



August 19, 2021

Rodney Butler
Chairman, Mashantucket Pequot Tribal Nation
2 Matt's Path
P.O. Box 3060
Mashantucket, CT 06338-3060

Re: Review of Sports Book Agreement between the Mashantucket Pequot Tribal Nation, Mashantucket Pequot Gaming Enterprise, and CrownCT Gaming, LLC

Dear Chairman Butler:

This letter responds to your January 21, 2021 request for the National Indian Gaming Commission's Office of General Counsel to review an agreement between the Mashantucket Pequot Tribal Nation (Tribe), Mashantucket Pequot Gaming Enterprise (dba Foxwoods Resort Casino), and CrownCT Gaming, LLC, a subsidiary of DraftKings, Inc. (DraftKings). Specifically, you have asked for my opinion whether the agreement is a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the agreement violates IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the following submissions:

- Sports Book Agreement between Crown CT Gaming, LLC, Mashantucket Pequot Tribal Nation, and Mashantucket Pequot Gaming Enterprise (August 18, 2021 version; unexecuted, 46 pages)
 - Exhibit A - Definitions
- Connecticut Sports Betting Financial Model (June 1, 2021 projections)

The Sports Book Agreement was unexecuted but represented to be in substantially final form. After careful review, it is my opinion that the Sports Book Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Sports Book Agreement does not violate IGRA's sole proprietary interest requirement.

Sports Book Agreement:

The Agreement governs on-reservation sports wagering at a retail sportsbook to be located at Foxwoods Casino and internet and mobile wagering for bettors located within the

Tribe's reservation. Foxwoods will operate the retail and kiosk gaming, and the Tribe will operate the online and mobile gaming.¹ DraftKings will provide services to both Foxwoods and the Tribe.

The Agreement has a term of (b) (4).² DraftKings will receive (b) (4) of the "Net Gaming Revenue," from the retail and online platforms, which as defined by the Agreement (b) (4).³ For the retail platform, "Net Gaming Revenue" is defined as

(b) (4)

Net Gaming Revenue" is defined as (b) (4).⁴ The "Online

(b) (4)

DraftKings will provide back-of-house procedures, standards, and controls that are consistent with prevailing industry standards for the retail and online platforms. Foxwoods and the Tribe must approve the operational procedures and any amendments.⁷ The back-of-house procedures, standards, and controls will include (b) (4)

(b) (4)

Foxwoods and the Tribe will hire all staff for the respective platforms, but they must consult with DraftKings for any management-level positions.⁹ DraftKings does not have

¹ Sports Book Agreement § 6(a); *see also id.* at Exhibit A Definitions ("Sports Betting Operation" "means the acceptance of a bet or wager on a sporting event at a bricks-and-mortar sports book placed by a member of the general public." "Game Offering" - "offering of Crown CT's online sports book to users located on Indian lands within the MPTN Reservation through the DraftKings Equipment pursuant to this Agreement on the Gaming Platform within the jurisdictional limits imposed by the Mashantucket Pequot Gaming Commission ...").

² *Id.* § 3(a).

³ *Id.* § 9(b); Exh. A ("Net Gaming Revenue").

⁴ *Id.* § Exh. A ("Net Gaming Revenue").

⁵ *Id.* § 6(d).

⁶ *Id.* § 9(c).

⁷ Sports Book Agreement § 6(b).

⁸ *Id.* § 6(b).

⁹ *Id.* § 6(c).

approval authority over personnel decisions. Foxwoods and the Tribe will have the ultimate decision-making authority whether to accept or reject wagers at the respective sportsbooks. DraftKings will provide recommendations on accepting or rejecting. If DraftKings recommends that Foxwoods or the Tribe reject a wager, but Foxwoods or the Tribe accepts the wager, Foxwoods or the Tribe bears the risk of that wager.¹⁰

For the retail operation, the sportsbook will be co-branded as a Foxwoods and DraftKings sportsbook. The retail book will be the only sportsbook offered by Foxwoods at the casino and the only retail sportsbook offered by DraftKings in Connecticut.¹¹ Foxwoods will determine the location of the sportsbook at the casino. DraftKings can provide comments on construction plans, but has no approval authority.¹² DraftKings will provide between (b) (4) self-serve betting kiosks with the exact number determined by Foxwoods.¹³ DraftKings can recommend that Foxwoods increase or decrease the number of kiosks, but Foxwoods retains the authority to add or decrease the number of kiosks.¹⁴ (b) (4)

.16

DraftKings will contribute (b) (4)

.20

The Tribe will offer an online sportsbook for patrons located on the Tribe's Indian lands. The Tribe will be the manager and operator of the online platform, and DraftKings will consult with the Tribe.²¹ The server for the online platform will be located at Foxwoods.²² The Tribe must consult with DraftKings on marketing and consider all of DraftKings' recommendations.²³

¹⁰ *Id.*

¹¹ *Id.* § 5(a).

