

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of

**PENN NATIONAL GAMING, INC.,
a corporation,**

and

**PINNACLE ENTERTAINMENT, INC.,
a corporation.**

DOCKET NO. C- 4658

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) initiated an investigation into the proposed acquisition by Respondent Penn National Gaming, Inc. (“Penn National”) of Respondent Pinnacle Entertainment, Inc. (“Pinnacle”) (hereinafter referred to as “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in

further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its complaint, makes the following jurisdictional findings and issues the following Order to Maintain Assets:

1. Respondent Penn National Gaming, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its corporate head offices and principal place of business located at 825 Berkshire Boulevard, Suite 200, Wyomissing, Pennsylvania 19610.
2. Respondent Pinnacle Entertainment, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 3980 Howard Hughes Parkway, Las Vegas, Nevada 89169.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

I. (Definitions)

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. “Asset Maintenance Period” means, for each of the Assets To Be Maintained, the period commencing on the date this Order to Maintain Assets is issued by the Commission and ending on the respective Divestiture Date.
- B. “Assets To Be Maintained” means each of the Divested Casinos, and the Casino Business and Casino Assets related thereto.
- C. “Decision and Order” means:
 1. The proposed Decision and Order contained in the Consent Agreement in this matter until issuance of a final Decision and Order by the Commission; and
 2. The Final Decision and Order issued by the Commission in this matter, following the issuance of a final Decision and Order by the Commission.

II. (Asset Maintenance)

IT IS FURTHER ORDERED that during the Asset Maintenance Period:

- A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, to minimize any risk of loss of competitive potential of the Assets To Be Maintained, to operate the Assets To Be Maintained in a manner consistent with applicable laws and

regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Maintained, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Assets To Be Maintained (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Maintained.

- B. Respondents shall not terminate the operation of any of the Assets To Be Maintained, and shall conduct or cause to be conducted the business and operations of the Assets To Be Maintained in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Assets To Be Maintained. Included in the above obligations, Respondents shall, without limitation:
1. Maintain all operations of the Assets To Be Maintained in the regular course of business and in accordance with past practices, keep the organization and properties of the Assets To Be Maintained intact, and not reduce operating hours, marketing and promotional efforts, customer programs, entertainment offerings, or other services, amenities, or offerings;
 2. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;
 3. Provide the Assets To Be Maintained with sufficient funds to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment (including gaming equipment), and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;
 4. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;
 5. Provide support services at levels customarily provided by Respondents;
 6. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;

7. Maintain the books and records (including but not limited to all customer databases, loyalty program databases, and records relating to regulatory compliance) of the Assets To Be Maintained;
8. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:
 - a. Continuing to provide each of the Key Employees and Casino Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;
 - b. Providing reasonable financial incentives to encourage Key Employees and Casino Employees to continue in his or her position until the Divestiture Date, and as may be necessary to facilitate the employment of such Key Employees and Casino Employees by the proposed Acquirer following the Divestiture Date;
 - c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and
 - d. Not transferring any employees from any of the Assets To Be Maintained to any of Respondents' assets or businesses that Respondents will not divest;
9. Not display any signs or conduct any advertising or promotions (e.g., direct mailing, emails, social media postings), or do anything else visible to the public to indicate that Respondent is moving its operations to another location, or that indicates any of the Assets To Be Maintained will close;
10. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Assets To Be Maintained (including Respondent Pinnacle's mychoice customer rewards program), other than changes in the ordinary course of business consistent with changes made at Respondent Pinnacle's other casino businesses that Respondents will not divest; and
11. Not target, encourage, or convert customers of Divested Casinos to become customers of Respondents' other casino businesses that will not be divested, or otherwise take actions to change the composition or makeup of the Casino Customer Database Records or the Retained Customer Database Records; *provided, however*, that nothing in this sub-paragraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent Pinnacle's casinos or mychoice members, or (ii) in the ordinary course of business and in accordance with past practice.

Provided, however, that Respondents shall not be in violation of this Paragraph II if Respondents take actions (i) that are explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of Casino Assets and consistent with the purposes of the Decision and Order.

III. (Additional Obligations)

IT IS FURTHER ORDERED that:

- A. During the Asset Maintenance Period, Respondents shall not:
1. Provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement; or
 2. Use any Confidential Business Information for any reason or purpose, other than: as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

Provided, however, that nothing in this Paragraph shall prevent Respondents from retaining and using any tangible or intangible property (including Retained Customer Database Records) that Respondents retain the right to use pursuant to this Order to Maintain Assets or the Decision and Order, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order to Maintain Assets and the Decision and Order.

