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**STATE OF FLORIDA
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING**

IN RE: PETITION FOR DECLARATORY STATEMENT

BALLY GAMING, INC., d/b/a Bally Technologies
(proposed "Keno" slot game),

Petitioner,

(AND)

IGT, INC.,

Intervenor.

DS 2008-051

(2008041076)

DECLARATORY STATEMENT

Petitioner **BALLY GAMING, INC.** ("Petitioner" or "Company"), filed a Petition for Declaratory Statement with the Division of Pari-Mutuel Wagering (Division) regarding whether a slot machine with a visual game theme known as "Keno" is permitted for use at licensed slot machine facilities in Florida pursuant to Chapter 551, Florida Statutes (F.S.).

1. Petitioner is a slot machine manufacturer licensed pursuant to Chapter 551, Florida Statutes. Its address is 6601 S. Bermuda Road, Las Vegas, NV 89119. On July 22, 2008, Petitioner filed a Petition for Declaratory Statement seeking a determination of compliance with Chapter 551, Florida Statutes, and Chapter 61D-14, Florida Administrative Code (F.A.C.), as it relates to a particular type of slot machine which incorporates a visual presentation of Keno to display winning and losing outcomes (the "Machine"). On September 9, 2008, IGT, Inc., a

manufacturer of slot machines who has also filed petitions for declaratory statement with respect to similar machines, intervened in this proceeding.

2. On September 18, 2008, the Division conducted a public hearing at which time the Division personnel inspected the Machine and Petitioner demonstrated its operations. On September 19, 2008, the Division held a public hearing regarding the petition at which time sworn testimony was offered by Petitioner regarding the Machine.

3. Petitioner has standing to initiate this proceeding by virtue of its licensure as a slot machine manufacturer and its interest in selling slot machines to slot machine licensees who are also licensed under Chapter 551, Florida Statutes.

FINDINGS OF FACT

By virtue of the Division's inspection of the game, the representations in the Petition for Declaratory Statement, and the sworn testimony offered by Petitioner, the Division makes the following findings of fact on which it bases this Declaratory Statement.

4. The Machine resembles a "Las Vegas" slot machine utilizing a freestanding slot machine cabinet. The cabinet is identical to other of the Company's cabinets in use in Florida and complies with the specifications found in Rules 14.023 & 14.026, F.A.C.

5. The Machine requires a patron to insert tickets, currency, coupons or vouchers to activate the slot machine game. The Machine houses the terminal monitor, magnetic card reader, speaker system, random number generator (RNG), mechanical meters, drop boxes and ticket/bill acceptors within the cabinet. The main display area provides a LCD panel with touch screen. It contains a backlit graphics panel for displaying game information and instructions for the player. A two-tiered light is attached to the top of the Machine and is used to indicate jackpots or other predetermined events to slot machine licensee personnel. All of the electronic components are

housed inside the Machine behind the main display area in accordance with Chapter 61D-14, F.A.C.

6. The Machine meets all requirements of Florida's slot machine regulations and can be tested and certified for such compliance to the following standards set forth in Chapter 61D-14, F.A.C.:

- a. the location and specifications for the logic compartment meet the requirements set forth in Rule 14.024;
- b. the currency compartment is configured in accordance with Rule 14.025;
- c. the touch screen has been certified to meet the specifications of Rule 14.030;
- d. the bill acceptor similarly meets the standards of Rule 14.031;
- e. the Machine is capable of being linked to a computer ticket validation system in accordance with Rule 14.040;
- f. the Machine possesses the requisite meters set forth in Rule 14.042 and is capable of retaining the requisite data pursuant to Rule 14.043;
- g. the Machine is capable of detecting and displaying error conditions and illuminating its tower light in accordance with Rule 14.044; and
- h. the Machine will be certified by an independent testing laboratory that it creates the requisite message digest and meets the internal testing requirements, integrity checks, and other operational standards set forth in Rule 14.044.

7. In accordance with Rule 14.041, the Machine possesses an internal RNG which is statistically independent from any other device; conforms to the random distribution values specified in the slot machine's PAR sheet; passes statistical tests such as the chi-squared test or

random distribution analysis test; is cycled continuously in the background between games and during game play; and randomly determines the first seed number. The Machine uses communication protocols that protect the RNG and random selection process from influence by associated equipment.

