



January 8, 2018

Via First Class & Email

Mr. Charles LaBoy
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Pokagon Band Gaming Commission
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Re: Gambelit Poker LIVE! V1.0 - Game Classification Opinion

Dear Mr. LaBoy:

On October 20, 2017, you requested an advisory legal opinion concerning whether Gambelit Poker LIVE! V1.0 constitutes a Class II game under the Indian Gaming Regulatory Act ("IGRA") when played on Indian lands in Michigan. The short answer is yes. Based upon the game descriptions submitted, Gambelit Poker LIVE! V1.0 qualifies as a variation of poker that is not a banked card game or an electronic facsimile of poker. And because card games played for money and poker are explicitly authorized by the laws of Michigan, it is a Class II game when played on Indian lands there.

I. Game Description

Gambelit Poker LIVE! V1.0 is a card game played with: a deck of 52 specially marked playing cards on "Gambelit's custom 'D' shaped table;"¹ a live dealer; and two to six players. The ultimate objective is to make the best three card poker hand.² Before the game begins, every player places the same ante.³ The minimum size of the ante is set by the gaming operation and, at its discretion, the players may agree to play for higher stakes.⁴ The dealer collects the antes for purposes of the game's prize⁵, deducting the operation's commission from it.⁶

¹ Gambelit Poker LIVE! V1.0, Detailed Game Rules (Oct. 18, 2017).

² *Id.* at 2.

³ *Id.*

⁴ *Id.*

⁵ If a tie occurs, the prize is divided between the winners. *Id.*

⁶ *Id.*

While the game can be played with nothing but cards, when played with the Gamblit table, custom hardware and software are used in the play experience. Specifically, the table is a “wooden black-jack style table outfitted with electromechanical equipment that is operated through software.”⁷ “A dealer stands along the flat edge [of the table], and the players are positioned around the curved side.”⁸ “An Intelligent Shoe reads [the] cards as they are dealt.”⁹ The cards used are specially marked for that purpose.¹⁰ Two 32 inch “monitors [] mounted to the wings of the table” present information to players.¹¹ Such information includes game rules, card faces, and game outcomes.¹² A touch screen exists to the left of the dealer to provide information to the dealer and to allow her to issue commands to the computer.¹³ These commands include activating and deactivating positions, starting and restarting games, and changing the minimum and maximum wager values.¹⁴ The computer is in a locked enclosure beneath the table.¹⁵ “The Computer is connected to the Intelligent Shoe, the Player Monitors, the Dealer Console, speakers, switches, and LEDs.”¹⁶ Via software, the computer interfaces with all of the above.¹⁷ It also evaluates the game hands.¹⁸ The game table surface has a light strip with six individual LED sections, corresponding to each player position.¹⁹ These six sections also contain round actuators - essentially, buttons.²⁰ The buttons may be pressed by players.²¹

As mentioned, the goal of the game is to build the best three card poker hand.²² The game commences with a deal by the dealer.²³ “Starting with the player closest to the dealer’s left hand, the dealer will deal [from the shoe one card face up to every player] in a clockwise direction.”²⁴ These cards, like all others, are displayed on the player monitors.²⁵

⁷ Gamblit Live Table (GLT), Equipment Overview (Aug. 18, 2017) at 2.

⁸ *Id.*

⁹ *Id.* at 3. As an aside, a single deck automatic shuffler is optional. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.* at 3.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *Id.* When a button/actuator is pushed in, it “in turn presses the switch in.” *Id.*; Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 2.

²² Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 2. For the game, card rankings from highest to lowest are: Straight Flush, Three of a Kind, Straight, Flush, Pair, and High-Card. *Id.* at 2-3.

²³ *Id.* at 3.

²⁴ *Id.*; Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Nov. 27, 2017); Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Dec. 11, 2017).

²⁵ Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Dec. 11, 2017).

