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March 11, 2022

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RE: Petition of Golden Nugget Atlantic City, LLC for Approval of a Material Debt Transaction Pursuant to *N.J.A.C. 13:69C-4.3* (PRN 0192201)

Dear Pacifico Agnellini:

By petition PRN 0192201 dated January 18, 2022, Golden Nugget Atlantic City, LLC (GNAC) seeks material debt transaction approval from the Division of Gaming Enforcement (Division) to refinance and restructure existing debt and provide security for and guarantee new debt obligations, as detailed below, of qualified holding company Fertitta Entertainment, LLC (FE) f/k/a Golden Nugget, LLC (Transaction). The proceeds from the Transaction were used primarily to repay existing debt, increase FE's cash position, and satisfy Transaction costs.

I. INTRODUCTION AND BACKGROUND

Under the Casino Control Act (Act), *N.J.S.A. 5:12-1 et seq.*, the Division has conducted a review of relevant financial matters preceding the Transaction. The Golden Nugget Online Gaming, LLC (GNOG) going-public transaction that was approved by the Casino Control Commission (Commission) on November 25, 2020 (GNOG Transaction) imposed 16 essential casino licensure conditions. The conditions recommended and imposed through that GNOG Transaction included: (1) that GNAC maintain a cash balance of not less than \$20 million (Cash Balance Condition), (2) that reductions in staffing by more than 50 employees after July 31, 2021 required Division approval (Employment Condition), (3) that at least 5% of GNAC's net revenue be spent on capital expenditures annually (CapEx Condition), and (4) that GNAC operate its casino hotel facility at a certain level (Operating Condition). Those conditions were the sole premise upon which the GNOG Transaction was permitted to occur.



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Due in part to the unprecedented and extended pressures relating to the impact of the COVID-19 pandemic, GNAC experienced difficulties complying with certain conditions, which will be discussed herein. Collectively and considered together, those matters cause the Division to raise the concerns set forth in this report and impose conditions on GNAC in connection with approval of the Transaction. It must be emphasized that most of the online gaming revenue and online asset value of GNAC, as the brick-and-mortar casino licensee, has already been transferred to GNOG by virtue of the GNOG Transaction. As discussed herein, the conditions imposed were the means that the regulators relied upon to fully assure them and to ensure the financial stability of the GNAC casino licensee. The GNOG Transaction was a case of upstreaming value and cash flows from GNAC as the brick-and-mortar casino licensee to corporate persons. At the time of the GNOG Transaction, GNOG was valued at approximately \$745 million. As a result of the GNOG Transaction, Tilman J. Fertitta (TJF), who currently is the ultimate 100% owner and controlling person of the Golden Nugget organization (GNO), was issued equity interests valued at \$355 million through affiliated subsidiaries, in addition to indirectly benefitting by debt repayments and other means.

It is the Division's view that the Transaction is a step in a series of transactions which began in April 2020 with the issuance of a new term loan to Landry's Finance Acquisition Co., the predecessor to GNOG which will be referred to hereafter as GNOG for ease of reference. That \$300 million new term loan (GNOG Loan) included the transfer of the online gaming and sports wagering operations from GNAC to GNOG. That transaction was to combat the challenges of COVID-19 and to assist GNO in its operations. The casino licensing of GNOG as an Internet gaming (I-Gaming) affiliate of GNAC followed in November 2020 through a transaction whereby holding company Golden Nugget Online Gaming, Inc. (GNOGI) became a publicly-traded company. The third proposed transaction was the now-terminated merger (FAST Transaction) between Fertitta Entertainment, Inc. (FEI) and other entities whereby FEI sought to further realize value by establishing a publicly-traded parent company of GNAC and for the other enterprises currently within the operational organization of FEI; the third transaction, in another form, is now this material debt refinancing transaction, referred to herein as the Transaction. Finally, there is the currently pending transaction, pursuant to which DraftKings, Inc. (DraftKings) would acquire GNOG in an all-stock transaction (DraftKings Acquisition). Financial stability will be analyzed, as well as the GNOG license conditions, and addressed as part of the pending request for Transaction approval.

II. GOLDEN NUGGET ONLINE GAMING, LLC LOAN

On April 9, 2020, the Division approved a material debt transaction, on an emergent basis, for the GNOG Loan. The initial request of April 6, 2020 was for the approval of a \$250 million GNOG Loan due in 2023, with TJF providing an additional source of liquidity in the amount of \$50 million. On April 7, 2020 as a result of an oversubscription regarding the GNOG Loan, GNAC, GNO, and GNOG, however, requested that the GNOG Loan be approved in an upsized amount of \$300 million, while TJF would still infuse the \$50 million amount.

The GNOG Loan was obtained to provide liquidity for the operating needs of GNO during the economic shutdown brought about by the COVID-19 pandemic. The GNAC

online operations were then the only asset of value upon which the loan proceeds could be secured. GNAC was a guarantor of the GNOG Loan and the proceeds were advanced to GNO in April 2020. Given the emergent purpose and critical funding for potential future needs, as well as the \$50 million equity infusion by TJF, among other reasons, the Division approved the GNOG Loan. The proceeds of the GNOG Loan were loaned to a subsidiary of FEI on substantially the same terms (FEI Loan), and thus, interest on the FEI Loan would have covered interest on the GNOG Loan, another critical factor in the Division's analysis.

