IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE MH HABERKORN 2006 TRUST, MATTHEW H. HABERKORN, KILEY ROSE HABERKORN, and TIPPY LIVING TRUST U/A DTD September 10, 2013, on behalf of themselves and all other similarly situated stockholders of Empire Resorts, Inc.,	:	
Plaintiffs,	:	
v	:	C. A. No. 2020-0619-KSJM
EMPIRE RESORTS, INC., KIEN HUAT REALTY III LIMITED, EMANUEL R. PEARLMAN, KEITH L. HORN, GERARD EWE KENG LIM, EDMUND MARINUCCI, NANCY A. PALUMBO, RYAN ELLER, GENTING MALAYSIA BERHAD, GENTING (USA) LIMITED, HERCULES TOPCO LLC,	:	
Defendants.	:	

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, July 23, 2021
4:05 p.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON DEFENDANTS' MOTIONS TO DISMISS

APPEARANCES:

GREGORY V. VARALLO, ESQ.
Bernstein, Litowitz, Berger & Grossman LLP
-and-
J. DANIEL ALBERT, ESQ.
GRANT D. GOODHART III, ESQ.
MARIA STARLING, ESQ.
of the Pennsylvania Bar
Kessler Topaz Meltzer & Check, LLP
for Plaintiffs

JOHN D. HENDERSHOT, ESQ.
Richards, Layton & Finger, PA
-and-
ROGER A. COOPER, ESQ.
RAHUL MUKHI, ESQ.
KAL BLASSBERGER, ESQ.
of the New York Bar
Cleary Gottlieb Steen & Hamilton LLP
for Defendants Empire Resorts, Inc., Kien Huat Realty III Limited, Emanuel R. Pearlman, Gerard Ewe Keng Lim, Ryan Eller, Genting Malaysia Berhad, Genting (USA) Limited, and Hercules Topco LLC

MATTHEW D. STACHEL, ESQ.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
-and-
GEOFFREY CHEPIGA, ESQ.
ETHAN C. STERN, ESQ.
of the New York Bar
Paul, Weiss, Rifkind, Wharton & Garrison LLP
-and-
JESSICA E. PHILLIPS, ESQ.
of the District of Columbia Bar
Paul, Weiss, Rifkind, Wharton & Garrison LLP
for the Special Committee Defendants

- - -

THE COURT: All right. Juli, this is Kathaleen McCormick. Can you hear me okay?

THE COURT REPORTER: I can, Your Honor. Thank you.

THE COURT: All right. This is the time we've set for me to deliver my bench ruling on defendants' motions to dismiss. So I'll begin.

This stockholder class action challenges a merger in which the minority stockholders of Empire Resorts, Inc., which I'll refer to as "Empire" or the "company," were cashed out for $9.74 per share. The merger was designed by Tan Sri Lim Kok Thay, who I'll refer to as "KT Lim," and who held a majority of Empire's outstanding common stock through Kien Huat Realty III Limited, which I'll refer to as "Kien Huat." To fund the merger, KT Lim brought in his affiliated entities, Genting Malaysia Berhad, which I'll refer to as "GenM," and its subsidiary, Genting (USA) Limited, which I'll refer to as "Genting USA." And I'll refer to GenM and Genting USA collectively as the "Genting entities."

The stockholder plaintiffs filed this lawsuit alleging that the merger was the product of breaches of fiduciary duties. The defendants have

moved to dismiss the complaint on a variety of grounds, arguing first that the merger satisfied the conditions of *MFW* sufficient to invoke the business judgment standard and that plaintiffs failed to state a claim under that standard.

The individual defendants also argue that the plaintiffs have failed to state a claim against them. GenM argues that this Court lacks personal jurisdiction over it, and the Genting entities together argue that the plaintiffs failed to adequately allege that they formed a control group with Kien Huat or to state a claim for aiding and abetting against them.

For reasons I'll explain next, I am largely denying the motions to dismiss. Before I begin, I'll note that some of the quoted language I cite is partially excised or otherwise altered.

I'll turn now to the factual background, which I draw from the verified stockholder class action complaint and documents incorporated by reference.

Empire has operated in the gaming and hospitality business since its formation in 1993. Kien Huat began building a position in Empire in 2009.