Next, the dealer draws “one card from the shoe and an image of the card [is] displayed on player monitors.”²⁶ The card remains face down until it is discarded or awarded to a player.²⁷ Players “have 2 seconds to press their buttons to claim a card from the time its value is shown on the player monitor.”²⁸ The first person to press their button receives the card if they are eligible to claim it.²⁹ To be eligible, the player must be able to beat or tie the highest current hand.³⁰ Essentially, this means that the player has a hand that can be improved to be the leading hand.³¹ “When a player cannot claim a card because of this rule they are said to be ‘knocked out.’ The buttons of players who have been knocked out are not active when a new card is drawn. A knockout sound and animation will play and the knocked out player’s on-screen emoji will change to the ‘knocked out’ emoji.....”³² “Once a player is knocked out, they cannot claim additional cards” and are eliminated from the game.³³ “If the card is claimed, the dealer will place it in front of the player who claimed it.”³⁴ When no player claims a card, it is discarded³⁵ by the dealer, who places it in the discard pile.³⁶

“The dealer will continue to draw one card at a time until one player has claimed two cards, [] for a hand total of three cards[.]”³⁷ “Once a player has three cards, the Burndown begins.”³⁸ The number of cards dealt in the Burndown is the number of players in the game plus two.³⁹ However, “[i]f there are fewer cards remaining in the deck than the number specified for the burndown, no additional cards [are] dealt.”⁴⁰ Burndown cards are only able to be claimed by players with less than 3 cards.⁴¹

The game ends when any of the following occurs: a player has an unbeatable hand; the last card of the Burndown is dealt; the entire deck has been dealt; or all the

²⁶ Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* “In the case that a player does not have a card, the missing card is ranked less than any card grabbed. For example, if one player has a King and a 5, and the other has only a King, the player with King/5 has the higher hand because King/5 is higher than King/0. Missing cards do not count as a pair, and do not have a suit value.” Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 2.

³¹ Emails from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Nov. 27, 2017), (Dec. 11, 2017) & (Dec. 14, 2017).

³² Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 3.

³³ Emails from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Dec. 11, 2017) & (Dec. 14, 2017).

³⁴ Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 4.

³⁵ *Id.* at 3.

³⁶ Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Nov. 27, 2017).

³⁷ Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 4.

³⁸ *Id.*

³⁹ *Id.* For example, if there are 2 players, there are 4 cards in the Burndown. If the maximum number of players – 6 – participate, there are 8 cards in the Burndown. *Id.*

⁴⁰ *Id.*

⁴¹ Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Nov. 27, 2017).

players have three cards.⁴² The player with the best poker hand at the end of the game wins.⁴³ The dealer gives the winner the game prize (chips from the ante minus the commission).⁴⁴

II. Legal Background

a. IGRA

IGRA, 25 U.S.C. §§ 2701, *et seq.*, divides the world of Indian gaming into three classes. Class I gaming, which is not at issue here, encompasses “social games” played “solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”⁴⁵ Class II gaming includes card games if they:

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wages or pot sizes in such card games.⁴⁶

Class II gaming also expressly excludes any banking card game.⁴⁷ Banking card games, as defined by NIGC regulations, are games in which the banker (usually the house) competes against all players, collecting from losers and paying winners.⁴⁸ Conversely, non-banking card games are games where players play against each other, rather than the house or a single player acting as the bank.⁴⁹

Class III gaming is a catchall category and includes “all forms of gaming that are not Class I gaming or Class II gaming.”⁵⁰ Class III also includes any electronic or electromechanical facsimiles of any game of chance.⁵¹ An electronic or electromechanical facsimile is defined by NIGC regulations to mean “a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game”⁵²

⁴² Gamblit Poker LIVE! V1.0, Detailed Game Rules, *supra* at 4.

⁴³ *Id.* “In the case of a tie, the prize is divided evenly between the tied players. If the prize is not evenly divisible, the remainder will be paid to the tied player with the highest suited card.” *Id.*

⁴⁴ Email from Charles LaBoy, Pokagon Band Gaming Commission Executive Director, to Jo-Ann Shyloski, NIGC Of Counsel (Nov. 27, 2017).

⁴⁵ 25 U.S.C. § 2703(6).