In late 2020, a \$150 million amount of the GNOG Loan was repaid and the loan balances of the GNOG Loan and FEI Loan were reduced as part of the GNOG Transaction. However, the interest rate on the FEI Loan was reduced to only 6%, while the interest rate on the GNOG Loan remained around 13.2%. As a result, with regard to the \$19.8 million in estimated annual interest expense on the remaining \$150 million of the GNOG Loan, FEI was only responsible for \$9 million in interest payments and the remaining \$10.8 million became the responsibility of casino licensee GNOG, as was detailed in the Division's November 12, 2020 GNOG Transaction report (GNOG Report). In February 2021, GNOG repaid \$10.6 million of the GNOG Loan and the current remaining outstanding principal amount of the GNOG Loan is now \$139.4 million.

In connection with consideration of the proposed but now-terminated FAST Transaction, the Division advised of its position that GNAC could no longer bear responsibility for the GNOG Loan in light of the terms of the now-terminated FAST Transaction and the intended DraftKings Acquisition. It is the Division's position that GNAC must not fund any debt service on, or provide security for, the GNOG Loan. In that regard, the Division further advised that GNAC would need to provide documentation to the Division that GNAC had been removed as security for the GNOG Loan. On January 24, 2022, GNAC provided an executed credit agreement amendment to the GNOG Loan (Credit Amendment) to the Division. The Credit Amendment resulted in the release of the liens against the existing GNAC collateral and released the GNAC guaranty. The lenders required that the liens and guarantee be replaced with sufficient cash collateral. As discussed below, the GNOG Loan is expected to be assumed and satisfied by DraftKings as part of the DraftKings Acquisition and the cash collateral then would be released back to FEI. The Credit Amendment was a positive but necessary step in that the GNOG Loan provided liquidity to GNO of which GNAC is a part but which had no direct benefit to GNAC. In the Division's view, the Credit Amendment did not meet the definition of a material debt transaction pursuant to *N.J.A.C. 13:69C-4.1*, and therefore, no formal Division approval was required.

III. GOLDEN NUGGET ONLINE GAMING, LLC GOING-PUBLIC TRANSACTION

In the second step of the four transactions, and one of the two that monetized online gaming and sports wagering activities, the online operations of GNAC were transferred to GNOG through the assignment of the online skins to GNOG and the execution of a shared services agreement. As part of the GNOG Transaction, GNAC and GNOG in October 2020 filed a petition, with accompanying application, for the issuance of an I-Gaming affiliate casino license to GNOG. GNOG sought a casino license in preparation for a proposed business combination between LHGN Holdco, LLC (LHGN

Holdco) which is a subsidiary of Landcadia Holdings II, LLC (Landcadia) and Landry's Fertitta, LLC (Landry's Fertitta). Landcadia was a special purpose acquisition company (SPAC) sponsored by TJF and FEI. Through the GNOG Transaction, Landcadia, now known as GNOGI, became a publicly-traded entity. For ease of reference, Landcadia will be referenced herein as GNOGI. The GNOG Transaction consisted of two phases, the first of which resulted in a merger of two entities with the GNOG entity surviving. Prior to the first phase of the two-phase GNOG Transaction, GNOGI paid a total of \$14 million in dividends to TJF. In the second phase, Landry's Fertitta conveyed 100% of the equity in GNOG Holdings, LLC (GNOG Holdings) to LHGN Holdco in exchange for 31,350,625 Class B membership interests in LHGN Holdco and 31,350,625 shares of Class B non-economic (voting only) common stock in GNOGI which is the holding company of LHGN Holdco.

In the GNOG Report, the Division raised substantial policy issues as to the GNOG Transaction related to the online gaming industry in New Jersey in general and particularly as the industry then was adjusting to the unique challenges surrounding the COVID-19 pandemic with a strong reliance on online gaming activity. That crisis proved destabilizing to the traditional brick-and-mortar casino industry and continues to present unknowns as recovery continues. The GNOG Transaction monetized GNAC's profitable I-Gaming operations under GNOG in the midst of the health crisis. The Division expressed its view that the GNOG Transaction would have negative effects upon GNAC in terms of its structure and financially, especially as a result of the loss of online cash flows.

Relevant to that point, pursuant to New Jersey law, it is absolutely required that I-Gaming can only be conducted as part of an Atlantic City casino operation. See *N.J.S.A. 5:12-95.17i*. In recognition of technologies necessary to support I-Gaming, the Act was amended to authorize licensed casino operators to conduct I-Gaming within their casino premises, requiring all wagering to be conducted solely with the casinos and ensuring that all such gambling activity occurs within casinos located in Atlantic City. Based on those premises, I-Gaming without a direct link to an Atlantic City licensed casino simply cannot exist, and it is allowed and exists solely to support and enhance the casino licensee. See *N.J.S.A. 5:12-95.17a* through *95.17e* and *95.17i* through *95.17l*.

