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Comments on Electronic or Electromechanical Facsimile Definition
& Class II Classification Standards
National Indian Gaming Commission
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The undersigned State Attorneys General provide the following comments to the Proposed Rule on the Definition for Electronic or Electromechanical Facsimile, 71 Fed. Reg. 30232-30235 (May 25, 2006), and to the Proposed Rule on Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using ‘‘Electronic, Computer, or Other Technologic Aids.” 71 Fed. Reg. 30238-30261 (May 25, 2006). On August 4, 2006, the Commission extended the comment period for both sets of proposed regulations to September 30, 2006. 71 Fed. Reg. 44239-44240.

A. Comments to the Proposed Rule on the Definition for Electronic or Electromechanical Facsimile

The National Indian Gaming Commission (NIGC or Commission) has proposed a new definition of "electronic or electromechanical facsimile" of a game of chance, in 25 CFR §502.8, which would provide:

> (a) *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

As discussed in these comments, we find the proposed rule an improvement over the 2002 rule, 25 CFR § 502.8 (67 FR 41172, June 17, 2002), although we believe it still suffers from two flaws.

First, in proposed § 502.8 (b)(1), the definition suggests that a bingo, lotto or other game similar to bingo is an electronic or electromechanical facsimile when that electronic format incorporates *all* of the fundamental characteristics of the game, instead of simply incorporating the fundamental characteristics of the game. The word "all" should be eliminated, both to be consistent with subparagraph (a) (which does *not* use the word "all"), and because it overly restricts the definition; under the proposal, if a game played on a device incorporates anything less than "all" of the fundamental characteristics of a game, it may be argued that such a game does not meet the definition of "electronic or electromechanical facsimile."

Second, the definition continues to make a distinction that rests upon "broadening participation among competing players," a distinction that is not called for by the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§ 2701-21, nor does it serve a useful purpose here. The basic nature of class II games under IGRA already pits multiple players against each other. We recommend dropping the language "rather than broadening participation among competing players." We explain below.

1. Background. IGRA provides that "class II gaming" does not include, among other things, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(2). As Congress did not define "electronic or electromechanical facsimile," the Commission looked to other provisions in IGRA in order to craft a definitional rule that accurately covered such devices and which could serve to allow a

clean distinction between such a device and what is otherwise permitted in the play of class II gaming activities, namely, an "electronic, computer, or other technologic aid[]." 25 U.S.C. § 2703(7)(A)(i).

The ability to accurately distinguish between "aids" and "facsimiles" was and is important to the States, as the latter devices, along with "slot machines of any kind," are by definition class III gaming activities, requiring a tribal-state compact for their lawful use on Indian lands. 25 U.S.C. §§ 27030(7)(B)(ii), 2703(8), 2710(d)(1)(C). The intent of Congress was to engage the States in the process leading to the authorization of more serious forms of gambling that could occur on Indian lands. The Senate Committee Report accompanying S. 555 provides:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States.

S. Rep. No. 446, 100th Cong., 2d Sess. 13.

Accordingly, Congress provided that an electronic gambling device that is a facsimile of a game of chance would constitute a class III gaming activity. Congress made it eminently clear that such devices would be those covered by the federal Johnson Act. 15 U.S.C. §§ 1171-1178, also referred to as the Gambling Devices Act. That Act defined slot machines, and also defined other gambling devices as those:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a)(2).

In IGRA, Congress expressly provided that the Johnson Act is waived when a covered device is the subject of a Tribal-State compact, i.e., as a class III gaming activity. IGRA provides:

> The provisions of section 1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that - (A) is entered into under [the relevant IGRA provision for compacting] by a State in which gambling devices are legal, and (B) is in effect.

25 U.S.C. 2710(d)(6).

Conversely, IGRA states a Tribe may engage in class II gaming only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. § 2710(b)(1)(A), which clearly embraces the Johnson Act. Thus, the Johnson Act's gambling device prohibition applies to class II gaming activities and, as noted, the only exception in IGRA is provided by the text of the statute – gaming conducted under a valid Tribal-State compact – which, in turn, contemplates only class III gaming.

It is not surprising, then, that this was the logical construct applied by the Commission when it first adopted regulations defining terms in IGRA. In 1992, the Commission adopted definitional regulations that defined "technologic aid" as:

> a device such as a computer, telephone, cable, television, satellite or bingo blower and which when used: (1) [i]s not a game of chance but merely assists a player or the playing of a game; and (2) [i]s readily distinguishable from the playing of a game of chance on an electronic facsimile; and (3) [i]s operated according to applicable Federal communications law.