- B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information by Respondents that is not permitted by this Order to Maintain Assets, the Decision and Order, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by any persons to information available or stored on any of Respondents' computers or computer networks.
- C. Not later than 30 days from the date this Order to Maintain Assets is issued, Respondents shall:
1. Provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information; and
 2. Require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

- D. During the Asset Maintenance Period, Respondents, in consultation with each proposed Acquirer, for the purposes of ensuring an orderly transition, shall:
1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Casino Assets by the Acquirer is not delayed or impaired by the Respondents;
 2. Designate employees of Respondents knowledgeable about the operation of the Casino Assets, and Casino Business conducted at the Divested Casinos, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Casino Assets;
 3. Allow the Acquirer reasonable access to all Confidential Business Information related to the Casino Assets and to employees who possess or are able to locate such information; and
 4. Establish projected timelines for accomplishing all tasks necessary to effect the operational and marketing transition to the Acquirer in an efficient and timely manner.
- E. No later than the Divestiture Date, Respondents shall obtain at their sole expense all Governmental Authorizations and third-party consents necessary to divest the Casino Assets and for the Acquirer to operate the Divested Casinos in a manner that achieves the purposes of this Order to Maintain Assets and the Decision and Order. *Provided, however,* that Respondents shall assist the Acquirer in obtaining the transfer from Respondents, or issuance to the Acquirer, of any Governmental Authorization, permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.
- F. Respondents shall cooperate with and assist any person with whom Respondents engage in negotiations to acquire the Casino Assets in a due diligence investigation, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process.
- G. Respondents shall cooperate with and assist any proposed Acquirer of the Casino Assets to evaluate independently and offer employment to the Key Employees and Casino Employees relating to each of the Divested Casinos, with such cooperation to include at least the following:
1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:
 - a. Provide to the proposed Acquirer a list of all Key Employees and Casino Employees, and provide Employee Information for each; and
 - b. Allow the proposed Acquirer a reasonable opportunity to interview any Key Employees and Casino Employees;

2. Within 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:
 - a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Key Employees and Casino Employees; and
 - b. Make offers of employment to any of the Key Employees and Casino Employees;
3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Key Employees and Casino Employees, not offer any incentive to Key Employees and Casino Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Key Employees and Casino Employees by a proposed Acquirer; and
4. Respondents shall remove any impediments within the control of Respondents that may deter any Key Employees or Casino Employees from accepting employment with a proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by a proposed Acquirer, and shall not make any counteroffer to any Key Employees or Casino Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

IV. (Purpose Clause)

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) maintain and preserve the Casino Assets, and the Casino Business conducted at each of the Divested Casinos, as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order is achieved; (ii) prevent interim harm to competition pending the relevant divestiture and other relief; and (iii) promote achieving the purposes of the Decision and Order.

V. (Monitor)

IT IS FURTHER ORDERED that:

- A. Jeffrey Hartmann shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached to the Decision and Order as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements;

- B. No later than 1 day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements, in a manner consistent with the purposes of the orders.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.
 2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission
 3. The Monitor shall serve until all of Respondents' obligations under Paragraphs II and IV of the Decision and Order have been satisfied.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s).
- E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s).
- F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses,

claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph V.G, the term “Monitor” shall include all persons retained by the Monitor pursuant to Paragraph V.F of this Order to Maintain Assets.

- H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents’ obligations under this Order to Maintain Assets and the Decision and Order. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.
- I. Respondents may require the Monitor and each of the Monitor’s consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may require, among other things, the Monitor and each of the Monitor’s consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor’s duties.
- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
 - 1. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
 - 2. Not later than 10 days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents’ compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s) in a manner consistent with the purposes of the orders and in consultation with the Commission.
- L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets.

- M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order

VI. (Compliance Reports)

IT IS FURTHER ORDERED that:

- A. Respondent Penn National shall notify Commission staff via email at bccompliance@ftc.gov of: (1) the Acquisition Date no later than 5 days after the Acquisition Date; and (2) the date Respondents complete each of the divestitures required to be made pursuant to Paragraph II of the Decision and Order, no later than 5 days from each respective divestiture date.
- B. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondents shall submit to the Commission verified written reports (“compliance reports”) setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of this Order to Maintain Assets.
- C. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondents pursuant to the Decision and Order.

VII. (Change in Respondents)

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of Respondent Penn National Gaming, Inc.;
- B. Any proposed acquisition, merger, or consolidation of Respondent Penn National Gaming, Inc.; or
- C. Any other change in Respondent Penn National Gaming, Inc., including but not limited to assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

VIII. (Access)

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in the Decision and Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

IX. (Term)

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

- A. 3 business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Divested Casino, the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the Casino Assets related to such Divested Casino, as described in and required by the Decision and Order.

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three business days after the Decision and Order becomes final.

Provided, further, however, that if the Commission, pursuant to Paragraph II.B of the Decision and Order, requires the Respondents to rescind any or all of the divestitures to Boyd, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant Casino Assets until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of those assets, as required by the Decision and Order.

By the Commission, Commissioner Wilson not participating.

Donald S. Clark
Secretary

SEAL:

ISSUED: September 28, 2018