Under these governing public policies and statutory requirements, the GNOG Transaction presented novel legal and policy implications regarding the online gaming industry in New Jersey and the legislative intent of the Act, as well as the direction to be taken moving forward. The GNOG Loan arrangement and GNOG Transaction formally split the retail gaming operations of GNAC from GNAC under the FEI ownership structure at the exact time when the online operations could have supported GNAC's needs in light of dramatically-reduced cash flows at the brick-and-mortar operation, which support was one of the goals envisioned and intended by the Legislature's authorization of I-Gaming activities to ensure viability. Given the uncertainties and concerns with how GNAC might be adversely affected by the separation of its I-Gaming and sports wagering operation outside of the FEI ownership chain, and especially in light of the COVID-19 pandemic, the Division could not endorse the GNOG Transaction but recommended the above-discussed essential conditions be imposed if it were to be approved. The Division's recommended conditions were adopted by the Commission in its rulings. See Resolution

No. 20-11-25-01. As detailed herein, however, there have been issues with adherence to certain condition requirements which elevate the Division concerns as to the effects of the four-part series of transactions on GNAC.

Furthermore, the GNOG Transaction involved a SPAC. TJF has been involved as a sponsor for four SPACs: Landcadia Holdings, Inc., Landcadia, Landcadia Holdings III, Inc., and Landcadia Holdings IV, Inc. TJF was the Co-Chairman and Chief Executive Officer of Landcadia until the closing of the GNOG Transaction, where the merged entity, GNOG, was wholly-owned, through holding companies, by TJF. The GNOG Transaction was very profitable for GNO and TJF: in addition to interest shares, TJF, through holding and intermediary companies, received \$30 million cash consideration and a \$15 million dividend; Landry's Fertitta received \$355 million for its GNOG Holdings interest; the repayment of \$150 million of the GNOG Loan, which had a related prepayment premium penalty of approximately \$24 million, and the assumption of the remaining \$150 million balance at that time; the lessened interest rate on the FEI loan; and a reimbursement of various expenses exceeding \$10 million as well as the approximate \$745 million enterprise value of GNOG. Following the GNOG Transaction, GNOGI owned 54.1% of LHGN Holdco and 45.9% was owned by Landry's Fertitta. LHGN Holdco then wholly owned GNOG Holdings, which in turn then wholly owned GNOG. TJF then controlled 79.9% of the voting interest in GNOGI through Landry's Fertitta, which TJF also wholly owns.

SPACs are publicly-traded shell companies formed to raise money to acquire private companies and take them public. As noted, GNOGI went public utilizing the SPAC process.¹ In connection with TJF's involvement in these SPACs, TJF and several other parties were named as defendants in two putative class action suits regarding SPAC Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., unrelated to the GNOG Transaction, wherein the plaintiffs assert that TJF and the other defendants made false and misleading statements in securities filings, engaged in fraud, and violated accounting and securities rules.² The two cases were consolidated and that litigation remains pending.

Against the backdrop regarding SPACs which has served to further heighten the Division's review and analysis of the matters addressed in this report, the Division emphasizes that GNO has transacted business with the effect of extracting and upstreaming value from GNAC, to the potential detriment of GNAC. Generally, 20% of the initial investments inure to the benefit of the SPAC sponsors. Many SPACs later end up operating in the negative, meaning that unless a SPAC performs strongly, the shareholders will not benefit while the sponsors have an assured return.

IV. THE FAST TRANSACTION

As noted above, the now-terminated FAST Transaction was to be the third in a series of four transactions. As proposed, through a series of steps involving FAST Acquisition Corp. (FAST), a publicly-traded Delaware SPAC, the FAST Transaction would have resulted in establishing within the corporate structure both a new holding company

¹ See Warren, E., Brown, S., Smith, T., & Van Hollen, C., Letters to Michael Klein, et al., dated September 22, 2021, available at [https://www.warren.senate.gov/imo/media/doc/SPAC%20letters%20\[Combined\].pdf](https://www.warren.senate.gov/imo/media/doc/SPAC%20letters%20[Combined].pdf).

² *Welch v. Meaux, et al.*, 19-cv-01260, U.S. District Court, Western District of Louisiana (Lake Charles).

of GNAC and GNOG and a wholly-owned subsidiary of FAST Merger Corp., the new public company and ultimate parent of GNAC. On December 10, 2021, the FAST Transaction was terminated and the parties agreed that FEI would pay FAST and its shareholders up to \$33 million through a combination of upfront and deferred payments, part of which are contingent on whether FAST ultimately effectuates a business combination transaction. The settlement includes a payment to FAST which will be used to cover expenses associated with the terminated transaction as well as a replenishment of FAST's working capital account.

V. PROPOSED MATERIAL DEBT TRANSACTION

As the FAST Transaction was not consummated, GNO pursued a refinancing of its debt structure resulting in the pending petition for approval of the Transaction which is the current third part of the four-part series of transactions. By petition PRN 0192201 dated January 18, 2022, GNAC seeks approval of the Transaction from the Division pursuant to *N.J.A.C. 13:69C-4.3* to provide security for and guarantee new debt obligations, as detailed below, needed by FE to refinance existing debt. For the reasons set forth below, the Division approves the Transaction pursuant to *N.J.A.C. 13:69C-4.3*, but only subject to the imposition of the conditions listed on Exhibit A to this letter.

The Transaction refinances essentially all of the debt of FE, GNAC's intermediary parent company. Specifically, FE obtained \$5.55 billion consisting of new loans and issued notes (New Debt), the proceeds of which were used primarily to repay existing debt, increase FE's cash position, and satisfy transaction costs. Since the New Debt will be partially secured or guaranteed by GNAC, petitioners have sought Division approval in accordance with *N.J.A.C. 13:69C-4.3(a)*. The Division notes that while the Transaction closed, the security and guarantees related to GNAC, however, will not be effective until the requisite material debt transaction approval is obtained.