¹² *Id.* §§ 1, 2(c).

¹³ Sports Book Agreement § 2(f).

¹⁴ *Id.*

¹⁵ *Id.* § 2(g).

¹⁶ *Id.* § 6(d).

¹⁷ *Id.* §§ 2(b), 11(b).

¹⁸ *Id.*

¹⁹ Sports Book Agreement § 3(d).

²⁰ *Id.* § 3(e).

²¹ *Id.* § 6(a).

²² *Id.* § 8(a).

²³ *Id.* § 6(j).

The Agreement contains the following provision that prohibits DraftKings from managing the retail and online sportsbooks and is specific to sports betting functions:

Notwithstanding any provision in this Agreement, Crown CT shall not engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Gaming Activities (collectively, “Management Activities”); provided, however, that Crown CT will not be in violation of the foregoing restriction solely because Crown CT enforces compliance with any term in this Agreement that does not require the Gaming Activities to be subject to any third-party decision-making as to any Management Activities. Regarding wagers governed by this Agreement, FRC shall retain the ability to decide which sports betting wagers it will or will not accept and/or whether or not FRC wishes to change the lines of a particular game for the Sports Book, and MPTN shall retain the ability to decide which sports betting wagers it will or will not accept and/or whether or not MPTN wishes to change the lines of a particular game for the Game Offering, regardless of Crown CT’s recommendations. FRC shall retain control over the day-to-day operations of the Gaming Activities for the Sports Book, and MPTN shall retain control over the day-to-day operations of the Gaming Activities for the Game Offering. Notwithstanding any other possible construction of any provision(s) contained in this Agreement, it is agreed that within the meaning of IGRA: (x) this Agreement does not and shall not provide for the management of all or any part of the Gaming Activities by any person other than FRC or MPTN, or deprive FRC or MPTN of the sole proprietary interest and responsibility for the conduct of the Gaming Activities; and (y) Crown CT will not exercise any remedy or otherwise take any action under or in connection with this Agreement in a manner that would constitute management of all or any part of the Gaming Activities or that would deprive FRC or MPTN of the sole proprietary interest and responsibility for the conduct of any Gaming Activities.²⁴

Management Contracts:

The NIGC has defined a “management contract” to mean “any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.”²⁵ A “collateral contract” is defined as “any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).”²⁶

²⁴ *Id.* § 6(m).

²⁵ 25 C.F.R. § 502.15.

²⁶ 25 C.F.R. § 502.5.

While NIGC regulations do not define “management,” the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.²⁷ A “primary management official” includes “any person who has the authority ... [t]o set up working policy for the gaming operation.”²⁸ Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”²⁹ Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.³⁰ Essentially an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager – or, in certain circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.³¹

If a contract requires or permits the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of IGRA and requires the Chair’s approval.³² Management contracts that have not been approved by the Chair are void.³³

Management Analysis:

The Agreement does not permit any management of any gaming activity by DraftKings. The scope of services provided by DraftKings is well-defined. The Tribe has the discretion to accept or reject DraftKings’ recommendations, including changing lines on events and suspending events. The Agreement includes the sportsbook-specific prohibition on management as discussed above, and the Agreement states that the Tribe has the ultimate responsibility for the retail and online sportsbooks. Accordingly, the Agreement does not raise any management concerns.

²⁷ See NIGC Bulletin No. 94-5, “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

²⁸ 25 C.F.R. § 502.19(b)(2).

²⁹ *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

³⁰ See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

³¹ *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether to accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.

³² 25 U.S.C. § 2711.

³³ 25 C.F.R. § 533.7; see also *Wells Fargo Bank, Nat’l Ass’n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

Sole Proprietary Interest:

IGRA requires a tribe to possess “the sole proprietary interest and responsibility for the conduct of any gaming activity.”³⁴ “Proprietary interest” is not defined in IGRA or the NIGC’s implementing regulations. Black’s Law Dictionary defines a “proprietary interest” as an “interest held by a property owner together with all appurtenant rights”³⁵ An “owner” is “one who has the right to possess, use, and convey something.”³⁶ “Appurtenant” means “belonging to; accessory or incident to”³⁷ Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”³⁸

To determine whether an agreement violates the sole proprietary interest requirement, the NIGC analyzes three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) a third party’s right to exercise control over all or any part of the gaming activity.³⁹ Accordingly, if a party, other than the tribe receives a high level of compensation, for a long period of time, and possess some aspect of control, an improper proprietary interest may exist.