25 C.F.R. § 502.7 (1992).

Similarly, the NIGC, following the text and direction of the statute, defined "electronic or electromechanical facsimile of a game of chance" as "a device defined by [the Johnson Act]." 25 C.F.R. § 502.8 (1992). This definition, later abandoned by the NIGC in a split ruling, was upheld and used by the District of Columbia Circuit Court of Appeals in a rejection of a claim that a computerized pull-tab device constituted a technological aid, and thus, did not within the proscription of the Johnson Act. *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994).

Notwithstanding the judicial upholding of the "bright-line" definition, the NIGC in 2002, in a 2-1 decision, adopted a new definitional rule for "electronic or electromechanical facsimile," providing instead:

> Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8 (67 FR 41166, June 17, 2002).

As is apparent, the Commission dropped the reference to the Johnson Act and provided an "except" clause for games played in an electronic or electromechanical format as long as it broadens participation by allowing multiple players to play with or against each other rather than with or against a machine. The re-write was accomplished to allow a device, fitting within a newly-rewritten definition of "technologic aid," to not fall within the ambit of an "electronic or electromechanical facsimile." Several state Attorneys General wrote the Commission on July 23, 2001, during the comment period for the proposed re-write, objecting to the then-proposed modification, and once the final rule was issued in 2002, it was clear that, with minor exceptions, the final rule ignored the objections of the Attorneys General.

In adopting the 2002 rule, the Commission noted it expanded the definitions to reflect the notion that broadening participation is an important characteristic of a technologic aid, and carried this into the exception in the definition of a facsimile. 67 FR 41170-71. Even while acknowledging "broadening participation" is not a required element, the NIGC, by dropping the Johnson Act reference for a facsimile, heightened the importance of the "broadening participation" element. It rested that element on the notion that IGRA specifically provides for an electronic draw in bingo games, and that greater freedom with regard to class II gaming was intended by the Congress. *Ibid*. The Commission thus concluded in its prologue that the definition "electronic or electromechanical facsimile" should be more narrowly construed.

The Commission went further, and without citing any applicable text of the statute, stated that "IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities." 67 FR 41171. This statement fails to account for a meaningful distinction between class II games and class II games played electronically.

2. Discussion. The current proposal adjusts the 2002 definition for an "electronic or electromechanical facsimile," by, in part, adding the word "fundamental" in requiring that a facsimile replicate a game of chance by incorporating the *fundamental* characteristics of the game; this is a reasonable adjustment. It also "reverses" the exception in the 2002 definition, so that instead of "excepting" out bingo and games-similar-to-bingo played in an electronic format so long as they broaden participation among players, the proposed rule now provides an affirmative that bingo and bingo related games *are* facsimiles if an element of the game's format allows players to play with or against a machine, rather than broadening participation among players.

We believe the revision improves the definition, even if still flawed by relying on the notion of "broadening participation." We recommend dropping the language "rather than broadening participation among competing players."

The 2002 effort by the Commission to rest "electronic or electromechanical facsimile" on the notion of "broadening participation" among competing players, as discussed above, was not and is not sound. While the Senate Report accompanying the bill that became IGRA, S. 555, referred to permitting technology that would broaden potential participation levels in class II games, it carefully qualified the matter. The Committee said:

> *For example, linking participant players at various reservations whether in the same or different States,* by means of telephone, cable, television or satellite *may be a reasonable approach for the tribes to take.* Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games.... In other words, *such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.*

S. Rep. No. 446, 100th Cong., 2d Sess. 10 (1988) (emphasis added).

Although the Commission in 2002 picked up this language of "broadening" participation, it also eliminated in its then-new definition of "technologic aid" the (judicially upheld) requirement that such equipment be "readily distinguishable" from an "electronic or electromechanical facsimile," stating it was an unworkable test. Again, by eliminating the "readily distinguishable" test and any reliance on the Johnson Act, the 2002 NIGC action heightened the importance of "broadening participation." Many have simply jumped on the "broadening" notion to suggest that computerized gambling devices offering class II games are acceptable if they are to be played by multiple players. However, the Senate Committee's discussion of broadening participation with multiple players is importantly qualified by its language that it be "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine . . ."