8. Each possible permutation or combination of the game elements that produces a winning or losing game outcome is available for random selection at the initiation of each play and the Machine will not make a variable secondary decision after selection of the game outcome.

9. The Machine operates as a stand-alone game and is not linked to other player terminals in a communal fashion.

10. The Machine operates off of the Company's Alpha Video Gaming Platform that has received prior approval for at least 143 separate game themes in Florida. This slot machine game platform has been tested and certified by an independent testing laboratory licensed by the state for each separate game theme currently offered to Florida slot machine licensees. The certification provides confirmation that the Alpha Video Gaming Platform meets or exceeds all requirements of Chapter 551, F.S. and Chapter 61D-14, F.A.C., and a list of the approved game themes was provided to the Division as Exhibit A to the Petition for Declaratory Statement.

11. The Machine has been approved in over 30 jurisdictions as an approved slot machine. The Machine is currently in use at the casinos operated in Florida by the Seminole Tribe of Florida.

12. The game operated on the Machine possesses a payout and retention (PAR) sheet from the Company and is capable of being tested and subject to certification from an independent testing laboratory to ensure a probable minimum payout percentage of greater than 85 percent pursuant to Sections 551.103(1)(h), 551.104(4)(j), F.S., and Rule 14.038, F.A.C. A

copy of the verification letter issued by Gaming Laboratories, Inc. was included in the Petition for Declaratory Statement as Exhibit B. As submitted by Petitioner, the payout percentage for the game ranges from 88 to 94 percent.¹

13. In order to use the Machine, a player must add credits to the Machine via the insertion of cash, tickets, coupons, or other authorized medium. The player makes choices of which specific outcomes he or she wishes to wager on. No credits are committed until the player initiates the game. This is analogous to the player choosing the number of lines on which to wager in a video slot game prior to initiating the game. The player then initiates the game using a start button as they would in a video slot game. Once the game is initiated, the RNG provides an outcome which is correlated to twenty unique numbers ranging in value from 1 to 80. The video display showing the outcomes can be considered a 20 reel, single line video slot that displays a unique number on each reel. At the end of the game, if the outcome is a loss for the player, the game enters a "game over" state and adjusts hard and soft meters accordingly. If the displayed outcome is a win for the player, the Machine awards credits based on a predetermined pay table established in the game's rules that are available for display to the player by the Machine.

14. Credits are displayed and accounted via the hard and soft meters which are reported to the facility based monitoring system like any other slot machine. Credits are capable of being discharged via the play of the game or redeemed via a ticket printing system in accordance with state law.

15. There is no bank nor is there an implication of a bank within the game.

¹ All payout percentages are subject to certification by an independent testing laboratory.

16. The slot machine licensee has no ability to manipulate the payout percentage by adjusting the rules of the game.

17. Significant differences between the Machine and the actual game exist which include:

- a. Payout percentages do not equate to the standard table game of Keno. Traditional Keno ranges from 34–96 percent; the Machine is approximately 88–94 percent.
- b. No balls are used in the selection of the numbers nor is an air blower used to determine the result of the game.
- c. No human intervention is possible which could impact the game outcome.

18. Testing protocols by independent gaming testing laboratories perform different testing processes for table games and slot machines. Table game testing involves the rendering of a math analysis of the game and its payout percentages as well as a legal opinion as to whether the game's rules and basic strategy are similar to those elements of the game it purports to be. Slot machine testing differs in that it involves a host of mechanical and analytical testing of a myriad attributes established by the regulators for a slot machine which include meter accuracy, communication protocol verification, critical memory checks, control program checks, and testing of ticket issuance and acceptance processes. In making a determination of whether a machine is a slot machine or a table game, a testing lab compares the attributes of a proposed device to that of a slot machine, as set forth in a jurisdiction's regulations, to those commonly associated with the table game.

OPERATIVE STATUTES AND RULES

19. Section 551.101, F.S., states:

Slot machine gaming authorized. -- Any licensed pari-mutuel facility located in

Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 may possess slot machines and conduct slot machine gaming at the location where the pari-mutuel permitholder is authorized to conduct pari-mutuel wagering activities pursuant to such permitholder's valid pari-mutuel permit provided that a majority of voters in a countywide referendum have approved slot machines at such facility in the respective county. Notwithstanding any other provision of law, it is not a crime for a person to participate in slot machine gaming at a pari-mutuel facility licensed to possess slot machines and conduct slot machine gaming or to participate in slot machine gaming described in this chapter.