⁴⁶ 25 U.S.C. § 2703(7)(A)(ii); *See also* 25 C.F.R. § 502.3(c).

⁴⁷ 25 U.S.C. § 2703(7)(B)(i); 25 C.F.R. § 502.4(a)(1).

⁴⁸ 25 C.F.R. § 502.11.

⁴⁹ *Id.*; 25 C.F.R. § 502.3(c).

⁵⁰ 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

⁵¹ 25 U.S.C. § 2703(7)(B)(ii); 25 C.F.R. § 502.4(b).

⁵² 25 C.F.R. § 502.8.

Distinct from electronic or electromechanical facsimiles, and allowable for play with Class II games, are “electronic, computer, or other technologic aids.”⁵³ NIGC regulations define electronic, computer or technologic aid as: “any machine or device that: (1) Assists a player or the playing of a game; (2) Is not an electronic or electromechanical facsimile; and (3) Is operated in accordance with applicable Federal communications law.”⁵⁴ “Electronic, computer or other technologic aids include, but are not limited to, machines or devices that: (1) Broaden the participation levels in a common game; (2) Facilitate communication between and among gaming sites; or (3) Allow a player to play a game with or against other players rather than with or against a machine.”⁵⁵ “Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.”⁵⁶

So, whether a card game is Class II or Class III under IGRA and NIGC regulations requires an analysis of both the game itself – primarily, how it is played – and the laws of the state in which it will be played.⁵⁷ If the card game satisfies IGRA’s and NIGC regulations’ definitions of Class II gaming, but is played using an electronic, computer or technologic device, the determining factor in the game’s ultimate classification is whether the device is an aid to the play of the game, in which case the game is Class II, or whether the device is a facsimile of the game, in which case the game is Class III.

Here, for Gamblit Poker LIVE! V1.0 to qualify as a Class II game, Michigan state law must explicitly authorize or not explicitly prohibit its play and it must be played legally in the state; it must be a non-banking game; and the device associated with the game must qualify as a technical aid, not an electronic facsimile.

⁵³ 25 U.S.C. § 2703(7)(A)(i); 25 C.F.R. § 502.3(a).

⁵⁴ 25 C.F.R. § 502.7.

⁵⁵ *Id.* (b).

⁵⁶ *Id.* (c).

⁵⁷ See 25 U.S.C. § 2710(b)(1)(A) (“An Indian tribe may engage in, license and regulate, class II gaming on Indian lands within such tribe’s jurisdiction if – (A) such gaming is located in a State the permits gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited by Federal law) ...”); *Gaming Corp. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (“Indian tribes have the “right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” “States can influence class II gaming within their borders only if they prohibit those games for everyone under all circumstances.”); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (“the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.”); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312 (10th Cir. 2004) (same); see, e.g. *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029 (2^d Cir. 1990) (indicating that the district court correctly decided that because Connecticut law permitted “Las Vegas nights,” such gaming was permissible Class III gaming activity by the Tribe.).

b. Michigan state law

The only prohibition as to gambling originally in the Constitution of the State of Michigan prevented the Legislature from approving a lottery.⁵⁸ The Supreme Court of Michigan has interpreted the state's constitution as "not a grant of power to the legislature, but [] a limitation upon its powers," concluding that "the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States."⁵⁹

In 1931, via the Michigan Penal Code, the Legislature made accepting money or anything of value from a person "contingent on the result of a game not known by the parties to be certain"⁶⁰ a misdemeanor, punishable by imprisonment and a fine.⁶¹ Also prohibited as a misdemeanor with the same consequences is "keep[ing] or maintain[ing] for compensation] a gaming room, gaming table, game of skill or chance, or game partly of skill and partly of chance, used for gaming, or" permitting or aiding a person in doing so.⁶² Anyone who frequents a gaming location, house, or room is guilty of a misdemeanor along with anyone who wins money or something of value at gambling.⁶³ Even those who lose something of value at gaming and convey it or part of it to the winner are guilty of a misdemeanor, punishable by a fine.⁶⁴ Excepted from the law are games played pursuant to the Michigan Exposition and Fairgrounds Act or certain actions in connection with a race, contest, or game, including giving or paying prizes, entry fees, and expenses.⁶⁵ Also excepted from the law is "recreational card playing conducted at a senior citizen housing facility" under certain circumstances.⁶⁶

