

NATIONAL INDIAN GAMING COMMISSION

NOTICE OF VIOLATION

NOV-12-1

TO: George Scott, Town King
Thlopthlocco Tribal Town
PO Box 188
Clearview Road
Okemah, Oklahoma 74859

Alan Scott, Tribal Gaming Commission Chairman
Thlopthlocco Tribal Town
P.O. Box 188
Okemah, Oklahoma 74859

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The Titan Network, LLC
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Michael R. Gavenchak
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Anthony DeMartino Jr.
410 Park Creek Way
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Douglas Philip Pattison
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Adelino J. Vazquez
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A. Notification of Violation

1. Notice of Violation – Titan Network, LLC, Mercury Gaming Group LLC, and Anthony DeMartino, Jr., Michael Gavenchak, Doug Pattison and Adelino Vazquez in their official and individual capacities.

The National Indian Gaming Commission Chairwoman gives notice that Titan Network, LLC and Mercury Gaming Group, LLC, located in Atlanta, Georgia, and Anthony DeMartino, Jr., Michael Gavenchak, Doug Pattison and Adelino (Lino) Vazquez (collectively referred to as Respondents) in their official and individual capacities managed the Thlopthlocco Tribal Town's (Tribe) Golden Pony Casino (Casino) located in Okemah, Oklahoma without an approved management contract in violation of the Indian Gaming Regulatory Act and NIGC regulations from September 6, 2005 to December 31, 2010. 25 U.S.C. §§ 2710(d)(9); 2711; 25 C.F.R. § 573.6(a)(7).

The NIGC Chairwoman further gives notice that Mercury, Anthony DeMartino, Jr. and Michael Gavenchak failed to submit the Management Agreement between the Tribe and Mercury to the NIGC within 60 days of its execution in violation of NIGC regulations. *See* 25 C.F.R. § 533.2.

2. Notice of Violation – Thlopthlocco Tribal Town

The NIGC Chairwoman gives notice that the Tribe, with headquarters in Clearview, Oklahoma,¹ permitted the Respondents to manage the Casino without an approved management contract in violation of IGRA and NIGC regulations from September 6, 2005 to December 31, 2010. *See* 25 U.S.C. §§ 2710(d)(9); 2711; 25 C.F.R. § 573.6(a)(7).

The NIGC Chair also gives notice that the Tribe failed to submit the Management Agreement between it and Mercury to the NIGC within 60 days of its execution in violation of NIGC regulations. *See* 25 C.F.R. § 533.2.

B. Authority

Under IGRA and NIGC regulations, the Chairwoman may issue a notice of violation to any person for violation of any provision of IGRA, NIGC regulations, or any provision of a tribal gaming ordinance or resolution approved by the Chair. 25 U.S.C. § 2713(a); 25 C.F.R. § 573.3(a).

C. Applicable Federal and Tribal Laws

1. Management and control of a gaming operation by an entity other than the Tribe without a management contract approved by the Chair violates IGRA's Congressionally mandated policies of shielding the Tribe from organized crime and other corrupting influences; ensuring that the Tribe is the primary beneficiary of the gaming operation;

¹ The Tribe receives mail in Okemah, Oklahoma.

influences; ensuring that the Tribe is the primary beneficiary of the gaming operation; and protecting such gaming as a means of generating tribal revenue. *See* 25 U.S.C. § 2702(2), (3).

2. IGRA requires the NIGC Chair's approval of any management contract for the operation and management of class II or class III gaming. 25 U.S.C. §§ 2711(a); 2710(d)(9).
3. NIGC regulations reinforce this requirement, mandating that "[s]ubject to the [Chair's] approval, an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity." 25 C.F.R. § 533.1. Management contracts become effective upon the Chair's approval. 25 C.F.R. § 533.1(a). A tribe or a management contractor shall submit a management contract to the Chair for review within 60 days of execution by the parties. 25 C.F.R. § 533.2.
4. A management contract is defined by NIGC regulations as "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 C.F.R. § 502.15.
5. Management contracts that have not been approved by the Secretary of the Interior or the Chair are void. 25 C.F.R. § 533.7.
6. NIGC regulations at 25 C.F.R. § 502.19 define a "primary management official" as:
 - (a) The person having management responsibility for a management contract;
 - (b) Any person who has authority:
 - (1) To hire and fire employees; or
 - (2) To set up working policy for the gaming operation; or
 - (c) The chief financial officer or other person who has financial management responsibility.
 - (d) Any other person designated by the tribe as a primary management official.
7. NIGC regulations provide that it is a substantial violation of IGRA for a management contractor to operate a gaming operation without an approved contract. 25 C.F.R. § 573.6(a)(7).
8. The Chair has the authority to levy and collect civil fines, not to exceed \$25,000 per violation per day, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of IGRA or NIGC regulations. 25 U.S.C. § 2713(a)(1). NIGC regulations further provide the Chair with authority to levy and collect civil fines. Specifically, "[the Chair] may assess a civil fine, not to exceed \$25,000 per violation, against a tribe, management contractor, or individual operating Indian gaming for each notice of violation issued." 25 C.F.R. § 575.4. Moreover, "[i]f noncompliance continues for more than one day, the [Chair] may treat each daily illegal act or omission as a separate violation." *Id.* at (a)(2); *see*

accordance with . . . this part to determine whether a civil fine will be assessed, the amount of the fine, and, in the case of continuing violations, whether each daily act or omission will be deemed a separate violation for purposes of the total civil fine assessed.”).

9. Failure to comply with any provision of IGRA, NIGC regulations, or an approved tribal gaming ordinance is grounds for issuance of a notice of violation. 25 U.S.C. § 2713; 25 C.F.R. § 573.3(a).

D. NIGC Guidance and Applicable Case Law

1. The NIGC has issued guidance on what constitutes management for purposes of IGRA. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling any aspect of the gaming activity. *See NIGC Bulletin No. 94-5*. The performance of any one of these activities with respect to all or part of a gaming operation constitutes management. A party is required to obtain the NIGC Chair’s approval of a management contract before performing management activities at a gaming operation. *Id.*
2. Management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). Whether particular employees are "managerial" is not controlled by the specific job title of the position held by the employee. *Waldau v. M.S.P.B.*, 19 F.3d 1395 (Fed.Cir. 1994). Rather, the question must be answered in terms of the employee's actual job responsibilities, authority, and relationship to management. *Id.* at 1399. An employee can qualify as management if he actually has authority to take discretionary actions - thus being a *de jure* manager - or if he *recommends* discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).
3. Permitting a person or persons to directly manage operations of a casino transfers management responsibility to a third party in violation of the IGRA. *See Wells Fargo Bank v. Lake of the Torches Economic Development Corp.*, 658 F. 3d 684, 698 (7th Cir. 2011).
4. Control over the hiring of casino employees constitutes management activity under IGRA. *Id.* at 699.
5. An operating lease that affords a third-party company the opportunity to “set up working policy” and to develop employment procedures for a tribal gaming operation constitutes a management contract under IGRA. *See First American Kickapoo Operations, LLC v. MultiMedia Games*, 412 F 3d 1166, 1172 (10th Cir. 2005).

E. Circumstances of the Violations

Based on the totality of the circumstances set forth below, Respondents managed the Tribe's Casino, both as de facto and de jure managers and the Tribe allowed such management, in substantial violation of IGRA and of NIGC regulations. *See* 25 U.S.C. §§ 2711(a) and 2710(d)(9); 25 C.F.R. §§ 533.1 and 573.6(a)(7). In addition, the Tribe and Mercury and its principals failed to submit the Management Agreement within 60 days of its execution as required by NIGC regulations, 25 C.F.R. § 533.2.

F. Background

The Parties and Other Key Participants

The Tribe is a federally recognized Indian tribe. It owns and operates the Golden Pony Casino which is located on land placed in trust prior to October 17, 1988 in Okemah, Oklahoma. The Tribe has conducted gaming at this location since the early 1990s.

The Tribe's governing body, the Business Committee ("BC"), is comprised of five elected officers: the Town King (also called the Mekko), two Warriors, a Treasurer, a Secretary, and five advisors who are appointed by the officers. George Scott, the Town King since October 2009, has been a BC member since October 2002. He served as Acting Town King from approximately July 2005 until January 2007. He served as an advisor to the Business Committee following the January 2007 Tribal elections. He was appointed as Warrior on July 30, 2007 when the position became vacant by the appointment of Vernon Yarholar as Town King. Ron Barnett was the Tribal Administrator from August 2004 until December 2006 and has been the Tribal Treasurer since January 2007.

