August 5, 2022

Joseph Webster, Esq.
Hobbs, Strauss, Dean and Walker
1899 L St. NW
Suite 1200
Washington, DC 20036

Re: Review of draft vendor agreement between the Seminole Tribe of Florida and Seminole Hard Rock Digital, LLC

Dear Mr. Webster:

This letter responds to your March 3, 2022 request on behalf of the Seminole Tribe of Florida (Tribe) for the National Indian Gaming Commission Office of General Counsel to review a draft vendor agreement between the Tribe and Seminole Hard Rock Digital, LLC (SHRD) (Agreement). Pursuant to the Agreement, SHRD will provide retail sportsbook and internet gaming services to the Tribe's gaming facilities. Specifically, you have asked for my opinion on whether the Agreement is a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act. You also asked for an opinion whether the Agreement violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

In my review, I considered the Retail Sportsbook and Online Gaming Services Agreement, Marked NAI-1518582429v14, and submitted March 3, 2022, which was unexecuted but represented to be in final form. As will be discussed below in detail, the submitted agreement is unique in that the Vendor, SHRD, is majority owned by the Tribe for which it will be providing services. As your March 3, 2022 request sets out, the Tribe sent this office a letter on February 10, 2021, in which it discussed its intent to enter into the vendor agreement. In that letter, you requested the NIGC Office of General Counsel evaluate the sole proprietary interest by looking to the overall economic benefit the Tribe receives through the totality of the relationship rather than only the percentage of revenues paid to SHR Digital for services.[1]

In response to the February 2021 request, I sent an email on July 29, 2021 stating that the NIGC's Office of General counsel "agree[s] that the underlying structure of the agreement does not by itself raise sole proprietary interest concerns, since the Tribe still receives the economic benefit of the gaming."[2] We also stated, though that "we would need see the entire agreement before we can do a full sole proprietary interest analysis, since other factors such as the term and the amount of control exercised by the vendor are taken into consideration as part of the analysis."[3]

[1] *See,* Letter from Joseph Webster, Esq. to Michael Hoenig, NIGC General Counsel, February 10, 2021.
[2] *See,* email from Michael Hoenig, NIGC General Counsel, to Joseph Webster, Esq. July 29, 2021.
[3] *Id.*

Subsequent to my July 29, 2021 email response, though, the Tribe (b) (4) On October 12, 2021, the Tribe sent a version of the vendor agreement (b) (4) In conversations, this office expressed its concerns (b) (4) Before the NIGC could complete its analysis, though, (b) (4). As a result, we ceased our review of the submitted agreement.

On March 3, 2022, the Tribe submitted the agreement between the Tribe and SHRD that is the subject of this letter. The Agreement is substantially similar to that submitted on October 12, 2021, (b) (4).

SHRD will be co-owned by the Tribe (through its business HR Digital Owner, LLC), which will hold (b) (4) of the economic interest in any EBITDA generated in Florida, and by Original Interactive Partners, LLC (OIP), which will hold (b) (4) OIP is itself jointly owned, but with no tribal ownership.[6]

The term of the Agreement (b) years.[7] In exchange for its services, SHRD will be entitled to three different categories of fees:

- (b) (4)
- (b) (4)
- (b) (4)[8]

Pursuant to the Agreement, SHRD will provide "non-management technology-related services directed by the Tribe and consult with the Tribe on the layout, design, and construction of the retail sportsbook.[9] It will also provide and install retail computer wagering equipment, wagering

[4] *See,* Letter from Joseph Webster, Esq. to Michael Hoenig, NIGC General Counsel, October 12, 2021
[5] *Id.*
[6] *See,* Letter from Joseph Webster, Esq. to Michael Hoenig, NIGC General Counsel, March 3, 2022
[7] *Retail Sportsbook and Online Gaming Services Agreement,* Article II.
[8] *Id.* at § 1.01.
[9] *See, Id.* at Recitals; § 3.02.

odds software, odds display systems and provide self-service wagering kiosks."[10] For its part, the Tribe will be responsible for the general day-to-day operations and management at each Retail Sportsbook.[11]

Management Contracts:

The NIGC has defined a "management contract" to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." [12] A "collateral agreement" is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[13]

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[14] A "primary management official" includes "any person who has the authority … [t]o set up working policy for the gaming operation."[15] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[16] Whether a particular employee is managerial is not determined by an employee's actual job title, but by the actual responsibilities, authority, and relationship to management.[17] Essentially an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a de jure manager – or, in certain circumstances, where the employee acts as a de facto manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.[18]

