wheel.²⁵ The following roulette wager types, however, are only available on the *table* layout: split, street/trio, corner, five number, and six number.²⁶

Once a layout is chosen, a player may place wagers “by pressing the desired location. Blue chips will appear on the playboard and will indicate the value of credits being wagered on each bet location.”²⁷ If the player changes her/his mind, s/he may use *chip dragging* – dragging a placed wager to another location.²⁸ Importantly, each placed wager on a roulette location represents – and is transferred to - a wager on a 3x3 bingo card.²⁹ If a player puts more wagers on the same location on the roulette layout then the wager on the corresponding bingo card increases too.³⁰ For example, “if [a] player places \$6 bet on number 1, he gets one bingo card with [the] amount of \$6; if [a] player places \$6 split bet on numbers 1 and 2, he gets two bingo

¹⁴ Alfastreet Software Bingo-R User Manual, *supra* § 6 at 4.

¹⁵ Gaming System Report, *supra* at 3 (“The *Playing Stations* will show the result of the Bingo game by daubing any winning Bingo patterns.”).

¹⁶ KGM/Alfastreet’s Answers to Questions (Mar. 29, 2019) at 3 and (Oct. 29, 2019) at 3.

¹⁷ Game Play video – game example 2_1.mp4.

¹⁸ Alfastreet gaming Bingo R, Class II, Bingo to Roulette converter system at 1 (Mar. 27, 2013).

¹⁹ Alfastreet Software Bingo-R User Manual, *supra* § 2 (2) at 3; Class2 Bingo R User Manual, *supra* § 1.2 at 5; KGM/Alfastreet’s Answers to Questions (Jan. 4, 2019) at 2.

²⁰ KGM/Alfastreet’s Answers to Questions (Mar. 29, 2019) at 4.

²¹ Meaning: 16-7, 8-15, 19-33 and 20-34, 14-9 and 13-10.

²² Meaning: Neighbors 1, Neighbors 2, Neighbors 3, and Neighbors 4.

²³ KGM/Alfastreet’s Answers to Questions (May 30, 2019) at 2.

²⁴ Class2 Bingo R User Manual, *supra* § 1.2 at 6.

²⁵ *Id.*

²⁶ KGM/Alfastreet’s Answers to Questions (May 30, 2019) at 2.

²⁷ Class2 Bingo R User Manual, *supra* § 1.2 at 6.

²⁸ KGM/Alfastreet’s Answers to Questions (Mar. 29, 2019) at 3-4.

²⁹ Class2 Bingo R User Manual, *supra* § 1.2 at 5; KGM/Alfastreet’s Answers to Questions (Jan. 4, 2019) at 3.

³⁰ *Id.*

cards with [the] amount of \$3 for each number; [or] if [a] player places \$6 street bet on numbers 1, 2 and 3, he gets three bingo cards with [the] amount of \$2 for each number.”³¹ A player “can collect 38 Bingo-R cards [] on a double zero roulette layout [], one for each number (00, 0, 1, 2, 3, ... 34, 35, 36).”³² Further, many of the roulette-style wagers result in wagers on multiple bingo cards.³³ The player station screen shows the first seven (7) bingo cards, corresponding to the placed roulette-style wagers, on the upper right corner.³⁴ To see all the bingo cards corresponding to all the placed wagers, the player must push a specific button.³⁵

Upon a player placing a secondary game wager, the prompt – *Waiting For Other Players To Join* – is shown until a second player places a wager on the main card.³⁶ The prompt - “*Place Your Bets, Please* is displayed again until the *Hurry Up, Bets Are Closing* prompt occurs, followed by [the] *No More Bets* [prompt].”³⁷ *No More Bets* signifies that all wagers are closed.³⁸ Then, as described above as to the main game, the random number generator (RNG) generates the winning bingo numbers. If the winning numbers include two numbers in the second horizontal row of the 3x3 bingo cards, the cards win.³⁹ As noted above, the winning bingo numbers are displayed as lit bingo balls on the player station screen. These numbers are also converted to a “winning” roulette number and presented as that number flashing on a roulette wheel.⁴⁰ Game ending patterns for the main and secondary games occur simultaneously.⁴¹ In other words, achieving a game ending pattern on any secondary game’s bingo cards also means that a game ending pattern was achieved on at least one main card.⁴² Also as described above, the results are then transmitted to the player stations with either the players calling for a win by pressing the call button within the allotted time period or the player stations automatically daubing the winning bingo patterns. Again, if the auto-daub is not used and no player with a winning card pushes the call button within the allotted time, there is not a winner of either game.⁴³ Each secondary card is designed to win “on 1 of 38 2 number combinations.”⁴⁴

II. Applicable Law

A. Class II gaming

³¹ KGM/Alfastreet’s Answers to Questions (Jan. 4, 2019) at 3.