Kien Huat has held voting control of Empire since a March 2017 rights offering. Since then, Kien Huat has installed numerous members of management and the company's board of directors, and I'll refer to the company's board of directors as the "board." As of January 2016, Kien Huat owned 88.7 percent of Empire's outstanding common stock.

Kien Huat was also Empire's largest creditor. Over the years, Kien Huat and Empire entered into a series of loan agreements and amendments, and Kien Huat has secured the right to convert any portion of the principal amount of those loans into Empire common stock.

As of 2016, Empire's sole facility was a harness horseracing facility and video lottery terminal, also known as a "VLT," in Monticello, New York, and I'll refer to that as the "Monticello Raceway." In 2016, Empire's operating company, Montreign Operating Company, LLC, or "Montreign," secured a license to operate a premier casino and resort, Resorts World Catskills, which I'll refer to as "Resorts World," just down the road from Monticello Raceway in the Hudson Valley-Catskills region of New York.

The Resorts World license became effective on March 1, 2016. After that, Kien Huat elevated or caused to be elevated a number of alleged loyalists within the Empire structure. Kien Huat promoted its board designee, Emanuel Pearlman, to executive chairman of the board, entitling him to an annual salary of $650,000. Kien Huat hired Ryan Eller, a former officer of GenM subsidiary Genting New York LLC, as the company's CEO and appointed him as a board member. Kien Huat appointed one of the members of the Kien Huat board, Gerard Ewe Keng Lim, who I'll refer to as "Gerard Lim," to the Empire board. Eller and Gerard Lim replaced two outgoing directors who had no loyalties or affiliations with Kien Huat or the Genting entities. Kien Huat moved Jamie Sanko from his chief financial officer position at Genting Americas Incorporated to chief accounting officer at Empire.

Also around that time, Empire and Kien Huat entered into a letter agreement, which I'll refer to as the "2016 letter agreement," which provided that for a three-year period or until the one-year anniversary of the opening of Resorts World, Kien Huat would not take actions in furtherance of a

going-private transaction involving the company unless the transaction was subject to the approval of both, one, a majority of the shares outstanding entitled to vote that were unaffiliated with Kien Huat; and, two, either a majority of disinterested members of the board or a special committee of the board composed of disinterested members.

The terms of the 2016 letter agreement were extended by an additional year, by agreement, on December 28, 2017. Resorts World opened in 2018. As a result, the restriction extended through February 8, 2020, two years after the opening of Resorts World.

In November 2018, Empire entered into a series of agreements with bet365 Group Limited, which I'll refer to as "bet365," a British online gambling company. The agreements provided that bet365 would operate and manage Empire's retail sports book, online sports book, and online table games once all were legally authorized. Empire and bet365 agreed to split the revenues from these three ventures on a 50-50 basis.

Empire also agreed that bet365 could purchase up to 2.5 million shares of common stock of the company at a purchase price of $20 per share, for

an aggregate investment of up to $50 million. Pursuant to that agreement, bet365 purchased 1,685,759 shares of common stock.

In February 2019, the board retained Moelis to advise the company on capital structure issues and matters relating to near-term debt and debt covenant obligations. Moelis advised that additional capital could come from either Kien Huat or a third-party source, Empire could pursue a real estate transaction wherein Kien Huat would purchase their lease from Resorts World's landlord and allow deferred rental payments in return for cash or stock, or Empire could pursue a strategic agreement with an industry peer. All of these options could be accomplished, according to Moelis, within calendar year 2019.

In early 2019, Empire was considering a plan to close the Monticello Raceway. Rather than completely abandon the VLT business, however, Empire alternatively developed a plan to relocate the VLT machines from the Monticello Raceway to a location in Orange County, New York. This proposal had the benefit of both moving the VLT facility into a more densely populated area and moving it further away from Resorts World, which would draw customers to a new

property, separate from Monticello Raceway. I'll refer to this opportunity as "Orange County."

In March 2019, Empire engaged Global Gaming & Hospital Capital Advisors, LLC, which I'll refer to as "GGH Morowitz," to provide an analysis of Orange County's revenue potential. According to a GGH Morowitz report, the potential VLT facility in Orange County could generate annual revenue between $104.3 million to $208.1 million, with a likely range of $130.2 million to $156.2 million. By comparison, Resorts World had generated $139.7 million of gaming revenue in 2018.