In 1933, the Legislature took the opposite tack, legalizing its first form of gambling - pari-mutuel wagering on horse racing.⁶⁷ In 1972, the second form of legalized gambling came to fruition when Michigan voters ratified a resolution, removing the state constitution's provision prohibiting the Legislature from approving a lottery and revising it to explicitly allow the Legislature to authorize one.⁶⁸ Subsequently, the Lottery Act

⁵⁸ *Northville Downs v. Granholm*, No. 08-11858, 2009 WL 483076, at *1 (E.D. Mich. Feb. 25, 2009), *aff'd*, 622 F.3d 579 (6th Cir. 2010).

⁵⁹ *Taxpayers of Michigan Against Casinos v. State*, 471 Mich. 306, 327 (2004) (internal citations omitted).

⁶⁰ *United States v. Dakota*, 796 F.2d 186, 189 (6th Cir. 1986).

⁶¹ Mich. Comp. Laws Ann. § 750.301.

⁶² Mich. Comp. Laws Ann. § 750.303(1). There are exemptions to the statute for amusement devices, slot machines of a certain age and not used for gambling, and crane games. *Id.* (2)-(5).

⁶³ Mich. Comp. Laws Ann. §§ 750.314 & 750.315.

⁶⁴ Mich. Comp. Laws Ann. § 750.315.

⁶⁵ Mich. Comp. Laws Ann. § 750.310. A bill to clarify these exceptions has been introduced. *See* 2017 Michigan House Bill No. 4742, Michigan Ninety-Ninth Legislature - Regular Session of 2017.

⁶⁶ Mich. Comp. Laws Ann. § 750.303a.

⁶⁷ Horse racing Law of 1995, Act No. 279, Pub. Acts 1995 (codified at M.C.L. §§ 431.301-431.336); *See Northville Downs v. Granholm*, *supra*, at *1 ("Horse racing was the first form of legalized gambling in Michigan. The legislature established it by the Racing Act of 1933."); *United States v. Dakota*, 666 F. Supp. 989, 993 (W.D. Mich. 1985), *aff'd*, 796 F.2d 186 (6th Cir. 1986).

⁶⁸ *Northville Downs v. Granholm*, *supra* at *1 (quoting Mich. Const. art. IV, § 41 - "The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law.").

was passed, creating a state lottery.⁶⁹ This Act also authorizes the play by non-profit organizations of bingo, pull-tabs, millionaire parties, and charity games and raffles.⁷⁰ A “millionaire party” is “an event at which wagers are placed upon games of chance customarily associated with a gambling casino through the use of imitation money or chips”⁷¹

Legalized gambling in Michigan expanded even further when, in 1996, three state-licensed commercial casinos in Detroit were approved by Michigan voters and permitted by law by the Michigan Gaming Control and Revenue Act.⁷² The Act authorizes “casino gaming” and defines “gaming” as “to deal operate, carry on, conduct, maintain or expose or offer for play any gambling game or gambling operation.”⁷³ “Gambling operation” is “the conduct of authorized gambling games in a casino.”⁷⁴ And “[g]ambling game” means:

*any game played with cards, dice, equipment or a machine; including any mechanical, electromechanical or electronic device which shall include computers and cashless wagering systems, for money, credit, or any representative of value, including, but not limited to, faro, monte, roulette, keno, bingo, fan tan, twenty one, blackjack, seven and a half, klondike, craps, poker, chuck a luck, Chinese chuck a luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game, or any other game or device approved by the board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player.*⁷⁵

The law expressly does not apply to other specified gaming, including: pari-mutuel horse racing; the state lottery; bingo, millionaire parties, and other gaming permitted by non-profit organizations; recreational card playing; and Indian gaming under IGRA.⁷⁶ Felonies, punishable by imprisonment and/or fine, exist for conducting a gambling operation without a license, among other actions.⁷⁷ In addition, conducting a gambling

⁶⁹ Mich. Comp. Laws Ann. § 432.1 *et seq.*; *Northville Downs v. Granholm*, *supra* at *1 (citing Act. No. 239, Pub. Acts 1972 (codified at M.C.L. §§ 432.1–432.47)); *see also Michigan v. Little River Band of Ottawa Indians*, No. 5:05-CV-95, 2007 WL 1238907, at *2 (W.D. Mich. Apr. 27, 2007).

