

CALIFORNIA GAMBLING CONTROL COMMISSION

SPECIFIC LANGUAGE OF PROPOSED REGULATIONS

ASSISTANCE TO BINGO PLAYERS WITH DISABILITIES

CGCC-GCA-2009-03-E

TITLE 4. BUSINESS REGULATIONS.

DIVISION 18. CALIFORNIA GAMBLING CONTROL COMMISSION.

CHAPTER 8. BINGO.

ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS.

**§ 12482. Assistance to Bingo Players with Disabilities.**

~~(a)~~ Pursuant to the provisions of paragraph (6) of subdivision (p) of section 326.5 of the Penal Code, the following requirements are established as means by which the operator of a bingo game shall, as required by applicable law, offer assistance to players with disabilities:

~~(a)~~ For players with disabilities consistent with definitions set forth in the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 *et seq.*), when those disabilities would restrict a player's ability to mark cards:

~~(A)~~ The operator of a bingo game that offers card-minding devices shall reserve at least two card-minding devices, approved pursuant to Section 12486, for use by disabled players. If there are no requests for use of the reserved card-minding devices prior to fifteen minutes before the scheduled start of a session, the reserved devices may be made available for use by any player.

~~(B)~~ If the operator of a bingo game, or any other person involved in the conduct of a bingo game, charges players a fee for the use of card-minding devices, players with disabilities as described in ~~paragraph (1)~~ subsection (a) shall not be required to pay that fee or to comply with a minimum purchase requirement imposed on players utilizing card-minding devices, if any. Those players are required to comply with any minimum purchase requirement imposed on all players by an operator.

~~(C)~~ The operator of a bingo game that offers card-minding devices shall allow players with disabilities as described in ~~paragraph (1)~~ subsection (a) to claim prizes by presenting a printout of a winning card, or other evidence of a winning card approved by the Commission.

~~(2)~~ For players with disabilities consistent with definitions set forth in the ADA, when those disabilities would restrict a player's ability to verbally announce "BINGO," the operator of a bingo game shall allow those players to utilize a form of visual or audible signaling to notify the

operator of a winning pattern or "bingo," which may include a flag, paddle, light, horn, bell or whistle, or other means approved by the Commission.

(3c) For players with disabilities consistent with definitions set forth in the ADA, when those disabilities would restrict the players' ability to mark cards, or to announce "BINGO," the operator of a bingo game shall allow another individual to assist the disabled players in the play of bingo. The assisting individual shall not be counted towards the 750-player maximum applicable to remote caller bingo as provided in subdivision (i) of section 326.3 of the Penal Code.

Note: Authority Cited: Sections 19850.5, and 19850.6, Business and Professions Code; Sections 326.3 and 326.5, Penal Code. Reference: Sections 19850.5, and 19850.6, Business and Professions Code; Sections 326.3 and 326.5, Penal Code.



**K.GREG PETERSON**  
LAW OFFICES

August 24, 2009

**VIA FACSIMILE 916-263-0499**

Jim Allen, Manager  
Regulatory Actions Unit and Remote Caller Bingo Program  
California Gambling Control Commission  
2399 Gateway Oaks Drive, Suite 220  
Sacramento, CA 95833

Re: Assistance to Bingo Players with Disabilities  
[Proposed] Reg - Section 12482

Dear Mr. Allen:

I represent the California Charity Bingo Association ("CCBA") and I am submitting to you my client's comments in relation to the above-referenced proposed regulation which purports to provide assistance to bingo players with disabilities. Mr. Kim Blackseth has been retained as an expert in the case of *Video Gaming Technologies, Inc., et.al., v. Bureau of Gambling Control, et.al.*, USEDCA Case No. 2:08-cv-01241-JAM-EFB on behalf of the Plaintiffs and Intervenors which include disabled persons and charities. As part of his retention, Mr. Blackseth has reviewed the proposed regulation (Section 12482) and, on pages 8 and 9 of his enclosed report, you can see that he has concluded that the provisions of this law do not provide a "reasonable accommodation" to the disabled for purposes of allowing them to play bingo, and that the proposed regulation does not address the issues of the vision, mobility and cognitively disabled population, in particular.

If you have any questions concerning the above-referenced matters or Mr. Blackseth's report, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'KGP', with a long horizontal flourish extending to the right.

K. Greg Peterson

KGP/las



Kim R. Blackseth, Interests, Inc.  
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August 23, 2009

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50 California Street, 34th Floor  
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K. Greg Peterson  
Law Offices  
1716 L. St.  
Sacramento, CA 95811

*RE: Video Gaming Technologies vs. Bureau of Gambling Control*

Dear Ms. Froelich and Mr. Peterson;

As you requested, here is Kim R. Blackseth Interests, Inc.'s expert report evaluating (a) whether electronic bingo machines are a "reasonable accommodation" for the disabled, in lieu of "live call paper bingo" games, and (b) whether Senate Bill 1369 (2008) ("SB 1369"), the proposed amendment to CCR Section 12482, art. 1, Chapter 8, Div. 18, Title 4, providing for reasonable accommodations under SB 1369 ("Proposed Regulations"), and Sacramento County Ordinance No. 1403 ("Ordinance No. 1403") provide reasonable accommodations for the disabled.

*Issue*

In September 2008, the Legislature passed SB 1369, which was signed by Governor Schwarzenegger on September 28, 2008. After SB 1369 was passed, the County of Sacramento enacted Ordinance No. 1403. Both laws took effect January 1, 2009.

SB 1369 and Ordinance No. 1403 effectively outlawed electronic bingo machines from charitable bingo parlors. The Court must now consider whether the ban on electronic bingo machines violates Title II of the American's with Disabilities Act ("ADA"), and whether these machines provide a service or accommodation to certain disabled individuals who cannot otherwise play conventional "live call paper bingo". I was asked to opine on the issue of whether electronic bingo

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machines are a "reasonable accommodation" for certain disabled individuals, and whether SB 1369, the Proposed Regulations, and/or Ordinance No. 1403 provide reasonable accommodations for disabled bingo players.

### *My Qualifications*

My firm, Kim R. Blackseth, Interests has been providing consulting on a wide range of issues regarding matters of disabled access for 21 years. The complexity of the various *California Building Codes, Title 24, Americans with Disabilities Act, Fair Employment and Housing Act ("FEHA")* and the *Housing and Community Development (HCD)* regulations can be staggering.

The research and coordination necessary to advise consumers, employers, business owners, architects, municipalities and the legal community has become a highly specialized task.

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I was honored by **CALBO (California Building Officials)** in March 2007 with the **Presidents Special Recognition Award for "Efforts to Improve Public Safety and Disabled Access for All Californians"**.

I'm licensed by the **State of California** as a **Certified Access Specialist (CASp)**. This new (October 2008) certification requires state mandated qualifications and the passing of a rigorous test as developed by the Office of the State Architect. Only 67 people hold this certification, statewide, as of August 2009.

I am a current member of the State of California's **Accessibility Focus Group for the State Fire Marshall (OSFM)**. Additionally, I currently serve on **Housing and Community's (HCD) Accessibility Advisory Committee**.

Governor Schwarzenegger appointed me to the **California Board for Professional Engineer and Land Surveyors** in June 2007 and I'm the **current board President**.

I am **International Conference of Building Officials (ICBO)** and **International Code Committee (ICC)** certified in Disabled Access Building Code/Accessibility issues. I am certified in Disabled Access /Accessibility issues by the **California State Lottery** (they have a separate access program).

I served on the **Marin County Planning Commission** for 10 years, four years as Chairman. I was appointed to the **Airport Land Use Commission** in 1984 and the **Board of Building Permit Appeals** in 1982.

I have been active in the disability community for years (1980-2000) as **President of the Board of Directors for the Marin Center for Independent Living (MCIL)**, a statewide disability organization. *This non-profit works with all segments of the disabled population (blind, hearing, cognitive, mobility impaired, etc) to solve problems and live independently.*

I am **Academy Certified Expert** by the American Academy of Certified Consultants. My firm is an avid supporter of the **Miami Project to Cure Paralysis**. The **American Paralysis Association** for distinguished service recognized me in 1989. I was on the **Board of Trustees for Sutter Health Systems**, one of California's largest HMO's, and acted as **Chairman of the Sausalito Handicap Appeals Board**.

I have been a licensed **California General Building Contractor** since 1978 and received a **Paralegal certificate** from the University of California, Berkeley in 1996. I am a past board member of **The United Way** and the **American Red Cross**.

I have done disabled access consulting for over 2500 firms. This *partial* list includes:

- Consultant to the **Irvine Co and Shea Homes** on all facets of disabled access in **Multi-family housing development**;
- Consultant to the **CalTrans** on curb ramp issues Statewide;
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- **Defense Expert** for **Mervyn's** in their defense of the selective aisle width case;

- Featured speaker at the **US Federal Court's Eastern District Annual Conference**, in Monterey on November 3, 2001;
- Consultant to the **National Park Service** for the new Yosemite Lodge and Camp 4 in Yosemite Valley.
- Consultant to **California Attorney General** on a Federal ADA case involving the **Department of Corrections' 15 prison institutions**;
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- Featured speaker to **4000 Subway Franchisee's** at their annual conference in Las Vegas on August 2, 2001;
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- Disabled Access Consultant to the Skidmore, Owings and Merrill design teams on the proposed **Pier 32 Cruise Terminal in San Francisco**.
- Plaintiff's experts on a personal injury case with ADA and disabled access elements. The award exceeded **\$2.1 million dollars**.
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Regulations. The Northern District Federal Court ordered this study based on litigation from community groups.

- Worked as expert for the San Francisco Municipal Railway (MUNI) on their recent Federal Class Action suit;
  - Assisted the City of Chicago's Convention Complex called Metropolitan Pier and Exposition with disabled access elements.
  - Instructor with UC Berkeley's Extension Program, I teach a class on Universal Design and the ADA.
- 
- I also provide on-call-consulting services to many municipalities, including the Cities of Riverside, Petaluma, San Rafael, County of Napa, City of American Canyon, Mill Valley, Eureka, Clear Lake, Fresno, Sausalito, Corte Madera, Ross, County of Amador and the County of Marin.

#### *Personal Disability Knowledge*

I am also a disabled individual. I'm a C-5 quadriplegic (since 1979) and use an electric wheelchair for day-to-day ambulation and a pushchair on special occasions.

This unique combination of expertise in the field of disabled access and my daily observations and practical experience as a disabled individual make a rare and very useful mixture of technical and real world knowledge for my clients and the court.

#### *Basis of Expert Testimony*

The facts contained are within my personal knowledge, and I can and will testify competently to them if called to do so. The following opinions are based on my experience with providing program and physical facilities access for public and private entities.

#### *Electronic Bingo Machines as "Reasonable Accommodation"*

It is my opinion that the electronic bingo machines provide a "reasonable accommodation" to certain disabled individuals who would not otherwise be able to play bingo in an equal and dignified way.

### *"Live Call Paper Bingo"*

"Live call paper bingo" requires certain actions and physical attributes that are not available to all disabled persons. "Live call paper bingo" is fast moving and requires a certain level of cognitive skill to keep up with the caller, see the number on an electronic board and/or hear the called number. The player is then required to find the number on a paper card and "daub" it with a handheld marker.

The player must be able to manipulate a paper card, see or hear the called number, mark the card with a dauber and call "bingo" before any other player. All of the above requires a level of physical and cognitive skill, which prevents many disabled from participating or at minimum, playing on an unequal and disadvantaged field with the non-disabled.

### *Electronic Bingo Machines*

The electronic bingo machines depict an electronic representation of a bingo card. The machines are linked to a common game and two or more players are required to play, as you play against other players, not the "house".

The game is begun by putting a voucher (purchased at a kiosk) into the electronic machine. The machines require a "touch" of the screen with any part of the players body or single large button (on some machines) on the bottom of the lower display, to start the game and proceeds by a series of random "ball drops". This number is displayed on the upper screen.

The player must only touch the screen or large button three times, once to start, once to daub and finally to claim "bingo". The option of the large button or touch screen provides additional accommodation to more players.

If he or she decides to play again, the process is simply repeated. Once a player is done, the player hits the "redeem" button and a voucher is printed from the machine that is brought to the Cashier.

### *Electronic Features that Assist the Disabled*

"Live call paper bingo" is problematic for many disabled individuals. The range of disabilities is wide and not all are visible to the naked eye. They include, but are certainly not limited to:

- Vision impaired, which ranges from the low vision to completely blind;
- Hearing impaired, which ranges from hard of hearing to no hearing at all;
- Mobility impaired, which includes paraplegia, quadriplegia, polio, hemiplegia, stroke impaired, Multiple Sclerosis, ALS, etc;
- Cognitive issues, from stroke, head injury, learning disabilities, etc;

Within each of the above are countless variations, limitations and particular needs of the effected individuals

The electronic bingo machines do not require manipulation of a paper card, which can be difficult to impossible for disabled individuals to negotiate. Additionally, holding the dauber, much less marking the card is again, difficult to impossible for some mobility-impaired individuals.

The machines are touch screen and allow any portion of your body to simply touch the screen to "daub" the called number. This is vital to many who simply cannot hold the manual "dauber".

The players determine the pace, which is vital to many with cognitive issues. For many, the live call bingo is too fast to daub cards and recognize winning patterns to compete effectively with the non-disabled.

The numbers are "called" by a visual representation on the screen as well as "tones". The "tones" are bell-like and the number of "rings" signifies certain game actions or results. These machines offer large screens and tones for the low vision impaired.