³² Alfastreet Software Bingo-R User Manual, *supra* at 3.

³³ Game Play Photographs – 7-10 (e.g., outside bets, sectors, neighbors, trio, five-number, six-number, etc.).

³⁴ Class2 Bingo R User Manual, *supra* § 1.2 at 6.

³⁵ *Id.*

³⁶ KGM/Alfastreet’s Answers to Questions (May 30, 2019) at 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Game Play Photographs – 11 & 12; Alfastreet Software Bingo-R User Manual, *supra* § 2 (5) at 4.

⁴⁰ Alfastreet gaming Bingo R, Class II, Bingo to Roulette converter system, *supra* at 2 (for example, a roulette number “1” results from a winning bingo ball combination of 1 and 2; a roulette number of “2” results from a winning bingo ball combination of 3 and 4, etc. up to a winning roulette number of “38” results from a winning bingo ball combination of 75 and 76); Gaming System Report, *supra* at 3 (“The Bingo game result is also displayed as a corresponding alternative Roulette display.”); Alfastreet Software Bingo-R User Manual, *supra* § 4 at 4.

⁴¹ Alfastreet gaming Bingo R, Class II, Bingo to Roulette converter system, *supra* at 1.

⁴² *Id.* at 2.

⁴³ KGM/Alfastreet’s Answers to Questions (Oct. 29, 2019) at 3.

⁴⁴ Alfastreet gaming Bingo R, Class II, Bingo to Roulette converter system at 1 (Mar. 27, 2013).

IGRA defines Class II gaming in relevant part as:

(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.⁴⁵

IGRA further directs that “[t]he term ‘class II gaming’ does not include— . . . electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.”⁴⁶

NIGC regulations further elucidate the statute, defining Class II gaming 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 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 cards⁴⁷

Although IGRA does not define “other games similar to bingo,” NIGC regulations interpret the term to mean: “any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.”⁴⁸

B. Class III gaming

⁴⁵ 25 U.S.C. § 2703(7)(A).

⁴⁶ 25 U.S.C. § 2703(7)(B)(ii).

⁴⁷ 25 C.F.R. § 502.3.

⁴⁸ 25 C.F.R. § 502.9.

Under IGRA, Class III gaming is defined as “all forms of gaming that are not class I gaming or class II gaming.”⁴⁹ And NIGC regulations define Class III gaming, in relevant part, as “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— ...

(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;⁵⁰

III. Analysis

As noted above, you ask whether Bingo-R qualifies as a Class II game. Since it is not a card game, the question is whether the game is bingo or a game similar to bingo.⁵¹

A. Does Bingo-R contain the fundamental characteristics of bingo?

In IGRA, neither Congress, in devising the statutory definition of bingo, nor the NIGC in its interpretation of the definition found in its regulations, intended to limit bingo to its classic form.⁵² That being said, IGRA and NIGC regulations’ three explicit criteria for bingo are the legal requirements for a game to qualify as Class II bingo.⁵³ These criteria, as set forth above, require that: the game must be played for prizes with cards bearing numbers or other designations; cardholders must cover numbers as they are drawn; and the game must be won by the first person to cover the designated pattern.⁵⁴

i. Is Bingo-R played for prizes with cards bearing numbers or other designations?

The first criterion for bingo mandates that the game be “played for prizes ..., with cards bearing numbers or other designations.”⁵⁵ As is apparent from the plain language of this first criterion, there is no requirement that bingo be played with paper cards.⁵⁶ Further, IGRA and NIGC regulations explicitly allow the use of technologic aids in the game of bingo.⁵⁷ NIGC regulations specifically cite “electronic cards for participants in bingo games” as an example of a

⁴⁹ 25 U.S.C. § 2703(8).

⁵⁰ 25 C.F.R. § 502.4(a) & (b).

⁵¹ 25 U.S.C. § 2703(7); 25 C.F.R. § 502.3.