The board was presented with the Orange County plan at an April 9, 2019 meeting, and management told them that Orange County could generate $154 million of annual gaming revenue in its first full year of operation, potentially twice the amount of Empire's prior year's revenues. Then, on May 7, 2019, the board received an additional presentation on the company's financial condition and the potential of Orange County, this time from Moelis. The May 7 presentation noted that the Orange County scenario "impl[ied] a potentially meaningful positive net levered free cash flow impact."

Specifically, the impact of Orange County was projected to translate to $32 million in EBITDA in Orange County's first year and help Montreign's adjusted EBITDA rise from $26 million in 2019 to $95 million by 2023 and Empire's EBITDA rise from $14 million in 2019 to $80 million by 2023. The projections were even higher when including the potential impact of legalized online sports betting.

Enabling legislation for the Orange County plan partially revolved around Empire's compensating MGM Resort International's Yonkers Casino and Raceway, which I'll refer to as "Yonkers," for revenue that it would redirect from Yonkers. Empire's negotiations with MGM began in May and went through multiple proposals. Empire engaged Union Gaming Securities LLC to assess the impacts of Orange County on Yonkers in response to MGM's own study.

By June 4, 2019, MGM had demanded $10 million in mitigation payments per year from Empire, and Empire had countered with a base $5 million payment that could scale up to $7.5 million. On June 20, 2019, the New York State Legislature passed legislation approving Orange County.

As Orange County's legislative

approval neared, Empire's financing strategy shifted to a take-private plan. After the board discussed the legislation authorizing Orange County during the June 17, 2019 meeting, it discussed a modification of Moelis's engagement terms to include advising the company on a related-party M&A transaction.

During a June 21, 2019 meeting, the board determined to form a special committee comprising directors Keith L. Horn, Nancy A. Palumbo, and Edmund Marinucci to evaluate an acquisition of the company by a related party. The board had retained Moelis to advise the special committee, along with the company's long-time legal counsel, Paul, Weiss, Rifkind, Wharton & Garrison, LLP. The special committee became effective on July 1, 2019, and the special committee took no real action until the end of July.

Yet just days after the special committee's formation, on June 24, 2019, Pearlman, Eller, Moelis, and Paul Weiss met in person in New York City with representatives of Kien Huat and its counsel, Cleary Gottlieb Steen & Hamilton LLP. There were discussions at this meeting about the possibility of a potential transaction involving Kien Huat and the

company. No member of the special committee was present for the meeting.

Before the special committee was formed, KT Lim, through the Genting entities, began valuing Orange County in preparation for a potential transaction. In May 2019, the Genting entities engaged Union Gaming to evaluate the future prospects of Orange County. The analysis evaluated potential locations in Orange County for the VLT facility and projected that the facility could generate between $111 million and $138 million in gross gaming revenue.

In early July 2019, shortly after the June 24 board meeting, GenM re-engaged Union Gaming to evaluate the potential merger. Union Gaming's analysis included a discounted cash flow analysis that valued Empire as high as $15.95 per share, a public market comparable-companies analysis that yielded a valuation as high as $13.11 per share, and a precedent-transaction analysis that yielded a valuation range of $9.79 to $14.77 per share.

Three days later, on July 25, 2019, Kien Huat delivered a letter to Empire stating that Kien Huat no longer believed that Empire was viable as a stand-alone company and threatening to cease

providing equity financing "while Empire remains a public company." I'll refer to that as the "July 25 letter." The July 25 letter stated that, if invited by Empire to do so, Kien Huat was willing to make a proposal to acquire Empire. Kien Huat then made the July 25 letter public in a Schedule 13D filing.

Prompted by the July 25 letter, the special committee met for the first time on July 25, 2019. During this first meeting, Moelis and Paul Weiss discussed negotiation strategies for Kien Huat with the special committee. Pearlman and Eller were also present for the meeting.

Three days later, the special committee met again. At this meeting, the special committee learned from Paul Weiss that someone who attended the July 25 meeting had leaked information concerning the special committee's deliberations to Kien Huat. Despite this leak, the special committee did not restrict outsiders, including Pearlman and Eller, from being present at their meetings.

On August 5, 2019, Kien Huat and the Genting entities submitted a joint offer to take Empire private for $9.74 per share. I'll refer to that as the "proposal." Pursuant to the proposal,

Genting USA would acquire 13.2 million shares of Empire common stock currently held by Kien Huat, such that, post-transaction, Kien Huat and Genting USA would own 51 percent and 49 percent of Empire, respectively.