The electronic bingo machines tell the player when he or she wins. The electronic machines signal a win by "ringing" a bell and by display on the screen. One example of the winning display is a "777" on the lower display. This is invaluable to the vision or cognitively impaired and unavailable on the "live call paper bingo" game.

A disabled person could win the "live call paper bingo" game, but if they are slower cognitively, they could lose to able-bodied persons who do not have this "handicap".

### *Current Alternatives or Auxiliary Aids*

There are two current alternative devices available to assist the disabled play "live call paper bingo". These were a permanent card marked with Braille and an electronic "card minder". Neither of these resolved the myriad disabled participation issues.

- The Braille card was a plastic card with the numbers marked by Braille. As the numbers are called, the player uses a plastic button to mark the number. These buttons cover the Braille and are easily "bumped" onto adjacent numbers. It makes the cognitive issues a factor for players that have no cognitive issues to start with. It further requires the player has the ability to read Braille, which many vision impaired individuals cannot do. Accordingly it has a very limited use and it does not provide an accommodation for most.
- The electronic "card minder" is a small notebook sized device, which again require interaction with the live caller, physical manipulation of the device and daubing the numbers.

The "card minder" screens are small and the contrast (dull gray) is problematic to unusable for persons with low vision.

The electronic card minder does not resolve the issues faced in "live call paper bingo" including the issues of pace, physical manipulation of the device and daubing the numbers, cognitive recognition of numbers and patterns and sight and hearing limitations. It does not provide the desired "reasonable accommodation" for the "live call paper bingo" game.

### *Proposed Regulation on Assistance to Bingo Players with Disabilities*

The California Gambling Control Commission (Commission) is proposing specific regulations (CCR Section 12482, Article 1, Chapter 8, Division 18, Title 4) on assisting the disabled as one element of the California Remote Caller Bingo Act (CRBCA). My opinions are as follows:

Subsection (a) lists the means by which the disabled can receive assistance marking the paper cards. They include:

- Paragraph 1 provides at least two (2) card minding devices be reserved for person's with disabilities, unless 15 minutes before the game there is no request for them. They can then made available to anyone;

- In Paragraph 2, rental fees are required to be waived for these card minding devices for persons with disabilities;
- Paragraph 3 permits a "print out" of winning cards, in lieu of marked tangible cards by the disabled player;

Subsection (b) is amended to assist disabled players who cannot announce "Bingo" to have another individual do so for them.

Subsection (c) would allow a person with a disability to bring another player to mark the card and announce "bingo", who could not manipulate the card or call "bingo" on their own.

None of the above provides the "reasonable accommodation" the electronic bingo machines do. The accommodations in Subsection (a), paragraphs 1, 2 and 3, do not address the lack of accommodation for player with low vision, the hearing impaired or those with mobility issues, but simply address how the card minders are to be used.

The problems related to cognitive (i.e. pace and recognition), mobility (i.e., card minder and dauber manipulation) and visually impaired individuals (i.e., Braille recognition, size of display) are not resolved by the card minders and the changes in Subsection (a) do not address these issues.

The "reasonable accommodations" provided in Subsection (b) and (c) are no accommodation at all. Watching the person next to you play (even if on your behalf) is not playing at all. It is watching others play.

It is my opinion, the accommodations proposed by the above regulations, do not address the issues stated above for the vision, mobility and cognitively disabled population. On the record before me, and based on all the facts, SB 1369 and the proposed regulations do not appear to satisfy the requirements of Title II of the ADA.

#### *Electronic Bingo Machines as "Reasonable Accommodation"*

On matters of "reasonable accommodation" it is a long held interpretation by the Federal Agencies who enforce the ADA, including the EEOC (Title I) and DOJ (Titles II and III) that deference and guidance by the disabled is given a significant consideration in determining what is a reasonable accommodation.

In my research regarding the access for disabled individuals and in understanding this issue, I talked to or read the declarations of ten different disabled individuals who are or were active bingo players of electronic machines. All affirmed that they would not be able to play bingo independently and competitively, without the electronic machines and would be denied an important part of their social lives.

It is my opinion that the electronic bingo machines provide a "reasonable accommodation" to certain disabled individuals who would not otherwise be able to play bingo in an equal and dignified way and the proposed regulations do not mitigate the absence of the electronic machines, if they are removed.

My complete CV as well as my rates and previous cases as a Witness at trial or by deposition is attached.

Yours truly,



Kim R. Blackseth, ICC, CASp

*State of California Certified Access Specialist (CASp 0-21)*  
*State of California Building Standards Commissioner (2006-2007)*  
*President, California Board for Professional Engineer and Land Surveyors (2009)*  
*International Conference of Building Officials # 1085694-12*  
*ICC Certified Accessibility Inspector/Plans Examiner #20112*  
*Member of the Western Region Master Builders Association*  
*California General Building Contractor # 363311, since 1978*



K.GREG PETERSON  
LAW OFFICES

September 21, 2009

**VIA FACSIMILE 916-263-0499**

Jim Allen, Manager  
Regulatory Actions Unit and Remote Caller Bingo Program  
California Gambling Control Commission  
2399 Gateway Oaks Drive, Suite 220  
Sacramento, CA 95833

Re: Assistance to Bingo Players with Disabilities  
[Proposed] Reg - Section 12482

Dear Mr. Allen:

As you know, I represent the El Camino Athletic Boosters Club ("El Camino") and the California Charity Bingo Association ("CCBA"). I have written you twice previously concerning both the Cardminder regulation and the regulations the Commission is proposing with regard to Assistance to Bingo Players with Disabilities [proposed] Title 4, CRR Section 12482 (SB 1369). As you also know, El Camino is involved in the ongoing lawsuit and, as with our comments concerning the Cardminder regulations, I wish to submit to you the report of our expert, Mr. Kim Blackseth, as it pertains to this regulation.

As you know, it is my clients' position that electronic bingo machines remain the only current manner in which people with certain disabilities can be reasonably accommodated. However, rather than repeat Mr. Blackseth's comments, I refer you to his report, a copy of which is included with this correspondence. His comments that specifically relate to the Commission's proposed regulation begin near the bottom of page 8 of the included report.

Your attention to these matters is appreciated and if you have any questions concerning the same, please contact me.

Very truly yours,

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K. Greg Peterson

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cc: Joe Gomez (via email, w/o encl.)  
Sophie N. Froelich, Esq. (via email, w/o encl.)



Kim R. Blackseth, *Interests, Inc.*  
310 17th Street  
Oakland, CA 94612

Phone 510-839-1760 Fax 510-839-2085

August 23, 2009

Sophie-Nicole Froelich  
Attorney at Law  
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50 California Street, 34th Floor  
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**Issue**

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#### *Personal Disability Knowledge*

I am also a disabled individual. I'm a C-5 quadriplegic (since 1979) and use an electric wheelchair for day-to-day ambulation and a pushchair on special occasions.

This unique combination of expertise in the field of disabled access and my daily observations and practical experience as a disabled individual make a rare and very useful mixture of technical and real world knowledge for my clients and the court.

#### *Basis of Expert Testimony*

The facts contained are within my personal knowledge, and I can and will testify competently to them if called to do so. The following opinions are based on my experience with providing program and physical facilities access for public and private entities.

#### *Electronic Bingo Machines as "Reasonable Accommodation"*

It is my opinion that the electronic bingo machines provide a "reasonable accommodation" to certain disabled individuals who would not otherwise be able to play bingo in an equal and dignified way.

### *"Live Call Paper Bingo"*

"Live call paper bingo" requires certain actions and physical attributes that are not available to all disabled persons. "Live call paper bingo" is fast moving and requires a certain level of cognitive skill to keep up with the caller, see the number on an electronic board and/or hear the called number. The player is then required to find the number on a paper card and "daub" it with a handheld marker.

The player must be able to manipulate a paper card, see or hear the called number, mark the card with a dauber and call "bingo" before any other player. All of the above requires a level of physical and cognitive skill, which prevents many disabled from participating or at minimum, playing on an unequal and disadvantaged field with the non-disabled.

### *Electronic Bingo Machines*

The electronic bingo machines depict an electronic representation of a bingo card. The machines are linked to a common game and two or more players are required to play, as you play against other players, not the "house".

The game is begun by putting a voucher (purchased at a kiosk) into the electronic machine. The machines require a "touch" of the screen with any part of the players body or single large button (on some machines) on the bottom of the lower display, to start the game and proceeds by a series of random "ball drops". This number is displayed on the upper screen.

The player must only touch the screen or large button three times, once to start, once to daub and finally to claim "bingo". The option of the large button or touch screen provides additional accommodation to more players.

If he or she decides to play again, the process is simply repeated. Once a player is done, the player hits the "redeem" button and a voucher is printed from the machine that is brought to the Cashier.

### *Electronic Features that Assist the Disabled*

"Live call paper bingo" is problematic for many disabled individuals. The range of disabilities is wide and not all are visible to the naked eye. They include, but are certainly not limited to:

- Vision impaired, which ranges from the low vision to completely blind;
- Hearing impaired, which ranges from hard of hearing to no hearing at all;
- Mobility impaired, which includes paraplegia, quadriplegia, polio, hemiplegia, stroke impaired, Multiple Sclerosis, ALS, etc;
- Cognitive issues, from stroke, head injury, learning disabilities, etc;

Within each of the above are countless variations, limitations and particular needs of the effected individuals

The electronic bingo machines do not require manipulation of a paper card, which can be difficult to impossible for disabled individuals to negotiate. Additionally, holding the dauber, much less marking the card is again, difficult to impossible for some mobility-impaired individuals.

The machines are touch screen and allow any portion of your body to simply touch the screen to "daub" the called number. This is vital to many who simply cannot hold the manual "dauber".

The players determine the pace, which is vital to many with cognitive issues. For many, the live call bingo is too fast to daub cards and recognize winning patterns to compete effectively with the non-disabled.

The numbers are "called" by a visual representation on the screen as well as "tones". The "tones" are bell-like and the number of "rings" signifies certain game actions or results. These machines offer large screens and tones for the low vision impaired.

The electronic bingo machines tell the player when he or she wins. The electronic machines signal a win by "ringing" a bell and by display on the screen. One example of the winning display is a "777" on the lower display. This is invaluable to the vision or cognitively impaired and unavailable on the "live call paper bingo" game.

A disabled person could win the "live call paper bingo" game, but if they are slower cognitively, they could lose to able-bodied persons who do not have this "handicap".

### *Current Alternatives or Auxiliary Aids*

There are two current alternative devices available to assist the disabled play "live call paper bingo". These were a permanent card marked with Braille and an electronic "card minder". Neither of these resolved the myriad disabled participation issues.

- The Braille card was a plastic card with the numbers marked by Braille. As the numbers are called, the player uses a plastic button to mark the number. These buttons cover the Braille and are easily "bumped" onto adjacent numbers. It makes the cognitive issues a factor for players that have no cognitive issues to start with. It further requires the player has the ability to read Braille, which many vision impaired individuals cannot do. Accordingly it has a very limited use and it does not provide an accommodation for most.
- The electronic "card minder" is a small notebook sized device, which again require interaction with the live caller, physical manipulation of the device and daubing the numbers.

The "card minder" screens are small and the contrast (dull gray) is problematic to unusable for persons with low vision.

The electronic card minder does not resolve the issues faced in "live call paper bingo" including the issues of pace, physical manipulation of the device and daubing the numbers, cognitive recognition of numbers and patterns and sight and hearing limitations. It does not provide the desired "reasonable accommodation" for the "live call paper bingo" game.

### *Proposed Regulation on Assistance to Bingo Players with Disabilities*

The California Gambling Control Commission (Commission) is proposing specific regulations (CCR Section 12482, Article 1, Chapter 8, Division 18, Title 4) on assisting the disabled as one element of the California Remote Caller Bingo Act (CRBCA). My opinions are as follows:

Subsection (a) lists the means by which the disabled can receive assistance marking the paper cards. They include:

- Paragraph 1 provides at least two (2) card minding devices be reserved for person's with disabilities, unless 15 minutes before the game there is no request for them. They can then made available to anyone;

- In Paragraph 2, rental fees are required to be waived for these card minding devices for persons with disabilities;
- Paragraph 3 permits a "print out" of winning cards, in lieu of marked tangible cards by the disabled player;

Subsection (b) is amended to assist disabled players who cannot announce "Bingo" to have another individual do so for them.

Subsection (c) would allow a person with a disability to bring another player to mark the card and announce "bingo", who could not manipulate the card or call "bingo" on their own.

None of the above provides the "reasonable accommodation" the electronic bingo machines do. The accommodations in Subsection (a), paragraphs 1, 2 and 3, do not address the lack of accommodation for player with low vision, the hearing impaired or those with mobility issues, but simply address how the card minders are to be used.

The problems related to cognitive (i.e. pace and recognition), mobility (i.e., card minder and dauber manipulation) and visually impaired individuals (i.e., Braille recognition, size of display) are not resolved by the card minders and the changes in Subsection (a) do not address these issues.

The "reasonable accommodations" provided in Subsection (b) and (c) are no accommodation at all. Watching the person next to you play (even if on your behalf) is not playing at all. It is watching others play.

It is my opinion, the accommodations proposed by the above regulations, do not address the issues stated above for the vision, mobility and cognitively disabled population. On the record before me, and based on all the facts, SB 1369 and the proposed regulations do not appear to satisfy the requirements of Title II of the ADA.

#### *Electronic Bingo Machines as "Reasonable Accommodation"*

On matters of "reasonable accommodation" it is a long held interpretation by the Federal Agencies who enforce the ADA, including the EEOC (Title I) and DOJ (Titles II and III) that deference and guidance by the disabled is given a significant consideration in determining what is a reasonable accommodation.