⁵² *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000) (citing 57 Fed. Reg. 12382, 12382 – “The Commission does not believe Congress intended to limit bingo to its classic form.”) (“[T]he NIGC’s interpretation of both IGRA and the NIGC’s primary IGRA implementing regulation, 25 C.F.R. § 502, rests on the proposition that neither Congress nor the Commission intended to ‘limit bingo to its classic form.’”).

⁵³ *Id.* at 1096; *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000).

⁵⁴ 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3.

⁵⁵ 25 U.S.C. § 2703(7)(A)(i)(I); 25 C.F.R. § 502.3(a)(1).

⁵⁶ *Id.*

⁵⁷ 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3(a).

technologic aid.⁵⁸ Moreover, both the Ninth and Tenth Circuit Courts of Appeal have found MegaMania, a bingo game played with electronic cards, met this criterion.⁵⁹

In the main game of Bingo-R, the main card is a digital, three-row card with seventy-four (74) numbers set forth in sets of two with a free space in between, up to the number seventy-six (76).⁶⁰ As mentioned, each player's main card is unique with only 74 of the 76 numbers. The secondary game of Bingo-R also uses digital bingo cards that have a 3x3 bingo matrix, numbers assigned to each space and a wild space in the center of the card.⁶¹

As for the requirement that the game be played for prizes, Bingo-R awards monetary prizes in both the main and the secondary games. The main game's required wager is one dollar and a player is eligible to win one dollar or one dollar and one cent.⁶² In the secondary game, the prizes for a winning wager are "the same as with a classic double zero roulette."⁶³

Given that in Bingo-R players play for prizes with cards bearing numbers or other designations, the first bingo criterion is met.

ii. Do cardholders cover numbers or other designations as they are drawn?

The second criterion of bingo mandates that the cardholders cover the numbers when they are drawn or electronically determined.⁶⁴ Specifically, IGRA provides that bingo is a game "in which the holder of the card covers such numbers or designations when objects ... are drawn or electronically determined."⁶⁵ NIGC regulations interpreting this provision require that for bingo, "players cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined."⁶⁶ In short, IGRA states that the "holder of the card cover" and NIGC regulations further define such holder as a "player."

a. Call-For-Win

In both the main and the secondary games, after the winning bingo numbers are drawn, players may call for a win by pressing the call button within a certain defined time period.⁶⁷ By doing so, players cover the numbers that are electronically determined. Consequently, with the call-for-win feature employed and action taken by the players, Bingo-R satisfies the second criterion of bingo.

⁵⁸ 25 C.F.R. § 502.7(c).

⁵⁹ *103 Elec. Gambling Devices*, 223 F.3d at 1095; *162 MegaMania Gambling Devices*, 231 F.3d at 719.

⁶⁰ Class2 Bingo R User Manual, Alfastreet gaming, § 1.2 *How To Play*, at 5; Alfastreet Software Bingo-R User Manual, *supra* § 1 at 3; Game Play Photograph – 5.

⁶¹ Class2 Bingo R User Manual, *supra* § 1.1, Figure 3; Alfastreet Software Bingo-R User Manual, *supra* § 2- 3.2 & 5 at 2-3; Game Play Photograph – 13.

⁶² KGM/Alfastreet's Answers to Questions (May 30, 2019) at 3.

⁶³ *Id.* at 5.

⁶⁴ 25 U.S.C. § 2703(7)(A)(i)(II); 25 C.F.R. § 502.3(a)(2).

⁶⁵ 25 U.S.C. § 2703(7)(A)(i)(II).

⁶⁶ 25 C.F.R. § 502.3(a)(2).

⁶⁷ Alfastreet Software Bingo-R User Manual, *supra* § 6 at 4.

b. Auto-daub

Gaming facilities, however, may choose to not to employ the call-for-win feature.⁶⁸ And a setting on Bingo-R allows the player stations to automatically daub the winning bingo numbers.⁶⁹

A NIGC proposed rule and numerous prior Office of General Counsel legal opinions all underscore that the player must perform some act to be involved in the play of the game of bingo.⁷⁰ Moreover, this conclusion – that the player must actively participate in the play of the game – is consistent with an opinion from the United States District Court for the Northern District of California, which addressed the question of whether MegaMania, an electronic gaming device, qualified as bingo or a game similar to bingo.⁷¹ In so doing, the court examined whether the “covering” done by the player met the criteria for bingo. In MegaMania, the device automatically identified the numbers on each electronic bingo card that were electronically determined and the player “covered” them on the card by pushing a daub button.⁷² In holding that this method of covering was sufficient to qualify as bingo, the court explained: “[t]here is nothing in IGRA or its implementing regulations [] 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.”⁷³ Thus, in finding that IGRA and NIGC regulations “merely require a player to cover,” the court recognized the requirement for bingo that the player carry out some action to “cover.”