The special committee met on August 5, 2019, to discuss the proposal, with Eller and Pearlman in attendance. Among other things, the special committee discussed that the proposal reflected a less than 2 percent premium to Empire's then-current trading price.

The full board met later that day, on August 5, 2019, and reconvened on August 6, 2019, to discuss an update on Orange County. During those two days, the board was advised that management was projecting four potential Orange County scenarios in 2021: one, a low case EBITDA of $20.2 million; two, a base case EBITDA of $29.2 million; three, a highlighted case EBITDA, supported by mitigation negotiations with MGM, of $42.8 million; and, four, a pro forma EBITDA, including Resorts World slots, of $66.7 million.

The presentation further suggested that a mitigation agreement with MGM over its Yonkers

facility had effectively been reached, where Empire would pay a base payment of $5 million per year, with an incremental payment of half a million dollars for every $10 million of gross gaming revenue generated by Orange County over $125 million, capped at an additional $2.5 million annually.

Finally, the presentation indicated that a site location for Orange County had been located and that Empire had executed a nonbinding term sheet for a 20-year lease for this location, which the parties refer to as the "Cabella's" location.

The special committee met again the next day, on August 6, 2019, during which Moelis reviewed management projections recently prepared for the merger. Those projections excluded Orange County, despite the board's recent discussion.

Moelis advised the special committee that it needed more time to negotiate with Kien Huat and GenM. The special committee then determined to request an undefined increase in the proposed consideration because "[t]he Special Committee concluded that the Proposal's offer price was not yet compelling" and sought continued financing from Kien Huat and the right to solicit alternative proposals.

Recall that the 2016 letter agreement prevented Kien Huat from taking Empire private before February 8, 2020, unless it subjected the acquisition to a majority-of-the-minority stockholder vote and obtained disinterested director approval.

In negotiations over a waiver pursuant to 8 Delaware Code Section 203, Kien Huat refused to agree to protections requested by the special committee beyond the February 8, 2020, expiration of the 2016 letter agreement.

Likewise, during negotiations over a confidentiality agreement that occurred between August 6 and August 11, 2019, Kien Huat refused to agree to a standstill provision that would extend beyond the time frame set forth in the 2016 letter agreement. These refusals signaled that Kien Huat was not binding itself to the 2016 letter agreement protections for any longer than contractually required. At least that conclusion is reasonably inferable.

Ultimately, the special committee granted the Section 203 waiver and agreed to a standstill effective through February 8, 2020.

On August 9, 2019, Empire disclosed in a Form 10-Q that the company may have to enter Chapter

11 bankruptcy proceedings should its financial condition not improve, causing the company's stock price to fall to $8.18 by market's close on August 12, 2020.

At an August 9, 2019, meeting, the special committee authorized counsel to send Kien Huat a draft agreement and plan of merger "with the objective of negotiating a potential transaction over the next week." And I'll refer to that draft agreement as the "merger agreement."

On August 12, 2019, the special committee learned that Kien Huat and the Genting entities would not raise their offer price of $9.74 per share and that they had stated it was their best and final offer. But they also learned that Kien Huat would not agree to support any other alternative transaction if one emerged, even if the transaction contained superior terms. The special committee settled on bargaining over capital support for Empire and requested a $5 million special dividend for minority stockholders.

On August 14, 2019, Pearlman received a message from a representative of an industry gaming expert that the parties have referred to as "Party A."

Party A informed Pearlman that it had "money partners" and that it was intrigued by the opportunities that Orange County and online betting presented to Empire. The representative told Pearlman that he was interested in potentially investing in Empire to help it get through its liquidity crunch, which Pearlman communicated to Moelis on August 14, 2019.

Kien Huat's counsel had informed Paul Weiss on August 15, 2019, that it was targeting signing the merger agreement by August 19, 2019. Less than 24 hours later, on Friday, August 16, 2019, after Party A had talked to Moelis but before the special committee was informed of Party A's interest, Kien Huat decided a Monday signing was not quick enough and, through its counsel, relayed to Paul Weiss that "while [Kien Huat] and its affiliate Genting Malaysia Berhad were not threatening to walk away, they "could not guarantee" that they would be willing "to continue negotiations beyond Sunday, August 18, 2019 if a definitive agreement had not been entered into before ... Sunday evening Eastern Time." Kien Huat's demand that the merger be finalized before the weekend ended gave Party A and the money partners no realistic time to pursue an equity investment.