Titan incorporated on December 14, 2000 as a limited liability company located in Atlanta, Georgia. Tony DeMartino is the Chief Executive Officer and Michael Gavenchak is the President.

Mercury is a casino management company organized on April 1, 2005, by Titan executives DeMartino and Gavenchak, along with an experienced casino manager, Doug Pattison, who serves as its Chief Executive Officer. Mercury is located at the same address as Titan. DeMartino stated that he and Gavenchak brought Pattison on because of his gaming management experience. Titan and Mercury have, as noted by the Tribe's auditing firm, "substantially the same members and owners."

Adelino (Lino) Vazquez has, at various times, been employed by and negotiated business on behalf of, Titan and Mercury. A Vazquez business card describes him as Titan's "Director of External Affairs." Vazquez was listed on Mercury's website on July 22, 2011 as the "Director of Business Development."

The January 15, 2005 Consulting Agreement & related addenda

On January 15, 2005, Titan and the Tribe executed a Consulting Agreement for a six month term, with a starting date of January 1, 2005,² and with compensation to Titan at the rate of \$15,000 per month. Under the January 15 Consulting Agreement, Titan was to complete a feasibility study within three months; a marketing and advertising recommendation within two months; a development analysis within four months; and to generally assist with human resources as needed.

The January 15, 2005 Consulting Agreement also provided that:

Should Titan become aware of any other issues affecting the gaming facilities and operations, it may provide notice in writing or otherwise to management of the gaming facilities, the Thlopthlocco Tribal Town Gaming Commission and Thlopthlocco's Business Committee of the nature of the issue and any recommendations regarding the issue.³

On February 21, 2005, Gavenchak wrote a letter to then Town King Lewis McGertt in which he referred to the relationship between Titan and the Tribe as a "partnership, the success of which was dependent on each partner achieving their respective milestones during the 90 day period." The letter outlined "90 day deliverables" that each party would achieve.

One of the deliverables that Gavenchak outlined was for the Tribe to "approve and enter into a management agreement for the Okemah facility." On June 3, 2005, the Tribe signed a Management Agreement with the recently incorporated Mercury Gaming.⁴

On June 27, 2005, Gavenchak wrote a follow-up letter to Town King McGertt in which he assessed the progress made in reaching the "milestones" outlined in his prior letter. He referred to the previous six months as a "consulting period" and stated he was "very excited about the Management Agreement between the [Tribe and Mercury]." He noted, however, that, "[a]s we work together over the next several months while the NIGC is reviewing the Management Agreement, there are still many things...to be accomplished." Those items included:

- [I]mprovements that are physical/structural in nature, logistical and staff related;

² Although the Consulting Agreement reflects a term starting January 1, 2005, the BC did not approve it until January 7, 2005 and it was not executed until January 15, 2005. At a January 15, 2005 BC meeting, a motion was passed to change the date of the Consulting Agreement to February 1, 2005. The initial payment to Titan under the Consulting Agreement was made on January 18, 2005.

³ While standing alone, this provision may not be evidence of management, it does provide context for Respondents' actions.

⁴ The parties actions in entering into a Management Agreement evidence their intent that Mercury manage the Casino.

- a revised gaming floor plan and games selection recommendations and operating recommendations;
- advertising and promotions activities for the remainder of 2005 and in summary form for 2006; and
- a branding plan for the new name, an outdoor advertising plan, and a promotions program and schedule.

Letter from Gavenchak to McGertt of 6/27/05 at 1-2.

Gavenchak's letter included a June 28, 2005 internal Titan memorandum addressed to himself, Lino Vazquez and Tony DeMartino from Mercury CEO Doug Pattison in which Pattison wrote, "[w]e met again with [the tribal accountants] to review the most recent financial statement and noted several items of interest." These items included the need to adjust staffing levels, impose tighter controls on concession products, and re-negotiate vendor commissions. Pattison added that "[w]e began discussions to identify a new full service bank to better handle the current and future needs of the [C]asino." Enclosed with the memorandum were bank proposals that Pattison and Gavenchak, as Mercury representatives, had negotiated on behalf of the Tribe. Pattison advised that "[i]mmediate steps [must] be taken to address the above observations."

With the January 15, 2005, Consulting Agreement set to expire in three days, Gavenchak expressed the need for Titan to have greater involvement in the casino:

[t]here are several critical initiatives in place that are required to insure [sic] the ultimate goals for the gaming facility...to effect these requirements, our team members will be spending substantially more time in the [C]asino, require greater access to systems and staff as well as the time of the [BC].

(Letter from Gavenchak to McGertt of 6/27/05 at 3).

On July 22, 2005, an NIGC Field Investigator⁵ met with Enus Wilson, the Casino General Manager, who expressed frustration that the Tribe was paying Titan for suggestions he had already made to the BC. He informed the Field Investigator that if the BC extended the January 15, 2005 Consulting Agreement, he would resign. On July 29, 2005, an Addendum was executed extending the term, and on August 15, 2005, Wilson resigned.

The July 29, 2005 Addendum extended the January 15, 2005 Consulting Agreement "until the earlier of i) June 30, 2006, and [sic] ii) such time as the Gaming Facility Management Agreement between [the Tribe and Mercury] dated June 3, 2005 is approved by the [NIGC] . . ."

The Addendum also gradually increased Titan's monthly payment from \$15,000 to \$50,000, with the condition that "in the event that gaming revenues are less than

⁵ The NIGC has recently changed the title of this position from Field Investigator to Compliance Officer.

\$500,000.00 in any calendar month after June 2005...Titan's compensation shall be reduced to \$15,000.00 for said month." In this way, Titan's performance was tied to revenue such that the better Titan and the Casino performed, the more money Titan would make, a fundamental element of management agreements. See NIGC Bulletin 94-5 ("The presence of all or part of these activities in a contract with a tribe strongly suggests that the contract or agreement is a management contract requiring Commission approval. Such activities or requirements with respect to the gaming operation include, but are not limited to, the following: . . . Compensation based on a percentage fee (performance) . . .").

Approximately six months later, a second Addendum was executed. This March 1, 2006 Addendum set Titan's compensation at \$50,000 per month and eliminated the link between compensation and gaming revenues. During an interview with NIGC personnel, Acting Town King George Scott explained that this change was made out of concern "that a performance type of contract . . . would probably be considered a management contract."

The February 22, 2006 Addendum also extended the term of the January 15, 2005 Consulting Agreement by an additional year and eliminated the reference to bridging the Consulting Agreement to the June 3, 2005 Mercury Management Agreement. This particular modification had no real effect, however, because neither the Tribe nor Mercury had yet submitted the Mercury Management Agreement to the NIGC for review and approval. Therefore, there was no possibility that it could be approved.

NIGC Office of General Counsel Reviews January 15, 2005 Consulting Agreement and Addenda

On July 31, 2006, the NIGC Office of General Counsel wrote to the Tribe, Titan, and Mercury expressing concern that "Titan [was] exerting management over the [Casino]." This concern was based on a review of monthly reports detailing Titan's work at the Casino from August, September, and October of 2005, as well as copies of the January 15, 2005 Consulting Agreement, and the July 29, 2005 and February 22, 2006 addenda.

The NIGC OGC letter opined that the terms of the Consulting Agreement – its lengthy period and broad scope – were indications of a management relationship. It also noted that, based on information in Titan's monthly reports, it appeared that:

Titan is planning and coordinating fundamental aspects of the Tribe's gaming facility and is therefore a de facto manager, because [Titan] possesses the ability to develop policies and procedures and recommends action that is then implemented by others possessing actual authority.

The letter recommended that, "the parties immediately reassess their relationship and advise us of what action, if any, they will be taking to alleviate our concerns."

The Tribe responded on August 18, 2006, and, while not denying the factual bases for the NIGC OGC's concerns, asserted that "Titan has not engaged in any management activities under its Consulting Agreement with the [Tribe]" because Titan's activities were limited to presenting recommendations (or identifying options) and had no decision-making authority.

The Tribe also pledged that it would soon make the Management Agreement available to the NIGC for its review and approval and added that, in the future, it would:

review the activities of Titan under the Consulting Agreement and establish a more effective communication process between Titan and the [BC]. The communication process will clearly demonstrate that Titan acts only when requested to do so by the [BC], that Titan responds to [BC] requests with written proposals and/or recommendations, and that the [BC] acts affirmatively in either accepting or rejecting the proposals brought by Titan at the BC's request.