In my research regarding the access for disabled individuals and in understanding this issue, I talked to or read the declarations of ten different disabled individuals who are or were active bingo players of electronic machines. All affirmed that they would not be able to play bingo independently and competitively, without the electronic machines and would be denied an important part of their social lives.

It is my opinion that the electronic bingo machines provide a "reasonable accommodation" to certain disabled individuals who would not otherwise be able to play bingo in an equal and dignified way and the proposed regulations do not mitigate the absence of the electronic machines, if they are removed.

My complete CV as well as my rates and previous cases as a Witness at trial or by deposition is attached.

Yours truly,



Kim R. Blackseth, ICC, CASp

*State of California Certified Access Specialist (CASp 0-21)*  
*State of California Building Standards Commissioner (2006-2007)*  
*President, California Board for Professional Engineer and Land Surveyors (2009)*  
*International Conference of Building Officials # 1085694-12*  
*ICC Certified Accessibility Inspector/Plans Examiner #20112*  
*Member of the Western Region Master Builders Association*  
*California General Building Contractor # 363311, since 1978*

**EDMUND G. BROWN JR.**  
**Attorney General**

**State of California**  
**DEPARTMENT OF JUSTICE**



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September 30, 2009

**VIA E-MAIL ONLY**

James B. Allen, Regulatory Actions Manager  
California Gambling Control Commission  
2399 Gateway Oaks Drive, Suite 220  
Sacramento, CA 95833-4231

Re: Assistance to Bingo Players with Disabilities  
Proposed Commission Regulation-  
Title 4, California Code of Regulations, Section 12482

Dear Mr. Allen:

I am a Deputy Attorney General representing the Bureau of Gambling Control (Bureau) in the case in the United States District Court for the Eastern District of California, *Video Gaming Technologies, et al. v. Bureau of Gambling Control*, Case No. 2:08-cv-01241-JAM-EFB (VGT Litigation). The Bureau submits these comments regarding the above-proposed regulation.

The Bureau is in receipt of a copy of a comment letter from K. Greg Peterson on behalf of the California Charity Bingo Association transmitting to you a copy of a report by a Kim R. Blackseth (Blackseth Report) in relation to the VGT Litigation. The Blackseth Report states to the effect that the California Gambling Control Commission's (Commission) above-referenced proposed regulation is not lawfully adequate in providing a means for bingo operators to provide assistance to disabled players, raising the inference that so-called "electronic bingo machines" should be included as a reasonable accommodation alternative under the proposed regulation. The Bureau submits a report by D.C. Ladner, an expert in gaming technology with broad experience in addressing reasonable accommodation issues in gaming, to the effect that so-called electronic bingo machines do not constitute a reasonable accommodation in that they are inconsistent with the play of bingo, and that the Commission's regulation 12482, as previously adopted, provides an effective reasonable accommodation without resort to such electronic gambling devices.

Additionally, on its face, the Blackseth Report opines that "electronic bingo machines provide a 'reasonable accommodation' to *certain* disabled individuals . . ." (Blackseth Report, at p. 6, italics added.) As such, the Blackseth Report itself does not set forth electronic bingo machines as the *only* method of reasonable accommodation that may be used in the play of charitable bingo. Indeed, in the context of the VGT Litigation, it is undisputed that the electronic displays of gambling games on electronic bingo machines are for entertainment purposes and are not necessary to the machines' purported play of bingo. (A copy of an excerpt

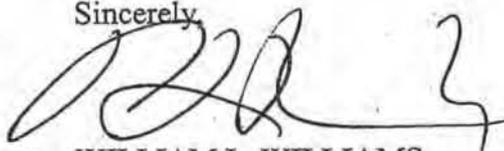
James B. Allen, Regulatory Actions Manager  
California Gambling Control Commission  
September 30, 2009  
Page 2

from the First Amended Complaint of the El Camino Athletic Boosters Club is enclosed, see ¶ 24, at pp. 7:26-8:2.)

A second preliminary injunction issued by the district court against the Bureau's enforcement of the charitable bingo statutes in the VGT Litigation is currently on appeal to the Ninth Circuit Court of Appeals. I am enclosing the appellate brief submitted to the Ninth Circuit on behalf of the Bureau that refutes the argument that electronic bingo machines must be required as a reasonable accommodation for the disabled in the play of charitable bingo. (See Appellant's [Bureau's] Opening Brief, at pp. 20-31.) Notably, the original district court decision in the VGT Litigation allowing for the continued use of electronic bingo machines, as a reasonable accommodation to play bingo, was vacated and remanded for reconsideration by the Ninth Circuit in light of the passage of SB 1369. (*VGT, et al. v. BGC, et al.*, Order, Case No. 08-16736, March 25, 2009, enclosed herewith.) In reference to electronic bingo machines, the Ninth Circuit stated that SB 1369 "unambiguously provides that the machines at issue in this case are illegal under state law." (*Ibid.*) The Bureau fully anticipates that the district court's second decision allowing for the use of electronic bingo machines in the play of bingo will not stand on appeal.

The Commission has the discretion under Penal Code section 326.5, subdivision (p)(6), to "issue regulations regarding the means by which the operator of a bingo game, as required by applicable law, may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game." It is the Bureau's position that the Commission's proposed regulation represents a reasonable exercise of its administrative discretion. Most importantly, the Commission does not have the discretion or authority under the state constitution to sanction the use of unlawful gambling devices that are specifically prohibited by Penal Code section 326.5, subdivision (p)(6), as well as Penal Code sections 326.3, subdivision (a)(8) and 326.5, subdivisions (o) and (p)(1) and (2), as is apparently proposed by California Charity Bingo Association. (Cal. Const., art. III, § 3.5.)

Sincerely,



WILLIAM L. WILLIAMS  
Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

WLW:plc  
Enclosures

cc: Jacob Appelsmith, CGCC

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 2 SARA J. DRAKE, State Bar No. 102565  
 Supervising Deputy Attorney General  
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 5 Sacramento, CA 94244-2550  
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 6 Fax: (916) 327-2319  
 E-mail: Bill.Williams@doj.ca.gov  
 7 *Attorneys for Defendants Bureau of Gambling  
 Control and Mathew C. Campoy*

8  
 9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12  
 13 **VIDEO GAMING TECHNOLOGIES,  
 INC., dba VGT, Inc., a Tennessee  
 14 Corporation, et al.,**

15 Plaintiffs,

16 v.

17 **BUREAU OF GAMBLING CONTROL, a  
 law enforcement division of the California  
 18 Department of Justice; MATHEW J.  
 CAMPOY, in his official capacity as the  
 19 Acting Chief of the Bureau of Gambling  
 Control; and JOHN MCGINNESS, in His  
 20 Official Capacity as the Sacramento County  
 Sheriff,**

21 Defendants.

22  
 23  
 24 **AND RELATED INTERVENORS.**

**2:08-CV-01241-JAM-EFB**

**DEFENDANTS BUREAU OF  
 GAMBLING CONTROL'S and  
 MATHEW J. CAMPOY'S EXPERT  
 WITNESS REPORT OF DESMOND C.  
 LADNER**

**ASSIGNED FOR ALL PURPOSES TO:  
 HONORABLE JOHN A. MENDEZ**

Courtroom: 6  
 Trial Date January 25, 2010

Action Filed: June 4, 2008

1 **I. QUALIFICATIONS**

2 I, Desmond C. "DC" Ladner am the owner and president of Video Research Labs,  
3 VRLABS, Inc., a Mississippi Corporation, which provides expert and consulting services related  
4 to hardware, software, and system integration and operation of electronic slot machines, video  
5 poker machines, and other gambling devices. I am the former Division Director for the  
6 Mississippi Gaming Commission (Division Director), where I was responsible for establishing a  
7 facility to test electronic gambling devices for compliance with the laws of the State of  
8 Mississippi. I was involved in testing games related to charitable gambling, including bingo  
9 systems, electronic bingo aids, and pull tab machines.

10 As Division Director, I was directly involved in drafting regulations for the State of  
11 Mississippi regarding reasonable accommodation of disabilities in the play of live-call bingo. I  
12 reviewed numerous electronic bingo monitoring devices available to assist the disabled bingo  
13 patrons in playing live-call bingo. Based upon my knowledge of the industry, I have also assisted  
14 the California Gambling Control Commission in developing its regulations to assist the disabled  
15 in the play of live-call bingo under California's charitable bingo statute. I am currently assisting  
16 the State of Alabama in assessing electronic gambling devices for the purported play of bingo in  
17 that state.

18 I have more than twenty-seven years of experience working in the electronic engineering  
19 field. I have been qualified as an expert on electronic gambling devices in numerous federal and  
20 state courts. A copy of my resume that accurately reflects my educational and employment  
21 experience is attached hereto as Exhibit A.

22 **II. SCOPE OF ENGAGEMENT**

23 I was retained by defendants California Bureau of Gambling Control and Mathew Campoy  
24 to assess the electronic gambling devices manufactured by Video Gaming Technologies, Inc.,  
25 (VGT) and Capital Bingo, Inc., (Capital Bingo) that are used in charitable bingo parlors in  
26 Sacramento, California. The scope of my assessment was to determine whether these devices  
27 played the game of bingo as commonly understood in the industry, and to determine whether the  
28 devices were a necessary reasonable accommodation for disabled persons in playing bingo.

1 **III. PUBLICATIONS AUTHORED BY WITNESS IN PREVIOUS TEN YEARS**

2 None

3 **IV. OTHER CASES IN WHICH WITNESS HAS TESTIFIED AS AN EXPERT AT**  
4 **TRIAL OR BY DEPOSITION**

5 See attached Exhibit B.

6 **V. INFORMATION REVIEWED**

7 To prepare my opinion I observed the following:

8 I played, and observed the play of VGT's and Capital Bingo's electronic gambling devices  
9 at the Sacramento Bingo Center, located at 3399 Arden Way, Sacramento, California, on June 23,  
10 2008. I also observed the demonstration of the VGT and Capital Bingo electronic gambling  
11 devices before Judge John A. Mendez on the morning of June 25, 2008.

12 I anticipate being allowed to view and inspect the electronic gambling devices used by  
13 Plaintiff in Intervention El Camino Athletic Boosters' Club in the course of further discovery in  
14 this matter.

15 I have reviewed the regulations of the California Gambling Control Commission at Title 4  
16 California Code of Regulations § 12482, "Assistance to Bingo Players with Disabilities," and §  
17 12486, "Approval of Card-minding Devices." Additionally I have reviewed Title 9 Compilation  
18 of Codes, Rules and Regulations of the State of New York § 5823.2, "Electronic Bingo Aids."

19 **VI. OPINION**

20 Based upon my operation and observation of the electronic gambling devices of VGT and  
21 Capital Bingo, it is my opinion that the VGT and Capital Bingo electronic gambling devices used  
22 at the Sacramento Bingo Center are inconsistent with the game of bingo. Their manner of play,  
23 speed of play, and method of betting are not at all like bingo, but rather mimic the operation of  
24 slot machines found in legal casinos in Las Vegas, Atlantic City, and the State of Mississippi.  
25 The differences in the operation of the VGT and Capital Bingo devices to the above-referenced  
26 slot machines are insubstantial in that the VGT and Capital Bingo devices require multiple button  
27 presses to operate them, whereas the above referenced slot machines require a single touch of a  
28 button.

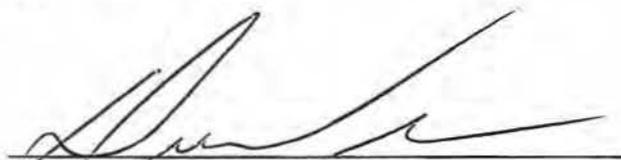
1 It is also my opinion that the VGT and Capital Bingo electronic gambling devices are not a  
2 necessary reasonable accommodation for the disabled to play bingo. Based upon my review of  
3 devices that were submitted by manufacturers for approval in the State of Mississippi, my  
4 attendance and observation at numerous trade shows for gambling devices, and my independent  
5 research, there are numerous other devices available, and specifically designed, to assist the  
6 disabled in effectively and competitively playing live-call bingo. The regulations promulgated by  
7 the California Gambling Control Commission for assisting the disabled in the play of bingo  
8 reflect a number of effective methods to assist the disabled in effectively playing live-call bingo  
9 that do not require the use of the slot machine-like electronic gambling devices of VGT and  
10 Capital Bingo. The VGT and Capital Bingo electronic gambling devices are played separate and  
11 apart from live-call bingo, use unnecessary graphical displays of other gambling games, and are  
12 not a necessary or reasonable form of accommodation to the disabled in playing bingo.

13 I am informed and believe that the electronic gambling devices used by the Plaintiff El  
14 Camino Athletic Boosters Club are substantially similar in operation to those of VGT and Capital  
15 Bingo. Therefore, Plaintiff El Camino Athletic Boosters Club's devices would also be  
16 inconsistent with the game of bingo and would not be a necessary or reasonable form of  
17 accommodation to the disabled in playing bingo.

18 **VII. COMPENSATION**

19 I have been paid \$11,614.66, for my time and expenses in relation to development of the  
20 above opinion through the date of this report. Billings for future services, including further  
21 device inspections, will be at \$250 per hour plus travel and expenses, or for testifying at trial or in  
22 deposition \$2000 per day, plus travel and expenses.