⁷⁰ Mich. Comp. Laws Ann. §§ 432.102, 432.103, 432.103a, 432.104a, 432.110a; *see also United States v. Dakota*, 666 F. Supp. 989, 993 (W.D. Mich. 1985), *aff’d*, 796 F.2d 186 (6th Cir. 1986).

⁷¹ Mich. Comp. Laws Ann. § 432.103a(8).

⁷² Mich. Comp. Laws Ann. §§ 432.201–432.226; *Northville Downs v. Granholm*, *supra*, at *1 (citing Initiated Law 1 of 1996 (“In 1996 Michigan voters approved ballot initiative Proposal E, which resulted in enactment of the Michigan Gaming Control and Revenue Act. The Act establishes the Michigan Gaming Control Board, M.C.L. § 432.204; it permits up to three gaming casinos in any city whose local legislature has enacted an ordinance approving casino gaming and that meets [certain] qualifications . . .”).

⁷³ Mich. Comp. Laws Ann. §§ 432.203(1) & 432.202(x).

⁷⁴ Mich. Comp. Laws Ann. § 432.202(v).

⁷⁵ Mich. Comp. Laws Ann. § 432.202 (emphasis added).

⁷⁶ Mich. Comp. Laws Ann. § 432.203(2)(a)-(e).

⁷⁷ Mich. Comp. Laws Ann. § 432.18.

operation without a license or with unauthorized games is subject to civil penalties and confiscation and forfeiture of all gaming equipment used for such games.⁷⁸

Michigan voters now have a say in further gambling expansion. In 2004, the voters amended the lottery provision of the state's constitution again, mandating their approval of any new form gambling.⁷⁹ Though, such provision exempts the three commercial casinos in Detroit as well as Indian gaming.⁸⁰

III. Analysis

Gamblit Poker LIVE! V1.0's game classification under IGRA depends upon whether: it is a card game; it is banked or non-banked; Michigan explicitly allows it or doesn't explicitly prohibit it and it's played in the state; and the device qualifies as a technologic aid to the play of the game or an electronic facsimile of it.

a. Is the game a "card game"?

First, because IGRA includes certain card games in its definition of Class II, is Gamblit Poker LIVE! V1.0 a card game? As described above, the game is played with a deck of cards with the ultimate objective of making the best three card hand. In the game, the dealer deals the cards. And, although the game can be played using an electronically enhanced table, monitors, and custom hardware and software, it can also be played with cards alone. Thus, Gamblit Poker LIVE! V1.0 qualifies as a card game.

b. Is the game "banked"?

Next, because IGRA excludes "any banking card games" from its definition of Class II, is Gamblit Poker LIVE! V1.0 a banked or non-banked card game? As previously explained, banking games are "played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners,

⁷⁸ Mich. Comp. Laws Ann. § 432.220.

⁷⁹ Mich. Const. art. 4, § 41. The amended section now provides:

The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where the gambling will take place. This section shall not apply to gaming in up to three casinos in the City of Detroit or to Indian Tribal Gaming.

As an aside, a U.S. District court found that "the exemption for tribal gaming [in this constitutional provision] may be gratuitous as Michigan has no authority to regulate gaming on tribal lands." See *Northville Downs v. Granholm*, *supra* *fn 4.

⁸⁰ Mich. Const. art. 4, § 41.

and the house can win.”⁸¹ In non-banking games, the players play against each other. For example, poker, typically, is a non-banking card game.