In separate letters, Mercury and Titan both concurred with the Tribe's position. (Letter from Pattison to Dittler of 8/21/06) and (Letter from Gavenchak to Dittler of 8/22/06). A review of Titan's monthly reports and other evidence establish that the parties did not establish a communication process that would demonstrate the relationship was merely a consulting one. In fact, the evidence shows the opposite: that Titan/Mercury openly managed the Tribe's Casino and did not recommend so much as decide what needed to be done and then do it.

On September 29, 2006, over one year after it was executed, the Tribe sent a copy of the Mercury Management Agreement to the NIGC for its review.

On October 4, 2006, the NIGC OGC sent a letter to all parties reiterating the concerns expressed in the July 31, 2006 letter and informing them that the matter had been "referred to the Directors of the Divisions of Enforcement and Contracts for purposes of monitoring."

On December 27, 2007, the Tribe and Titan signed a new Consulting Agreement for a term of four years, with compensation at \$50,000 a month, including all travel and out-of-pocket expenses. While the language of this Consulting Agreement was similar in many respects to the January 15, 2005 Consulting Agreement, it was different in one important respect: it eliminated references to fixed time periods for achieving discrete goals. For instance, the marketing analysis, which in the January 15, 2005 Consulting Agreement was to be completed within two months, was now open-ended.

With respect to the out-of-pocket expenses, beginning in January 2008 and through June 1, 2011, Titan consistently invoiced the Tribe for expenses in the amount of \$3,340 per month. This monthly amount is just shy of the \$3,500 expense amount identified in the Consulting Agreement as requiring tribal pre-approval. The NIGC has obtained documentation showing that when Vazquez incurred travel-related out-of-

pocket expenses, such expenses were reimbursed by Titan, which in turn invoiced the Tribe separately from the \$3,340 amount and was reimbursed by the Tribe. Former Casino CFO Dillon Byrd stated to the NIGC that in his opinion, Titan/Mercury's travel related expenses should be paid from Titan's consulting fee and not be paid by the Tribe as a separate expense.

Over the next several years, the Tribe did not follow through on its commitment to "establish a more effective communication process between Titan and the BC." Virtually no catalog of Titan recommendations was kept and there is no documentation showing specifically what Titan recommended, to whom, when, how it was considered or whether it was accepted or implemented. In fact, the BC made very few attempts to conduct oversight over Titan/Mercury and, in general, was merely updated at monthly BC meetings by Titan/Mercury about its Casino management activities as reflected in Titan monthly reports. As Doug Pattison explained to BC members at a March 6, 2007 meeting, "you pick the time and we'll be there and just explain what we've done the past month and what's going on." At the same meeting Pattison also stated "normally we come in and we really talk more short term we talk about how did last month go, and what we plan on doing in the next month or two months" See March 6, 2007 audiotape of Business Committee meeting.

Although Acting Town King George Scott and Tribal Treasurer Ron Barnett both told NIGC representatives that most of the recommendations made by Titan were not documented because they were oral and typically made in a casual, informal way throughout any given day, their statements conflict with Pattison's statement as well as the monthly reports prepared by the Respondents.

Lastly, the NIGC requested that the Tribe and the Respondents produce all email communications between their respective personnel. An examination of what was produced did not reveal any communications showing recommendations made by Respondents and approval by the BC prior to implementation.

In 2011, in lieu of providing the NIGC documentation showing the implementation of the "more effective communication process," the Tribe advised the NIGC that, "[t]he recommendations made by Titan are generally contained in the monthly reports. Casino management (general manager, marketing, etc.) would generally decide whether to follow the recommendations."

As set forth below, Titan/Mercury's constant and wide-ranging "recommendations" constituted management. The extent and the consistency with which Casino personnel followed these "recommendations" demonstrate Respondents' actual control over Casino operations and management decisions relating to hiring, firing, and coordinating and planning other Casino activities and policies. Interviews with former Casino General Managers and a former Promotions Manager further demonstrate Respondents' de facto and de jure management of the Casino.

G. Summary of Violation

Based on a thorough review of the record before me, I conclude that Mercury, Mercury's representatives, and the Tribe violated the IGRA and NIGC regulations by failing to timely submit to the NIGC the Management Agreement executed between them on June 3, 2005, and that Respondents and the Tribe violated the IGRA and NIGC regulations by Respondent's *de facto* and *de jure* management of the Casino without an NIGC approved management contract; Respondent's *de facto* and *de jure* management of the hiring and firing of Casino managers and control over job changes; Titan/Mercury, Pattison and Vazquez's *de jure* management of Casino marketing and advertising; Respondent's *de jure* management of the Casino's contractual relationships with gaming machine vendors; and Titan/Mercury and Pattison's *de facto* management of the Casino's budget.

Untimely submission of Management Contract

NIGC regulations provide that a tribe or a management contractor shall submit a management contract to the Chair for review within 60 days of execution by the parties. 25 C.F.R. § 533.2. On June 3, 2005, the Tribe and Mercury executed a Management Agreement for the Casino. On September 29, 2006, over one year after it was executed, the Tribe submitted a copy of the Mercury Management Agreement to the NIGC for its review. Because neither Mercury, Tony DiMartino, Michael Gavenchak nor the Tribe timely submitted the Management Agreement, all are in violation of NIGC regulations. 25 C.F.R. § 533.2.

Respondents' de facto and de jure management of the Casino without an NIGC approved management contract

IGRA and NIGC regulations prohibit the management of any part of an Indian gaming operation by a third party without benefit of an NIGC approved management contract. 25 U.S.C.

§§ 2710 (d)(9) and 2711, and 25 C.F.R. § 573.6(a). Respondents exerted management control and decision-making authority over the hiring and firing of Casino management, a management function, from September 2005 to October 2010, without an NIGC approved management contract. Furthermore, the Tribe allowed Respondents to exert such control in violation of IGRA and NIGC regulations.

Following Wilson's departure on August 15, 2005 the Casino operated for several weeks without a General Manager. On September 9, 2005, Assistant General Manager Darin Price was promoted briefly to Acting General Manager, and then promoted to General Manager on September 22, 2005. During this time, a Titan/Mercury staffer was on-site approximately 70% of the time that the Casino was open. On October 11, 2005, only 19 days after Price was promoted to General Manager, he was replaced by Joe Cavilla.

Acting Town King George Scott and Tribal Administrator Ron Barnett acknowledged their reliance on Titan's expertise to run the Casino during this time of transition. As Barnett stated, Vazquez was so often on-site at the Casino, operating out of office space he shared with Barnett and the Acting Town King, because the Tribe needed him to *implement* the Titan recommendations. Implementation of recommendations is a management function.

Following Wilson's departure, the Tribe requested Titan assist in identifying someone for the position. Mercury CEO Doug Pattison recommended Joe Cavilla, a former employee of Doug Pattison. No other prospective General Managers were interviewed or presented to the BC. The job opening was not advertised. On October 11, 2005, the BC hired Joe Cavilla as the new General Manager. Cavilla was terminated on August 13, 2006, shortly after the OGC letter expressing concern was sent to the Tribe and Titan/Mercury.

In approximately August 2006, Darin Price was again promoted to Casino General Manager. Price voiced his complaints to others at the Casino that Titan was "double-billing" the Tribe. Price was fired between late April and mid-May, 2008.

Carl Noon was promoted to the Acting General Manager position in late April of 2008. Upon his promotion, Pattison visited the Casino and talked to Noon about Casino operations. Pattison told Noon that Titan's relationship to the Tribe was similar to a partnership.

Town King Scott explained during an interview with NIGC personnel that of all the Casino General Managers between 2005 and 2010, only Cavilla demonstrated expertise in comprehending financial statements, interpreting gaming machine data, understanding cash flows, negotiating with vendors, and successfully marketing and promoting the Casino. Also according to Town King Scott, only Cavilla possessed the ability to take advice and implement it. Acting Town King Scott believed that things improved after the BC hired Titan because it was always a struggle to get the General Managers to take and follow advice, and recommendations, and to put those recommendations into action. From Town King Scott's point of view, the Casino was successful when the General Managers followed what Titan recommended.