At the special committee's August 16, 2019, meeting, Paul Weiss informed the committee that Kien Huat had rejected the special dividend request but had offered a ten-day go-shop period where the special committee could attempt to solicit alternative proposals. Moelis advised that the proposed ten-day go-shop would be adequate to negotiate with third parties even after signing the merger agreement. The special committee bought into this advice and, at the end of the meeting, determined that the special committee was prepared to accept Kien Huat and the Genting entities' latest offer.

The go-shop effectively prohibited the financing proposal that Party A was floating, and it required discussions with third parties to involve a takeover proposal, which was defined to require a minimum threshold offer affecting at least 20 percent of the company's assets or voting power.

For the company to ultimately agree to a deal with a third party, the merger agreement required that the alternative proposal constitute a superior proposal, which was defined to be a "[p]roposal to acquire at least 75% of the outstanding equity or assets of the Company." Considering Kien

Huat's unwillingness to sell its stake in the company, there was a limited chance that an alternative proposal would ever satisfy the definition to trigger a superior proposal, especially when parties like Party A were interested only in financing.

The Empire board met on August 18 and approved the merger. Leading up to that meeting, Moelis prepared its fairness opinion based on the negotiated merger price. The plaintiffs allege that the management projections that Moelis used in this opinion were compromised. And I'll pause now to backtrack and briefly describe the facts concerning this theory.

Recall that on August 6, 2019, Moelis made a presentation to the special committee that included certain management projections. Those projections included a base case and a base case plus management agreement where Resorts World would be run by a Genting entities affiliate for an 8 to $10 million annual fee. Both cases excluded Orange County. The base case projected EBITDA of $17 million in 2020, rising to $49 million by 2023. Under the base case plus management agreement case, management projected 2020 EBITDA of $29 million, rising to $63

million by 2023. Both cases assumed online sports betting would be legalized.

Those August 6 cases were not used by Moelis for its fairness analysis. Instead, management provided new projections to Moelis on August 14, 2019, which eliminated the base case plus management agreement case and included online sports betting as an assumption in only one scenario. Also, the August 14 projections included an across-the-board reduction of approximately $5 million per year in EBITDA over the projection period, thereby reducing Empire's projected EBITDA.

Neither the proxy accompanying the merger vote nor the special committee materials explained why these revisions were made in the August 14 projections. Documents obtained through Section 220 proceedings indicated that management was working with Moelis to make numerous negative changes that drove down the company's projections, without the special committee's involvement.

On August 14, 2019, management pushed Moelis to complete its review of a model and send it to Kien Huat, despite Moelis wanting more time with it to evaluate recent management-driven changes. Moelis

employees requested that Eller confirm that Orange County should not be assumed in the base case, which they did on August 14, 2019. This occurred without a meeting of the special committee or any involvement of committee members.

During the August 18 board meeting, Moelis delivered its financial analysis and oral fairness opinion based on the allegedly compromised company projections that excluded Orange County but included the cannibalization and other costs associated with the Monticello Raceway. Moelis's valuation analysis yielded negative equity values and share prices for Empire.

In September 2019, after the merger agreement was executed, the board received a presentation from management titled "Merger Discussion" that included extensive projections for Orange County running through 2026. This presentation suggested that Genting Americas would complete the development of Orange County. It also suggested that Genting Americas would operate Resorts World, as contemplated by the August 6 base case plus management agreement scenario.

The projections included EBITDA from

Orange County alone rising from $42 million in 2022 to $54.1 million by 2026. Empire's consolidated EBITDA, including Orange County, was projected to jump from $15 million in 2021 to $57.2 million in 2022, after the opening of Orange County, and then continue to increase to $74.2 million in 2023 and $91.5 million in 2024. Further, Empire had made progress on selecting a Cabella's location for Orange County.

On November 15, 2019, Empire stockholders approved the merger with only 52.7 percent of the minority shares voting in favor of the merger. The minority vote included bet365's 1,685,759 shares as unaffiliated with Kien Huat, despite bet365's joint venture sports betting operation with Empire. But for bet365's vote in favor of the merger, the majority-of-the-minority vote condition would not have been satisfied.