Here, because the players in Gamblit Poker LIVE! V1.0 play one another rather than a banker or the house, with the house only taking a commission, it is a non-banked card game. Consequently, the game is not categorically excluded from the definition of Class II.

c. Is the game explicitly authorized by Michigan law?

Under IGRA, card games that “explicitly authorized by the laws of the State” come within the Class II definition.⁸² Since Gamblit Poker LIVE! V1.0 qualifies as a non-banked card game under IGRA, the question is whether Michigan law⁸³ explicitly authorizes it. Indeed, it does.

Pursuant to the Michigan Gaming Control and Revenue Act, certain gambling games are authorized for play in three casinos in a city that meets the Act’s requirements. These games explicitly include “*any game played with cards, . . . , for money, credit, or any representative of value, including, but not limited to, . . . poker . . .*”⁸⁴ Since Gamblit Poker LIVE! V1.0 qualifies a “game played with cards . . . for money,” it is explicitly authorized by Michigan law.

Moreover, the Michigan Gaming Control and Revenue Act also explicitly authorizes poker.⁸⁵ In addition, the Lottery Act explicitly authorizes “millionaire parties,”⁸⁶ which are defined as events conducted by non-profit organizations “at which wagers are placed upon games of chance customarily associated with a gambling casino through the use of imitation money or chips”^{87 88}

⁸¹ 25 C.F.R. § 502.11.

⁸² 25 U.S.C. § 2703(7)(A)(ii)(I).

⁸³ A discussion of the relevant Michigan law does not include Tribal-State compacts that Michigan has entered into and have been approved by the Secretary of the Interior, because the Michigan Supreme Court has held that approval of such compacts by resolution by the Legislature does not constitute state law. *See Taxpayers of Michigan Against Casinos v. State*, 471 Mich. 306, 312–13 (2004) (“We hold that the Legislature’s approval of the compacts through HCR 115 did not constitute legislation. In approving those compacts by resolution, the Legislature did not modify Michigan law in any respect”); *see also Taxpayers of Michigan Against Casinos v. State of Michigan*, 478 Mich. 99, 108 n. 2 (2007).

⁸⁴ Mich. Comp. Laws Ann. § 432.202 (emphasis added).

⁸⁵ *Id.*

⁸⁶ Mich. Comp. Laws Ann. §§ 432.102, 432.103, 432.103a, 432.104a, 432.110a; *see also United States v. Dakota*, 666 F. Supp. 989, 993 (W.D. Mich. 1985), *aff’d*, 796 F.2d 186 (6th Cir. 1986).

⁸⁷ Mich. Comp. Laws Ann. § 432.103a(8). The state regulations associated with such parties are located here - http://www.michigan.gov/documents/mgcb/2013-088_TY_Final_Millionaire_FINAL_05-14-2014_456388_7.pdf & <http://www.micga.org/rules--regulations.html>

⁸⁸ News reports indicate that “[l]ast year, poker game fundraisers hosted by Michigan nonprofits brought in \$93.5 million . . . , according to numbers self-reported by non-profits to the Michigan Gaming Control Board.” *Crain’s Detroit Business* (Feb. 19, 2017), <http://www.craigslist.com/print/620486> And that “Michigan has one of the biggest casino-style charitable gaming programs of its kind in America . . . in the past three years, [] authoriz[ing] 30,000 millionaire party games, which resulted in about \$270 million in

Because Gambelit Poker LIVE! V1.0 constitutes a variation of poker, it is also explicitly authorized by the Lottery Act and the poker aspect of the Michigan Gaming Control and Revenue Act. There are “at least a hundred variations of [p]oker” of two classes – Closed (Draw), where the players’ cards are hidden from each other until the end of the hand, and Open (Stud), where some cards in the players’ hands are revealed to all the players as play progresses.⁸⁹ “In all [the] variations two factors remain constant: 1. The value or rank of each [p]oker hand[;] [and] 2. At the showdown[,] the hand cannot consist of more than five cards though more cards are used in many [p]oker variations.”⁹⁰ The first factor has been qualified to mean: “a hand of higher rank than that of any other player – as evaluated by the rules of the game being played.”⁹¹