Against this backdrop, monthly reports between September 2005 and December 2010 reflect Respondents' involvement in a wide range of Casino management actions. As set forth more fully below, Titan/Mercury managed the following areas of the Casino:

- a. Budget preparation and process;
- b. Advertising and promotions;
- c. Vendor negotiations;
- d. Human resources;
- e. Cash systems negotiation; and
- f. Employee manuals and training.

When the Casino operated without a General Manager, Respondents actively managed the Casino as *de jure* managers. Later, the Tribe's leadership made it clear to the succession of Casino General Managers that they were to take and implement Respondents' recommendations, thereby making Respondents *de facto* managers. In this way, Respondents were both *de jure* and *de facto* managers of the Tribe's Casino from September 6, 2005, to December 31, 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. §§ 2710 (d)(9) and 2711, and 25 C.F.R. § 573.6(a) Furthermore, the Tribe allowed and actively encouraged Respondents to manage the Casino without an approved management contract from December 6, 2005 to December 31, 2010, in violation of 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

Respondents' de jure and de facto management of the hiring and firing of Casino managers and control over employee job changes

IGRA and NIGC regulations prohibit the management of any part of an Indian gaming operation by a third party without benefit of an NIGC approved management contract. 25 U.S.C.

§§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a). Respondents exerted management control over the hiring and firing of Casino management, a management function, from September 2005 to October 2010, without an NIGC approved management contract. Furthermore, the Tribe allowed Respondents to exert such control in violation of IGRA and NIGC regulations. Specifically, Respondents exerted management control over the hiring and firing of Casino managers Carl Noon, Harvey Thompson, and Darin Price, and over employee changes related to Kenna Smith and Mark Lantis.

Vazquez arranged to have a new position of Assistant Human Resources created and to have Noon promoted to that position. Vazquez subsequently told General Manager Darin Price to fire Assistant General Manager Thompson. Shortly thereafter, Vazquez informed Noon that he would take Thompson's former job as Assistant General Manager. Not long after Noon was promoted to Assistant General Manager, Vazquez informed Titan/Mercury representatives Gavenchak, DeMartino and Pattison that Price had "gone bad" and had attempted to convince the BC that Titan/Mercury was not necessary. In response, Gavenchak instructed Vazquez to get Price fired. Within three weeks, the BC fired Price. Noon was then promoted to General Manager. Approximately two months after receiving a substantial pay increase, Noon was fired after speaking with NIGC representatives about Titan/Mercury's activities at the Casino.

Vazquez, as a Titan/Mercury representative, also exerted control over job changes within the Casino. While General Manager Noon was away from the Casino and without his permission, Vazquez transferred Promotions Manager Kenna Smith to an entirely different job monitoring the Casino's compliance with federal tax reporting mandates. Upon her transfer, Vazquez directed General Manager Noon to re-hire former Casino promotions employee Mark Lantis, which he did.

Through direct actions and influence over BC decisions, Respondents exerted management control and decision-making authority over the hiring and firing of Casino management from September 2005 to October 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. §§ 2710 (d)(9) and 2711, and 25 C.F.R. § 573.6(a). Furthermore, the Tribe allowed Respondents to exert such management control over decisions regarding the hiring and firing of Casino managers without an approved management contract from September 2005 to October 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710 (d)(9), 2711 and 25 C.F.R. § 573.6(a).

Respondents exerted de jure management control of Casino marketing and advertising through its control of promotions and billboard advertising

IGRA and NIGC regulations prohibit the management of any part of an Indian gaming operation by a third party without benefit of an NIGC approved management contract. 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a). Respondents exerted management control and decision-making authority over Casino marketing and advertising from August 2008 to February 16, 2010, without an NIGC approved management contract. Furthermore, the Tribe allowed Respondents to exert such control in violation of IGRA and NIGC regulations.

In particular, Respondents exerted management control over Casino promotions and billboard advertising. This control over promotions began in earnest after General Manager Price was terminated, at which point Vazquez told then Promotions Manager Smith that promotions would be done “in-house” by Titan personnel.

Around August 2008, Vazquez insisted, against General Manager Noon’s wishes, that the Casino give away motor scooters. After the scooter promotion ended, Noon advised Vazquez that it was not a successful promotion. Nevertheless, Vazquez ordered more scooters for a subsequent promotion.

At a December 3, 2009 BC meeting, Vazquez informed the BC that Joy Larios, a Mercury employee, was working with the Casino’s advertising and marketing department and with the General Manager on new promotions. According to Smith, Vazquez decided that Larios would put the promotions together and told Smith to forward her promotional ideas to Larios for Larios’ approval prior to placement of advertisements regarding the promotions. On December 8, 2009, Larios directed Smith’s work on promotions at the Casino; she asked Smith to work on rules and procedures for an upcoming promotion. Smith later explained that everything she did with marketing and promotions as the manager of that department was to be approved by Larios and Vazquez, although she did not always seek their approval.

At the December 3, 2009 BC meeting, Vazquez also reported that the Casino was investing more money in obtaining vendor participation in marketing and advertising. Further, he advised that Titan/Mercury had received a promise of an additional \$8,000 toward promotions from one vendor and were planning to get \$5,000 more from each of

the other vendors. Consistent with Vazquez's comments to the BC, he encouraged vendors to contribute more money to Casino promotions. According to Cletus Colbert, former Casino Compliance Officer, around May 2010, Vazquez urged Tribal Gaming Commissioner Scott to reduce the fees vendors pay to the Commission so that Vazquez could reasonably request that the vendors contribute money to Casino promotions. Later that month, Commissioner Scott did reduce the vendor fees.

Titan/Mercury, Vazquez and Pattison also controlled billboard advertising. From the beginning of his employment with the Casino, Noon understood that Vazquez and Titan were in charge of the billboard advertising. At one point, General Manager Noon suggested making a change to the billboards and Vazquez responded that he would first need to check with Titan. Noon stated that following this he was not allowed to make changes to the billboard graphics.

On February 16, 2010, Vazquez sent an email to Kristin Lamont, an account executive with Lindmark Outdoor Advertisements regarding art for the Casino billboards, which was designed by Titan's art department and approved by Doug Pattison.

Through his direct actions, Vazquez, at various times either as an employee of Mercury or Titan, exerted management control and decision-making authority over Casino marketing and advertising from August 2008 to February 16, 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9) and 2711; 25 C.F.R. § 573.6(a). In addition, at various times Mercury employee Joy Larios directed and approved Casino work, including directly contacting Casino game vendors and directing Casino employees. Furthermore, the Tribe allowed Vazquez, variously an employee of Mercury or Titan, to exert such management control over Casino marketing and advertising without an approved management contract from August 2008 to February 16, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710 (d)(9) and 2711, and 25 C.F.R. § 573.6(a).

Respondents' de jure management of the Casino's contractual relationships with gaming machine vendors

IGRA and NIGC regulations prohibit the management of any part of an Indian gaming operation by a third party without benefit of an NIGC approved management contract. 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a). Titan/Mercury representatives exerted management control and decision-making authority over the Casino's gaming machine vendors from September 2005 to February 17, 2010, in violation of IGRA and NIGC regulations. Furthermore, the Tribe allowed Titan/Mercury representatives to exert such control in violation of IGRA and NIGC regulations.

Titan/Mercury monthly reports tout progress in reducing gaming machine vendor percentages. In the September 2005 monthly report, Titan takes credit for reducing the percentage that the Casino paid to three machine vendors. In addition, in its October

2005 monthly report, Titan took credit for reducing the percentage for all but one game vendor. Later reports in 2009 and 2010 similarly tout Titan's work vis-à-vis gaming machines by stating that Titan/Mercury met with two game machine vendors to increase the number of gaming machines on the floor.

On December 3, 2009, Vazquez advised the BC that Titan/Mercury was re-negotiating the percentage split for Class III machines in an effort to reduce the vendor share on those machines. Vazquez further advised the BC that there likely would be another two to five machine vendors added pending on-going negotiations.

This activity is consistent with the expectation among Tribal leadership that the General Managers were to rely on Titan's expertise and experience in vendor negotiations. According to Acting Town King Scott, the Casino General Managers did not have the knowledge or the experience to negotiate vendor contracts and that Titan was able to get better terms for the Casino.