23  
24  
25 Dated: August 14, 2009

  
26 \_\_\_\_\_  
27 DESMOND C. "DC" LADNER  
28

**EXHIBIT A**

**DESMOND C. LADNER**

Ladner Building  
124 Main Street  
Post Office Box 3971  
Bay Saint Louis, Mississippi 39520  
(228) 466 - 0210 - Office  
(228) 596 - 1658 - Cellular  
vrlabs@bellsouth.net

**EXPERIENCE**

**VIDEO RESEARCH LABS**  
Bay Saint Louis, MS

*Owner/President*  
3/2004 - Present

Provide consulting and expert services in various areas of legalized gaming and illegal gaming activities. These areas include the hardware, software, system integration and operation of electronic slot machines, video poker machines, automated card shufflers, bingo, keno, computerized slot monitoring systems, progressive gaming systems, multi-player distributed bingo systems and various other electronic associated equipment utilized in the gaming industry. Additionally, provide expert opinions to various federal, state and local government agencies on the legality of electronic equipment allegedly used in illegal gaming operations. Provide mathematical analysis services for various games of chance.

**MISSISSIPPI GAMING COMMISSION**  
Biloxi, MS

*Division Director*  
5/1995 - 3/2004

Joined the Commission to create a facility to conduct testing of electronic gaming devices as to their compliance to the rules and regulations of the State of Mississippi. This entailed construction of the facility as well as capitalization of the required equipment in addition to staffing of the engineering personnel. During the course of these events, developed test methodologies and constructed the required software tools (C/C++) needed to evaluate gaming devices to include slot machines, video poker machines, progressive systems, slot accounting computerized systems and various other associated electronic devices utilized in the gaming industry. Responsibilities include the management of the engineering staff, budget generation and management and high-level technical support for engineering staff. Have provided expert testimony in numerous court cases involving illegal gaming at the federal, state and local level of various states including Mississippi, Florida, Indiana and Tennessee. Have served as a panel member and speaker at numerous worldwide gaming industry conferences during this period. Awarded *US Patent 6,663,487* in December 2003 for a video poker game which offers a variable pay-table to the player.

**ADVANCED MICROELECTRONICS**  
Jackson, MS

*Senior Engineer*  
3/1994 - 5/1995

Primarily responsible for the design and development of custom mixed-signal CMOS integrated circuits for external customers. Particularly, a multimedia audio CODEC ASIC designed for Texas Instruments. From customer specification designed and simulated various sections of the IC to include the auto-calibration circuitry and portions of the compander utilized in the on-chip compression algorithms. Additionally, developed the test methodology to verify compliance of the device to initial specifications. During the course of development of this project, Mentor Graphics schematic capture (LED) and simulation (LSIM) tools were utilized. Additional responsibilities include future product development strategy and architecture for board-based products and other business ventures.

**GRASS VALLEY GROUP**  
Grass Valley, CA

*Senior Design Engineer*  
4/1990 - 12/1993

Project Leader of the control point system for the Krystal 4400, Digital Picture Manipulator (DPM) released in March 1994 at the National Association of Broadcasters (NAB) in Las Vegas, NV. This multi-processor system included the control panel with user-interface, communications sub-system that utilized Ethernet, Taxi and LocalTalk networks operating in parallel. Network communications from the control point allowed for dynamic acquisition of pooled resources as needed for a particular task. Responsibility for this project included hardware design and management of the hardware, software and mechanical aspects of the system as well as the personnel assigned to these tasks.

In November 1991, was appointed as Project Leader for the design and development of a 3D video warping processor for the DPM700, which allows active video to be projected in 3D space, in real-time. The multi-processing architecture implemented in this option enabled such effects as pageturn, pageroll and many other curve-linear effects. On-the-fly calculations via Analog Devices AD2105, in addition to pixel interpolation via

custom ASICs allowed the rapid introduction of newer effects. This option was introduced in April 1992 at NAB in Las Vegas. Additionally, constructed a full-featured software simulator, written in C, of the hardware prior to completing the final hardware design and software architecture.

Prior to the assignment to DPM products, I was responsible for the definition, design and development of Grass Valley's first generation Serial Digital (143 - 270MBPS) conversion products. These products included conversion from composite analog video to serial digital at eight times video subcarrier rate and visa versa, in both NTSC and PAL video standards, which were introduced in April 1991 at NAB in Las Vegas. Assisted in the development of a digital FIR filter ASIC incorporated in these products utilized to greatly reduce the antialias filter requirements in the analog domain. During the course of development of these products, considerable time was spent with key customers to define the desired features and performance.

**TEKTRONIX, Inc.**  
Vancouver, WA

*Design Engineer*  
6/1987 - 4/1990

Responsible, as a team member, for the design and development of Tek's first generation VXibus products. Designed the VXibus interface, 68000-based computer and portions of the hi-speed digital sections of the VX5260, 200 MSPS digitizer and VX5790, 25 MHz Arbitrary Waveform Generator. In addition, was the sole designer of the VX1521 Development Module in which *US Patent 5,251,150* was awarded in December 1993 for its internal architecture. In 1989, presented a technical paper at WesCon in San Francisco, CA to the technical session on JTAG/IEEE 1149 Serial Protocols.

**UNIVERSITY of SOUTHERN MISSISSIPPI**  
Hattiesburg, MS

*Instructor*  
8/1986 - 5/1987

Experience in the areas of digital, analog and instrumentation instruction, served as an instructor for 100 and 200 level courses. *Flexibility in university hours allowed employment with Beam Communications in parallel.*

**BEAM COMMUNICATIONS (WDAM-TV)**  
Hattiesburg, MS

*Assistant Chief Engineer*  
10/1984 - 5/1987

Responsible for the repair and maintenance of facility production and control equipment. Directly managed a staff of four maintenance engineers. In 1986, was solely responsible for retrofitting to facility for MTS Stereo Broadcast. As needed, designed custom electronic devices required to continually upgrade the facility. Such systems included: A/V routing switch systems, remote gain control units and the electronic portion of the set used on a locally produced game show, CiviQuiz. *FCC license - General Class Radiotelephone.*

**TEKTRONIX, Inc.**  
New Orleans, LA

*Lead Technician*  
6/1980 - 8/1984

*(Left Tektronix to pursue degree on full-time basis at USM.)* Began as a Junior Electronic Technician and progressed to Lead Technician in approximately two years. Responsible for repairing and calibrating electronic test and measurement equipment to component level, including sophisticated medical equipment. Considerable experience in analog and digital circuits. One of three technicians selected on a national basis in 1984 by Tektronix to travel to other service centers to assist in the training and supervising of personnel in repair and calibration procedures. Assisted sales engineers in demonstrations and resolving technical problems with customers.

## EDUCATION

July 24, 1996 - July 28, 1996

University of Nevada, Las Vegas  
*40 Hours Training in Regulation of Gaming*

May 22, 1996 - May 26, 1996

New Jersey DGE  
Gaming Device Test methodologies

September 1984 - May 1986

University of Southern Mississippi  
B.S. (Electronic Engineering)

January 1983 - May 1984

University of New Orleans  
Engineering Courses

September 1978 - May 1980

Pearl River Community College  
A.S. (Electronics Technology)

September 1972 - May 1978

Saint Stanislaus College  
High School Diploma

**EXHIBIT B**

## TESTIMONY LOG FOR DESMOND C. LADNER

<b>2004</b>	<b>MATTER</b>	<b>PARTIES</b>	<b>COURT</b>
December	Patron Dispute Hearing	Payton .v. Boomtown & Bally Gaming	MS Gaming Com
<b>2005</b>			
March	Deposition	Torango .v. Harrah's & Aristocrat	Federal - NV
April	Illegal Gaming	State (AL) .v. Red Top Market	Bessemer, AL
May	Deposition	State (GA) .v. Six Video Devices	Cobb Co., GA
June	Deposition	Planet Bingo .v. FortuneNet	Federal - NV
June	Illegal Gaming	State (GA) .v. Six Video Devices	Cobb Co., GA
November	Trial - Markman	Torango .v. Harrah's & Aristocrat	Federal - NV
<b>2006</b>			
May	Deposition	Multimedia .v. Aristocrat	Federal - CA
<b>2007</b>			
June	Deposition	Torango .v. Harrah's & Aristocrat	Federal - NV
September	Deposition	Torango .v. Harrah's & Aristocrat	Federal - NV
November	Deposition	Torango .v. Harrah's & Aristocrat.	Federal - NV
<b>2008</b>			
June	Declaration	VGT Inc .v. Bureau of Gambling Control	Federal - CA
<b>2009</b>			
June	Trial - Trade Secret	Torango .v. Harrah's & Aristocrat	Federal - NV

\*\*\* END \*\*\*.

1 K. Greg Peterson, Esq. (SBN: 118287)  
John H. McCardle, Esq. (SBN: 155115)  
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Facsimile: (916) 492-2680  
5 Email: greg@kgregpeterson.com  
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6

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non-profit corporation  
8

9 UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA

11 VIDEO GAMING TECHNOLOGIES, INC., ) Case No. 2:08-CV-01241 JAM EFB  
dba, VGT, Inc., a Tennessee Corporation; )  
12 UNITED CEREBRAL PALSY OF GREATER ) FIRST AMENDED COMPLAINT IN  
SACRAMENTO, a California Non-Profit ) INTERVENTION FOR  
13 Corporation; WIND Youth Services, a ) DECLARATORY AND INJUNCTIVE  
California Non-Profit Corporation; ROBERT ) RELIEF  
14 FOSS, an individual; JOAN SEBASTIANI, an )  
15 individual, ) (JURY TRIAL DEMANDED)  
16 ) [Fed. R. Civ. P. 38(b), Civil Local Rule  
Plaintiffs, ) 38-201]

17 v.  
18 )

19 BUREAU OF GAMBLING CONTROL, a law )  
enforcement division of the California )  
20 Department of Justice; MATHEW J. )  
CAMPOY, in his official capacity as the )  
21 Acting Chief of the Bureau of Gambling )  
Control, and JOHN MCGINNESS, in his )  
22 official capacity as Sacramento County )  
23 Sheriff, )

24 Defendants. )

25 AND RELATED INTERVENORS )  
26 )

27 Plaintiff-Intervenor, EL CAMINO ALTHLETIC BOOSTERS CLUB, LLC,  
28 ("Boosters") brings this First Amended Complaint against defendants BUREAU OF



1 violate California law and, Boosters is informed and believes, will violate the amended  
2 Ordinance. These are the same 71 machines which the Sacramento County Sheriff has  
3 licensed as in compliance with the Sacramento County Ordinance applicable to electronic  
4 bingo machine gaming and which resulted in the issuance Special Business License No.  
5 SSD 4067. As a condition of the issuance of this license, Boosters was required the  
6 Sacramento County Sheriff's Department to obtain independent certification, which it did,  
7 that its 71 electronic bingo machines were not unlawful bingo devices or illegal slot  
8 machines. Therefore, according to Sacramento County and its ordinance, Boosters is in  
9 full compliance with California law.

10 24. The Boosters' electronic bingo machines operate as follows. The customer  
11 walks up to a kiosk, inserts the desired cash amount into kiosk and receives a voucher  
12 print out. The customer then takes the voucher, inserts it into the desired machine, and  
13 selects the bingo game from a menu of optional animations. The electronic bingo  
14 machines allow the customer to play pennies, nickels, dimes, or quarters. Once a random  
15 bingo ball drops, its number then appears on the bingo card displayed on the above  
16 screen. To obtain the sequence of numbers needed to win, the customer must hit the  
17 same button three times: once to play, once to daub the bingo card, and once to claim his  
18 or her winnings. If a customer decides to keep playing, he or she simply starts the  
19 process over again; play, daub, and claim. As the customer repeats the process, he or  
20 she either gains or loses credits towards their bingo game. If a customer wins or decides  
21 to leave a machine for any given reason, he or she hits the "redeem" button. In doing so,  
22 another voucher is printed from the machine and brought to the cashier to be exchanged  
23 for the dollar amount printed on the ticket. Boosters' electronic bingo machines are not  
24 classified as slot machines because the customers are playing a bingo card and at all  
25 times are playing against each other, only. There must be two or more players at all  
26 times to initiate a bingo game. On the above display screen a digital bingo card appears,  
27 and on which randomly generated numbers appear. The screen below is merely a video  
28 screen which displays a different electronic game for entertainment purposes only, in

1 regards to which there is no combination needed to win. It does not generate any actual  
2 cash winnings, and has absolutely no bearing on the outcome of the bingo games.

3 25. Each player obtains a digitized or electronic bingo card which is visible on  
4 the above screen before the first ball drops or appears. Each player has at their disposal  
5 a paper card that the electronic card represents. These paper cards are available in  
6 booklet at any time from stands in the hall, from the cashier on demand, or the player can  
7 request a booklet of paper bingo cards from an assistant who is usually a volunteer from  
8 one of Boosters' charities. This allows the customer to determine a win solely based on  
9 the paper card alone. The electronic bingo machines themselves do not accept nor  
10 disburse cash or coins.

11 26. Boosters' electronic bingo machines are in all respects therefore compliant  
12 with the California Constitution, the California Penal Code (specifically §326.5(o)), and  
13 the relevant Sacramento County ordinances. Boosters is informed and believes that  
14 Defendants' allegations contained in the Cease and Desist Order are based upon the  
15 Boosters' use of electronic bingo cards and/or the intent of Defendants to use any pretext  
16 available to prohibit electronic bingo machine gaming in California.

17 **E. Intervention, The TRO and Preliminary Injunction**

18 27. Based upon Boosters' belief that its electronic bingo machines complied  
19 with Penal Code section 326.5, Boosters filed papers seeking to intervene in this case on  
20 June 18, 2008.