If a contract requires or permits the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of

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[10] *Id.*
[11] *Id.* at § 3.11.
[12] 25 C.F.R. § 502.15.
[13] 25 C.F.R § 502.5.
[14] *See* NIGC Bulletin NO. 94-5, "Approved Management Contracts v. Consulting Agreements (unapproved Management Contracts are Void)."
[15] 25 C.F.R. § 502.19(b)(2).
[16] *N.L.R.B.* v. *Bell Aerospace Co*., 416 U.S. 267, 288 (1974).
[17] See *Waldau* v. *M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).
[18] *Id.* at 1399 (*citing N.L.R.B.* v. *Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether to accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.

IGRA and requires the Chair's approval.[19] Management contracts that have not been approved by the Chair are void.[20]

Management Analysis:

The Agreement does not permit any management of any gaming activity by SHRD. The scope of services provided by SHRD is well defined. The Tribe shall at all times retain supervisory and ultimate decision-making authority over the gaming.[21] Accordingly, the Agreement does not raise any management concerns.[22]

Sole Proprietary Interest:

IGRA requires that a tribe have the sole proprietary interest in, and responsibility for, the conduct of any gaming activity.[23] Under this section of the Act, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place.[24] In reviewing sole proprietary interest, the OGC typically analyzes three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) a third party's right to exercise control over all or any part of the gaming activity.[25] Final agency actions by the NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a third party receives a high level of compensation for a long period of time and possesses some aspect of control.[26]

Sole Proprietary Interest Analysis:

The purpose of the sole proprietary interest requirement is to ensure that the Tribe, as opposed to a third party, maintains ownership and control over its gaming and remains the primary beneficiary of its gaming activity. As discussed above, the Agreement does not grant SHRD management authority over the Tribe's gaming. Similarly, nothing in the Agreement on its face grants SHRD any control over the Tribe's gaming. As for the term and the fee; under normal circumstances, the (b) (4) and fee of (b) (4) Revenues would raise significant concerns. Here, however, the Tribe owns (b) (4) of the vendor company, so will maintain the sole proprietary interest through the Vendor company it owns in partnership with OIP. Put another way, applying the three criteria above does not lead to "an entity other than the Tribe" possessing a proprietary interest because the Tribe owns the majority entity providing the services. And the remaining (b) (4) share of fees to OIP does not, by itself, raise sole proprietary interest concerns.

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[19] 25 U.S.C. § 2711.
[20] 25 C.F.R. § 533.7; *see also Wells Fargo Bank, Nat'l Ass'n* v. *Lake of the Torches Econ. Dev. Corp*., 658 F.3d 684, 688 (7th Cir. 2011).
[21] *Retail Sportsbook and Online Gaming Services Agreement,* at Recitals; § 3.04; § 5.06.
[22] *See* NIGC Bulletin 94-5.
[23] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. §§ 522.4(b)(1), 522.6(c).
[24] *Id.*
[25] *See City of Duluth* v. Fond du Lac Band of Lake Superior Chippewa, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), aff'd in pertinent part, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision); see also *Bettor Racing, Inc. v. National Indian Gaming Commission*, 812 F.3d 648, 652 (8th Cir. 2016).
[26] *City of Duluth*, 830 F. Supp.2d at 723-24.

Overall, it is my opinion that the Agreement does not grant SHRD a proprietary interest in the Tribe's gaming operation. This opinion, though, is limited to the facts as present here. As stated above, the circumstances here are unique. I am able to reach this opinion because of the structure of the company providing services. If that ownership structure changes – for example, if the Tribe's ownership share is reduced through merger or a greater ownership interest transferring to OIP – this opinion will no longer apply.

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

Finally, this opinion is limited to whether the agreement implicates management or violates IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation. This opinion does not extend to other IGRA requirements such as restrictions on the uses of net gaming revenues.

Please note that it is my intent that this letter be released to the public through the NIGC's website. If you have any objection to this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.[27] If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.[28] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[29] Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter**. After this time elapses, the letter will be made public and objections will no longer be considered. *Id.*

If you have any questions, please contact me at (202) 420-9241.

Sincerely,

Michael Hoenig
General Counsel

[27] 25 C.F.R. § 517.7(c).
[28] 139 S. Ct. 2356 (2019).
[29] 25 C.F.R. § 517.7(d).