John Scarne, an expert on card games, believed poker’s “outstanding popularity” is due to the fact, among others, that: “[i]t may be played in a great many different ways;” “[t]he stakes may vary from no limit to penny ante, just as long as the minimum and maximum betting limits are agreed upon before the game begins;” [a]ny number of players from two to eight may play, although two to six make the best game;” and “[e]ach player, on his own, battles all the others.”⁹²

In light of the above, Gambelit Poker LIVE! V1.0 qualifies as a variation of poker for the following reasons. First, at the showdown, the hands consist of three cards, which is less than five. Second, the value and rank of the poker hands is a variation of the standard ranking, with Straight Flush, Pair, and High-Card having the same ranking as the standard but Flush, Straight, and Three of a Kind being reversed.⁹³ Third, and finally, the game has other characteristics of poker, including that the ante is agreed to before the game begins, two to six players may play, and each player plays against all others to win.

d. Is the device a technologic aid or an electronic facsimile?

Lastly, to qualify as Class II, Gambelit Poker LIVE! V1.0 must be technologic aid to poker⁹⁴, not an electronic facsimile of it. An electronic facsimile is “a game played in

chip sales.” *Id.*; see also [USPokersites.com](https://www.uspokersites.com) (“Michigan allows charitable bingo, raffles and what are called Millionaire’s Nights - essentially casino nights where participants can play poker and a host of other games.”), <https://www.uspokersites.com/legal/usa/michigan/>

⁸⁹ See John Scarne, *Scarne’s New Complete Guide to Gambling*, 671 (Simon & Schuster, Inc., 1986); see also *id.*, 672 (“It may be played in a great many different ways.”), 678-679 (“Poker has so many variations”); John Scarne, *Scarne’s Encyclopedia of Card Games*, 7 (First Quill/HarperResource, 2001).

⁹⁰ *Scarne’s New Complete Guide to Gambling*, *supra*, 672; See also NIGC OGC Game Classification Opinion – “Double Hand High-Low” (Sept. 9, 1999) (opining that the game at issue possessed the common elements of poker based upon *Scarne’s New Complete Guide to Gambling*), <https://www.nigc.gov/images/uploads/game-opinions/doublehandhighlow.pdf>.

⁹¹ *Scarne’s Encyclopedia of Card Games*, *supra*, 7; see also *id.*, 33 (same for Stud poker).

⁹² *Id.*

⁹³ *Scarne’s Encyclopedia of Card Games*, *supra*, 9 & 33.

⁹⁴ A prior OGC legal opinion and inemorandum have explained this office’s legal view that IGRA allows the use of technologic aids with Class II card games. See, e.g., NIGC OGC Game Classification Opinion – “Net Poker Gaming System” at 4 (July 3, 2013), https://www.nigc.gov/images/uploads/game-opinions/2013.07.03_Ltr_to_Foley_fr_NIGC_re_NetPoker_Gaming.pdf; Memorandum to Acting NIGC

an electronic . . . format that replicates a game of chance by incorporating all of the characteristics of the game.”⁹⁵ In contrast, a technologic aid is a “machine or device that (1) Assists a player or the playing of a game; (2) Is not an electronic [] facsimile; and (3) Is operated in accordance with applicable Federal communications law.”⁹⁶ A technologic aid allows “a player to play a game with or against other players rather than with or against a machine.”⁹⁷

Gamblit Poker LIVE! V1.0 satisfies all three criteria to constitute a technologic aid. Starting with what it is not, Gamblit Poker LIVE! V1.0 is not an electronic facsimile, because the device does not incorporate all the characteristics of poker. Video poker machines are examples of electronic facsimiles, incorporating all aspects of the game of poker, as they accept bets, deal poker hands, evaluate hands against standard poker rankings, and pay winning hands according to paytables.⁹⁸ Instead, here, Gamblit Poker LIVE! V1.0 requires a live dealer, who: collects the players’ antes, deals the cards, places claimed cards in front of players, discards unclaimed cards, and pays the winner⁹⁹ the prize. Moreover, players must place a wager, decide whether to claim a card and be the first eligible player to push a button to obtain it. Given these actions required by the dealer and the players, the device does not incorporate all characteristics of poker. And it is certainly not a wholly contained copy of poker in a machine.