20. Section 551.102(8), F.S., states:

"Slot machine" means any mechanical or electrical contrivance, terminal that may or may not be capable of downloading slot games from a central server system, machine, or other device that, upon insertion of a coin, bill, ticket, token, or similar object or upon payment of any consideration whatsoever, including the use of any electronic payment system except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance, terminal, machine, or other device to receive cash, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually. The term includes associated equipment necessary to conduct the operation of the contrivance, terminal, machine, or other device. Slot machines may use spinning reels, video displays, or both. A slot machine is not a "coin-operated amusement machine" as defined in s. 212.02(24) or an amusement game or machine as described in s. 849.161, and slot machines are not subject to the tax imposed by s. 212.05(1)(h).

21. Section 551.102(11), F.S., states:

"Slot machine licensee" means a pari-mutuel permitholder who holds a license issued by the division pursuant to this chapter that authorizes such person to possess a slot machine within facilities specified in s. 23, Art. X of the State Constitution and allows slot machine gaming.

22. Section 551.111, F.S., states:

Notwithstanding any provision of law to the contrary, a slot machine manufactured, sold, distributed, possessed, or operated according to the provisions of this chapter is not unlawful.

23. Section 849.086(2), F.S., states:

(b) "Banking game" means a game in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play.

24. Section 849.08, F.S., states:

Whoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

25. Rule 61D-14.022(2) and (3), F.A.C., "Slot Machine Requirements," states:

(2) No slot machine game shall be certified for play in this state by a licensed independent test laboratory if it operates a program of play that replicates a game that is prohibited under Section 849.08, Florida Statutes, unless the slot machine game contains a player skill component and is not based on a banking game.

(3) Prior to the sale or delivery of a slot machine for play in this state, a slot machine manufacturer shall provide certification in writing to the division from a licensed independent testing laboratory that each of the slot machines it intends to offer for sale in this state meet all criteria for operation contained in Chapter 551, F.S., and Rule 61D-14, F.A.C. All testing of slot machines to be offered for play in this state is the responsibility of the manufacturer.

26. Rule 61D-14.041(4), F.A.C., "Randomness Requirements and Game Play

Auditing," states in pertinent part:

The slot machine shall not make a variable secondary decision after selection of the game outcome. ...

27. The Encyclopedia Britannica describes Keno as follows:

A gambling game played with cards (tickets) bearing numbers in squares, usually from 1 to 80. A player marks or circles as many of these numbers as he wishes up to the permitted maximum, after which he hands in, or registers, his ticket and pays according to how many numbers he selected. At regular daily intervals a total of 20 numbered balls or pellets are randomly drawn from a container, and prizes are paid out by the house according to how many of each player's selected numbers are drawn.

CONCLUSIONS OF LAW

28. The Division is authorized to regulate the pari-mutuel slot machine industry and administer the provisions of Chapter 551, F.S., pursuant to Section 551.103, F.S.

29. Sections 120.565(1) & (2), F.S., provide as follows:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

30. The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance. *Novick v. Dep't of Health, Bd. of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002). The Supreme Court of Florida, in *Florida Dep't of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), recognized that by enacting Section 120.565, F.S., the Legislature gave citizens a right to get a clear, binding answer from the agency on how the agency's statute and rules apply. In *Investment Corp of Palm Beach*, the Court also recognized the unique nature of the gambling industry with limited participants who would almost invariably have an interest in a declaratory statement. The Court further found that changes to the Florida Administrative Procedure Act allow for the issuance of declaratory statement even though the interest of persons who are not a party may be affected. *Id.* 747 So. 2d at 378 & 385.

31. Additionally, in *Lennar Homes, Inc. vs. Dep't of Bus. & Prof. Reg.*, 888 So. 2d 50, 53-54 (Fla. 1st DCA 2004), the court held that the authority to issue a Declaratory Statement is limited by Section 120.565, F.S. to a determination "as to the applicability of a statutory provision . . . to the petitioner's particular set of circumstances." However, in that same opinion

the court also cited *Investment Corp.*, 747 So.2d at 385 for the proposition that an agency can issue a declaratory statement dealing with a petitioner's "particular set of circumstances," while at the same time announcing its intention to initiate rulemaking on the same subject. In that case, the court reasoned:

It must be observed that under circumstances such as those presented in this case, involving such a unique industry having very limited participants engaged in almost identical operations, declaratory statements as to one would almost invariably be of interest to others in the very limited group. We are not aware of any rule of law that precludes an agency from simultaneously pursuing both courses of action. Further, such an approach to these issues does not appear to harm the rights of "[a]ny substantially affected person[(s)]. *Id.*

32. Florida law essentially defines a slot machine as a device which contains three basic elements. First, it must operate via the insertion of some object; second, the device must operate with some element of chance; and third, it must render some form of prize, directly or indirectly. *See* Sections 849.16 & 551.102(8), F.S., *see also Kirk v. Morrison*, 146 So. 215 (Fla. 1933). Based on the information presented in the petition, the testimony presented at the hearing, and the demonstration of the Machine at issue, there is no question that the device meets the statutory and common law test of a slot machine, the possession of which would subject an individual to possible criminal prosecution.

33. Having established the threshold issue of its basic operation, the question remains whether the Machine meets the criteria established in Chapter 61D-14, F.A.C., which would authorize its possession by a licensed slot machine facility in Florida. Having taken testimony regarding the components of the device and the factual assertions that the Machine, if evaluated by an independent testing laboratory, would possess the established attributes for an authorized slot machine, the sole remaining issue is whether the Machine complies with the restrictions set forth in 61D-14.022(2), F.A.C., which states: "No slot machine game shall be certified for play in this state by a licensed independent test laboratory if it operates a program of play that

replicates a game that is prohibited under Section 849.08, Florida Statutes, unless the slot machine game contains a player skill component and is not based on a banking game." In order to sufficiently evaluate this issue a predicate must be laid as to the basics of the table game of "Keno".

34. Keno is a game typically played by trying to guess some of twenty numbers that will be randomly drawn from a field of 1 through 80. Several types of Keno tickets are available, depending on how many numbers a player marks, or selects, and the payoffs depend on how many of these selected numbers appear among the twenty numbers drawn. A traditional live casino Keno game uses a circular glass enclosure called a "bubble" containing 80 ping pong-like balls which determine the balldraw result. Each ball is imprinted with a number 1 through 80. During the balldraw, a blower pushes air into the bubble and mixes the balls. A casino employee referred to as the "caller" presses a lever opening a tube, where the balls lift one at a time into a "V" shaped tube called the "rabbit ears". The caller and a "verifier" record each of 20 balls drawn, and the computerized Keno system calculates all wagers based on the numbers drawn.

35. Players wager by marking an "X" over the "spot" choices on a blank Keno ticket form with 80 numbered selection boxes (1 to 80). After all players successfully place their wagers, the casino draws 20 balls (numbers) at random. Some casinos automatically call the balldraw at preset timed intervals regardless of whether or not players are waiting to place a wager. Each casino sets its own series of pay scale choices called "pay tables". The player is paid based on how many numbers drawn match the numbers selected on the ticket and according to the payable selected with regard to the wager amount.

36. The casino makes money on Keno games because the payoff odds are less than the true odds. Further, the house advantage on any game varies widely from casino-to-casino, ranging from 4% to 66%. Assuming that the bubble itself is properly operated and maintained, draws constitute independent trials and the element of chance is the key component to the game of Keno.

37. Varying house pay tables have a significant influence on the payout of a game of Keno. Further, the casino has a house advantage of 29.01% on a standard \$2 bet placed in a typical 6-spot casino game.

38. This advantage translates to a typical house hold percentage of roughly 28% on Keno games. The Nevada State Gaming Control Board reports that the hold percentage for the state of Nevada in the year ending April 30, 2008, was 28.3%.

39. The game presented for consideration possesses a PAR sheet indicating a house hold that is less than half of traditional Keno and in compliance with the state mandated minimum of 85% payout to players.

40. Unlike the traditional game of Keno, the Machine does not allow the player to actually play the game of Keno. There is no "bubble" containing numbered balls, no numbered cards, and no casino personnel calling the numbers. The graphics of the game merely show a win or loss outcome format which is determined by the RNG and the pre-determined pay table set for the game. The expression of a win or loss, instead of being displayed in typical slot machine format such as a row of "7"s, cherries, gold bars and the like, is being portrayed as a game of Keno. Additionally, the payout of the game is not determined as a ratio to the player's wager but instead is tied to a pay table which correlates to the possible outcomes determined by the RNG.