⁶⁸ KGM/AlfaStreet’s Answers to Questions (Oct. 29, 2019) at 3; Game Play video – game example 2_1.mp4 at 1:58 (“I don’t think our casino is going to set it up like that.”).

⁶⁹ Gaming System Report, *supra* at 3.

⁷⁰ See 78 Fed. Reg. 37998, 37999 (June 25, 2013) (In the proposed rule, the player takes the initial action of touching a button.); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 12-13 (Sept. 26, 2003); Letter to Joseph H. Webster, Esq., Hobbs, Straus, Dean & Walker from Penny J. Coleman, NIGC Acting General Counsel re: Rocket FastPlay Bingo 1.0 Advisory Opinion at 12 (Oct. 18, 2004) (“FastPlay meets the requirement that a player cover when objects are drawn in that numbers are not stored on the game’s computer. Instead, numbers are released sequentially and displayed in the order released and players all have the same opportunity to cover (or daub) immediately upon release of drawn balls.”); Letter to Jack Saltiel, Cadillac Jack, Inc., Chief Technical Officer from Penny J. Coleman, NIGC Acting General Counsel re: Cadillac Jack Triple Threat Bingo Advisory Game Classification Opinion at 12 (Dec. 23, 2004) (“the player is actually performing some act to be involved in the play of the game of bingo.”); Letter to Nancy McAlister, Commissioner, Eastern Shawnee Tribe of Oklahoma from Penny J. Coleman, NIGC Acting General Counsel at 1 (April 22, 2005) (“As I understand Lucky Lotto, it automatically daubs matching numbers for the player without the player taking any overt action, and it lacks a designated game-winning pattern. These features make the game Class III.”); Letter to David Matheson, President, Bingo Nation Network Authority, from Eric Shepard, NIGC Acting General Counsel re: Bingo Nation Game Advisory Opinion at 5 (June 27, 2014) (“Following the draw of a number, the proxy player must press a ‘Daub/Claim’ button on their minding device, which covers the corresponding number on each matching game card.”).

⁷¹ *United States v. 103 Elec. Gambling Devices*, No. C 98-1984 CRB, 1998 WL 827586, at *1 (N.D. Cal. Nov. 23, 1998) *aff’d*, 223 F.3d 1091 (9th Cir. 2000).

⁷² *Id.* at *1 and *6.

⁷³ *Id.* at *6; see also *United States v. 162 MegaMania Gambling Devices*, No. 97-C-1140-K (N.D. Okla. October 26, 1998), *aff’d*, 231 F.3d 713 (10th Cir. 2000) (court found pressing a daub button was sufficient to “cover” for purposes of bingo).

Therefore, when using the auto-daub feature, the second bingo criterion is not satisfied, because Bingo-R does not conform with the statutory and regulatory mandate that the player “cover.” The player must undertake some act to actually and actively participate in the play of the game. When using the auto-daub, the player does not participate in game play to cover nor actively participate in the covering in any way.

iii. Is Bingo-R won by the first person to cover the designated pattern?

a. Call-For-Win

IGRA defines bingo as a game “in which the game is won by the first person covering a previously designated arrangement of numbers ... on such cards.”⁷⁴ Under NIGC regulations, this third criterion mandates that players “win the game by being the first person to cover a designated pattern on such cards.”⁷⁵ Given this language,

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.⁷⁶

Any pattern is sufficient “to yield a prize, as long as the pattern is ‘previously designated’.”⁷⁷

Also, bingo must have a winner. This “straightforward proposition” derives from the statutory and regulatory language as well – “the game is won when the first player achieves the game-winning pattern designated before the game starts.”⁷⁸ And this “accords with common experience of the game [-] [y]ou keep drawing numbers until someone wins, and someone has to win.”⁷⁹ Though “nothing in the Gaming Act or regulations prohibits more than one winner” and “the language in [IGRA] 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.”⁸⁰

Here, both the main game and secondary game possess designated, game ending patterns, which are a horizontal line with two numbers. As previously explained, game ending patterns on the main and secondary game cards occur simultaneously. So achieving game ending patterns on any secondary game cards means that a game ending pattern was achieved on at least one main card. Also there may be simultaneous winners, as everyone who has the requisite two winning

⁷⁴ 25 U.S.C. § 2703(7)(A)(i)(III).