A. Sources and Uses of Funds

The \$5.55 billion in New Debt consists of a \$3.3 billion senior secured first lien term loan (New Term Loan), \$1.25 billion in new senior unsecured notes (New Unsecured Notes), and \$1.0 billion in senior secured notes (New Senior Notes), as illustrated in the following table:

Table 1
FE Debt Refinancing
Forecasted Sources and Uses of Cash
Pro Forma as of December 31, 2021
(\$ in Millions)

Sources of Cash		Uses of Cash	
New Term Loan	\$3,300	Repay Existing Debt	\$4,622
New Unsecured Notes	1,250	Increase FE Cash Balance	■
New Senior Notes	1,000	Transaction Costs/Accrued Interest	■
		Purchase of Catch Hospitality	■
Total Sources of Cash	\$5,550	Total Uses of Cash	\$5,550

On a pro forma basis as of December 31, 2021, the proceeds from the New Debt would be used to repay \$4.622 billion in existing debt, add \$[REDACTED] million to FE's cash position, and satisfy \$[REDACTED] million in transaction costs and accrued interest. The sources and uses table above also includes a \$[REDACTED] million cash outlay for FE to acquire a 50% interest in Catch Hospitality Group Productions LLC (Catch Hospitality), which deal closed in December 2021. TJF will contribute his existing 50% equity interest in Catch Hospitality to FE, and as a result, FE will own 100% of that entity.

As highlighted in Table 1, FE will benefit from the addition of an estimated \$[REDACTED] million to its cash balance. Separately, FE paid a \$250 million dividend to TJF around the time of the Transaction from existing cash on hand, which partially reflects the contribution of his equity in Catch Hospitality. After the Transaction and dividend payment, FE would maintain around \$[REDACTED] billion in cash on a pro forma basis as of December 31, 2021, which would serve as a key resource for FE going forward to pursue growth opportunities and maintain financial flexibility.

B. Impact on Long-Term Debt

As of December 31, 2021, FE maintained \$4.781 billion in debt, consisting of: (1) a \$2.535 billion term loan (Term Loan), (2) \$1.323 billion in 6.75% senior notes (Senior Notes), (3) \$670 million in 8.75% subordinated notes (Subordinated Notes), (4) the \$150 million FEI Loan, (5) \$94 million outstanding on a \$255 million revolving credit facility (Revolver), and (6) \$9 million in miscellaneous debt obligations. Due primarily to the incremental cash proceeds obtained through the New Debt, FE's long-term debt increased by around \$778 million after the Transaction, as shown in the following table:

Table 2
FE
Projected Long-Term Debt
As of December 31, 2021
(\$ in Thousands)

Debt Component	Pre-Refinancing	Adjustments	Post-Refinancing
Term Loan/New Term Loan	\$2,535	\$ 765	\$3,300
Senior Notes/New Senior Notes	1,323	(323)	1,000
Subordinated Notes/New Unsecured Notes	670	580	1,250
FEI Loan	150	(150)	-
Revolver/New Revolver	94	(94)	-
Other	9	-	9
Total	<u>\$4.781</u>	<u>\$ 778</u>	<u>\$5.559</u>

In addition to the Transaction, the FEI Loan is to be eliminated. Thus, after the Transaction and the elimination of the FEI Loan, FE's long-term debt totals \$5.559 billion on a pro forma basis at year-end 2021, consisting of the following components:

- The \$3.3 billion New Term Loan has an interest rate of around 4.5% initially and will mature in 2029. The New Term Loan is secured by a first priority

interest in substantially all of the assets of FE and guaranteed by all existing and future wholly-owned subsidiaries of FE, including GNAC.

- The \$1.250 billion in New Unsecured Notes have an 6.75% interest rate and will mature in 2030. The New Unsecured Notes are guaranteed by all existing and future wholly-owned subsidiaries of FE, including GNAC.
- The \$1.0 billion in New Senior Notes have a 4.625% interest rate and will mature in 2029. The New Senior Notes have the same security and guarantees as the New Term Loan and rank senior in the right of payment to the New Unsecured Notes.
- The \$9 million in other debt.

FE maintained a \$255 million Revolver. As part of the Transaction, FE obtained a new \$500 million revolving credit facility (New Revolver) that will mature in 2027. No borrowings are projected to be outstanding on the New Revolver at any time through 2024, but approximately \$█ million of the commitment is expected to be dedicated to support letters of credit. Thus, GNAC projects approximately \$█ million in available borrowing capacity through 2024.

C. EBITDA and Debt Service Obligations

After the Transaction, FE's blended average interest rate is around 5.1%, a slight decrease compared to the 5.3% interest rate under the prior debt structure. While the average interest rate has decreased, the higher level of borrowings resulted in a \$█ million increase in annual interest expense, from \$255 million under the prior debt structure to \$█ million after the Transaction. Additionally, annual principal repayments increased by approximately \$█ million after the Transaction, from \$29 million to \$█ million. Thus, annual debt service requirements of interest plus principal repayments increased by \$█ million, from \$284 million under the current debt structure to \$█ million after the Transaction and the elimination of the FEI Loan obligations.

