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Shingle Springs Band of
Miwok Indians

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF EL DORADO

SHARP IMAGE GAMING, INC., a California Corporation,

Plaintiff,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, a federally recognized Indian Tribe,

Defendant.

No. PC 20070154

SPECIAL APPEARANCE

DECLARATION OF ROBERT SERTELL IN SUPPORT OF DEFENDANT SHINGLE SPRINGS BAND OF MIWOK INDIANS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Date: September 6, 2007
Time: 9:00 a.m.
Place: Department Nine
Judge: Hon. Daniel Proud

AE194

I, D. ROBERT SERTELL, declare as follows:

1. I have personal knowledge of the facts set forth below, and if I were called today to testify regarding those facts, I could do so.

2. I am currently the Chairman of Casino Horizons Corporation, which is a training and consulting firm specializing in gaming.

3. I am a professional slot machine instructor, licensed continuously by the New Jersey Casino Control Commission for more than 28 years. I am also a professional electronics instructor, certified by the New Jersey Department of Education for more than 36 years. In total, I have more than 50 years experience in the gaming industry.

4. Since approximately 1980, I have been qualified as an expert on multiple occasions concerning gaming machines, gaming devices, and their operating characteristics. I have testified on those subjects, including the distinctions between Class II and Class II gaming, in federal, state, and local courts in this country, and before administrative tribunals in the United States and Canada.

5. From 1979 to 1997, I served as the Assistant Director of Atlantic Community College's Casino Career Institute (CCI). At CCI, I personally designed and taught college level courses in *Slot Department Management, Slot Department Operations, and Casino Control Commission Regulations.* I also designed and taught seminars for law enforcement personnel and Casino Control Commission inspectors who were charged with supervising and regulating casino gaming machine operations.

6. Beginning in 1994, I included in the curriculum for these seminars an analysis of the distinctions between "Class I," "Class II," and "Class III," based on the three classifications that apply to gaming, which are set forth in the Indian Gaming Regulatory Act (IGRA), and its related federal regulations.

7. Since 1994, numerous tribes have retained me to visit their facilities, evaluate their machines, and conduct training for their gaming commissions and casino employees. Tribes that have engaged me for such work include: the Agua Caliente Tribe, the Mashantucket Pequot Tribe, the Tule River Tribe, the Cabazon Band of Mission Indians, the 29 Palms Band of Mission

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Indians, the Middletown Rancheria, the Chukchansi-Mono Tribe, the Smith River Rancheria, the Robinson Band of Pomo Indians, the Pechanga Tribe, the Chitimacha Tribe of Louisiana, and others.

8. Beginning in 1998, the National Indian Gaming Commission ("NIGC") retained me annually to serve as the agency's resident expert on gaming machines. I served in that capacity continuously from 1998 through 2001.

9. Based on my experience in gaming, I am aware that Class I gaming involves social games played solely for prizes of minimal value and traditional forms of Indian games played in connection with tribal ceremonies or celebrations, none of which is pertinent here.

10. Class II gaming includes the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull tabs, instant bingo, and other games similar to bingo.

11. Class III gaming encompasses all forms of gaming that are not Class I or Class II gaming, and specifically includes slot machines and electronic or electromechanical facsimiles of any game of chance.

12. Class III gaming is allowed on Indian land only pursuant to a written agreement, known as a Tribal-State compact, between a Tribe and a State, whereas Class II gaming can be conducted on Indian land without a compact.

13. I have examined the Gaming Machine Agreement ("GMA") dated May 24, 1996 between Sharp Imaging Gaming, Inc. ("Sharp") and the Shingle Springs Band of Miwok Indians ("Tribe") and I am familiar with its contents.

14. I have examined the Equipment Lease Agreement ("ELA") dated November 15, 1997 between Sharp and the Tribe and I am familiar with its contents.

15. I have reviewed portions of the transcript of the deposition of Christopher S. Anderson dated September 2, 2005 taken in connection with the case of Wayne I. Queen vs. the Shingle Springs Band of Miwok Indians, Superior Court of the State of California for the County

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of El Dorado (case number PC20030729). It is my understanding that a copy of relevant excerpts of Mr. Anderson's September 2, 2005 deposition testimony is attached as Exhibit A to the Declaration of Anthony Cohen, which is filed concurrently with my declaration.

16. Mr. Anderson states on page 16 of his deposition transcript that the machines Sharp Image Gaming, Inc. ("Sharp") supplied to the Tribe under the GMA were Class III machines. Mr. Anderson also states, on page 31 of the deposition transcript, that the aforementioned machines were Class III because the outcomes of the games played on the machines were determined by a "random number generator," which I will reference simply as "random generation."