Through their direct actions, Vazquez at various times either as an employee of Mercury or Titan, and Wallace, a Mercury employee, planned, directed, and/or controlled the Casino's contractual relationships with gaming machine vendors at various times between September 2005 and February 17, 2010, without a management contract approved by the NIGC Chair in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

Furthermore, the Tribe allowed Vazquez and Joe Wallace, a Mercury slot machine expert, to plan, direct, and control the Casino's contractual relationships with gaming machine vendors without an approved management contract from September 2005 to February 17, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. § 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

Titan/Mercury and Pattison's de facto management of the Casino's operating budget

IGRA and NIGC regulations prohibit the management of any part of an Indian gaming operation by a third party without benefit of an NIGC approved management contract. 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a). Titan/Mercury and Pattison exerted management control and decision-making authority over the development of the Casino's operating budget from September, 2005 to December 31, 2010 without an NIGC approved management contract. Furthermore, the Tribe allowed Titan/Mercury and Pattison to exert such control in violation of IGRA and NIGC regulations.

Titan monthly reports between September 2005 and December 2010 detailed its substantial control over the development of Casino operating budgets. For example, on August 29, 2007, Pattison forwarded via email a draft budget to Dylan Byrd, then Casino CFO and a number of other individuals including Michael Gavenchak and Vazquez, recommending they follow a similar budgeting process to years past. According to CFO Byrd, Pattison's draft budgets were routinely passed without any

substantial alteration and that the Casino adhered completely to those budgets throughout the years. Byrd further states that Pattison regularly resisted pressure from the BC to review his draft budgets.

Email messages confirm this process. The budget was presented to the BC two days after Pattison's email. The next day, Pattison was apprised of the BC's reaction to his budget. "Wanted to let you know that the budget meeting was a non-event...In the benediction they prayed for wisdom to know what to do with the budget. They were pleased that the distribution [of money from the Casino to the Tribe] was increasing. Let me know where we need to go from here. I certainly didn't get any direction [from the BC] last night."

Titan/Mercury and Pattison managed the Casino budget from September, 2005 to December 31, 2010 without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. §§ 2710(d)(9); 2711, and 25 C.F.R. § 573.6(a). Furthermore, the Tribe allowed Titan/Mercury and Pattison to manage the Casino budget without an approved management contract from August, 2005 to December, 31, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710(d)(9); 2711, and 25 C.F.R. § 573.6(a).

FIRST VIOLATION

The Tribe and Mercury violated NIGC regulations by failing to timely submit the Management Agreement executed between them on June 3, 2005

1. NIGC regulations provide that a tribe or a management contractor shall submit a management contract to the Chair for review within 60 days of execution by the parties. 25 C.F.R. § 533.2.
2. Town King George Scott explained that when the Tribe executed the January 15, 2005 Consulting Agreement with Titan, it was to be a bridge to a management contract.
3. On June 3, 2005, the Tribe and Mercury executed a Management Agreement for the Casino.
4. A July 29, 2005 Addendum extended the first Consulting Agreement until the earlier of June 30, 2006, or such time as the Management Agreement between the Tribe and Mercury, dated June 3, 2005 was approved by the NIGC. At this point, the Management Agreement had not been submitted to the NIGC for review.
5. On September 29, 2006, over one year after it was executed, the Tribe submitted a copy of the Mercury Management Agreement to the NIGC for its review.
6. The Tribe ultimately withdrew the Management Agreement in September 2009.

7. The Tribe did not submit the Management Agreement until more than a year after it was executed.
8. Therefore, because neither party to the Management Agreement timely submitted it, both parties are in violation of NIGC regulations. 25 C.F.R. § 533.2.

SECOND VIOLATION

Respondents and the Tribe violated IGRA and NIGC regulations — by Respondents' *de facto* and *de jure* management of the Casino without an NIGC approved management contract

Titan's management of Casino when no General Manager was overseeing Casino operations

1. Following Wilson's departure on August 15, 2005, the Casino operated for several weeks without a General Manager on staff. On August 24, 2005, then Tribal Administrator Ron Barnett issued a memorandum to all Casino employees entitled "Maintaining present schedules" in which he advised employees that the Business Committee had approved the "Titan Consulting Agreement," that Enus Wilson was no longer the Casino General Manager, and that during this transition phase "while the Titan Consulting Team [became] established", any questions should be directed to "Titan representative Lino Vazquez." On September 9, 2005, Assistant General Manager Darin Price was promoted to Acting General Manager, and then promoted to General Manager on September 22, 2005. During this time, a Titan/Mercury staffer was on-site approximately 70% of the time that the Casino was open. On October 11, 2005, only 19 days after Price was promoted to General Manager, he was replaced by Joe Cavilla.
2. Titan's September 2005 monthly report shows Titan involved at that time in a wide range of Casino management actions. The report notes Titan's completion of over 90% of these actions, as reproduced below:

Operations/Financial

- Implemented numerous promotions (e.g. jackpots, TGIF promo and buffet etc.) and other operations measures resulting in Casino's highest volume generating month in history. **COMPLETE**
- Developed three (3) year budget for approval **COMPLETE**
- Obtained architects/engineer plan to improve facility – see attached **COMPLETE**
- Temporarily relocated unacceptable break room and finalized other Casino floor improvements **COMPLETE**
- Outdoor advertising plan submitted for approval and execution **COMPLETE**
- Sign company plan for 90 foot backlit sign and to allow Tribe to finance **PENDING**
- Three Game vendors now at 20% [reduction from higher split of revenue] **COMPLETE**

- Reviewed August 2005 financial statement identifying profit enhancement opportunities **COMPLETE**
- Concession stand improvement plan - **PENDING**

HR and Staff

- Prepared and submitted Golden Pony Casino Employee Handbook for Legal Review - **COMPLETE**
- Identified and recruited General Manager – Joe Cavilla – with commercial casino experience. **COMPLETE**
- Corrected [Human Resources] function – successfully reduced staff count and excess payroll **COMPLETE**
- Rectified employee schedule issues and achieved improved service levels and operational efficiency **COMPLETE**
- Obtained Employee Uniform program and submitted for approval **COMPLETE**

Advertising and Public Relations

- Submitted Outdoor Campaign for approval and implementation **COMPLETE**
- Negotiated advertising rates with relevant local publications and Radio and implemented campaign **COMPLETE**
- Negotiating/reviewing prospect of large sign financing – see above **PENDING**

3. Subsequent Titan monthly reports detail similar management activities undertaken and either accomplished by Titan or pending completion by Titan. Following is a partial list of Titan accomplishments from Titan monthly reports between October 2005 and December 2010.

- Oct. 2005: All but one game vendor now at 20%
Outdoor Campaign approved and implemented
Local publications and radio campaign in place
- Dec. 2005: Met with reps from Global Cash Advance and Casino management. Awaiting final contract proposal
- April 2006: Continued monitoring and development of in-casino promotions
- June 2006: Begun preparation of new Operating Budgets for fiscal years ended Sept. 30, 2007-2009 for BC review and approval

Global Cash Advance contacted to train casino personnel
- Sept. 2006: Completed preparation of new Operating Budgets for fiscal years ended September 30, 2007-2009 for BC

review and approval

Global Cash Advance scheduled to train casino personnel

- Feb. 2007: Created budgeting process
Assisted in negotiation of signage
Fully develop direct mail program
- March 2007 Creating effective radio advertising campaign
- July 2007 Continue to improve current number and performance of gaming machines
- August 2007 Took over oversight of HR to successfully reduce staff count and payroll. Prepared and submitted 16 job descriptions for review and comment.
- Oct. 2007 Prepared operating budget for year ended September 30, 2008
- Dec. 2007 Identified new ATM provider. Casino will receive 100% of fees
- Feb. 2008 Creating effective radio advertising campaign
- July 2008 Continue to recommend effective marketing promotions and advertising
- March 2009 Prepared operating budget for year ended Sept. 30, 2010
Discussion with Class III slot machine manufacturers regarding installation and alternative financing
- August 2009 Class III slot machines ready for installation. Additional vendors reviewed for consideration and further analysis of Class II games in process
- Oct. 2009 New back office system (Table Trac) has been installed and employees are being trained
Repositioning of ATM on floor
- Feb. 2010 Continue to improve current number and performance of Dec. 2010 gaming machines. Met with AGS and VGT to increase # of games
Prepared operating budget for year ended Sept. 30, 2010
Continue to recommend effective marketing promotions and advertising