⁷⁵ 25 C.F.R. § 502.3(a)(3).

⁷⁶ Letter to Donald Bailey, President, Atlantic Internet Group Corp., from Penny J. Coleman, Acting General Counsel re: Quarterback Draw Football at 8 (Sept. 3, 2009).

⁷⁷ *103 Elec. Gambling Devices*, 223 F.3d at 1098.

⁷⁸ Letter to Donald Bailey, President, Atlantic Internet Group Corp., from Penny J. Coleman, Acting General Counsel re: Quarterback Draw Football at 7.

⁷⁹ *Id.*

⁸⁰ *162 MegaMania Gambling Devices*, 231 F.3d at 722.

bingo numbers on their cards and calls for a win within the allotted time wins. But if all players with winning cards fail to push the call button then the win “disappears”⁸¹ and the game ends without a winner.⁸² It is possible then for there to be ball draws without winners. This is not in accord with IGRA and NIGC regulations.⁸³

In addition, the secondary game may be played by only one player.⁸⁴ Although two players are necessary for the main game to begin, the secondary game will occur even if only one of those players makes a wager on the on the electronic roulette graphics. In such instance, the secondary game lacks competition among multiple players and fails to satisfy the statutory and regulatory requirements of bingo. And it is no matter that the secondary game is just that because secondary, interim, consolation, and progressive games must comport with the statutory and regulatory requirements of bingo to be such.⁸⁵

Without a winner after every ball draw/game and competition among multiple players, Bingo-R fails to satisfy the third criterion for bingo.

b. Auto-daub

As discussed, the third criterion of bingo requires the game be won by the first person to cover a previously designated pattern.⁸⁶ When Bingo-R uses the auto-daub function, the players fail to take any action to cover or actually and actively participate in such covering. As a result, with the auto-daub function employed, Bingo-R does not fulfill the third criterion for bingo.⁸⁷

B. Is Bingo-R a game similar to bingo?

⁸¹ KGM/Alfastreet’s Answers to Questions (Mar. 29, 2019) at 3.

⁸² Email from Jason Cohen, Executive Vice President, KGM Gaming, to Jo-Ann M. Shyloski, Of Counsel re: Bingo-R, Questions – Follow-up (Jan. 23, 2020).

⁸³ *See, e.g.*, Letter to Donald Bailey, President, Atlantic Internet Group Corp., from Penny J. Coleman, Acting General Counsel re: Quarterback Draw Football at 8; *see also* Letter to Larry Montgomery, President and COO, Multimedia Games, Inc., from Penny J. Coleman, Acting General Counsel re: MegaMania at 6 (July 23, 1997).

⁸⁴ Email from Jason Cohen, Executive Vice President, KGM Gaming, to Jo-Ann M. Shyloski, Of Counsel re: Bingo-R, Questions – Follow-up (Jan. 23, 2020).

⁸⁵ Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 21 (Sept. 26, 2003).

⁸⁶ 25 U.S.C. § 2703(7)(A)(i)(III); 25 C.F.R. § 502.3(a)(3).

⁸⁷ *See, e.g.*, Letter to James C. Malcolm, Vice President Marketing, Gaming Ventures International, Inc., from Barry Brandon, NIGC General Counsel re: POKO at 2 (Aug. 11, 1999) (POKO is not bingo because it does not have a designated pattern and is not won by the first person covering a designated pattern); *See* Letter to Don W. Abney, Sax and Fox Nation, Principal Chief, from Richard B. Schiff, Senior Attorney re: Tele-Bingo at 2 (June 21, 1999) (not bingo in part because player does not win by being the first person to cover a previously designated arrangement); Letter to Joseph H. Webster, Esq., Hobbs, Straus, Dean & Walker, LLP, from Penny Coleman, NIGC Acting General Counsel re: Rocket FastPlay Bingo 1.0 at 13 (Oct. 18, 2004) (“FastPlay also meets the requirements that the person actually cover the pre-designated pattern.... [A]n automatic daub, in which the player need not have any response to the numbers that are called, would not be acceptable.”); Letter to Robert A. Luciano, President, Sierra Design Group re: Mystery Bingo at 13 fn. 8 (Sept. 26, 2003) (“In our view, the presence of this [auto-daub] feature would mean that the game no longer met the second and third requirements that constitute the definition of bingo in Section 2703(7)(A)”).