Nothing suggests, however, that a Johnson Act gambling device is acceptable for class II gaming simply if multiple players are engaged.[1] Most class II games pit multiple players against

[1] Whether the Johnson Act exempts class II "technological aids" has become the subject of conflicting decisions in the federal circuit courts, and the Supreme Court has not resolved the issue. Most recently, in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003), the Eighth Circuit held that IGRA does not provide an implied exemption from the Johnson Act for gambling devices used as purported technologic aids to class II gaming. *Id*., at 611-612. The court held that the statute's reference to "not otherwise prohibited by Federal law" refers to the Johnson Act and that in order for a device to be used by a Tribe in Indian country in the *absence*

each other in any case; even in pull-tabs, where an individual singly purchases a pull-tab, the pull-tabs have a pre-determined winner that will appear to one of multiple purchasers. Broadening a game to multiple players might establish that a game is class II, not whether it acceptable when played on a computer or electronic device. Even the Tenth Circuit in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission* rejected the Commission' suggestion to graft a "broaden participation" requirement onto IGRA. The court noted:

> … nothing in either IGRA's text or legislative history points towards a *requirement* that a technologic aid broaden participation. Indeed, the Committee Report uses the term "for example" to describe how a device might qualify as a Class II aid by broadening participation in the given game.

327 F.3d 1019, 1041 (2003).

3. Recommendations. We believe the more critical distinction here rests on whether a player of a class II game is playing "with or against a machine" that, significantly, applies "an element of chance" to win or lose. Thus, in evaluating the proposed rule, we believe the Commission should drop the phrase in § 502.8(b)(2) "rather than broadening participation among competing players," and complete the sentence at "with or against a machine," or, in order to restore the meaning of the Johnson Act, the following: "with or against a machine that applies an element of chance to win or lose the game."

There is confusion about the role of "multiple players" in this debate that has led to the assumption that using a device that "broaden[s] participation among competing players" somehow means that the players are not playing with or against a machine. In fact, in a class II game, players typically share in the stakes in the game, and all are vying for a prize, pot, or award, often one to which they have contributed. This, however, does not relate to whether they are playing with or against a machine. A machine, as played by the player or players, may control the game, the element of chance, and the selection of a winner or winners. A player certainly is playing with or against the machine in these cases, regardless of whether he or she shares in the stakes of the game with other multiple players. Simply "broadening participation among competing players" cannot be the *sine qua non* of what defines a technologic aid.

Additionally, as discussed in the introduction to these comments, we recommend the Commission eliminate the word "all" in § 502.8(b)(1), describing what fundamental characteristics of a game must be incorporated to make the game an electronic or electromechanical facsimile. As noted, subparagraph (a) of the rule does not use the word "all."

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of a tribal-state compact, the device both must not be a "gambling device" under the Johnson Act and must be a "technologic aid" under IGRA.

The proposed rule adds the word "fundamental" to "characteristics" and this is adequate.

The appearance of the word "all" in one subparagraph and not in the other will lead to confusion and contention over the scope of what characteristics must be incorporated to make a device a facsimile. Significantly, it should be eliminated because it opens the rule to the argument that a game that incorporates anything less than "all" of the fundamental characteristics of a game does not meet the definition of "electronic or electromechanical facsimile." Anything that is not an "exact" replica of a class II game will be offered as a permissible class II game in electronic or electromechanical format that clearly may be in violation of the Johnson Act and IGRA.

As the Attorneys General offered in their July 23, 2001 letter:

> The danger, and in our estimation, the mistake to be made in repealing 25 CFR 502.8, was recognized by the D.C. Circuit years ago in *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964), addressing the 1962 amendments to the Johnson Act: "This section . . . address[es] only those machines which, although differing from the slot machine in physical design, are calculated to function quite as effectively in separating the public from its money on a large scale. [The section] appears to have proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers."

As we said then, this agency similarly should guard against the "ingeniousness of gambling machine designers" and avoid using language in the rule that would provide room to countenance a gambling device that properly should be the subject of a Tribal-State compact. The word "all" should be deleted from § 502.8(b)(1).

B. Comments to the Proposed Rule on Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using ''Electronic, Computer, or Other Technologic Aids."

The Commission has prepared an extensive proposed rule on standards to apply to class II games, such as bingo and games similar to bingo, lotto, pull-tabs and instant bingo, when played through an electronic medium using "electronic, computer, or other technologic aids." 71 Fed. Reg. 30238-30261 (May 25, 2006).