4. All Titan monthly reports in the NIGC's possession are attached to and incorporated in this notice of violation.

5. Monthly reports were not presented to the BC as options, but as actions already taken.
6. Tracey Hill states that during her tenure on the BC, the BC was left out of the Casino decision-making process. She states she “cannot recall a single instance in which Titan or Lino brought to us a recommendation for BC approval...or asked us for authorization to proceed with some action.”
7. Email records show that Pattison was working with Finley & Cook personnel between August 15, 2005 to October 11, 2005 (when no General Manager was on staff) to create the Casino budget; an action wholly outside the terms of the Consulting Agreement. For example, on September 6, 2005, Finley & Cook supervisor Paula Brown wrote to Pattison, “[c]ould you please clarify what years you want changed to 5,000 [*sic*] on Promotion expense for Oct, Nov, Dec.”
8. These management activities coincide with Gavenchak’s June 27, 2005 pledge that Titan would be “spending substantially more time in the [C]asino.”
9. Without a General Manager during this time to make these management decisions, tribal leaders at that time - Acting Town King George Scott and Tribal Administrator Ron Barnett - acknowledged their reliance on Titan’s expertise to run the Casino. (This reliance continued through a succession of General Managers). As Barnett stated, Vazquez was so often on-site at the Casino, operating out of office space he shared with Barnett and the Acting Town King, because the Tribe needed him to *implement* the Titan recommendations.
10. Although the Tribe has asserted that the monthly reports contain Titan’s recommendations, which were then either accepted or rejected, the reports themselves say otherwise. The reports are phrased as items to accomplish, and then it is noted whether that item was completed or is still pending.

Joe Cavilla’s Tenure as General Manager

11. Unable to recruit a General Manager, the Tribe requested Titan assist in identifying someone for the position.
12. Mercury CEO Doug Pattison recommended Joe Cavilla, a former employee of Doug Pattison. No other prospective General Managers were interviewed or presented to the BC. The job opening was not advertised. On October 11, 2005, the BC hired Joe Cavilla as the new General Manager.
13. During Cavilla’s tenure as Casino General Manager, Titan reimbursed him monthly for various living expenses, including rent, gas, food, and utilities as well as travel-related expenses of airfare and parking.
14. Town King Scott explained during an interview with NIGC personnel that of all the Casino General Managers between 2005 and 2010, only Cavilla demonstrated expertise

in comprehending financial statements, interpreting gaming machine data, understanding cash flows, negotiating with vendors, and successfully marketing and promoting the Casino. Also according to Town King Scott, only Cavilla possessed the ability to take advice and implement it. Acting Town King Scott believed that things improved after the BC hired Titan because it was always a struggle to get the General Managers to take and follow advice, and recommendations, and to put those recommendations into action.

15. From Town King Scott's point of view, the Casino was successful when the General Managers followed what Titan recommended.

16. In discussions with the NIGC in November 2011, Tribal Treasurer Ron Barnett described the process in more detail:

Usually, most of the recommendations were made on a day to day basis between the consultant and the General Manager or, and, would tie in to [the] Mekko and Treasurer...for example... it looks like the carpet needs cleaning. So...you guys do business with anybody? No. Let's... see who's out there. And, do you have Tribal members that do that kind of thing? No. Well, then I recommend, you know, let's ask around and see who does good work around here and see if we can get somebody. We recommend that the carpets need cleaning, you know, things as obvious as that.

17. Cavilla was terminated after approximately one year as General Manager, and shortly after the OGC letter expressing concern was sent to the Tribe and Titan/Mercury. His termination is not reflected in any BC meeting minutes provided to the NIGC. George Scott advised the NIGC that he asked Cavilla to resign. Some time in 2009, Pattison re-hired Cavilla as a Mercury slot machine expert.

18. Lino Vazquez, who at that time was Mercury's Director of Business Development, then brought Cavilla back to the Casino as a consultant for Titan.

19. According to Barnett, in this capacity, from his termination as General Manager through September 2011, several times a year Cavilla visited the Casino to determine the mix and placement of games on the Casino floor.

Darin Price's and Carl Noon's Tenures as General Manager

20. In approximately August 2006, Darin Price was promoted to Casino General Manager.

21. According to Price, at a gaming convention in the fall of 2006, Pattison introduced him to Joy Larios, a Las Vegas based promotions expert doing business as "Rooftop Creative", and also employed by Mercury as its director of promotions.

22. In approximately March 2007, Price told Kenna Smith, then Casino promotions manager, that he and Vazquez had decided that Smith should contact Larios and have her handle advertisement layout, posters and direct mailing for the Casino. Smith did so.
23. Price resented that the Casino paid Larios for these services because while apparently acting pursuant to her role as owner of Rooftop Creative, Larios had initially identified herself as a Mercury employee. Price felt that if she was employed by Mercury, her services should have been included as part of Titan's monthly fee.
24. Price voiced his complaints to others at the Casino that Titan was "double-billing" the Tribe. He also claimed to colleagues that he had evidence that Tribal leaders George Scott and Ron Barnett had accepted gifts from Titan. Price was fired between late April and mid-May, 2008.
25. Carl Noon was promoted to the Acting General Manager position in late April of 2008 with minimal prior experience in casino general management. Upon his promotion, Pattison visited the Casino and talked to him about Casino operations. Pattison told Noon that Titan was there to help him and that their relationship was similar to a partnership.
26. Upon becoming General Manager in June of 2008, Noon's interactions with Vazquez increased dramatically and they communicated on a daily basis. Vazquez promised Noon that he would obtain for Noon a higher salary.
27. Noon noticed that Scott or Barnett would contact Vazquez about Casino business and then Vazquez, in turn, would bring these matters to Noon's attention. This led Noon to believe that Vazquez had more management authority than he did.
28. Whether one is a manager is not controlled by the specific job title of the position held by the employee. *Waldau v. M.S.P.B.*, 19 F.3d 1395 (Fed.Cir. 1994). Rather, the question is answered in terms of actual job responsibilities, authority, and relationship to management. *Id.* at 1399. An employee can qualify as management if he recommends discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a de facto manager. *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).
29. As set forth above, Titan/Mercury managed the following areas of the Casino:
 - a. Budget preparation and process;
 - b. Advertising and promotions;
 - c. Vendor negotiations;
 - d. Human resources;
 - e. Cash systems negotiation; and
 - f. Employee manuals and training
30. When the Casino operated without a General Manager, Titan/Mercury managed the Casino. Later, the Tribe's leadership made it clear to the succession of Casino General

Managers that they were to take and implement Titan/Mercury's recommendations. In this way, Titan/Mercury was both a de jure and a de facto manager of the Tribe's Casino from September 6, 2005, to December 31, 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a)

31. Furthermore, the Tribe allowed and encouraged Titan/Mercury to manage the Casino without an approved management contract from December 6, 2005 to December 31, 2010, in violation of 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

THIRD VIOLATION

Titan/Mercury and the Tribe violated IGRA and NIGC regulations by Titan/Mercury's de facto management of the hiring and firing of Casino managers

Hiring and Firing of Casino Managers and Control over Employee Job Changes.

1. Carl Noon was hired in February 2007 as a night shift floor supervisor. Vazquez told him that he would get Noon "off the floor" and into an office job. Shortly thereafter, General Manager Price informed Noon that a new position would be created for him and in July 2007, Noon was promoted to the newly created position of Assistant Human Resources Director.
2. In December 2007, Vazquez informed Price that Tribal Gaming Commissioner Clarence Yarholar did not like the Casino's Assistant General Manager, Harvey Thompson. Vazquez told Price that he must fire Thompson.
3. Shortly after this meeting, Vazquez told Noon that Noon would be replacing Thompson as Assistant General Manager. After Price fired Thompson, Vazquez told Noon, "we're going to get *you* in that office."
4. A few weeks later, Price informed Noon that he was to be promoted to Assistant General Manager and in January 2008, Noon became the Assistant General Manager.
5. On April 10, 2008, Vazquez sent an email to Gavenchak, DeMartino, and Pattison alerting them that, "Darin has gone bad! It seems he has been trying to convince some people on the [BC] that we are not necessary and that he is capable of running things himself."
6. Gavenchak replied to Vazquez, "Get him fired asap if true."
7. Over the next several weeks, Vazquez remained at the Tribe and met daily with tribal leaders.
8. Less than three weeks later, on April 29, 2008, the BC voted to fire Price effective the following day. It does not appear as though Price was immediately fired however,

because on May 5, 2008, Town King Vernon Yarholar requested the Tribal Attorney to prepare a legal memorandum advising the Tribe on the “potential separation of Darin Price.” A representative of Titan/Mercury also requested similar advice from the tribal attorney because in his May 9, 2008 memorandum the tribal attorney states he received a request for [Price’s] termination by the Tribe’s gaming consultants and prospective managers.