In sum, Bingo-R fails to satisfy two out of the three bingo criteria, because there can be ball draws/games without winners; the secondary game can be played by only one player; and, when the auto-daub is used, players do not cover or actively participate in the game. As a consequence, Bingo-R is not bingo. But can Bingo-R constitute a game similar to bingo?

IGRA permits games similar to bingo to qualify as Class II if they are played in the same location as bingo.⁸⁸ Although IGRA does not define “games similar to bingo,” NIGC regulations do, interpreting the term to mean “any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.”⁸⁹ In devising this definition, the Commission explained that “games similar to bingo” have to satisfy some, but not all, of the three criteria for bingo.⁹⁰

Bingo-R, though, does not qualify as a game similar to bingo. To qualify as such, a game must be “bingo-like,” meaning close enough to bingo to be considered a variant by possessing nearly all the characteristics that are inherent in bingo’s statutory and regulatory criteria. Because Bingo-R only possesses one of the three criteria, it fails to come within the zone of games that may be considered a variant.⁹¹ Not to mention that taking an act to cover or actually and actively participating in such covering as well as winning after a ball draw are essential elements to the play of bingo or a variant of the game.⁹² For these reasons, Bingo-R is not a game similar to bingo.

Since Bingo-R is not bingo; a game similar to bingo; a Class I social game played for prizes of minimal value or a traditional form of Indian gaming engaged in connection with tribal ceremonies or celebrations;⁹³ or a Class II card game,⁹⁴ it is a Class III game. All games that are not Class I or II are Class III.⁹⁵

IV. Conclusion

⁸⁸ 25 U.S.C. § 2703(7)(A)(i)(III).

⁸⁹ 25 C.F.R. § 502.9.

⁹⁰ 67 FR 41166-02 “Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo” (June 17, 2002) (“the class was left open to a group of non-specific, bingo-like games, or ‘variants’ on the game of bingo,” ... [which] “do not necessarily meet each of the elements specified in the statutory definition of bingo.”).

⁹¹ See Letter to Alan Frank, The HomeBingo Network, from Penny J. Coleman, NIGC Acting General Counsel re: 8 Draw Kingo at 8 (May 11, 2004).

⁹² See Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 13 (Sept. 26, 2003) (“We find that covering numbers as they are called is an essential ingredient to the play of the game of bingo or a variant of that game. We conclude that a game offered as class II bingo or a ‘game similar to bingo’ must provide a ‘daub’ or ‘cover’ requirement for all players after the bingo numbers are announced and not just for winning players.”); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 3 fn. 5 (May 26, 2004) (same); Letter to Donald Bailey, President, Atlantic Internet Group Corp., from Penny J. Coleman, Acting General Counsel re: Quarterback Draw Football at 7 (Sept. 3, 2009) (The plain language of IGRA’s third element for bingo necessitates that the game have a winner).

⁹³ 25 U.S.C. § 2703(6).

⁹⁴ See 25 U.S.C. § 2703(7)(A)(ii); 25 C.F.R. § 502.3(c).

⁹⁵ 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

Bingo-R is not Class II bingo, as two of the three statutory and regulatory bingo criteria are not met. Nor is Bingo-R a game similar to bingo, as it is not a variant of the game and lacks a majority of the elements that make up bingo under IGRA and NIGC regulations. And because it is not a Class I or Class II game, Bingo-R is Class III.

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chair or the NIGC Commission, who are free to disagree with it in any action that comes before them or via the Chair's prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court. Further, by issuing this advisory legal opinion, the NIGC Office of General Counsel does not speak on behalf of the U.S. Department of Justice or the United States Attorneys in regard to their enforcement responsibilities.⁹⁶

If you have any questions regarding this legal opinion, please contact Jo-Ann M. Shyloski, Of Counsel, at (202) 632-7003.

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenic". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Hoenic
General Counsel

cc: Jessie Kingston, KGM Compliance Officer

⁹⁶ See, e.g., 18 U.S.C. §§ 1166-1168; 15 U.S.C. §§ 1171-1178; 31 U.S.C. §§ 5361-5367.