Sole Proprietary Interest Analysis:

The Agreement has a (b) (4) term from either the launch of the IGRA-based sportsbook or the launch of the State-regulated sportsbook, whichever is earlier.⁴⁰ At the end of the term, the parties will enter into negotiations for a “Renewal Term,” which will be negotiated. (b) (4)

.⁴¹ The term by itself does not raise a proprietary interest concern.

The parties have worked diligently with the Office of General Counsel to remove any opportunity for DraftKings to control the retail and online sportsbooks. The Agreement does not grant any control to DraftKings over the Tribe’s sportsbooks. The Tribe has the ultimate authority over the retail and online platforms, can accept or reject services and recommendations from DraftKings, and will have the ability to change odds, accept or rejects wagers, and determine which events to offer. Accordingly, there are no issues of control.

DraftKings will receive (b) (4) from retail and online platforms as defined by the Agreement.⁴² The “Net Gaming Revenue” and “Online Gaming

³⁴ 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

³⁵ BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

³⁹ *See* NIGC NOV-11-02, (July 12, 2011); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff’d in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision).

⁴⁰ Sports Book Agreement § 3(a).

⁴¹ *Id.* § 3(b).

⁴² *Id.* § 9(b).

Revenue” definitions (b) (4)

Overall, it is my opinion that the Agreement does not grant DraftKings a proprietary interest in the Tribe’s sportsbooks. DraftKings has no ability to control the sportsbooks, and once the term expires after (b) (4), the parties can renegotiate their relationship. The Tribe is aware of the financial projections for its on-reservation sportsbooks (b) (4). The Tribe sees the sportsbooks as another amenity to Foxwoods and as a way to increase patron traffic. Unlike a situation where a third party is receiving a share of net gaming revenue and providing little or no ongoing services to the Tribe, DraftKings is providing ongoing services and recommendations throughout the term of the Agreement.⁴³ (b) (4), in this instance the fee alone does not grant a proprietary interest in the Tribe’s gaming operation.

It is important to note that the Office of General Counsel reviews each agreement on its own terms. We did so here with the Sports Book Agreement. This opinion does not mean that every agreement with a similar fee or term, including future agreements proposed by the Tribe, will necessarily result in a favorable declination letter opinion.

It is my understanding that the draft Sports Book Agreement is represented to be in substantially final form, and if the Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein, this opinion shall not apply. This opinion is limited to the Sports Book Agreement listed above. This opinion does not include or extend to any other agreements not submitted for review.

Please note that it is my intent that this letter be released to the public through the NIGC’s website. If you have any objection to this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.⁴⁴ If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of Information Act (FOIA),⁴⁵ please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.⁴⁶ Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”⁴⁷ Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter**. After this

⁴³ Compare NIGC NOV-11-02 (third party acquires a proprietary interest in a tribe’s gaming operation when the third party acquires an interest in gaming revenue for little or no service or assets provided).

⁴⁴ See 25 C.F.R. § 517.7(c).

⁴⁵ 5 U.S.C. § 552(b)(4).

⁴⁶ 139 S. Ct. 2356 (2019).

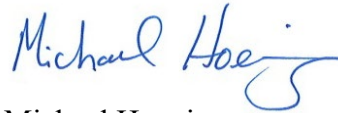
⁴⁷ See 25 C.F.R. § 517.7(d).

Letter to Chairman Butler, Mashantucket Pequot Tribal Nation
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Mashantucket Pequot Gaming Enterprise, and CrownCT Gaming, LLC
Page 8 of 8

time elapses, the letter will be made public and objections will no longer be considered.⁴⁸ If you need any additional guidance regarding potential grounds for withholding, please see the United States Department of Justice's Guide to the Freedom of Information Act at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

If you have any questions, please contact NIGC Staff Attorney Steve Iverson at (202) 632-7003 or by email at steven_iverson@nigc.gov.

Sincerely,



Michael Hoenig
General Counsel

cc: Jared Baumgart, Senior Legal Counsel

⁴⁸ *Id.*