41. Further unlike the traditional game of Keno, the Machine does not allow the payout percentages to be manipulated by the house. Since the RNG is triggered with every play, the operation of an unfair game, such as calling improper numbers, creating an unfair playing environment, is not a possible strategy as there is no “bubble” or numbered balls involved. Similarly, the PAR sheet for the game cannot be manipulated by the house through manipulations of the “house rules” or pay tables that could potentially affect odds or payout structure from one play of the game to another.

42. The *American Heritage Dictionary* defines the term “replicate” as follows: “To duplicate, copy, reproduce, or repeat.” Given that the win/loss outcomes are not determined by the selection of balls or numbers called by casino employees, that payout of the game is not controlled by rules set by the House, and that the payout for the Machine is significantly different from the traditional game, the game being played cannot be said to be a duplicate, copy, reproduction, or repeat (a “replicate”) of Keno.

43. The game being played is operated in the same cabinet, possesses the same components, and utilizes the same game logic as at least 143 other slot machine games in the Bally Alpha game platform approved for sale and use in Florida. The Machine submitted by the Petitioner is capable of being evaluated by independent testing laboratories for compliance with all attributes of a slot machine established by Florida law and the Division’s administrative rules. The Machine possesses far greater slot machine attributes than those of the game Keno. Its use at the casinos operated by the Seminole Tribe of Florida and its use in over 32 other regulated gaming jurisdictions as an approved “slot machine” also offer significant evidence that the Petitioner’s proposed machine meets all requirements for slot machine certification in the state.

CONCLUSION

The conclusions regarding the matters addressed in this Declaratory Statement are based upon the facts and specifics provided by the Petitioner and articulated in this Declaratory Statement and in sworn testimony from the public hearing. Any alteration in the facts as presented either in the petition or in the presentation of the proposed machine from those described herein nullifies this Declaratory Statement and will require a new analysis upon which to base the issue of any future Declaratory Statement. The Petitioner has demonstrated its standing to request determination as to the legality of the Machine at issue.

In sum, the play of Keno on Petitioner's Alpha Video Gaming Platform varies from the actual live play of Keno in a casino. Further, the following factors are significant in the Division's reaching its determination that Machine does not replicate Keno as prohibited by Rule 61D-14.022(2), F.A.C.:

1. Randomness of the game is determined by a random number generator (RNG);
2. Each terminal is operated by a single player, and therefore no player on any other machine influences the outcome of the player operating the Machine;
3. Each terminal complies individually with the requirements of Chapter 551, F.S., and Chapter 61D-14, F.A.C., confirmation of which is ultimately subject to certification by an independent testing laboratory; and
4. Each terminal is separately metered and reports individually to the facility monitoring system.

Finally, Rule 61D-14.022(2), F.A.C., is currently in rule making. These proceedings have demonstrated a need to clarify, through the rule-making process, those factors which the Division has considered in making its determination that the slot machine game herein addressed is not prohibited by Rule 61D-14.022(2).

Accordingly, based on the findings of fact herein and those set forth in the Petition for Declaratory Statement, the Machine at issue, which allows the play Keno themed games, meets the threshold elements for a slot machine under Florida law and is not otherwise prohibited by Rule 61D-14.022(2), F.A.C., for use at licensed slot machine facilities, provided it is certified by an independent testing laboratory to meet all other technical elements of a slot machine set for in the statutes and rules administered by the Division.

THEREFORE, the Division affirms that the Machine described herein is a slot machine which may be subject to testing and certification for use at Florida licensed slot machine facilities pursuant to Chapter 551, F.S., and Chapter 61D-14, F.A.C.

DONE AND ORDERED this 6th day of OCTOBER, 2009, in Tallahassee, Florida.



JOE DILLMORE
Interim Director
Division of Pari-Mutuel Wagering
Dept. of Business & Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL


Any party to this proceeding has the right to seek its judicial review under Section 120.68, Florida Statutes, by the filing of a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 1940 North Monroe Street, Tallahassee, Florida 32399-2202, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must

be filed (received) in the Office of the Agency Clerk within thirty days after the date this Order is filed with the Clerk.

CERTIFICATE OF SERVICE

I hereby certify this 7th day of October, 2009, that true copies of the foregoing "Order" have been served by U.S. Mail and telefax [or email] upon:

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