Further, Gamblit Poker LIVE! V1.0 meets the second criteria of assisting players play the game or assisting in the play of the game. If chosen by the operation, the device may use its automatic shuffler to shuffle the cards. When the dealer deals the cards, the shoe reads them and displays them on the player monitors, assisting the players in seeing each card, deciding whether to attempt to claim the card, and keeping track of the cards in their competitors’ hands. The device evaluates each player’s hand, assisting the player in knowing whether she is eligible to claim a card and the ultimate outcome of the game. The device further assists in claiming cards, because instead of raising a hand, being the first person to strike a table, or attempting to claim a card in some other way, players’ push buttons to claim them. The device also informs players via sounds, animation, and an inactive button that they have been eliminated from the game. Finally, at the end of the game, the player monitors show the game outcome, confirming it for the dealer and the players’ benefit. And because the game can be played only with the cards, all of the above simply assists the dealer and the players play the game.

Chairman Skibine & Vice Chairman DesRosiers, from Acting General Counsel Coleman re: Classification of card games played with technologic aids (Dec. 17, 2009), <https://www.nigc.gov/images/uploads/game-opinions/20091217MemoreClassificationofcardgamesplayedwithtechnologicaidstoNIGCActingChairmanGeorgeSkibine.pdf>. Given that this is the long-standing view of this office, there is no need to set forth those explanations in detail again. They are incorporated herein by reference.

⁹⁵ 25 C.F.R. § 502.8.

⁹⁶ 25 C.F.R. § 502.7(a).

⁹⁷ *Id.* (b).

⁹⁸ Memorandum to Acting NIGC Chairman Skibine & Vice Chairman DesRosiers, from Acting General Counsel Coleman re: Classification of card games played with technologic aids, *supra* at 4.

⁹⁹ There may be more than one winner, via a tie. See note 5, *supra*.

In addition, Gamblit Poker LIVE! V1.0 meets the third criteria of a technologic aid: it “is operated in accordance with applicable Federal communications law.”¹⁰⁰ Like the *Digideal* opinion, the table here is not linked with other tables and, in communicating with the shoe, apparently meets FCC regulations on radio emissions.¹⁰¹

IV. Conclusion

Gamblit Poker LIVE! V1.0 is a Class II game when played on Indian lands in Michigan. Because Michigan law explicitly authorizes the play of card games for money, including poker, and Gamblit Poker LIVE! V1.0 is a non-banked card game, a variation of poker, and a technologic aid, Gamblit Poker LIVE! V1.0 is Class II.¹⁰²

If you have any further questions, please contact NIGC Of Counsel, Jo-Ann Shyloski at (202) 632-7003.

Sincerely,



Michael Hoenig
General Counsel

¹⁰⁰ 25 C.F.R. § 502.7(a)(3).

¹⁰¹ Memorandum to Acting NIGC Chairman Skibine & Vice Chairman DesRosiers, from Acting General Counsel Coleman re: Classification of card games played with technologic aids, *supra* at 3.

¹⁰² This legal opinion is advisory in nature only and it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel or Acting General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chairman or Commission, who are free to disagree with it in any action that comes before them or via the Chairman’s prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court and is issued solely as a matter of courtesy to the Tribe. See *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1031 (10th Cir. 2017) (“IGRA’s text, statutory structure, legislative history, and associated regulations all establish that Congress did not intend judicial review of NIGC General Counsel opinion letters.”), *cert. denied sub nom. Kansas v. Nat’l Indian Gaming Comm’n*, No. 17-463, 2017 WL 6271685 (U.S. Dec. 11, 2017); <https://www.nigc.gov/general-counsel/legal-opinions>.