It is important to note that the increase in debt service requirements would be higher if the FEI Loan obligations are not eliminated and the effects of its elimination had not been included in the analysis; the effects of the FEI Loan are illustrated below:

Table 3
FE
Debt Service Requirements
Pro Forma for Calendar Year 2021
(\$ in Thousands)

	Pre-Refinancing	Post-Refinancing	Increase (Decrease)
Debt Service Excluding FEI Loan	\$264	\$█	\$█
Interest on FEI Loan	20	-	20
Total Debt Service Requirements	<u>\$284</u>	<u>\$█</u>	<u>\$█</u>

As summarized above, focusing on the Transaction, annual debt service obligations increased by \$■ million. If the \$■ million per year in annual interest savings stemming from the elimination of the FEI Loan are realized, the overall debt service obligations increase by \$■ million with the effects of both the Transaction and the anticipated FEI Loan elimination.

The Transaction and the elimination of the FEI Loan result in an estimated \$■ million increase in annual debt service requirements. FE, however, generates significantly more in earnings before interest, taxes, depreciation, and amortization (EBITDA) than its debt service requirements and other cash needs. In the forecasts provided in support of the Transaction, FE projects EBITDA ranging from \$■ million to \$■ million per year for the next three years, while its cash outlays including mandatory debt service payments are estimated between \$■ million and \$■ million each year. With the projected excess cash flows, FE expects to fund \$■ billion in optional debt repayments between 2022 and 2024, while maintaining a cash balance of around \$■ billion throughout the period. Thus, noting TJF benefitted by virtue of the \$250 million dividend payment, the Transaction does not raise a financial issue in relation to FE, given the considerable excess cash flows, the increased cash balance, and the higher New Revolver commitment. Nevertheless, the Division now addresses the following matters regarding GNAC as the casino licensee and its financial stability.

D. Golden Nugget Atlantic City, LLC

As addressed above, the Division identified issues and concerns related to GNAC in the GNOG Report, which made clear that GNOG's casino license application should only be granted, and the GNOG Transaction should only be approved by the Commission, if stringent financial conditions were imposed to ensure the financial stability of the GNAC operation. Those conditions, as recommended by the Division, were imposed by the Commission. See Resolution No. 20-11-25-01. From a financial standpoint, and as previously mentioned, the key conditions are the Cash Balance Condition, the Employment Condition, the CapEx Condition, and the Operating Condition. The following discussion provides additional detail regarding (1) the Cash Balance Condition, (2) the Employment Condition, (3) the CapEx Condition, (4) the Operating Condition, as well as the Division's imposition of conditions, in conjunction with the Transaction.

1. Cash Balance Condition

The Cash Balance Condition requires GNAC to maintain a cash balance of at least \$20 million at all times. This condition was recommended by the Division to ensure that there was ample liquidity to support the operational needs of the property. Subsequent to the imposition of the condition, GNAC sought Division approval to include borrowing capacity on the Revolver toward the minimum cash balance calculation. The Division approved the request, provided that local GNAC management had the ability to directly access funds on the Revolver.

While it was the Division's expectation that Revolver access would be relied upon to address minor cash shortfalls from the \$20 million requirement, GNAC instead used the flexibility provided by the Division to reduce its actual cash position to levels at times

that were close to half that amount. Specifically, between January and May 2021, GNAC had only maintained between \$9 million and \$11 million in cash, and thus, GNAC had complied with the condition only through its access to the Revolver to an extent that accounted for around 50% of the cash balance requirement in those months on average. In light of the foregoing, the Division has imposed a condition to require minimum liquidity of \$25 million, of which a minimum of \$12 million shall be in unrestricted cash and the remainder of which may be satisfied through the availability under the New Revolver, provided that local GNAC management has the ability to directly access funds on the New Revolver.

2. Employment Condition

With regard to the Employment Condition, the Division emphasizes that GNAC was originally required to comply with that condition by no later than July 31, 2021. In advance of that date, the Division contacted GNAC to ensure that the condition would be complied with by the required deadline. In response, GNAC instead sought Division approval to extend the compliance date to July 1, 2022. In GNAC's request for an extension, there were deficiencies in the information provided to support the request, although it had been incumbent upon GNAC to provide statistical data and other information for the Division to appropriately evaluate the request. Ultimately, after evaluating further GNAC submissions sought and needed by the Division and in recognition of the ongoing impact of the COVID-19 pandemic on the casino industry, the Division approved an extension until July 1, 2022 and modified the Employment Condition to require the submission of quarterly reports demonstrating GNAC's progress and a plan toward meeting the condition requirements by the new date, which condition requirements continue to present challenges to GNAC.

Based on the statistics provided by management, GNAC is currently significantly below 2019 employment levels. Management's hope is that labor challenges will be substantially reduced entering 2022 and GNAC would be in a more normalized hiring cycle in 2022. The Employment Condition was required in light of the GNOG Transaction out of concern for GNAC's revenue performance and competitiveness. Those concerns remain as the total reduction in force as a percentage is among the highest of all Atlantic City casinos. In light of GNAC's staffing shortages and business adjustments required as COVID-19 recovery continues, the Division has imposed a condition requiring GNAC to provide monthly employment updates accompanied by comparative analyses regarding its progress in achieving the goal of having no fewer than 50 full-time and part-time employees when compared to the number of full-time and part-time employees as reported to the Commission in the corresponding month between March 2019 and February 2020, which condition is included in Exhibit A.