17. Gaming machines that have outcomes determined by "random generation" include Random Number Generators (RNG), which are a dedicated section within the computer's software that performs a specially-formulated algorithm to produce numbers that cannot be predicted by any human player. The icons displayed on such machines are chosen by the RNG software code, which is written so that the machine will continually draw random numbers at a rate of thousands per second while the machine is in operation. The outcome of any given play of a slot machine is determined by the RNG software code *after* the player commences play.

18. Machines whose outcomes are determined by random generation necessarily constitute a form of Class III gaming because each outcome of each play is determined *by, and within, the machine itself,* which means the customer is playing against the *machine*, rather than against other customers. Where a person uses a gaming machine that includes software written to generate its own winning number, the player is playing against the machine, not any other player. A gaming device where a customer plays against the machine falls squarely within the classification of Class III gaming.

19. I have examined the ELA and have concluded that the gaming machines Sharp was to supply under the agreement were Class III. Under the ELA, Sharp was to supply the Tribe with 400 "video gaming/pulltab devices." The terms "gaming device" and "gambling device" are synonymous and interchangeable and both connote a form of Class III gaming activity. In addition, I have reviewed the Tribal-State Gaming Compact between Shingle Springs and the

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State and I am aware that the Compact, which was signed on September 23, 1999 (almost two years after the ELA was executed) defines "gaming device" in a consistent manner. Specifically Section 2.8 of the Compact recognizes that a "gaming device" is:

> any slot machine within the meaning of article IV, section 19, subdivision (f) of the California Constitution. "Gaming Device" includes, but is not limited to, instant lottery game devices and video poker devices. Each player station of a multi-player slot machine constitutes a separate Gaming Device.

20. Other language in the ELA further demonstrates that the agreement called for the supply of Class III machines. The ELA specifies that the lessor will provide "progressive hardware, software, and signage for the video gaming devices[.]" Such software and equipment is not compatible with the play of a Class II pull tab game. The terms "progressive hardware and software" refer to a device known as a progressive controller that is used to assign a small percentage of each machine's individual wager to the cash amount that is displayed on a progressive jackpot sign. The small individual amounts that are assigned by the controller enable the size of the progressive jackpot to "*progress*," or to continually become larger and more attractive to customers. The progressive software is dedicated to the operation of the controller and the jackpot sign and is not used for any other function. In order for a player to qualify for a linked progressive jackpot, they must first receive the highest possible winning combination from their own individual machine. Under such circumstances, the player is playing against his own machine rather than competing with other players for the same prize. Playing against the machine, where the machine determines the wining combination for each game play, constitutes Class III gaming.

21. That the machines provided under the ELA were standalone gambling devices is further evidenced by the absence of any language in the ELA referencing cabling, components, controllers or servers that would permit the concurrent linkage of the machines. The linkage of the machines would be necessary to ensure that players would be playing against other players. Such an omission is particularly noteworthy in light of the precise references in the ELA to the hardware, software, and signage necessary to link machines to the progressive equipment.

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22. The ELA also references "video gaming/pull tabs." While under IGRA, paper pull tab games, if played in the same location as bingo, are considered to be a form of Class II gaming, on the date the ELA was executed, no video pull tab machines had been determined to be a form of Class II gaming. I am aware of this fact based on my employment as a gaming expert and instructor. Specifically, it was a customary and routine part of my duties at Atlantic Community College to monitor the latest court decisions and NIGC gaming classification opinions in order that they might be incorporated into my Slot Department Management classes and also into my seminars for the Tribal Gaming Academy. The NIGC opinions regarding the classification of video pull tab machines for the time period through November 1997 are currently available for review on the NIGC's website. I have recently checked that website and confirmed that as of December 1997, the NIGC had issued no opinions finding that video pull tab machines were a form of Class II gaming.

23. In addition, pull tab-based technologies that were approved for Class II gaming after 1997 were merely "display systems", and *not* gambling devices. These machines merely *displayed* whether a ticket the player bought elsewhere (such as from a ticket booth) included a winning number, and did not have any "gaming" function. In effect, the "gamble" took place at the printing plant that produced these tickets. This absence of any gaming function has been critical to findings that these "display systems" were technological aids to Class II gaming, rather than Class III machines.

24. It is my opinion that under the terms of the ELA, the gaming machines Sharp agreed to supply the Tribe could ***not*** qualify as Class II machines. I am confident that the ELA, on its face, required Sharp to supply the Tribe with Class III gaming devices, notwithstanding the fact that the Tribe possessed no gaming compact with the State in November 1997, when the contract was signed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed July 6, 2007, in Vineland, New Jersey. **AE199**

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