On July 24, 2020, Matthew H. Haberkorn, Kiley Rose Haberkorn, the MH Haberkorn 2006 Trust, and the Tippy Living Trust U/A dated September 10, 2013, which I'll refer to collectively as the "plaintiffs," filed a stockholder class action in this Court against Empire, Kien Huat, Pearlman, Horn, KT Lim, Marinucci, Palumbo, Eller, GenM, Genting USA, and

Hercules Topco LLC. And I'll refer to those collectively as the "defendants." Plaintiffs brought this action on behalf of all holders of Class A stock who were allegedly harmed by defendants' actions asserting five claims.

In Count I plaintiffs claim that Kien Huat and the Genting entities breached their fiduciary duties a controllers.

In Count II, plaintiffs claim that Pearlman, Horn, Gerard Lim, Marinucci, and Palumbo breached their fiduciary duties as directors.

In Count III, plaintiffs claim that Pearlman and Eller breached their fiduciary duties as officers.

In Count IV, plaintiffs claim, in the alternative, that the Genting entities aided and abetted breach of fiduciary duties.

And in Count V, plaintiffs assert a claim for aiding and abetting breaches of fiduciary duty against Hercules. And I'll note that Hercules is a Delaware LLC formed in connection with the merger and affiliated with Kien Huat and the Genting entities.

On September 3, 2020, Horn, Marinucci,

and Palumbo, who I'll refer to as the "special committee defendants," moved to dismiss the complaint pursuant to Court of Chancery Rule 12(b)(6). All the other defendants moved to dismiss all claims pursuant to 12(b)(6) as well. GenM moved to dismiss pursuant to Rule 12(b)(2). And the parties fully briefed defendants' motions on March 1, 2021, and the Court heard oral argument on April 29, 2021.

I want to take a quick break, and then I'll turn to the legal analysis.

(Brief discussion off the record.)

THE COURT: All right. Turning now to legal analysis. I'll address the defendants' argument in the following order: First, I'll resolve whether plaintiffs adequately allege that the transaction is subject to the entire fairness standard. Second, I'll determine whether the complaint states a claim against Kien Huat. Third, I'll address whether the complaint states a claim against the individual defendants. Fourth, I'll discuss whether the complaint states a claim against the Genting entities. Fifth, I'll address whether the complaint states a claim against Empire and Hercules. And, last, I'll discuss GenM's arguments concerning personal jurisdiction.

Before turning to the Rule 12(b)(6) arguments, it's helpful to review the governing standard. The governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability. When considering a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pleaded factual allegations in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible to proof. The Court, however, need not accept conclusory allegations unsupported by specific facts or draw unreasonable inferences in favor of the nonmoving party.

The substantive standard also plays a central role here. This Court reviews squeeze-out transactions under the entire fairness standard unless the transaction was subject to the six conditions set forth in *Kahn v. M&F Worldwide Corp*. If a plaintiff pleads facts supporting a rational inference that any of these conditions were not present, then the defendant may not invoke the business judgment standard at the pleading stage.

In this case, plaintiffs plead facts

making it reasonably conceivable that multiple of the *MFW* conditions were not met. And I'll focus my analysis on two deficiencies: first, the failure to implement the timing requirements of *MFW*, sometimes referred to as the *ab initio* requirement; and, second, the failure to obtain approval of the majority of the minority stockholders.

I'll start with the timing argument. It is well-settled that for *MFW* protections to restore the business judgment standard, a controller must, *ab initio*, condition the transaction on approval by a special committee and a majority of the minority stockholders.

The *MFW* framework aims to replicate a third-party bargaining process free from a controller's coercive influence. As the *MFW* Court held, the *ab initio* requirement serves to incentivize controlling stockholders to "ced[e] potent power to the independent directors and minority stockholders."

This upfront promise not to bypass the special committee or the majority-of-the-minority condition limits the potential for any retributive going-private effort.

As the Supreme Court held in *Flood v.*

Synutra, "[T]he purpose of the words '*ab initio*,' and other formulations like it in the *MFW* decisions, require the controller to self-disable before the start of substantive economic negotiations, and to have both the controller and the Special Committee bargain under the pressures exerted on both of them by these protections."

So for the *ab initio* requirement to mean anything and to accomplish the goal of eliminating otherwise-present bargaining pressures, the condition must be irrevocable. As this Court observed in *In re Dell Technologies Incorporated Class Five Stockholders Litigation*, the controller must "irrevocably and publicly disable[] itself from using its control to dictate the outcome of the negotiations and the shareholder vote."