21 28. On June 28, 2008, the Court granted Boosters' application for leave to  
22 intervene and on August 5, 2008, Boosters filed its complaint in intervention for  
23 declaratory and injunctive relief. Boosters' claims included several claims for declaratory  
24 relief that Boosters' electronic bingo machines do not violate Penal Code section 326.5  
25 and the other statutes identified in the Order because tangible paper cards are available  
26 to all players using Boosters' electronic bingo machines; section 326.5 does not preclude  
27 the use of electronic cards in any event; a lawful bingo device cannot be a slot machine  
28 or other gambling device by definition; and also that the Bureau's threatened seizure of

1           72. Boosters has been obliged to retain the undersigned counsel for the filing  
2 and prosecution of this action. Boosters is entitled to recover its attorney's fees, costs  
3 and expenses from the Sheriff pursuant to 42 U.S.C. §§ 12205.

4           73. Pursuant to 42 U.S.C. § 12133, 29 U.S.C. § 794(a), and 42 U.S.C. § 2000e-  
5 5(g), this Court is vested with the authority to grant injunctive relief in favor of Boosters,  
6 including enjoining the Sheriff from enforcing the amended Ordinance in a manner that  
7 prohibits or threatens to prohibit the use of Boosters' electronic bingo devices.

8  
9                   **WHEREFORE**, Boosters respectfully requests that this Court grant the  
10 following relief:

11           A. Enter a declaratory judgment that the enforcement of SB 1369 in a manner  
12 that prohibits or threatens to prohibit the use of Boosters' electronic bingo devices is a  
13 violation of Title II of the ADA and the federal Supremacy Clause;

14           B. Enter a further declaratory judgment that the enforcement of the amended  
15 Ordinance in a manner that prohibits or threatens to prohibit the use of Boosters'  
16 electronic bingo devices is a violation of Title II of the ADA and the federal Supremacy  
17 Clause;

18           C. Enter a preliminary injunction enjoining Defendants Bureau and Campoy  
19 from acting on and/or enforcing SB 1369, or directing others to act or enforce SB 1369, in  
20 a manner that prohibits or threatens to prohibit the use of Boosters' electronic devices  
21 until after a trial on the merits of plaintiffs' claims;

22           D. Enter a preliminary injunction enjoining Defendant Sheriff from acting on  
23 and/or enforcing the amended Ordinance, or directing others to act or enforce the  
24 amended Ordinance, in a manner that prohibits or threatens to prohibit the use of  
25 Boosters' electronic devices until after a trial on the merits of Boosters' claims;

26           E. Enter a permanent injunction to enjoin Defendants from acting on and/or  
27 enforcing SB 1369 and the amended Ordinance, or directing others to do so, in the  
28 manner described above;

09-16092

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**VIDEO GAMING TECHNOLOGIES, INC., dba  
VGT, Inc., a Tennessee Corporation; et al.,**

Plaintiffs-Appellees,

v.

**BUREAU OF GAMBLING CONTROL, a law  
enforcement division of the California Department  
of Justice; et al.,**

Defendants-Appellants,

**CAPITAL BINGO, INC., a California  
corporation, et al.,**

Intervenors-Appellees.

On Appeal From the United States District Court  
for the Eastern District of California

No. 2:08-CV-01241-JAM-EFB  
John A. Mendez, Judge

**APPELLANTS' OPENING BRIEF**

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## STATEMENT OF RELATED CASES

### United States Court of Appeals for the Ninth Circuit

1. *Video Gaming Technologies, Inc., v. Bureau of Gambling Control*,  
USCA No. 09-16165; USDC Eastern District of California Co. Civ.  
S-08-01241.
2. *Video Gaming Technologies, Inc., v. Bureau of Gambling Control*,  
USCA No. 08-16736, USDC Eastern District of California Case #  
Civ. S-08-01241.

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## INTRODUCTION

This case is about the lawfulness of slot machine-style electronic gambling devices being used by the appellee charitable organizations to purportedly play bingo under the state's charitable bingo statute. Based upon the Americans With Disabilities Act (ADA), Plaintiffs and Appellees<sup>1</sup>—gambling device manufacturers, charitable organizations and certain disabled individuals—are seeking to preliminarily and permanently enjoin the Appellants California Department of Justice Bureau of Gambling Control and the Chief of the Bureau in his official capacity (“Bureau”<sup>2</sup>) from enforcing the state's charitable bingo statute and other state laws prohibiting certain types of gambling devices. The district court issued a preliminary

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<sup>1</sup> Due to the voluntary dismissals of Video Gaming Technologies, Inc., and Joan Sebastiani, the Appellees consist only of United Cerebral Palsy of Greater Sacramento (“UCP”); WIND Youth Services (“WIND”); Robert Foss; Capital Bingo, Inc.; Haggin Post No. 521, The American Legion, Department of California; Casa Robles School Ramsmen, Inc.; Mary Brown, and El Camino Athletic Boosters Club, LLC. Unless otherwise specified, all references to Appellees are to all of the appellees listed above. (Excerpts of Record “ER” Vol. 3, 366-67, 390-92, 409-10, Pltfs.’ Amd. Compls.; ER Vol. 3, 340-42, 349-51, Stips & Orders of Dismissal.)

<sup>2</sup> Unless otherwise specified, the Bureau and Appellant Mathew Campoy are jointly referred to herein as the Bureau. Mathew Campoy has since retired from the Bureau; however, the Plaintiffs have not substituted in the Bureau's current chief for Mr. Campoy.

injunction to prohibit the Bureau from enforcing the state's charitable bingo law against the Appellees' electronic gambling devices, in effect invalidating the state's charitable bingo law.

This is an appeal from the issuance of a second preliminary injunction entered following this Court's remand of the case to the district court. In the first appeal,<sup>3</sup> this Court ordered the preliminary injunction vacated and reconsidered in light of changes in the law regarding the standard for issuance of a preliminary injunction and changes in state law clarifying the unlawfulness of the electronic gambling devices at issue. (ER Vol. 3, 331-33, Order [of Ninth Circuit Court of Appeals].) With regard to the above-referenced changes in state law, this Court stated that the California "Legislature enacted Senate Bill Number 1369, which unambiguously provides that the machines at issue in this case are illegal under state law." (*Id.*) Nonetheless, upon reconsideration, the district court issued a second preliminary injunction against enforcement by the Bureau and the Sacramento County Sheriff of the state's laws against the Appellees' electronic gambling devices. The substantive thrust of the district court's

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<sup>3</sup> All references to the "first preliminary injunction" and the "First Appeal" are, respectively, to the district court's preliminary injunction order entered on June 30, 2008, and to this Court's order of March 25, 2009, on the appeal from that preliminary injunction order.

ruling is that the state's charitable bingo law, to the extent that it prohibits the use of electronic gambling devices such, as those operated by plaintiffs, is not valid under the ADA. Because the district court erred in granting the second preliminary injunction, this appeal has been brought by the Bureau.

### **STATEMENT OF JURISDICTION**

The district court exercised jurisdiction over Appellees' claims for violations of the ADA under 28 U.S.C. § 1331. The district court issued and entered its order granting the preliminary injunction on May 7, 2009, and Appellants filed their notice of appeal from that order on May 26, 2009. (ER Vol. 1, 36-40, Ord. Granting Prelim. Inj.; ER Vol. 2, 49-50, Not. of App.) This Court has jurisdiction over this appeal from an order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1). This appeal is timely under Federal Rules of Civil Procedure, Rule 4(a).

### **ISSUES PRESENTED ON APPEAL**

Did the district court abuse its discretion in granting the preliminary injunction?

- a. Is it probable that the Appellees will succeed on the merits of their claim that the Bureau's actions violated the ADA?
- b. Are Appellees likely to suffer irreparable harm in the absence of injunctive relief?

c. Does the balance of equities tip in favor of Appellees so as to support injunctive relief?

d. Is the issuance of a preliminary injunction in the public interest?

### STATEMENT OF THE CASE

On June 4, 2008, Video Gaming Technologies, Inc. (“VGT”), the manufacturer of gambling devices involved in this action, United Cerebral Palsy of Greater Sacramento, and WIND Youth Services, a tax exempt organization, and Robert Foss and Joan Sebastiani, persons with disabilities within the meaning of the ADA (hereafter collectively “VGT et al.”), filed a Complaint<sup>4</sup> for Declaratory and Injunctive Relief and Ex Parte Motion for Temporary Restraining Order against the Bureau, seeking to enjoin the Bureau from acting upon the Bureau’s prior notifications to bingo establishments to remove gambling devices including those manufactured by VGT, from their premises within thirty days. (ER Vol. 4, 619-36, Compl.) VGT et al.’s action contended that the anticipated enforcement action against their electronic gambling devices would violate the ADA, would be

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<sup>4</sup> As set forth herein, after the enactment of SB 1369, clarifying the illegality of the electronic gambling devices at issue in this case, [former Plaintiffs] VGT and Joan Sebastiani dismissed their actions with prejudice.

an unconstitutional deprivation of property rights under 42 U.S.C. § 1983, and would violate state laws pertaining to charitable bingo. (*Id.*) The district court granted a temporary restraining order and ordered the Bureau to show cause on June 25, 2008, why a preliminary injunction should not be issued. (ER Vol. 4, 591-96, Temp. Restr. Ord.)

On June 12, 2008, Appellees Capital Bingo (“Capital Bingo”), Inc., another electronic device manufacturer; Haggin Grant Post 521, the American Legion Department of California; Casa Robles High School Ramsmen, Inc.; and Mary Brown (collectively, “Capital Bingo, et al.”) moved to intervene in the suit, and sought a temporary restraining order, and joinder in the pending motion for the preliminary injunction based upon the same causes of action employed by VGT, et al., which motion to intervene was granted. (ER Vol. 4, 575-90, Compl. in Inter.; ER Vol. 4, 639-44, Civ. Dock.)

On June 25, 2008, the hearing on the preliminary injunction took place. Just prior to the hearing on the preliminary injunction, an inspection of ostensible samples of VGT’s and Capital Bingo’s electronic gambling devices was conducted by the district court judge at a local hotel. (ER Vol. 4, 477-531, Rep.’s Tr. Hrg. on Mot. for First Prelim. Inj. on 6/25/08.) After the inspection of the devices, the parties returned to the district court and

argued the matter. (ER Vol. 4, 461-76, Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on 6/25/08; ER Vol. 4, 644, Civ. Dock.) At the conclusion of the June 25, 2009, hearing, the district court stated that it would grant the preliminary injunction and would prepare a written order. (*Id.*) On June 30, 2008, the district court issued its Order Granting Preliminary Injunction. (ER Vol. 4, 538-47, Ord. Granting Prelim. Inj.) The district court's order stated in part as follows:

Plaintiffs and Intervenors have demonstrated that irreparable injury will result if Defendants [sic] actions are not enjoined and that the balance of hardships tips in their favor. Plaintiffs and Intervenors have also demonstrated that there remain serious questions about whether the [Bureau's] threatened seizure of their electronic bingo machines violates the ADA or their constitutional rights.

(ER, Vol. 4, 541, Ord. Granting Prelim. Inj.)

On July 29, 2008, the Bureau filed a Notice of Appeal from the district court's issuance of the Order Granting the Preliminary Injunction. (ER Vol. 4, 532-33, Not. of App.)

On July 28, 2008, the district court issued an order allowing Appellee El Camino Athletic Boosters Club, LLC ("El Camino"), another charitable organization, to intervene in the case under very similar claims to those being pursued in the complaints of VGT, et al. and Capital Bingo, et al. (ER

Vol. 4, 536-37, Ord. Re: El Camino; ER Vol. 3, 444-60.) The preliminary injunction in place from June 30, 2008, was amended to prevent the Bureau from taking enforcement action as to El Camino's electronic gambling devices. (ER Vol. 3, 440-43, Stip. Re: Amd. & Order.)

On September 30, 2008, California Governor Arnold Schwarzenegger signed California State Senate Bill Number 1369 ("SB 1369")<sup>5</sup> into law, which clarified that the electronic gambling devices, including devices distributed by VGT, et al., and operated by Capital Bingo, et al., and El Camino, were not a lawful form of charitable bingo. (ER Vol. 3, 422-39, Ex. A to Req. for Jud. Not.) As this Court stated in its order on the First Appeal, SB 1369 "unambiguously provides that that the machines at issue in this case are illegal." (ER Vol. 3, 331-33, Order [of the Ninth Circuit Court of Appeals].) See Cal. Pen. Code §§ 326.3(a)(8), 326.5(o) & (p). The only allowable electronic devices in the play of charitable bingo under SB 1369, are card-minding devices which by definition cannot:

Display or represent the game result through any means, including, but not limited to, video or mechanical reels or other slot machine or casino game themes, other than highlighting the winning numbers or symbols marked or

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<sup>5</sup> The state's charitable bingo statutes as amended by SB 1369 are found at California Penal Code sections 326.3, 326.4, and 326.5.

covered on the tangible bingo cards or giving an audio alert that the player's card has a prize-winning pattern.

Cal. Pen. Code § 326.5(p)(2)(C).

SB 1369 also provides regulatory authority in the California Gambling Control Commission to address the issue of lawful means by which bingo operators “may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game. . . .” Cal. Pen. Code § 326.5(p)(6).

Between November 12 and November 20, 2008, the three Plaintiff groups—VGT, et al., Capital Bingo, et al., and El Camino—each filed an amended complaint that dropped their claims under state law and 42 U.S.C. § 1983, and asserted only a claim under the ADA against the Bureau. (ER. Vol. 3, 365-83, 388-407, 408-21, Amd. Compls.) These three amended complaints also named Sacramento County Sheriff John McGinness (“Sheriff”), in his official capacity, as a party defendant, and sought to enjoin him from taking any enforcement action against their electronic gambling devices under the ADA. (*Id.*)

On December 1, 2008, with the district court’s preliminary injunction in force pending appeal, the Bureau entered into a stipulation and order with the three Plaintiffs’ groups under which the Bureau agreed not to enforce the

provisions of SB 1369 until there a judicial resolution of the cases. (ER Vol. 3, 360-63, Stip. & Ord.) On December 3, 2008, the Sheriff entered into a similar stipulation and order agreeing not to enforce SB 1369 until there was a resolution of the case in the Court of Appeals. (ER Vol. 3, 352-55, Stip. & Ord.)