The undersigned state Attorneys General support the issuance of these standards and believe they will serve an especially useful purpose, allowing the Commission to more readily

distinguish what games are properly class III gaming activities. The Attorneys General do not presume to comment on precisely how Tribes may wish to conduct bingo, games similar to bingo, lotto, pull-tabs and other class II games. However, the scope of this proposed rule goes only to when such games are played in an electronic format. When class II games are played using electronic or electromechanical devices, and either the game replicates the fundamental characteristics of the class II game or it is a type of slot machine, then the game is class III and requires a Tribal-State compact.

We also agree with the Commission that when bingo and games similar to bingo are played in an electronic format "it becomes easy to use features such as the instantaneous, rather than serial, release of numbers and the automatic covering (daubing) of those numbers on a player's electronic card as a pretext to fundamentally change or distort the nature of the game such that it becomes an 'electronic facsimile' of the game." 71 FR 30241 (Prologue). When the nature of the game is so converted, the states have a keen interest in the Commission enforcing workable standards to ensure uncompacted class III gaming is not occurring.

We offer the following comments in support of the proposed standards:

1. Independence of the bingo card and number draws. We agree with the NIGC's determination that each player in the game must obtain the card or cards to be used by the player in the game *before* numbers or other designations for the game are randomly drawn or electronically determined. § 546.4. We believe that the application of the element of chance in bingo or in a game similar to bingo must be independent from the assignment of cards and the designations on those cards. We support the requirement that the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool of such numbers that is greater than the number of spaces on the card used in the game. This also helps ensure a fair game with "real time" responses to the draw of numbers without "pre-drawn" numbers being used. Bingo players should have to "cover" their numbers "when" the numbers are drawn. § 546.5. Similarly, we believe that an auto-daub procedure fails to qualify as a process of "covering" "when" the draw occurs. Allowing the game to "unfold" automatically can be sped up to super-slot-machine speeds, and effectively mimic a slot machine. While we have no objection to a non-card game similar to bingo being house-banked, as IGRA appears to allow it, 71 FR 30242 (Prologue), it is important for the Commission to be able to ensure the integrity of the game with an clean independent draw of numbers and with numbers not being re-used or "pre-drawn."

Additionally, the Commission, in this proposed rule, permits something called "bingo" in an "ante-up" format. See § 546.6(k). While such a game appears to mimic a marriage of poker and bingo, it does not appear to the States to be a traditional form of bingo, or "classic" bingo. Arguably it is similar to bingo, but it is similar to poker as well, and causes one to wonder whether it is really what Congress had in mind.

2. Number of players. We also support the Commission's proposal to require a minimum number of persons to play these games, including the requirement that games may not be limited to two (2) players. § 546.6. Accordingly, we support the rule structurally encouraging play with six (6) or more players, including a time delay to facilitate this. If games are designed to allow only two players, particularly with high speed, they approach games that allow one player, which arguably cannot qualify as bingo or a game similar to bingo. Further, such games come closer to appearing like and functioning as slot machines. If Congress had intended to allow bingo and games similar to bingo to be played as a slot machine or electronic facsimile, yet as a class II gaming activity, it could have said so, and it did not.

3. No reliance on additional elements of chance. We also support the Commission restricting the allowance of any additional prize in the game of bingo or games similar to bingo if that prize is based on the application of an additional element of chance. § 546.4(n). Any game that permits pooling and/or awards of prize money subject to an additional chance element, independent of the game's releases, may constitute a traditional lottery or other form of a class III gaming activity that requires a Tribal-State compact. Technically, we believe that a "progressive prize," as defined by this rule, *is* a form of a traditional lottery, but we do not object to it here, as it appears to be part of the traditional game of bingo and the proposed rule requires that it be awarded solely in a win of one bingo game to the next, and not based on events outside the random selection of numbers in the game.

4. Alternative result display options. We support the Commission's requiring any "alternative" display of bingo results filling not more than ½ of the total display space. § 546.4(o). With the use of slot-machine themes and increased speeds, the appearance and action of these devices may approach slot machines. We support measures to ensure that the "technologic aids" assisting the player reflect traditional bingo and not a class III device.