9. The legal memorandum cautioned the Tribe that Titan/Mercury has served as ‘consultants’ for almost four years and that based on the email exchange [between Vazquez and Gavenchak] one could consider Titan/Mercury to be exercising management functions by ordering that Mr. Price should be ‘fire[d] asap!’
10. The tribal attorney advised the Tribe that firing Price could be construed as retaliation for his whistle-blowing on Mercury/Titan’s alleged conduct.
11. In April 2010, while Noon was at a meeting in San Diego, Vazquez arranged to have Smith transferred from her position as Casino promotions manager to a job ensuring the Casino’s compliance with federal income tax reporting requirements.
12. Vazquez then directed Noon to re-hire former Casino employee Mark Lantis, who had handled promotions before Smith. Although Noon was reluctant, Vazquez insisted. In April 2008, just prior to Price’s termination, Vazquez told Noon that the BC would promote Noon to Acting General Manager.
13. On April 29, 2008, the BC voted to promote Noon to Acting General Manager. At this meeting Town King Vernon Yarholar told Noon that he was to “work with Titan.”
14. In July or August 2010, Vazquez told Noon he was working to get Noon a pay raise. Vazquez said he would address the issue at an upcoming BC meeting. Approximately a month later, Noon received a 25% raise.
15. In October 2010, approximately two months after receiving this substantial pay raise, Noon met with NIGC representatives to discuss Titan’s activities at the Casino.
16. Approximately a month later, Noon was called into a meeting with Vazquez, Town King Scott and BC Member/Tribal Treasurer Barnett. He was asked what NIGC representatives had discussed with him and what information Noon had provided. They telephoned attorney David McCullough and he participated in the conversation as well.
17. About three weeks after the meeting, and only a few months after receiving a 25% pay raise, Noon was fired.
18. In late 2011, BC Member/Tribal Treasurer Barnett told NIGC representatives that Noon was terminated because “he...had some personal problems[.]”

19. Acting Town King Scott painted a different picture of why Noon was fired. He explained that management of the Casino overwhelmed Noon.
20. Whether one is a manager is not controlled by the specific job title of the position held by the employee. *Waldau v. M.S.P.B.*, 19 F.3d 1395 (Fed.Cir. 1994). Rather, the question is answered in terms of actual job responsibilities, authority, and relationship to management. *Id.* at 1399. An employee can qualify as management if he actually has authority to take discretionary actions - thus being a *de jure* manager - or he *recommends* discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980))
21. Through his direct actions and his influence over BC decisions, Vazquez, at various times either as an employee of Mercury or Titan, exerted management control and decision-making authority over the hiring and firing of Casino management from February 2007 to October 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).
22. Vazquez arranged to have a new position of Assistant Human Resources created, and to have Noon promoted to that position. Vazquez subsequently told General Manager Price to fire Assistant General Manager Thompson. Shortly thereafter, Vazquez informed Noon that he would replace Thompson as Assistant General Manager. Not long after Noon was promoted to Assistant General Manager, Vazquez informed Gavenchak, DeMartino and Pattison that Price had “gone bad” and was trying to convince the BC that Titan/Mercury was not necessary. Gavenchak instructed Vazquez to get Price fired. Within three weeks, the BC fired Price. Noon was then promoted to General Manager. Approximately two months after receiving a substantial pay increase, Noon was fired after speaking with NIGC representatives about Titan/Mercury’s activities at the Casino
23. In addition, while General Manager Noon was away from the Casino and without his permission, Vazquez transferred Promotions Manager Smith to an entirely different job monitoring the Casino’s compliance with federal tax reporting mandates. Upon her transfer, Vazquez directed General Manager Noon to re-hire former Casino promotions employee Mark Lantis.
24. The Tribe allowed Respondents, to exert such management control over decisions regarding the hiring and firing of Casino managers without an approved management contract from February 2007 to October 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710(d)(9), 2711 and 25 C.F.R. § 573.6(a).

FOURTH VIOLATION

Titan/Mercury violated IGRA and NIGC regulations by managing Casino marketing and advertising

Titan/Mercury controls Casino promotions

1. After General Manager Price was terminated, Vazquez told Smith to send to him via email any promotional ideas she was considering and told her that promotions would now be done in-house, by Titan personnel.
2. Around August 2008, Vazquez decided the Casino should give away promotional motor scooters. Noon was opposed to the idea but Vazquez insisted. Smith came to work one day to find an invoice on her desk from *Atlanta on Wheels*. When Smith asked Noon about the scooters, he told her that Vazquez wanted to use them in a promotion.
3. Noon and Smith did not think the scooter promotion went well and Noon so advised Vazquez. Nevertheless, Vazquez ordered more scooters.
4. At a November 24, 2009 BC meeting, Vazquez, referring to Mercury's Joy Larios, informed the BC that Larios was working with the Casino's advertising and marketing department and the General Manager to set up new promotions and to get them on the Casino calendar for the following six months.
5. Two weeks later, on December 8, 2009, Larios directed Smith's work at the Casino. She asked Smith to work on rules and procedures for an upcoming promotion.
6. Smith discussed this with Noon, who related that Vazquez wanted Larios to put the promotions together and that Smith was to forward the promotional ideas to Larios for Larios' approval prior to placement of advertisements regarding the promotions.
7. Smith later explained that everything she did with marketing and promotions as the manager of that department had to be approved by Vazquez and Larios.
8. At a December 3, 2009 BC meeting, Vazquez reported on marketing and advertising, stating that vendors' participation in promotions the prior year was weak but that it was getting better. Vazquez further reported that more money was being invested in obtaining vendor participation in marketing and advertising. Further, he advised that they had received a promise of an additional \$8,000 from one vendor and were planning to get \$5,000 more from the rest of the vendors. He ended by reassuring the BC that Titan planned to continue receiving vendor investment in marketing and advertising throughout the upcoming year.
9. Vazquez encouraged vendors to contribute more money to Casino promotions. Cletus Colbert, Compliance Officer from May 23, 2008 until March 10, 2011,

recalls attending a May 2010 meeting with Vazquez, Noon, and Tribal Gaming Commissioner Alan Scott. Prior to the meeting, Vazquez told Colbert that Colbert should tell Commissioner Scott to reduce the fees vendors paid to be licensed to do business with the Tribe as an incentive for the vendors to increase their investment in Casino promotions. Colbert told Vazquez that Vazquez should tell Scott himself. During the meeting Vazquez, with Noon's backing, urged Commissioner Scott to reduce the fees. Later that month, Commissioner Scott reduced the fees and sent an email to Colbert relaying the decrease in vendor fees.

10. Meanwhile, Mercury's Joy Larios was directly contacting game vendors on behalf of the Casino in efforts to organize Casino promotions.

Titan/Mercury Controls Billboard Advertising

11. From the beginning of his employment with the Casino, Noon understood that Vazquez and Titan were in charge of the billboard advertising. At one point, Noon suggested making a change to the billboards and Vazquez responded that he would first need to check with his Titan advertising team. Noon stated that following this he was not allowed to make changes to the billboard graphics.
12. On February 16, 2010, Vazquez sent an email to Kristin Lamont, an account executive with Lindmark Outdoor advertisements, to let her know that he would have Titan's art department forward new layout in the next several days. After Titan's art department finished the billboard design, it was forwarded to Vazquez who in turn forwarded it to Doug Pattison for his approval.
13. Through his direct actions, Vazquez, at various times either as an employee of Mercury or Titan, exerted management control and decision-making authority over Casino marketing and advertising from August 2008 to February 16, 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9) and 2711; 25 C.F.R. § 573.6(a). In addition, at various times Mercury employee Joy Larios directed and approved Casino work, including directly contacting Casino game vendors and directing Casino employees.
14. Furthermore, the Tribe allowed Vazquez, variously an employee of Mercury or Titan, to exert such management control over Casino marketing and advertising without an approved management contract from August 2008 to February 16, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

FIFTH VIOLATION

Titan/Mercury and the Tribe violated IGRA and NIGC regulations by Titan/Mercury's management of the Casino's contractual relationships with gaming machine vendors