Defendants argue that, because the 2016 letter agreement was in place prior to the commencement of the negotiation, *MFW*'s *ab initio* requirement was satisfied. And there's a degree of truth to this contention. It is true that, by virtue of the letter agreement, the requirement was in place upfront.

Unfortunately, however, this timing

argument misses the point. As I just explained, it is not enough that the controller self-disables at the beginning. Rather, for the condition to actually mitigate concerns of retribution, the condition must be irrevocable, in the sense that it remains in place for the duration of the negotiations over the offer. That's what's required in order for the condition to achieve full disarmament.

In this case, Kien Huat made clear that its self-disabling was limited to the duration of the 2016 letter agreement, and the imposition of the condition was thus conditional. Kien Huat twice signaled to the special committee that it would not commit to the *MFW* conditions for any longer than it was contractually required, according to the complaint.

First, in connection with its Section 203 waiver request, Kien Huat refused to agree to the protections requested by the special committee beyond February 2020, when the 2016 letter agreement would expire. Then, while negotiating a confidentiality agreement, Kien Huat refused to agree to the special committee's request for a standstill provision that it would extend beyond the 2016 letter agreement. Kien

Huat had no obligation to abide by the *MFW* framework beyond February 2020, and it's at least reasonably conceivable that it would not voluntarily assume such restrictions following the expiration of the 2016 letter agreement. So the *ab initio* requirement is not fully satisfied.

Plaintiffs also adequately allege that the transaction was not approved by the majority of the minority stockholders because the tabulation of that vote included the votes of bet365. What constitutes an unaffiliated majority-of-the-minority vote pursuant to *MFW* does not appear to have been fully litigated in this Court. Then-Vice Chancellor Strine's discussion of the requirement that the minority stockholders be disinterested calls into question the propriety of including a stockholder with significantly divergent interests from the other minority stockholders.

Defendants argue that bet365 did not have different incentives than other minority Empire stockholders, but it's at least reasonably conceivable that the opposite is true. Empire and bet365 had an agreement in place, such that, if New York regulators made sports betting legal, bet365 would have the right

to operate Empire's sports book.

The complaint alleges that Pearlman, without special committee authorization, sent Kien Huat's July 25 letter to bet365 and then had discussions with bet365 concerning the potential consequences of an acquisition of Empire on bet365's relationship with the company. Based on these allegations, I can reasonably infer that the transaction provided some benefit to bet365 that was not shared by the other minority stockholders.

At this stage, it suffices to say that it is reasonably conceivable that bet365 was not disinterested and was not an unaffiliated minority stockholder for the purposes of this *MFW* condition. Without bet365's vote, the majority-of-the-minority vote would not have carried. And for that reason, plaintiffs have adequately alleged that entire fairness applies to the challenged transaction.

Because plaintiffs have adequately alleged facts sufficient to show that *MFW* does not apply at the pleading stage, defendants cannot avail themselves of the business judgment rule on this motion and the entire fairness standard governs my analysis.

Application of the entire fairness standard typically precludes dismissal on a Rule 12(b)(6) motion. As this Court held in *Hamilton Partners L.P. v. Highland Capital Management, L.P.*, the Court cannot dismiss claims subject to entire fairness review unless defendants are "able to show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it." Defendants have not met this burden.

Plaintiffs have adequately alleged an unfair process. Fair process refers to how the transaction was timed, initiated, structured, negotiated, and disclosed to directors and stockholders, as well as how the approvals of the directors and stockholders were obtained.

During the negotiations, Kien Huat publicly threatened to cut off financing for Empire and accelerated the timeline of the merger. Kien Huat rushed the special committee by imposing deadlines. For example, it imposed a two-week deadline to sign the merger agreement from the date of the offer.

Between the short time frame and the restrictive go-shop, the special committee was not

able to effectively negotiate with parties such as Party A. Although Moelis initially advised the company that it had a number of strategic options, by accelerating the timeline, Kien Huat effectively limited those options and forced Empire's hand on the merger.

In addition, the complaint raises a number of issues regarding alleged leaks that may have been evidence of back-channeling communications. As one example, Paul Weiss informed the special committee that there was a leak at the July 25, 2019, meeting and that someone at that meeting may have relayed information about the meeting back to Kien Huat.

In itself, these allegations of back-channeling may not be enough to suggest an unfair process, but they are certainly something to consider as we go forward.

