



AUG 24 2006

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Re: PlayAway pull tabs, classification opinion

Dear Ms. Staudenmaier:

This is in response to your request for an opinion classifying GameLogic's PlayAway pull tabs game. I apologize for the delay in getting back to you and for any inconvenience that this may have caused. My staff and I have examined in detail the game description, computer model, technical information, and legal arguments you provided. We are also familiar with the technical details of GameLogic's PlayAway keno game and its treatment and reception by regulators in Connecticut and New Jersey. Based upon all of these things, I conclude that PlayAway pull tabs is a Class II game played with technologic aids.

#### PLAYAWAY

Reduced to its essentials, PlayAway is a simple game. Like traditional pull tabs, PlayAway cards are sold by the casino operator from finite sets containing pre-determined numbers of winning and losing cards. Also like pull tabs, the patron removes or scratches off a portion of the PlayAway card to reveal pre-printed results below. Winning results are highlighted, and the patron can determine the value of the card by comparing the results to a paytable printed on the back. Winning cards are validated by the operator using pre-printed information under the section marked "void if removed." Here, though, the similarity with traditional pull tabs ends.

Unlike ordinary pull tabs, PlayAway cards are designed to be taken home. Each card has on it a section marked "Internet access code" that when removed or scratched off reveals a 16-digit code. The code enables the patron to check the results of the PlayAway card by entering the code at a designated website.

At the website, the patron may select a button – "Get Results Now" – that will display the results of, and the value of, the card. The main purpose of the site, though, is not to display what the patron can already do by scratching off a portion the card. Rather, the site dresses up the card results in the guise of other games. The patron can elect to "play" any one of ten "games" listed on a menu. Some of the games appear to be variations on slot machine or

spinning-reel games. Others are variations on common casino card games such as blackjack or video poker. Still others are variations of home video games and are not standard casino games at all.

In any event, after choosing a game, the patron, to all appearances, plays by spinning reels, playing a few hands of cards, etc. The outcome of the game, however, will always be the same as the outcome of playing the underlying card. For example, if scratching off the PlayAway card would have revealed winning combinations worth \$5, then the patron will always appear to win \$5 on the Internet site no matter which game she chooses and no matter how well or how badly she apparently plays it. If she chooses Blackjack, then hitting on 20 will produce the same \$5 result as standing on 13. Similarly, if the underlying PlayAway card is a losing card worth \$0, then the result of any game chosen on the internet site will be \$0, again no matter how well or how badly played. Winning PlayAway cards can only be redeemed at the casino where they were purchased. No account is set up for the players and no money is transferred over the Internet.

#### LEGAL ANALYSIS

IGRA 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, in relevant part: “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, punchboards, tip jars, instant bingo, and other games similar to bingo ....” 25 U.S.C. § 2703 (7)(A)(i). Class III is a catch-all 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 also includes any banking card games and any electronic or electromechanical facsimiles of any game of chance. 25 U.S.C. § 2703 (7)(B)(i)-(ii); 25 C.F.R. § 502.4 (b).

Classification of the PlayAway game presents three separate questions. First, is PlayAway pull tabs or some other similar game? If the latter, PlayAway does not fall within the definition of Class II and is Class III. Second, if PlayAway is pull tabs, does it use technologic aids or is it an electronic facsimile of the game? If the former, PlayAway is Class II. If the latter, PlayAway is Class III. Finally, is PlayAway a kind of Internet gambling? If so, it is illegal under the laws of the United States, no matter its classification.

#### 1. Pull tabs

Neither IGRA nor the Commission’s regulations define pull tabs. The game is, however, well known. It is a game of chance traditionally played with two-ply paper cards. *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F. 3d 633, 635 (D.C. Cir. 1994). 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 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 (10<sup>th</sup> Cir. 2003).

In traditional pull tabs, bingo hall clerks sell the cards from retail counters or mobile carts. Clerks also redeem winning cards for cash prizes. *Diamond Games Enterprises Inc. v. Reno*, 230 F. 3d 365, 367 (D.C. Cir. 2000). More recently, operators have sold pull tabs from elaborate dispensing machines. These are able both to read the results of each card using a barcode printed on the card for that purpose and to display those results on video monitors. Some dispensers mimic the play of slot machines by displaying spinning reels. Winning cards produce “winning” reel combinations, and losing cards produce losing reel combinations. *Id.* at 367-368.

Given this history and these variations, the PlayAway cards are pull tabs. The PlayAway cards are each sold for a fixed price from a deal containing a finite number of pre-designated winners and losers. Players reveal hidden combinations of symbols by removing a latex or paper cover, and cards with symbols arranged in winning patterns can be redeemed for prizes.

## 2. Technologic aids

The next question, then, is whether the Internet website used to reveal the results of the PlayAway cards is a technologic aid to the game of pull tabs or an electronic facsimile of that game of chance. In relevant part, the Commission’s regulations define a technologic aid as equipment that

- (1) assists a player or the playing of a game; [and]
- (2) is not an electronic or electromechanical facsimile....

25 C.F.R. § 502.7(a). The website easily satisfies the first requirement. One can easily imagine, for example, a visually impaired patron using the “Get Results Now” button on his or her home computer in order to see the card results written in larger type than those printed on the card itself.