3. CapEx Condition

Pursuant to the CapEx Condition, GNAC is required to spend at least 5% of its net revenue on capital expenditures beginning with calendar year 2021. The Division raised concerns regarding compliance with this condition, given that GNAC's actual capital expenditures averaged only 2% of net revenue for the first nine months of 2021, which

was less than half of the condition requirement with only three months then remaining in the year.

Based on GNAC's limited capital spending, the Division formally requested GNAC's capital expenditure and net revenue estimates for 2021 through 2023. In response, GNAC provided the following data indicating that GNAC would not be in compliance for 2021:

Table 4
GNAC
Projected Capital Expenditures and Net Revenue
For the Three Years ending December 31, 2023
(\$ in Thousands)

	2021	2022	2023	Total
Capital Expenditures	\$ 5,689	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Net Revenue	138,027	[REDACTED]	[REDACTED]	[REDACTED]
Percentage	4.1%	[REDACTED]%	[REDACTED]%	[REDACTED]%

As summarized above, GNAC was not on track to comply with the requirement for 2021, as projected capital expenditures were only 4.1% of net revenue. When informed of the deficiency, GNAC indicated that the anticipated shortfall in capital spending for 2021 would be reallocated to 2022. Notwithstanding the above, after Division inquiries, GNAC decided to increase its capital spending and ultimately substantially complied with the condition.

From the Division's perspective, 2021 is the first year that GNAC was required to comply with the CapEx Condition, and that condition was one of the critical elements for the Division not to object to the GNOG Transaction. With that background, GNAC made no attempt to address the anticipated capital expenditure shortfall until the Division questioned the low level of spending for the first three quarters of 2021. In fact, the first time the Division became aware that GNAC did not intend to comply with the condition is when the data contained in Table 4 above was submitted at the end of September 2021. In light of the foregoing, the Division made clear that if GNAC had any issues or concerns with condition compliance, it had an obligation to engage in a dialogue with the Division and to submit a plan to address the anticipated deficiency immediately when GNAC knew it might not comply with the condition requirements, which was definitely at a point well before the end of September and long before any Division inquiries into this topic.

As attached in Exhibit A, the Division has imposed a condition requiring GNAC to deposit, into a dedicated capital expenditure account, 5% of its net revenue from the immediately preceding calendar year from 2022 through 2024. The initial capital expenditure funding for 2022 shall occur by no later than March 31, 2022. Further, any shortfall amount for 2021 regarding actual capital expenditures shall be added to the initial funding amount for 2022. The capital expenditure funding for 2023 and 2024 shall occur by no later than January 31, 2023 and January 31, 2024, respectively. In addition, at the

end of 2024, the capital expenditure requirements will be reconciled based upon the applicable net revenue amounts for those three years.

a. The Amended Casino Property Tax Stabilization Act

The Casino Property Tax Stabilization Act (PILOT Act), *N.J.S.A. 52:27BBBB-18 et seq.*, was amended on December 21, 2021 to address the economic impact of the COVID-19 pandemic on Atlantic City. Originally, the statute created a 10-year plan for casinos to make payments in lieu of property tax (PILOTs) by establishing an annual mandatory minimum property tax which was not to exceed a casino's property tax payments for calendar year 2015. This plan was first implemented in calendar year 2017 and is to be terminated at the end of calendar year 2026. The amendment contains two major changes to the capital expenditure requirements. First, maintenance expenditures have been eliminated from the calculation, and thus, only capital expenditures will be part of the calculation that demonstrates compliance with this standard. Second, the ability of casino licensees to rely on projected expenditures to comply with this standard has been eliminated, and instead, compliance with this standard will be based on the actual net revenue and capital expenditures for the immediately preceding five-year period, which generally mirrors the condition requirement imposed on GNAC.

The Division has reminded GNAC that 5% of net revenue is the minimum threshold and that GNAC is encouraged to undertake more substantial projects that would result in capital expenditures in excess of the 5% minimum requirement. To assist GNAC in embarking on a major project, the Division has imposed a condition as set forth in Exhibit A to permit spending above 5% on a cumulative basis to be used to offset capital expenditure requirements in subsequent years.

4. Operating Condition

The Operating Condition required GNAC to operate its casino hotel facility at the same levels as during 2019, except as required by governmental restrictions or as approved by the Division. This condition was recommended by the Division to address a scenario whereby GNAC management would operate at less than full capacity after governmental restrictions associated with the COVID-19 pandemic are eliminated. The Division recognizes, however, that compliance with this condition is to a degree subjective, given the lingering health issues related to COVID-19 and the difficulties encountered by the casino industry with hiring employees.

Nevertheless, the Division has been advised by GNAC management of areas where GNAC is not operating at full capacity, and it is the Division's view that the reduced offerings and other operating decisions have had a negative impact on GNAC's revenues when compared to other properties in Atlantic City. To counteract the revenue declines, GNAC dramatically reduced its costs and expenses by a percentage that was more than double the average cost reduction reported by its competitors. Since GNAC's profitability strategy appears to be more focused on cost reductions than operational improvements, the Division has advised GNO's executives that there needs to be an increased direction toward enhancing GNAC's amenities and offerings that would translate into increased revenues. To evaluate GNAC's business operations on an evolving basis in implementing

amenity changes that will be in accord with customer demands and to provide flexibility, the Division has imposed a condition to ensure that GNAC continues to operate its casino hotel as a first-class facility in accordance with statutory requirements, with the goal of increasing revenues and staffing levels to improve the competitive position of the property in the Atlantic City market.