On December 18, 2008, VGT dismissed all of its claims with prejudice. (ER Vol. 3, 349-51, Stip. & Ord.)

On March 2, 2009, Joan Sebastiani, an individual Plaintiff in the case, dismissed her claims with prejudice.<sup>6</sup> (ER Vol. 3, 340-42, Stip. & Ord.)

On March 25, 2009, this Court issued an order on the First Appeal, vacating the preliminary injunction and remanding the matter to the district court for reconsideration. (ER Vol. 3, 331-33, Order [of Ninth Circuit Court of Appeals].) On March 25, 2009, counsel for Capital Bingo, et al. sent a letter to the Bureau's counsel taking the position that no enforcement action should be taken before the district court reconsidered the matter. (ER Vol. 3, 319A-19C, Ex. A to Goodman Decl.) On March 27, 2008, the Bureau

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<sup>6</sup> Shortly after this voluntary dismissal, substitutions of attorneys were filed so that counsel for Capital Bingo, et al. represented all of the remaining Plaintiffs in the suit with the exception of El Camino. (ER Vol. 3, 334-339, Substs. & Ords.)

sent responsive correspondence to the remaining Plaintiffs' counsel to the effect that his clients must remove the subject electronic gambling devices from the premises covered by the [vacated] preliminary injunction within 15 days<sup>7</sup>, and bring their bingo operations into compliance with state law. (ER Vol. 3, 319D-19F, Ex. B to Goodman Decl.) On or about March 31, 2009, the Sheriff sent a similar written notification to the remaining Plaintiffs. (ER Vol. 3, 319G-319H, Exh. C to Goodman Decl.)

On April 3, 2009, the remaining Plaintiffs from VGT, et al., and Capital Bingo, et al. moved ex parte for a temporary restraining order to prevent the Bureau and the Sheriff from taking enforcement action against their electronic gambling devices. (ER Vol. 3, 320-30, Ex Parte Mot. for TRO.) Without awaiting opposition, on April 6, 2009, the district court issued the temporary restraining order setting a hearing on an order to show cause regarding a preliminary injunction for April 14, 2009. (ER Vol. 3, 303-05, TRO.)

On April 6, 2009, El Camino joined in the then pending motion for a temporary restraining order and made its own motion for the same. (ER

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<sup>7</sup> This 15-day grace period was agreed to a part of the stipulation and order in re: the motion to amend the preliminary injunction. (ER Vol. 3, 360-63, Stip. & Ord.)

Vol. 3, 296-302, Joinder in Ex Parte Mot.) On April 7, 2009, the district court issued a corrected temporary restraining order to prevent the Bureau and the Sheriff from taking enforcement. (ER Vol. 3, 280-83, Corr. TRO.) The Bureau and the Sheriff filed oppositions to the order to show cause. (ER Vol. 2, 131-279, Bureau's & Sheriff's Opps. and Decls. in Supp. of Opps.)

The hearing on the order to show cause was held before the district court on April 14, 2009. (ER Vol. 1, 1-35, Rep.'s Tr. Hrg. on Mot. for Second Prelim Inj. on April 14, 2009; ER Vol. 4, 656, Civ. Dock.) At the conclusion of the hearing, the district court stated that it would grant the preliminary injunction, and directed counsel for Capital Bingo, et al., to prepare a written order. (*Id.*) On May 4, 2009, a proposed order was lodged with the district court by counsel for Capital Bingo, et al. (ER Vol. 2, 101-06, Prop. Ord.) The Bureau and the Sheriff submitted objections to the proposed order and proposed alternative orders for the district court's consideration on May 6, 2009. (ER Vol. 2, 62-67VV, 85-100, Objects. to Prop Ord. & Altern. Prop. Ords.) On May 7, 2009, the district court issued an order granting the preliminary injunction based almost entirely on Capital Bingo et al.'s proposed order. (ER Vol. 1, 36-40, Ord. Granting Second

Prelim. Inj.) On May 26, 2009, the Bureau filed an appeal from the order granting the preliminary injunction. (ER Vol. 2, 49-50.)

### **STATEMENT OF FACTS**

As a bureau within the California Department of Justice, the Bureau is responsible for the enforcement of California's laws regarding controlled gambling and also has authority to investigate suspected violations of the California Penal Code provisions prohibiting or limiting various forms of gambling, which includes the statute that addresses charitable bingo. (Cal. Bus. & Prof. Code §§ 19805(h), 19826(a), (b), (c), (d), (e); Cal. Penal Code §§ 319, 321, 326.5, 330a, 330b, 330.1, 335a; see also Cal. Govt. Code § 15002.5.) During 2003 and 2004, the Bureau began receiving numerous complaints and inquiries from the public and law enforcement concerning bingo establishments using devices or machines that appeared to be prohibited as a "slot machine or device" as that term is defined under California Penal Code §§ 330a, 330b and 330.1. (ER, Vol. 4, 604, Campoy Decl.) In response to this concern, agents of the Bureau investigated and determined that illegal gambling devices were to be found not only at bingo establishments, but also at the locations of a number of fraternal organizations. (ER, Vol. 4, 604, Campoy Decl.) Thereafter, complaints regarding the illegal gambling devices increased, and on June 6, 2004, the

Bureau issued a law enforcement advisory addressed to county sheriffs and municipal police departments outlining the illegality of the use of electronic gambling devices being operated as bingo devices. (ER, Vol. 4, 604, 610-12, Campoy Decl. Ex. 1.) Complaints about the unlawful gambling devices thereafter subsided. (*Id.*)

In 2006, complaints about the use of illegal gambling devices in bingo establishments again began to increase. (ER, Vol. 4, 604-05, Campoy Decl.) Bureau agents visited the locations about which complaints had been received and determined that bingo establishments were again operating illegal gambling devices. (*Id.*) The Bureau met with local law enforcement agencies regarding plans to address the problem. Most of those agencies indicated that they did not have the resources to address the issue and expressed their belief that the Bureau was best suited to handle the problem. (*Id.*)

In August of 2007, with the number of complaints of use of illegal gambling devices by charitable bingo establishments increasing, the Bureau issued another law enforcement advisory, this time not only to law enforcement, but also to approximately 200 bingo establishments statewide. (ER, Vol. 4, 604-05, Campoy Decl.) The 2007 law enforcement advisory reaffirmed that electronic “bingo” systems that substituted electronic

gambling devices for the play of bingo were illegal, but that use of electronic aids that merely notified bingo players that they were winners, used in conjunction with a traditional bingo card, was allowable. (ER Vol. 4, 613-14, Campoy Decl. Ex. 2.)

Although the initial response to the August 2007 advisory appeared to indicate industry compliance, after six or seven months complaints regarding the use of illegal gambling devices by bingo establishments again increased. (ER Vol. 4, 604-05, Campoy Decl.) A sampling of bingo establishments by Bureau agents confirmed the devices were once again proliferating. (*Id.*) It also came to the Bureau's attention that California cardroom operators, bars and other commercial establishments, believing that the Bureau would take no action against such gambling devices, were considering offering these devices for play by the public. (ER Vol. 4, 605, Campoy Decl.) Based on these facts, the Bureau decided to move forward with enforcement action against the use of the devices. (ER, Vol. 2, 605-06, Campoy Decl.)

Commencing on May 7, 2008, Bureau agents visited bingo establishments throughout the State to determine if there were illegal gambling devices on the premises. (ER Vol. 4, 606, Campoy Decl.) Based on these inspections, the Bureau issued written notifications to fifteen bingo establishments where illegal gambling devices were found. (ER, Vol. 4,

606, Campoy Decl.) The establishments were notified that they had thirty days to remove all such devices, or they would face enforcement action, including seizure of the devices. (ER Vol. 4, 606-07, Campoy Decl.) Prior to expiration of the thirty-day period, VGT, et al. filed suit. (ER Vol. 4, 619-36, VGT Compl.)

VGT, Capitol Bingo, and World Touch Gaming Inc.<sup>8</sup> (“World Touch Gaming”) are manufacturers of the electronic gambling devices that are operated in bingo establishments in the County of Sacramento, California that were the subject of the Bureau’s thirty-day notifications. (ER Vol. 3, 392-93, VGT Second Amd. Compl.; ER Vol. 3, 413-14, Capital Bingo First Amd. Compl.; ER Vol. 3, 369, El Camino First Amd. Compl.) While there are some differences in their operation, VGT’s, Capital Bingo’s and World Touch’s gambling devices look like slot machines and have graphic interfaces that display slot machine-type reels and other types of gambling that are illegal under California law, such as Keno. (ER Vol. 4, 477-531 Rep.’s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008, ER Vol. 3, 370-72, El Camino First Amd. Compl.) Unlike bingo, these electronic

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<sup>8</sup> World Touch Gaming, Inc. is not a party, but is the manufacturer of the electronic gambling devices used by El Camino. (ER Vol. 3, 368, El Camino First Amd. Compl.)

gambling devices operate and play like slot machines in that players place their bets by the insertion of purchased monetary credits, with each bet having a monetary equivalent, and bets of large amounts resulting in correspondingly higher monetary prize levels. (*Id.*) The betting on and play of these devices is also extremely rapid, unlike live call bingo. (ER Vol. 4, 571-72, Johnson Decl.)

The electronic gambling devices are available for play and played by the disabled and non-disabled alike, without reference to whether a patron is a qualified disabled individual. (ER Vol. 4, 568, Rep.'s Tr. Hrg. on Mot. for Temp. Rest. Ord. on June 5, 2008.)

There is no evidence to indicate that such electronic gambling devices are the only reasonable accommodation to play bingo.<sup>9</sup> Indeed the three amended complaints at issue claim that each of VGT's, Capital Bingo's, and World Touch Gaming's own separate form of electronic gambling devices constitutes the only reasonable accommodation in the play of bingo. (ER Vol. 3, 394, 399, VGT's Second Amd. Compl. ¶¶ 23, 24 & 47; ER Vol. 3, 409-10, 416, Capital Bingo's First Amd. Compl. ¶¶ 5 & 38; ER Vol. 3, 368,

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<sup>9</sup> These devices are specifically excluded from the definition of bingo and expressly prohibited as form of bingo under the state's charitable bingo law. Cal. Pen. Code § 326.5(o) & (p); see also Cal. Pen. Code § 326.3(a)(8).

377, El Camino's First Amd. Compl. ¶¶ 14 & 43.) As discussed below, the California Gambling Control Commission has issued regulations implementing the provisions for assistance to the disabled that do not include illegal electronic gambling devices. (Appellants' Req. for Jud. Not. Exh. A.) The County of Sacramento allows for assistance to the disabled by a live person. (ER Vol. 2, 232, Sac. County Code (SCC) § 4.26.168(V).)

An important change in circumstances since the first preliminary injunction was granted is that SB 1369 specifically provides:

The California Gambling Control Commission shall issue regulations to implement the requirements of this subdivision and may issue regulations regarding the means by which the operator of a bingo game, as required by applicable law, *may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game*, provided that the means of providing that assistance shall not be through any electronic, electromechanical, or other device or equipment that accepts the insertion of any coin, currency, token, credit card, or other means of transmitting value, and does not constitute or is not a part of a system that constitutes a video lottery terminal, slot machine, or devices prohibited by Chapter 10 (commencing with Section 330 [of the California Penal Code]).

Cal. Penal Code § 326.5(p)(6) (emphasis added). At the hearing on the second preliminary injunction, the Bureau adduced uncontroverted evidence that the California Gambling Control Commission ("Commission") was

about to adopt such regulations concerning assistance to the disabled in the play of charitable bingo. (ER, Vol. 2, 168-70, Ciau Decl.) Prior to the Court's written order granting the second preliminary injunction, the Bureau gave specific notice to the district court that the Commission was scheduled on May 7, 2009, to consider for adoption the regulations providing for assistance to the disabled referenced above. (ER Vol. 2, 62-67H, Objects. to Prop. Ord. & Req. for Jud. Not.) The district court nonetheless issued its written order granting the second preliminary injunction on May 7, 2009. (ER, Vol. 1, 36-40, Ord. Granting Prelim. Inj.) The Commission did indeed adopt such regulations, which went into effect on May 18, 2009. (Appellants' Req. for Jud. Not., Ex. A.)

### SUMMARY OF ARGUMENT

In the First Appeal, this Court vacated the preliminary injunction and remanded the case for reconsideration in light of the enactment of SB 1369 and the intervening United States Supreme Court decision in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), setting forth a more stringent standard for preliminary injunctive relief than had been employed by the district court in relation to the First Preliminary Injunction.

Upon remand, the district court, ostensibly employing the *Winter* standard for the issuance of preliminary injunctive relief, ruled that the

Plaintiffs/Appellees were “likely to succeed on the merits of their allegation that enforcement of the provisions of SB 1369 would violate the Americans With Disabilities Act (“ADA”).” The district court’s ruling is not supported by the ADA as a matter of law. No state “service, program, or activity” is at issue in the Bureau’s enforcement of state statutes concerning charitable bingo, and the electronic gambling devices at issue are not reasonable accommodation required under the ADA.