1. Early Titan monthly reports tout progress in reducing gaming machine vendor fees. In the September 2005 monthly report, Titan takes credit for reducing the percentage 3 Casino vendors received from the gaming machines they provided.
2. In the October 2005 monthly report, Titan takes credit for having reduced that fee on all but one game vendor.
3. Later reports in 2009 and 2010 similarly tout Titan's work vis-à-vis gaming machines by stating that Titan met with AGS and VGT, two game machine vendors, to increase the number of gaming machines on the floor.
4. Titan/Mercury's routine presentations to the BC typically included updates about on-going vendor negotiations and game machine planning. At a December 18, 2008, BC meeting, Vazquez stated that Titan was "looking at" game machine vendor MultiMedia, as well as Cadillac Jack and others.
5. Approximately a year later, at a December 3, 2009 BC meeting, Vazquez reported that game machine vendors were significantly more cooperative than initially expected. He advised that they were re-negotiating the percentage split for Class III machines, and were hoping to reduce the vendor share on those machines to 15%.
6. Regarding the Class III machines, Vazquez advised the BC that they now had approximately 18 machines from Bally's, 10 from Cadillac Jack, another 10 from NOVA and that there likely would be another two to five machine vendors added pending on-going negotiations.
7. On January 26, 2010, Joe Wallace, a Mercury slot machine expert, emailed Noon a proposed agreement with gaming machine vendor JFW and recommended that "we have your legal representative review [this]." Noon forwarded it for legal review. According to Noon, Vazquez negotiated this agreement.
8. On February 17, 2010, Noon forwarded to Wallace and Vazquez a Bally Technologies vendor agreement and asked for review and advisement as to its contents. Wallace replied to Noon with instructions for continuing the negotiations stating that "I want to keep this moving through and we should probably have this decided by the end of the week."
9. It is not surprising Titan would be involved in vendor negotiations because of the expectation among Tribal leadership that the General Managers were to rely on Titan's expertise and experience in vendor negotiations. According to Acting Town King Scott, the Casino General Managers did not have the knowledge or the

experience to negotiate vendor contracts and that Titan was able to get better terms for the Casino than the General Managers could have.

10. On October 7, 2011, Titan submitted a letter to the Tribe terminating the Consulting Agreement. By that time, Titan had operated at the Casino under the various agreements and addenda for almost 7 years.
11. The Tribe paid Titan a total of approximately \$3.8 million, not including expenses of up to \$3,500 per month.
12. Through their direct actions, Vazquez at various times either as an employee of Mercury or Titan, and Wallace, a Mercury employee, planned, directed, and/or controlled the Casino's contractual relationships with gaming machine vendors at various times between September 2005 and February 17, 2010, without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).
13. Furthermore, the Tribe allowed Vazquez and Wallace to plan, direct, and control the Casino's contractual relationships with gaming machine vendors without an approved management contract from September 2005 to February 17, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. § 2710(d)(9) and 2711, and 25 C.F.R. § 573.6(a).

SIXTH VIOLATION

Titan/Mercury and the Tribe violated IGRA and NIGC regulations by Titan/Mercury's management of the Casino's budget

1. On August 29, 2007, Pattison wrote an email to Dylan Byrd, then Casino CFO; Sam Rowe, and Kevin Huddleson of Finley & Cook; and Michael Gavenchak and Vazquez, stating:

Gentlemen, [t]his was only the first pass at the 2007-2008 budget for the [Casino]. I've made critical changes to the attached budget and forwarded them to Kevin. However, Mercury Gaming has not yet finalized the plan and cannot accept any responsibility for any premature review of a work product that is not yet complete. Careful review and many years of experience resulted in a 2006-2007 [Casino] budget that was incredibly accurate in spite of many unforeseen obstacles during the fiscal year. We would recommend that the process for this budget season remain similar to prior years.
2. Pattison speaks as though Mercury is ordinarily responsible for the Casino's financial planning.
3. In the email, Pattison advises the others to avoid a "premature review" of his draft and to follow a similar process to years past.

4. According to CFO Byrd, Pattison regularly resisted pressure from the BC to review his draft budgets.
5. CFO Byrd also noted that Pattison's draft budgets were routinely passed without any substantial alteration and that the Casino adhered completely to those budgets throughout the years.
6. Subsequent emails confirm this process. Two days after Pattison's email, on August 31, 2007, the budget was presented to the BC. The next day, Finley & Cook manager Kevin Huddleson apprised Pattison of the BC's reaction to his budget. "Wanted to let you know that the budget meeting was a non-event...In the benediction they prayed for wisdom to know what to do with the budget. They were pleased that the distribution [of money from the Casino to the Tribe] was increasing."
7. Huddleson concluded the email by asking Pattison, "Let me know where we need to go from here. I certainly didn't get any direction [from the BC] last night."
8. Kenna Smith, former Casino promotions manager, recalls that at the beginning of Carl Noon's tenure as General Manager, Noon told her he was unhappy because Sam Rowe of Finley & Cook reported casino financial information directly to Vazquez, rather than to Noon.
9. Titan monthly reports detailed its substantial input and influence over the Casino budgeting process:

Sept 2005:	Developed 3 year budget
June 2006:	Begin preparation of new operating budgets for fiscal years ended September 30 2007, 2008 and 2009
Sept. 2006:	Completed preparation of new Operating Budgets for fiscal years ended September 30, 2007-2009 for BC review and approval
July-Aug 2006:	Completed preparation of new operating budgets for 2007-2009
Feb. 2007:	Created budgeting process
Sept. 2007:	Continued to develop three year budgets
Oct.-Dec. 2007:	Prepared operating budget for year ended September 30, 2008

March 2009: Prepared operating budget for year ended September 30, 2010

Dec. 2010: Prepared operating budget for year ended September 30, 2010

10. Titan/Mercury actively managed the Casino budget from September 6, 2005 to December 31, 2010 without a management contract approved by the Chair in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9); 2711, and 25 C.F.R. § 573.6(a).

11. Furthermore, the Tribe allowed Titan/Mercury to actively manage the Casino budget without an approved management contract from August, 2005 to December, 31, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. § 2710(d)(9); 2711, and 25 C.F.R. § 573.6(a).

H. Measures Required to Correct the Violations

There is no cure for these violations. Titan and Mercury either directly managed part of the Casino or acted as de jure managers of part of the Casino, and such actions cannot be cured.

There is no cure for the failure to timely submit the Management Agreement because the time to submit the Management Agreement has lapsed.

I. Appeal

Within 30 days after service of this NOV, any party served with this NOV may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal, and, if desired, request for hearing to the National Indian Gaming Commission, 1441 L Street NW, Ninth Floor, Washington, DC 20005. Appellants have a right to assistance of counsel in such an appeal. A notice of appeal must reference this Notice of Violation.

Within ten days after filing a notice of appeal, an Appellant must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If an Appellant wishes to present oral testimony or witnesses at the hearing, it must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. An appellant may waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

J. Fine-Submission of Information

The violations cited above may result in the assessment of a civil fine against the Tribe and Respondents in an amount not to exceed \$25,000 per violation per day. Under 25 C.F.R.

§ 575.5(a), the Tribe and Respondents may submit written information about the violation to the Chairwoman within 15 days after service of this notice of violation (or such longer period as the Chairwoman may grant for good cause). The Chairwoman shall consider any information submitted in determining the facts surrounding the violations and the amount of the civil fine, if any.

Dated this 22nd of August, 2012



Tracie L. Stevens, Chairwoman

cc: Alan Scott, Chairman, Thlopthlocco Tribal Town Tribal Gaming Commission (Agent for Service)

Certificate of Service

I certify that this **Notice of Violation** was sent by certified U.S. mail and return receipt requested, on this 22nd day of August 2012 to:

George Scott, Town King
Thlopthlocco Tribal Town
PO Box 188; Clearview Road
Okemah, Oklahoma 74859

Alan Scott, Tribal Gaming Commission
Chairman Thlopthlocco Tribal Town
P.O. Box 188
Okemah, Oklahoma 74859

S & H Atlanta, LLC, Agent for Service
Mercury Gaming Group, LLC
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Atlanta, GA 30328

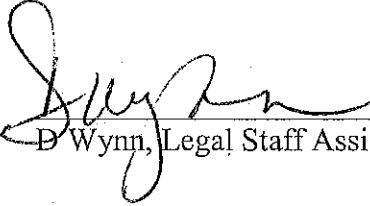
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