5. Tangible medium required for pull-tabs and instant bingo. We also support the Commission's proposed rule to require that every pull-tab card or instant bingo ticket be in a tangible medium, such as paper or plastic, readily accessible to the player. §§ 546.7, 546.8. Important to this proposed rule is that no display option should determine a winner, a prize or change the result of the pull-tab, nor can a pull-tab or instant bingo ticket be generated, printed, redeemed or paid out at the player station. We believe that that case law is still controlling and relevant as expressed by the courts in *Cabazon Band* v. *NIGC,* 827 F. Supp. 26 (D.D.C. 1993), aff'd 14 F.3d. 633 (D.C. Cir. 1994); *Cabazon Band of Mission Indians* v. *National Indian Gaming Commission,* 14 F.3d 633 (D.C. Cir. 1994) (*Cabazon II*); and *Sycuan Band* v. *Roache,* 54 F.3d 535 (9th Cir. 1995), as discussed in the Prologue to the proposed rule. We also think it important that the definition include, as is proposed: "[e]ach deal contains a finite number of pull-tab cards that includes a pre-determined number of winning cards." It may be important for the Commission consider how to ensure that the game of pull-tabs is fair to the players, i.e., that

the decks are in fact finite, that players are playing all the way through a deck, that decks are not being stopped short or being substituted one deck for another to manipulate odds unfairly against players.

6. **Including the States in the Notification and Appeal Processes.** The States call for a notification procedure to the States in the process for approval, introduction and verification of technologic aids. See proposed § 546.9. Such a process can provide for means to protect trade secrets, and commercial and financial information that is privileged and confidential. Still, a description of the working of the proposed "technological aid" that is offered for certification should be provided to the State or States where the gaming device is to be used, upon the regular submission to the Commission. The applicant should be able to provide enough details to allow a State to make its own determination of whether the device is a "technological aid," a "facsimile" or a slot machine. The State should be given the opportunity to comment or object to the Commission proceeding with the determination that a particular device is a mere technologic aid and such comments should be included in the Commission's determinations.

Additionally, the State should be allowed the opportunity to appeal a finding of the Commission that a device is a technologic aid. Again, the interests of the States are heightened when devices are proposed that may in fact be facsimiles or slot machines requiring a class III tribal-state compact, and thus, the States should be able to participate in the process.

If the Commission has additional questions or needs additional information from the Attorneys General, please do not hesitate to contact us. We would like to express our gratitude to the Commission and its staff for its hard work in preparing these proposed rules. They reflect much hard work, analysis and thoughtfulness.

Sincerely,

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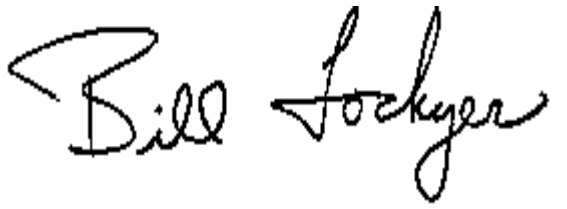

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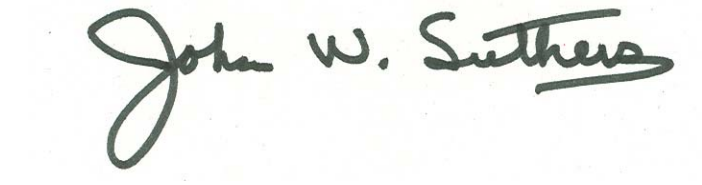

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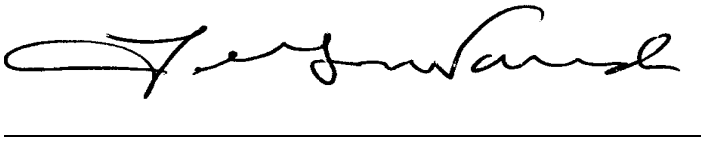

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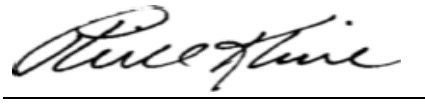

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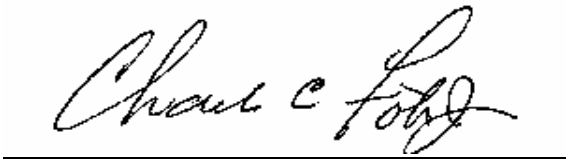

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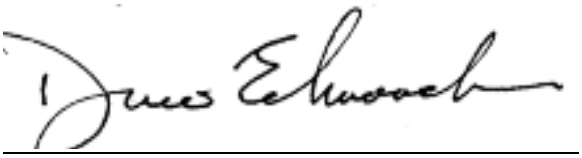

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