As to the balancing of equities, in issuing the preliminary injunction the district court simply disregarded the state’s paramount interest in determining how charitable bingo is to be played in the State of California in favor of deliberate violations of the law by Appellees. The district court also improperly displaced the California State Legislature’s determination of the public interest in favor of its own perception of the public interest in allowing the use of electronic gambling devices in playing charitable bingo.

#### **STANDARD OF REVIEW**

The district court’s grant of a preliminary injunction is reviewed under the abuse of discretion standard. *Brown v. California Dept. of Transportation*, 321 F. 3d 1217, 1221 (9th Cir. 2003). The district court’s conclusions of law are reviewed de novo. *Id.*

As noted by this Court in the First Appeal, the standard under which the district court determines whether a preliminary injunction should issue is set forth in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, as follows:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

*Id.* at 374 (citations omitted).

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN DETERMINING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS UNDER THE ADA**

The amended complaints in this case allege that enforcement of the state's charitable bingo statutes violates Title II of the ADA, by discrimination on the basis disability. The operative prohibition of Title II in title 42 U.S.C. § 12132, provides that “[no] qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the *benefits of the services, programs, or activities* of a public entity, or *be subjected to discrimination* by any such entity.”

(Emphasis added).

Appellees' primary argument throughout this matter is that their electronic gambling devices constitute the "only" reasonable accommodation for the play of charitable bingo, and that the Bureau's action in enforcing the prohibition of such devices under the state's charitable bingo and gambling laws constitutes unlawful disparate treatment under 42 U.S.C. § 12132. The seminal disparate treatment case under Title II of the ADA in this Circuit is *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). In *Crowder*, the strict quarantine requirements for all animals entering Hawaii had a disparate impact on blind individuals relying upon guide dogs as aids. This Court stated that the quarantine "effectively precluded visually-impaired persons from using a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions" and concluded that "the quarantine requirement is a policy, practice or procedure which discriminates against the visually-impaired individuals by denying them meaningful access to state services programs or activities by reason of their disability." *Crowder*, 81 F.3d at 1485. Appellees' electronic gambling devices have nothing to do with access to state "services, programs, or activities," and cannot reasonably be compared to guide dogs for the blind.

Additionally, *Crowder* does not dispense with the need for some operative relationship between the public entity and the disabled plaintiff claiming an injury at the entity's hands under 42 U.S.C. § 12132. In *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 1175-76 (9th Cir. 1999), this Court examined *Crowder* and reasoned that "the 'action' words in the statute [42 U.S.C. § 12132] assume a relationship between a public entity, on the one hand, and a member of the public, on the other. The former *provides* an output that the latter *participates in or receives*." *Id.* (Emphasis in original.) There is no such provider-receiver relationship implicated in the Bureau's enforcement of California's gambling laws.

In an analogous context to this case involving a law enforcement action, an arrest was held not to be a service or benefit that could support an ADA claim. *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1159 (W.D. Wash. 1999). "As noted in *Rosen [v. Montgomery County Maryland]*, 121 F.3d [154] at 157 [(4th Cir. 1997)], casting the perpetration of a crime and any resulting arrest as a service or activity the benefit of which a disabled person has been denied strains the statutory language to, if not past, the breaking point." *Id.*

As set forth above, SB 1369 does provide that the Commission "may issue regulations regarding the means by which the operator of a bingo

game, as required by applicable law, may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game,” and the Commission has exercised this regulatory authority. Cal. Pen. Code § 326.5(p)(6). However, the mere provision of direction to bingo operators about lawful means to provide assistance to the disabled does not turn charitable bingo into a state service, program, or activity. Indeed, such regulatory direction is only necessary by virtue of Appellees’ efforts to compel the use of slot machine-style devices as a form of charitable bingo despite SB 1369 under the guise of a reasonable accommodation.

The district court and Appellees have relied heavily on *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) to find an actionable claim under the ADA. (ER Vol 1, 38, Ord. Granting Second Prelim. Inj., ER Vol. 4, 544-45, Ord. Granting First Prelim. Inj.) Such reliance on *McGary* is misplaced. Unlike the “novel” theory allowed to go forward in the context of a motion to dismiss in *McGary*, this case does not involve direct enforcement of state regulations against disabled individuals. Rather, this case involves a facially neutral interpretation of the state’s gambling laws being applied not to the disabled, but to third parties, the charitable bingo operators. As such, this case is akin to *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884 (D. Id. 2006), in which facially neutral regulations

concerning agricultural burning as applied to third parties were alleged to have a disparate impact on disabled individuals. *Id.* at 879. Referring to the plaintiffs' ADA challenge to the regulations governing agricultural burning, the court stated:

Plaintiffs' [sic] here argue they have been denied access to the outdoors, public parks, streets, and the like as a result of the State's failure to accommodate their disabilities when implementing and administering the Smoke Management Program. Any failure by the State to accommodate or modify the Smoke Management Plan necessarily requires that the State first be required to provide such an accommodation or modification. The Plaintiffs maintain accommodation is required by the ADA and [Rehabilitation Act] because the State has chosen to regulate field burning; in other words, that because the State has undertaken the job of regulating field burning, the State is now under a duty to consider the needs of disabled individuals who will be impacted by the smoke and provide such accommodations as are necessary. This argument is an attempt to bypass the threshold questions of whether there is discrimination by the State and, second, whether the discrimination is based upon an individual's disability. Only after these determinations are made are the inquiries regarding accommodation and modification ripe. No such discrimination by the State has been alleged in this case.

*Id.* at 888.

In the present case, the Bureau has undertaken to neutrally regulate gambling to the benefit of all state citizens in accordance with state law. Like the plaintiffs in *Safe Air for Everyone*, the Appellees and the district

court would bypass the threshold questions of whether there has been discrimination by the Bureau and whether such discrimination is based upon an individual's disability. These requirements for an action under the ADA are not met in this case and cannot be bypassed.

Citing *Alexander v. Choate*, 469 U.S. 287 (1985), the court in *Safe Air for Everyone* went on to state:

The Supreme Court has rejected the "notion that all disparate-impact showings constitute prima facie cases" of discrimination. What is required is that handicapped individuals be afforded meaningful access to the benefit offered by the state, which sometimes requires reasonable accommodations in order for the disabled to access the benefit. The Supreme Court made clear, however, that meaningful access does not require that the disabled receive a greater benefit but, instead, that the handicapped are provided equal access to the benefit offered by the state as provided to non-handicapped individuals. This standard is met here.

*Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d at 889-90 (citations omitted). Charitable bingo is not a state service, program, or activity.

Moreover, Appellees do not seek equal access to charitable bingo, but rather seek to gamble on various non-bingo games on illegal electronic gambling devices. Such a demand is outside the scope of the ADA.

**II. ASSUMING ARGUENDO THAT THE ACTIONS OF THE BUREAU IN THIS CASE ARE COGNIZABLE UNDER THE ADA, THERE IS NO LIKELIHOOD THAT APPELLEES CAN SUCCEED ON THE CLAIM THAT THEIR DEVICES ARE A REQUIRED REASONABLE ACCOMMODATION.**

Even assuming, arguendo, that there is a cognizable ADA claim in this case, under *Crowder v. Kitagawa*, 81 F.3d at 1485, “[t]he court’s obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives.” SB 1369 states in pertinent part:

The California Gambling Control Commission shall issue regulations to implement the requirements of this subdivision and may issue *regulations regarding the means by which the operator of a bingo game, as required by applicable law, may offer assistance to a player with disabilities in order to enable that player to participate in a bingo game*, provided that the means of providing that assistance shall not be through any electronic, electromechanical, or other device or equipment that accepts the insertion of any coin, currency, token, credit card, or other means of transmitting value, and does not constitute or is not a part of a system that constitutes a video lottery terminal, slot machine, or devices prohibited by Chapter 10 (commencing with Section 330 [of the California Penal Code]).

Cal. Penal Code § 326.5(p)(6) (emphasis added).

At the district court hearing, the Bureau provided uncontroverted evidence that the Commission was developing emergency regulations to

address assistance to disabled persons in the play of charitable bingo within the lawful parameters of the charitable bingo statute. (ER Vol. 2, 168-70, Ciau Decl.) Indeed, the Commission adopted those regulations governing assistance to the disabled that are reasonable, adequate to the task, and now in effect. (Appellant's Req. for Jud. Not., Ex. A.)

Under *Crowder*, the state has set forth and implemented a reasonable regulatory mechanism for dealing with assistance to the disabled that is appropriate in light of the alternative proffered by Plaintiffs—the continued allowance of an illegal form of gambling for all bingo patrons. See *Assenberg v. Anacortes Housing Auth.*, 268 Fed. Appx. 643, 644; *Ross v. Raging Wire Telecomms.*, 42 Cal. 4th 920, 926-27 (Cal. 2008) (the court stating that laws prohibiting discrimination against the disabled do not require implementation of unlawful reasonable accommodations).

A state is not required to make any and all possible modifications under the ADA.

Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only “reasonable modifications” that *would not fundamentally alter the nature* of the service provided.

*Tennessee v. Lane*, 541 U.S. 509, 511 (2004) (emphasis added); see 42 U.S.C. § 12182(b)(2)(A)(ii). SB 1369 dispels any vagueness as to what constitutes bingo by clarifying that the definition of bingo does not allow electronic gambling devices. Cal. Penal Code § 326.5(o), see also Cal. Pen. Code § 326.3(a)(8). Therefore, without any doubt, the use of electronic gambling devices as an accommodation to the disabled does fundamentally alter the nature of bingo as defined by statute. The ADA simply does not require the state to permit that. *Tennessee v. Lane*, 541 U.S. at 511; *Pruett v. Arizona*, 606 F.Supp.2d 1065, 1078-79 (D.Ariz., 2009) (proffered reasonable accommodation using a chimpanzee as a service animal that would fundamentally alter state statutes restricting wildlife possession was not required under the ADA).

Appellees' position is that their several vendors' (VGT, Inc., Capital Bingo, Inc., and World Touch Gaming, Inc.) variations of electronic gambling devices are the "only" reasonable accommodation in the play of charitable bingo. (ER Vol. 3, 394, 399, VGT's Second Amd. Compl. ¶¶ 23, 24 & 47; ER Vol. 3, 409-10, 416, Capital Bingo's First Amd. Compl. ¶¶ 5 & 38; ER Vol. 3, 368, 377, El Camino's First Amd. Compl. ¶¶ 14 & 43.) That each separate variation of electronic bingo is the *only* reasonable accommodation borders on a semantic, if not a legal, impossibility.

Moreover, at the demonstration of electronic gambling devices that preceded the first preliminary injunction hearing, it was asserted time and again by Plaintiffs in reference to the VGT's and Capital Bingo's devices that the gambling game graphics were wholly unnecessary to the devices' play of bingo, and were purely for "entertainment" value. (ER Vol. 4, 487-88, 496, 501, 505, 527, Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008.) Counsel for Capital Bingo actually covered up the display of the gambling-type graphics during the demonstration to illustrate this point for the district court. (ER Vol. 2, 173-77, Excerpt from Rep.'s Tr. Hrg. on Mot. for First Prelim Inj. on June 25, 2008.) In that same vein, in its Second Amended Complaint, El Camino has pleaded:

On the above display screen [of the electronic gambling device] a digital bingo card appears, and on which randomly generated numbers appear. The screen below is merely *a video screen which displays a different electronic game for entertainment purposes only*, in regards to which there is no combination needed to win. It does not generate any actual cash winnings, and has absolutely no bearing on the outcome of the bingo games.

(ER Vol. 3, 371-72, El Camino's First Amd. Compl. ¶ 24 (emphasis added).)

By Appellees' own admission, the gambling games displayed on their devices are purely for "entertainment" purposes, and have nothing to do with effectuating the play of bingo or awarding of prizes. As such, the critical

display of gambling games is not at all necessary to the devices as “reasonable accommodation” in the play of bingo. A reasonable accommodation that is “not necessary to prevent discrimination on the basis of disability” is not required under the ADA. *Pruett v. Arizona*, 606 F. Supp. 2d at 1078.

Moreover, the several different electronic gambling devices of the various vendors—each of which is proffered by Plaintiffs as the *only* reasonable accommodation—must be provided not just to qualified disabled individuals, but to all patrons of the bingo establishment. This is well beyond “reasonable” in the context of what the ADA requires. *Pruett v. Arizona*, 606 F.Supp.2d 1065 at 1079.

The ADA requires only accommodations that are reasonable.

“[T]he accommodation required by the law is limited, not just expanded, by the word ‘reasonable.’ ” *McGary*, 386 F.3d at 1270. Where a law is intended to protect the community, an accommodation that threatens the health and safety of the community may be unreasonable. *Id.* Courts generally will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers, but the ADA and accompanying regulations require courts to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. *Crowder*, 81 F.3d at 1485.

*Pruett v. Arizona*, 606 F. Supp. 2d at 1079. SB 1369 is an appropriate action by the state to address the assistance to disabled, while maintaining the state's long-standing interest in regulating gambling, even when done for charitable purposes. Cal. Const. art. IV, § 19; Cal. Bus. & Prof. Code §§ 19801, 19985-19987; Cal. Pen. Code §§ 319-329. and §§ 330-337z.

