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Re: Megananza MZA 2001 Bingo System Agreement (Rental) and Software License, dated August 17, 2001, between MegaBingo, Inc. and the Kickapoo Tribe of Oklahoma

Dear Mr. Salazar, Mr. Kaskaske, Ms. Hernandez, Mr. Lind, and Mr. Loebig:

On June 21, 2004, responding to a National Indian Gaming Commission (NIGC) request, a Megananza MZA 2001 Bingo System Agreement (Rental) and Software License (Agreement) between MegaBingo, Inc. (MBI) and the Kickapoo Tribe of Oklahoma (Tribe), dated August 17, 2000, was provided to the NIGC for review. The purpose of our review is to determine whether the Agreement constitutes a management contract or collateral agreement to a management contract and is therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

We have not completed our review of the Agreement. We are concerned that the Agreement evidences a proprietary interest by MBI in the Tribe's gaming activity. Such a proprietary interest would be contrary to IGRA, NIGC regulations, and the Tribe's approved gaming ordinance. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); Kickapoo Tribe of Oklahoma Tribal Gaming Ordinance, approved by the NIGC on July 3, 2001, Section 109(a).

Consequently, because of our concern, we request that the parties provide us with a justification for the fee obtained by the MBI in this instance. Please provide such justification in writing and submit it to us as soon as possible.

Proprietary Interest

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). Accordingly, the Tribe's gaming ordinance, approved by the NIGC, specifically requires that "the Tribe shall have the sole proprietary interest in and responsibility for the conduct of all gaming operations." Kickapoo Tribe of Oklahoma Tribal Gaming Ordinance, approved by the NIGC on July 3, 2001, Section 109(a).

"Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . ." An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to. . ." *Id.* Reading these definitions together, proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

Id.

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, stating only that, "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Secondary sources also shed light on the definition of "proprietary interest." In a chapter on joint ventures in *American Jurisprudence*, 2nd Edition, the difference between having a proprietary interest and being compensated for services is discussed in the context of determining when a joint venture exists.

Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits

themselves. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Consequently, if a joint venture is found to exist it would be further evidence that the Tribe did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but then concludes that "[i]t is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances." 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Determination

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place.

As noted above, we are concerned that the Agreement bestows a proprietary interest in the gaming activity on MBI, in violation of IGRA, its implementing regulations and the Tribe's gaming ordinance because of the excessive compensation provided to MBI in proportion to the services rendered.

Management contracts approved by the Chairman of the NIGC have a fee cap set at thirty percent (30%) of net revenues or forty percent (40%) of net revenues if the capital investment required and the gaming operation's income projections require the higher fee. See 25 U.S.C. §§ 2711(c)(1)-(2). The IGRA defines net revenues as: "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." See 25 U.S.C. § 2703(9) (emphasis added).

Here, the Agreement gives MBI a fee equaling {

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In light of MBI's fee, we are concerned with the amount of the Tribe's actual profit that is being paid to MBI is contrary to the IGRA. It is possible for

Therefore, we request that the parties provide us with a written justification for the fee as soon as possible.

Moreover, this further evidence of a proprietary interest in the gaming operation.

Conclusion

We are concerned that it bestows a proprietary interest in gaming activity on MBI in violation of IGRA, its implementing regulations, and the Tribe's gaming ordinance. Due to this concern, we request that the parties provide any explanation and information available that might establish that the contract terms do not violate the requirement that the Tribe maintain the sole proprietary interest in the gaming operation.

If you have any questions or concerns, please contact Staff Attorney Andrea Lord at (202) 632-7003.

Sincerely,



Penny J. Coleman
Acting General Counsel