E. Discussion

Pursuant to *N.J.A.C. 13:69C-4.3(a)*, no casino licensee shall consummate a material debt transaction without the prior approval of the Division. A material debt is a debt of \$50 million or more, whether in a single transaction or cumulative transactions during any 12-month period, or such other amount as the Division may determine is appropriate to ensure the continued financial stability of a casino licensee. *N.J.A.C. 13:69C-4.1*. Material debt also includes a guarantee of the debt of an affiliate, an assumption of the debt of an affiliate, or an agreement to place any encumbrance on its approved casino hotel facility to secure the debts of an affiliate. *Ibid.* GNAC currently serves as partial security and guarantor of the existing Term Loan and as guarantor of the Senior Notes and Subordinated Notes. After the material debt approval, GNAC would serve in the same capacity for the New Term Loan, New Senior Notes, and New Unsecured Notes.

Annual debt obligations following the Transaction now are \$■ million higher than they would have been prior to the Transaction along with the anticipated elimination of the FEI Loan, but that change is not viewed as substantial in light of the extent of the overall Transaction, nor will the Transaction have a foreseeable negative impact on FE's financial stability based on the forecasts. As highlighted above, FE's EBITDA is sufficient to fund its interest payments under its current forecasts. Further, FE expects to have access to \$■ million of the \$500 million New Revolver availability through 2027 and a considerable cash balance as noted above. Nevertheless, as expressed in the GNAC discussion above, the Division has concerns related to the GNAC operation which are addressed by the conditions imposed in connection with the Division's approval of the Transaction. Accordingly, the Division approves the Transaction, subject to the imposition of the conditions as set forth in Exhibit A.

VI. PROPOSED DRAFTKINGS, INC. ACQUISITION OF GOLDEN NUGGET ONLINE GAMING, LLC

The fourth transaction is the pending DraftKings Acquisition. On August 9, 2021, GNOG and DraftKings entered into an Agreement and Plan of Merger (Merger Agreement). The Merger Agreement would merge GNOG with and into a wholly-owned subsidiary of publicly-traded DraftKings through a series of steps. As a result, GNOG would no longer be an affiliate of GNAC, and therefore, if the transaction contemplated by the Merger Agreement is to occur, two conditions of Resolution No. 20-11-25-01 would need to be eliminated. The first condition requires that GNOG remain an I-Gaming affiliate of casino licensee GNAC (Affiliate Condition). The second condition requires that no amendments, modifications, addenda or assignments of the Shared Services Agreement or the I-Gaming Agreement between GNAC and GNOG be made without prior written approval of the Division (Agreements Condition). The Affiliate Condition resulted from the

statutory requirement that, pursuant to *N.J.S.A. 5:12-82(b)(5)*, GNOG was an I-Gaming affiliate of GNAC necessitating an I-Gaming affiliate casino license. Based on the rights and responsibilities entrusted to GNOG pursuant to the I-Gaming Agreement, the Agreements Condition flows therefrom, in order to ensure the Division would receive notice of proposed changes and Division approval was required for any changes regarding the I-Gaming arrangements, as well as to preserve the relationship of GNAC and GNOG under common ownership.

The DraftKings Acquisition remains pending. The Division notes that with regard to the DraftKings Acquisition, it is monitoring five suits which have been filed by GNOGI shareholders and are pending in Delaware.³

VII. CONCLUSION

For the reasons discussed above, the conditions attached as Exhibit A, which reflect the above-referenced regulatory concerns, are imposed. Based upon the Division's extensive review of the series of transactions described herein, the Division could not approve the Transaction without imposing the conditions as they are now set forth in Exhibit A, which conditions are meant to ensure the continued financial viability of GNAC and to serve the public policy interests of the State of New Jersey.

This writing is not effective without an accompanying Order approving the Transaction and imposing the licensure conditions set forth in Exhibit A to this report executed by the Director.

Sincerely,



Alessandra A. Baldini
Deputy Attorney General

c: James T. Plousis, Chairman

³ See *Eschbart v. Golden Nugget Online Gaming, Inc., et al.*, (Del.Ch.Ct. December 28, 2021) (2021-1113); *Grove v. Golden Nugget Online Gaming, Inc., et al.*, (Del.Ch.Ct. December 28, 2021) (2021-1115); *Barnes v. Golden Nugget Online Gaming, Inc., et al.*, (Del.Ch.Ct. January 18, 2022) (2022-0048); *Bassin v. Golden Nugget Online Gaming, Inc., et al.*, (Del.Ch.Ct. January 18, 2022) (2022-0053); and *Corwin v. Golden Nugget Online Gaming, Inc., et al.*, (Del.Ch.Ct. February 2, 2022) (2022-0111).

Exhibit A

Conditions

1. GNAC shall maintain liquidity of not less than \$25 million, of which a minimum of \$12 million shall be in unrestricted cash and the remainder of which may be available under the New Revolver.

2. Within 5 days of the end of each month, a financial representative of GNAC shall provide the Division with a certification that GNAC maintained liquidity totaling at least \$25 million at all times during the month.