**III. THE DISTRICT COURT ERRED IN DETERMINING THAT APPELLEES WOULD SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTIVE RELIEF**

Assuming, arguendo, that a cognizable claim under the ADA has been made to justify issuance of a preliminary injunction, no harm would accrue to Appellees in the implementation and enforcement of SB 1369. As discussed above, SB 1369 allows for the Commission to address the issue of assistance to disabled, and the Commission has done so. Similarly, the Sacramento County ordinance authorizing charitable bingo also addresses means of reasonable accommodation to the disabled. Provision for such reasonable accommodation is wholly in the hands of the Appellees, who have simply chosen instead to use electronic gambling devices for pecuniary reasons unrelated to the ADA. Indeed, Appellee United Cerebral Palsy put forth evidence referencing the revenues that it would lose if it did not continue to use electronic gambling devices as its basis for eschewing financial mitigation available under SB 1369. (ER Vol. 3, 311-14, Bergman

Decl.) Far from irreparable harm being caused by the Bureau's anticipated enforcement action, any resulting hardship to Appellees stems solely from the choice of Appellees' charities and gambling device manufacturers to offer only their illegal devices to assist the disabled. (*Id.*)

**IV. THE DISTRICT COURT ERRED IN DETERMINING THAT THE BALANCE OF EQUITIES TIPPED IN FAVOR OF APPELLEES.**

Appellees' charities' and device manufacturers' only genuine interest in offering electronic gambling devices as the "only" reasonable accommodation in playing charitable bingo is pecuniary. Their ADA claims are little more than a pretext for these transparent motivations and should be treated as such. It is almost inexplicable that the district court would find that deliberate violators of state criminal laws motivated by pecuniary interests are, in the balance, deserving of equitable relief.

**V. THE DISTRICT COURT ERRED IN DETERMINING THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION**

In SB 1369, the California State Legislature articulated the several public interests involved in charitable bingo as follows:

(a) The [California State ] Legislature finds and declares all of the following:

(1) Nonprofit organizations provide important and essential educational, philanthropic, and social services to the people of the State of California.

(2) One of the great strengths of California is a vibrant nonprofit sector.

(3) Nonprofit and philanthropic organizations touch the lives of every Californian through service and employment.

(4) Many of these services would not be available if nonprofit organizations did not provide them.

(5) There is a need to provide methods of fundraising to nonprofit organizations to enable them to provide these essential services.

(6) Historically, many nonprofit organizations have used charitable bingo as one of their key fundraising strategies to promote the mission of the charity.

(7) Legislation is needed to provide greater revenues for nonprofit organizations to enable them to fulfill their charitable purposes, and especially to meet their increasing social service obligations.

(8) Legislation is also needed to clarify that existing law requires that all charitable bingo must be played using a tangible card and that the only permissible electronic devices to be used by charitable bingo players are card-minding devices.

Cal. Pen. Code § 326.3(a)

At the hearing on the second preliminary injunction, the district court attacked the process of enacting SB 1369 in pertinent part, as follows:

Let me start with the machines, although I will indicate that the machines aren't really the issue anymore, as I indicated in my questions to Mr. Williams. It's really the law itself that's at issue in this

case now and whether that law complies with the requirements of the ADA.

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It's a strong argument, an argument that courts hear often, judges hear often, that judges should stay out of the business of legislation and should stay in the business of law.

The problem I'm having with the argument and with SB 1369 is I see no evidence supporting this argument in this specific piece of legislation. And as I said, I read it line by line, I looked at the history. I looked at 50 articles concerning how this got passed in trying to understand the law itself and whether, in fact, it is deserving of I think a presumption that laws—I think most judges believe that—that laws passed by state legislatures should have a presumption of validity.

And in this case, in my review, the presumption isn't warranted. And it's what Mr. Goodman alluded to. And that is this was a law which has been described, in even the kindest of terms, as a gut-and-amend bill that came in the final days of a legislative session that was the product of a compromise between Indian gaming tribes and large charities like the Catholic church. The church wanted the change because its games were losing customers to Indian casinos in recent years. And the tribes had long sought to end electronic bingo in Sacramento County. They argued that it encroached on their exclusive right to operate slot machines in California. "Indian gaming interests sent dozens of lobbyists to the Capitol on the bill." This is an article from The Sacramento Bee<sup>10</sup> dated October 2nd, 2008.

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<sup>10</sup> None of the news articles referred to by the district court were offered in evidence by any party.

There is an article also in The Sacramento Bee, and it's the September 3, 2008, edition, which is one of the best chronologies of legislation that I've seen, and, in particular, focuses obviously on SB 1369. Interestingly, back in April of 2008, there was legislation introduced by Senator Darrell Steinberg, SB 1626, that would have allowed bingo to be played on electronic replicas. But Steinberg dropped his bill before it received its first hearing. And then Senator Battin and Senator Cedillo took up the legislation. There is a quote from Senator Battin which would seem to undermine the argument that this bill is in the public interest, represents the interests of the people of the State of California. This is an article from the August 30th, 2008, edition of The San Diego Union-Tribune in which Senator Battin is quoted as follows. It says, "Senator Jim Battin, a Palm Desert Republican close to the tribes, bluntly said the measure was driven by a need to protect hundreds of millions of dollars the state receives from gaming tribes for the exclusive right to offer electronic gaming devices."

SB 1369 was written hastily, with little public comment, and with little public input. Again, done in the waning days of the legislative session. Senator Cedillo gutted a bill about school lunches and inserted the bingo measure into this piece of legislation.

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Obviously, the newspapers have pointed out that two primary moving forces between this legislation, and in particular the tribes, have contributed \$656,700 to 70 of the Legislature's 120 members, and that was only in the first six months of 2008. There was according to the history of this legislation, little, if no, opportunity for public comment.

There was a two-hour hearing. As county counsel Mr. Reed indicated, it was passed within 11 days. And

in an article in the Los Angeles Times, September 15, 2008, it's written that "It's more than a little troubling to see the haste with which lawmakers, who receive huge donations from tribes, rush to do their bidding. The state had been in the process of determining the legality of charity bingo machines, but Cedillo's bill would end that discussion. Californians should demand to see it reopened.

"At the time the gaming pacts were made, bingo machines weren't commonly available. Now that they are, it raises the question of whether any new technological advances in gambling that represent competition to Indian tribes will be banned. If so, the state first needs an open and public debate on the issue, not a quickly packaged and wrapped gift to Indian gaming.

"Through the state gambling pacts, Indian casinos pay \$100 million a year to the state. In addition, the tribes have donated hundreds of thousands of dollars to legislators this year alone."

And the article ends with the following: "California has just gotten a disturbing demonstration of the clout such sums can buy."

It concerns courts when legislation that criminalizes behavior is drafted in such a hastily fashion and is, in effect, benefitting not the public but two specific special interests. This is, in fact, a special interest piece of legislation. The evidence does not support the argument that this legislation is in the public interest.

(ER Vol. 1, 5-12 Rep.'s Tr. Hrg. Mot. for Second Prelim. Inj., April 14, 2009.) Notwithstanding this scathing attack,<sup>11</sup> it appears the district court actually agreed with all of the legislative findings of SB 1369, except for the one finding pertaining to use of electronic gambling devices in playing charitable bingo, for which the district court would substitute its view of the public interest for that of the California State Legislature.

The district court went on to state, as follows:

As the papers from the county counsel indicate, this is still a heavily regulated game even before SB 1369. And in the absence of 1369, it would continue to be heavily regulated. It's only being limited, at least from the evidence before the Court, because of special interests that were able to get this law passed.

And I thought it was somewhat ironic, I mean in considering these arguments last night, that when I got home, there sitting on the table was the official voter pamphlet<sup>12</sup> for the special election that's going to be held in May of this year. And I turned to Proposition 1C in which we're being asked to consider and, as I understand it, being supported and we're being urged to pass. It's a proposition which is designed to modernize the state lottery "to increase the percentage of lottery

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<sup>11</sup> The district court's derisive attitude toward the state's charitable bingo law pre-dates SB 1369 in that the district court apparently facetiously highlighted the letters BINGO in its first preliminary injunction order. (ER Vol. 4, 546, Ord. Granting First Prelim. Inj.)

<sup>12</sup> The voter pamphlet referred to by the district court was not offered in evidence by any party.

funds returned to players as prizes." It goes on to argue: With higher prize payouts, the state is hoping that the payouts "can attract more spending for lottery tickets and increase lottery profits." In other words, the state wants us to gamble more. And so here I have Mr. Williams saying we absolutely need to limit gambling. And I understand why he makes that argument, and he makes it well. But we have a state that is now encouraging us to pass a ballot initiative which will encourage more gambling, which will increase profits to the state, and we have a state budget which, in part, is now dependent on the gambling industry. We have legislation being passed which allows the Indian casinos to increase the number of slot machines, again increasing revenue to the state.

And I compare that to allowing someone who is disabled who simply wants to go down to a local bingo hall and play bingo on an electronic device. And there's a disconnect there for me. And it's among the many reasons I don't find the state's arguments about SB 1369 to be supported by any credible evidence. On the other hand, I do have evidence that these plaintiffs directly benefit from electronic devices.

(ER Vol. 1, 14-16, Rep.'s Tr. Hrg. Mot. for Second Prelim. Inj., April 14, 2009.)

It is of some note that the ballot proposition referenced by the district court did not pass. (Appellants' Req. for Jud. Not. Ex. B.) The people of California may not have thought the proposition was in the public interest, or perhaps they were simply swayed by high-priced political advertising campaigns. The result is nonetheless the statement of the public interest

under California's initiative process. Cal. Const. art. II, § 1. In the same vein, the California State Legislature articulates the public interest of the people of the State of California under its republican form of government. Cal. Const. art. IV, § 1; *see also* U.S. Const. art IV, § 4. It is beyond the pale for the district court to simply disregard the indisputably lawful actions of state government in articulating the public interest as embodied in SB 1369.

### CONCLUSION

Based on the foregoing, the district court abused its discretion in issuing the second preliminary injunction against Appellants Bureau of Gambling Control and Mathew Campoy. This Court should reverse the district court's ruling, and vacate and dissolve the preliminary injunction.

Dated: July 1, 2009

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Attorney General of California  
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/s/ WILLIAM L. WILLIAMS, JR.

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*Attorneys for Defendants/Appellants*

SA2008304077

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1  
FOR 09-16092**

1. This brief complies with the type-volume limitation of Fed. R. App.P. 32(A)(7)(B) because this brief contains 8,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect, version 8.0 in 14 point Times New Roman.

Dated: July 1, 2009

/s/ WILLIAM L. WILLIAMS, JR.  
William L. Williams, Jr.  
Deputy Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2009, I electronically filed the foregoing

### **APPELLANT'S OPENING BRIEF and REQUEST FOR JUDICIAL NOTICE**

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following non-CM/ECF participants:

**HARLAN W. GOODSON  
The Law Office of Harlan Goodson  
1126 2nd Street, Suite 205  
Sacramento, CA 95814**

Dated: July 1, 2009

/s/ PAULA CORRAL

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UNITED STATES COURT OF APPEALS

MAR 25 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

VIDEO GAMING TECHNOLOGIES,  
INC., a Tennessee corporation UNITED  
CEREBRAL PALSY OF GREATER  
SACRAMENTO, a California non-profit  
corporation; WIND YOUTH SERVICES,  
a California non-profit corporation;  
ROBERT FOSS; JOAN SEBASTIANI,

Plaintiffs - Appellees,

v.

BUREAU OF GAMBLING CONTROL, a  
law enforcement division of the California  
Department of Justice; MATHEW J.  
CAMPOY, in his official capacity as the  
Acting Chief of the Bureau of Gambling  
Control,

Defendants - Appellants,

v.

HAGGIN GRANT POST NO. 521, THE  
AMERICAN LEGION, DEPARTMENT  
OF CALIFORNIA; CAPITAL BINGO,  
INC.; CASA ROBLE HIGH SCHOOL  
RAMSMEN, INC.; MARY BROWN; EL  
CAMINO ATHLETIC BOOSTER CLUB,

Plaintiff-intervenors -  
Appellees.

No. 08-16736

D.C. No. 2:08-cv-01241-JAM-  
EFB

Eastern District of California,  
Sacramento

ORDER

Appeal from the United States District Court  
for the Eastern District of California  
John A. Mendez, District Judge, Presiding

Argued and Submitted March 1, 2009  
San Francisco, California

Before: WALLACE, THOMAS and BYBEE, Circuit Judges.

After the initial briefing in this case was completed, the California Legislature enacted Senate Bill 1369, which unambiguously provides that the machines at issue in this case are illegal under state law. In the aftermath of this bill's passage, all appellees have dropped their claims under 42 U.S.C. § 1983 and a number of the appellees have withdrawn as parties in this matter. We decline to resolve the legal issues presented by this case until the district court has an opportunity to reevaluate the plaintiffs' claim under the Americans with Disabilities Act. We therefore vacate the preliminary injunction and remand this matter to the district court for reconsideration in light of this substantial new development. On remand, the district should consider the effect, if any, of *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), which clarified the proper approach a district court should follow in evaluating claims of irreparable harm prior to granting a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely

to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 129 S. Ct. at 374

All future appeals in this case shall be assigned to this panel. The parties shall bear their own costs on appeal.

VACATED AND REMANDED.

BYBEE, Circuit Judge, concurring in the judgment.

I concur in the court's order insofar as it vacates the preliminary injunction. I write separately to make clear that, in my view, the plaintiffs have not set forth a colorable ADA claim.

Title II of the ADA requires only "reasonable modifications that would not fundamentally alter the nature of the service provided." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (internal quotation marks omitted); *see also* 28 C.F.R. § 35.130(b)(7). The machines at issue here permit the play of a complete "bingo" game in a matter of seconds and employ a betting scheme and physical structure materially indistinguishable from garden-variety slot machines (and quite unlike traditional bingo). They thus appear not to be a remotely reasonable accommodation for any inability on the part of the disabled to participate in live call bingo, as plainly required by § 326.5(o) of the California Penal Code. I would have denied the application for a preliminary injunction.