As to the second requirement, the Commission’s regulations defines facsimile, in relevant part, as “a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game....” 25 U.S.C. § 502.8. The concept is well illustrated in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9<sup>th</sup> Cir. 1994).

There, the Ninth Circuit was faced with the question whether the “Autotab model 101 electronic pull tab dispenser” was a Class III facsimile or a Class II aid. The Autotab was a wholly electronic implementation of pull tabs. Patrons played at video terminals that displayed a video representation of a pull tab cards and a video representation of removing the tab and revealing the “pre-printed” numbers beneath. There was an electronic deal containing a finite number of pull tabs with pre-determined winners and losers, all stored in a central computer and passed one at a time to the video terminals for play.

Ninth Circuit had no difficulty finding that the Autotab was an electronic facsimile: “the pull tab machines at issue here are not, in our view, readily distinguishable” from paper pull tabs. *Id.* at 543. The machines in other words, made electronic all of the fundamental characteristics of the paper version of the game:

The game retains the fundamental characteristics of the paper version of pull-tabs: the video pull-tab machine is supplied with a computer-chip cartridge that insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes; when all tickets have been played, all the prizes will have been awarded.

*Id.* at 541.

Similarly, in *Cabazon Band*, above, the D.C. Circuit found another wholly electronic version of pull tabs to be a Class III facsimile. That game, like the Autotab, had a computer that “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 Band*, 14 F. 3d at 635. This, the D.C. Circuit found, exactly replicated paper pull tabs and was thus a Class III facsimile. *Id.* at 636.

Here, by contrast, the features of pull tabs are not reproduced when a player chooses to view the pull tab results from the designated website. Unlike the Autotab or *Cabazon Band* game, there is no central deal electronically reproduced on a computer system and no electronic “pulling” of tabs to reveal symbols. Rather, the results of the pre-printed paper cards are simply passed to the website for display, either directly or in the form of the scripted outcome of another game, which may or may not even be found in a casino.

Put slightly differently, the game of pull tabs remains in the paper PlayAway cards and is not reproduced in the “games” on the website. This is best illustrated by *Diamond Games Enterprises v Reno*, 230 F. 3d 365 (D.C. Cir. 2000). The machine at issue there was the Lucky Tab II pull tab dispenser. When activated, the machine cut a paper pull tab from a roll of some 7500 cards and dropped it in a tray for the player. As the card was traveling, the machine read a barcode on the back of the card and displayed the winning or losing result on a video screen using the spinning reels and symbols of a slot machine. Regardless of the display, the player still had to redeem winning cards with a clerk. *Id.* at 367-368.

The D.C. Circuit specifically rejected the government’s argument that the machine was a Class III facsimile:

The game is in the paper rolls, not ... in a computer.... 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. 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.

*Id.* at 370. *Accord, Seneca-Cayuga*, above, 327 F.3d at 1042-1043 (finding the Magical Irish pull tab dispenser, a substantively identical machine, to be Class II for these same reasons). Revealing the results of the PlayAway pull tabs at the website is no different. The game still exists in the tangible paper medium. The patron has the option to play pull tabs on the card or through the alternate Internet game. Since the result is identical whichever way the patron chooses to play, the Internet “games” are entertaining displays but wholly unnecessary to the play of the game. As in *Diamond Game*, the game is in the tangible pull tab. Accordingly, the website used to reveal the results of the PlayAway pull tab cards is not an electronic facsimile. The website meets the Commission’s definition of “technologic aid.” 25 C.F.R. § 502.7(a)

### 3. Internet gambling

Finally, because the Internet is used to reveal PlayAway game results and even to make it appear as if the patron were playing a gambling game, the question of whether use of the Playaway website constitutes Internet gambling naturally arises. Internet gambling, of course, is prohibited in the United States under the Wire Act, 18 U.S.C. § 1084. If use of the PlayAway website does constitute Internet gambling, then use of the site is impermissible regardless of PlayAway’s classification. That said, nothing in the use of the Internet – either revealing the results of PlayAway pull tabs or “playing” entertaining games to reveal those results -- constitutes Internet gambling in any way.

Simply put, the wager – the gambling – is complete upon the patron’s purchase of the PlayAway card at the casino. This is easiest to see in the fact that the patron need not reveal the card results at all. Rather than scratching off the results or displaying the results through the Internet, the patron can redeem the card immediately after its purchase.

Revealing the pull tab results on the website does not change this, for that activity is not gambling. There is no element of chance. The results of the “games” on the website are determined by the results of the player’s pull tab card, and nothing the player can do can change them. A \$5 pull tab is worth \$5 no matter which Internet “game” the patron selects or, if the game is one like Blackjack that involves decisions, how she chooses to play that game. No gambling in, in short, is done over the Internet, nor does any money change hands that way. The website states clearly that winning tickets must be redeemed at the casino where they were purchased.

CONCLUSION

Given all of the foregoing, it is my opinion that the PlayAway cards and associated website are Class II pull tab, provided, of course, that the tabs are sold in the same location as bingo. 25 U.S.C. § 2703(7)(A)(i)(III). If you have any questions or require anything further, please contact Michael Gross, Senior Attorney, at 202-632-7003.

Sincerely,

A handwritten signature in cursive script that reads "Penny J. Coleman".

Penny J. Coleman  
Acting General Counsel

cc: Chairman Hogen  
Michael Gross, Senior Attorney  
Steven N. Kane, CEO GameLogic, Inc.