3. GNAC shall immediately notify the Division if it does not have liquidity totaling at least \$25 million. Any notification pursuant to this Condition shall be accompanied by a plan submitted by FEI and its qualified subsidiaries to address the shortfall.

4. On an ongoing basis, GNAC shall satisfy all payables and other liabilities that are more than 30 days past their due date, unless such payable or other liability is subject to a valid dispute by GNAC. FEI and its qualified subsidiaries shall advance any funds necessary for GNAC to comply with this Condition.

5. Within 5 days of the end of each month, GNAC shall provide the Division with an accounts payable aging report which specifically identifies the length of time that each liability has been outstanding. For any obligation that has not been paid by a respective due date, the aging report shall set forth the plan to address each obligation, including the date by which each obligation will be satisfied.

6. Beginning on March 31, 2022, and on a monthly basis thereafter, GNAC, within 5 days of the end of each month, shall provide a plan along with comparative analyses regarding its progress toward achieving the goal of having no more than 50 fewer full-time and part-time employees when compared to the number of full-time and part-time employees as reported to the Commission in the corresponding month between March 2019 and February 2020. Such monthly plan and comparative analyses must provide: (1) staffing statistics by full-time, part-time, seasonal and temporary/on-call employees comparing the relevant time periods and categorized by position title and applicable salary, and (2) detail with regard to full-time, part-time, seasonal and temporary/on-call employee position figures for which it is actively recruiting, categorized by position and applicable salary, and detail with regard to the status of those recruitment efforts, including any applicable employment start dates for newly hired employees. The comparative analyses shall also provide a breakdown as to persons on leave and furlough.

7. GNAC shall pay, as and when due, all local, state and federal taxes, including the full amount of real estate taxes or PILOT obligations as invoiced by the City of Atlantic City, as well as any fees imposed by the Act or the regulations promulgated pursuant thereto.

8. On an annual basis beginning with calendar year 2021, GNAC shall spend at least 5% of its net revenue on capital expenditures. Compliance with this condition shall

be measured on a cumulative basis, such that major capital expenditure initiatives may offset future spending requirements with the prior written approval from the Division. Within 5 days of the end of each month, GNAC shall submit a report to the Division:

- a. Detailing the amount GNAC spent on each capital expenditure project for the prior month, the year-to-date amount expended, a budget for the remainder of the year, and a total for the calendar year, and
- b. Comparing GNAC's total capital expenditures as reported on line 4 of the Division's Statement of Cash Flows to its net revenue as reported on line 5 of the Division's Statement of Income, which must reconcile to GNAC's audited financial statements on an annual basis.

9. To address the capital expenditure requirements for calendar year 2022 through 2024, GNAC shall deposit 5% of its net revenue from the immediately preceding calendar year into a dedicated bank account with a financial institution that has a physical location in New Jersey, with those funds only withdrawn for GNAC capital expenditures. The initial capital expenditure funding for 2022 shall occur by no later than March 31, 2022; the capital expenditure 2023 funding shall occur by no later than January 31, 2023; and the 2024 capital expenditure funding shall occur by no later than January 31, 2024. Any shortfall amount for 2021 regarding actual capital expenditures shall be added to the initial funding amount for 2022. GNAC shall submit to the Division: (1) documentation that the dedicated account has been created and funded no later than March 31, 2022, and (2) notification of any planned withdrawals from the account and the purpose of the withdrawal 5 business days in advance. At the end of 2024, the capital expenditure requirements will be reconciled based upon the applicable net revenue amounts for those 3 years. Any funds in the dedicated account shall be excluded from the cash balance requirement in Condition 1 and shall be used solely for GNAC capital expenditures.

10. Except as required by governmental restrictions or as approved by the Division, GNAC must continue to operate its casino hotel as a first-class facility.

11. Within 5 days of the end of each month, GNAC shall provide the Division with detailed comparative analyses of its hotel room availability, food and beverage options, retail outlets, entertainment venues, and other amenities compared to the same month in 2019. For any area where the offerings are below those offered in 2019, GNAC shall submit the reasons for the shortfall.

12. FEI and its qualified subsidiaries, as qualified holding companies of GNAC, shall not cease providing the financial support and access to funds necessary for GNAC to comply with these Conditions and maintain its qualifications, including financial stability, integrity, and responsibility.

13. GNAC shall not fund any debt service on, or provide security for, the \$139.4 million remaining balance on the GNOG Loan.

14. The requirements as set forth in the above Conditions shall not be modified or eliminated except with the approval of the Division Director or his designee, with notice of such approval directed to the Chairman of the Commission.

STATE OF NEW JERSEY
Office of the Attorney General
Department of Law and Public Safety
Division of Gaming Enforcement

Petition of Golden Nugget Atlantic City,
LLC for Approval of a Material Debt
Transaction Pursuant to *N.J.A.C. 13:69C-*
4.3

ORDER
PRN 0192201

It is ORDERED that the attached letter dated March 11, 2022, by Deputy Attorney General Alessandra A. Baldini, regarding a material debt transaction, for the reasons expressed therein, is hereby adopted, specifically subject to Conditions 1 through 14 set forth on Exhibit A therein.

Dated:

March 11, 2022



DAVID REBUCK
DIRECTOR

Casino Licensing