Defendants point to the go-shop as evidence of fair process, but that argument is unavailing. The go-shop only provided ten days to seek an alternative transaction. It only permitted takeover transactions -- and superior ones, at that. And with the threat to cut off financing, the go-shop was structured in a way that guided the company's hand

towards the merger. It doesn't effectively mitigate all the other concerns and allegations concerning an unfair process.

For those reasons, plaintiffs have adequately alleged an unfair process.

They've also adequately alleged unfair price. Fair price refers to the economic and financial considerations of a transaction, such as market value, earnings, future prospects, and other factors that affect the intrinsic value of a company's stock.

The merger offered a 2 percent premium to Empire's then-current trading price. Considering the recent decline in the company's stock, that premium would be negative if compared to the 3-, 6-, or 12-month volume-weighted average of the price of the company's stock. Moelis also confirmed that Kien Huat's comments regarding its intent to cut off financing depressed the company's stock appraise.

In addition to Kien Huat's alleged attempt to capitalize on the company's depressed stock price, the valuation analysis that Moelis delivered to the special committee was based on the company's projections that excluded Orange County and were other

allegedly compromised.

Because plaintiffs have adequately alleged unfair process and price, the complaint states a claim against Kien Huat under the entire fairness standard.

I turn now to the motion brought by the individual defendants. And they are director Gerard Lim and the special committee defendants -- Horn, Marinucci, and Palumbo. As to them, plaintiffs must plead a violation of the duty of loyalty by operation of the exculpatory charter provision.

The Supreme Court held in *Cede v. Technicolor* that the duty of loyalty "mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling stockholder and not shared by the stockholders generally."

They held in *KCG Holdings*: "A failure to act in good faith may be shown ... where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation" or fails to act in the face of a known duty to act, demonstrating a conscious disregard of

their duties.

As to the officer defendants -- Pearlman and Eller -- plaintiffs need only plead facts supporting a reasonable inference that, acting in their capacity as officers, they breached the duty of loyalty or care. The applicable standard for the duty of loyalty is the same as the standard I just outlined for directors. The standard applicable to the duty of care of an officer is gross negligence. As this Court described in *Baker Hughes*: "To plead gross negligence, a plaintiff must allege conduct that constitutes reckless indifference or actions that are without the bounds of reason."

Turning to the arguments by the special committee defendants, plaintiffs' primary theory is that they acted in bad faith by failing to manage conflicts of interest during the merger process, and this theory is well-pled.

Plaintiffs allege that, after it was leaked to Kien Huat from the special committee's very first meeting on July 25, the special committee continued to allow management members to participate in the meetings. Plaintiffs allege that the special committee was not involved or privy to the creation of

the company's projections and allowed a conflicted management team to work with Moelis to taint Empire's valuation.

In support of this theory, plaintiffs point to emails showing that Moelis repeatedly asked management, after receiving the August 14 projections, whether Orange County should be excluded from the base case, with Eller responding that it should, all without special committee members being included in the communication.

In the projections, the upside Orange County case was stripped out, the downside of the Monticello Raceway was included, the management agreement case was excluded, and an approximate $5 million per year EBITDA reduction over the projected period was included. Orange County's exclusion had the effect of eliminating additional annual EBITDA of $25.6 million beginning in 2022, growing to 39.9 million in 2024, based on the August 14 projections. And by September 2019, Orange County's EBITDA projections had increased to $42 million in 2022, rising $49.7 million by 2024.

The special committee never received -- and, more importantly, never asked for --

an analysis of the company's value including Orange County. And their meeting minutes nowhere reflect a discussion of Orange County's projections, despite recent discussions of Orange County in prior board meetings. It is reasonably conceivable that the special committee did not consider various sets of financial projections and that they considered only what management instructed Moelis to use.

Defendants make the argument that including Orange County in the projections would have been unreasonable and unjustified due to its uncertainty. The special committee's protestations that Orange County was too uncertain to include in Moelis's analysis ignores the facts that are adequately alleged; such as, one, the meeting minutes reflect zero discussions of that reasoning; two, the special committee never even requested such analysis; three, the two-and-a-half-year horizon referenced in their brief was well within the projection period that Moelis used for its analysis; and, four, management and the full board continued to plan for Orange County in the ordinary course of business immediately after the approval of the merger.

The uncertainty argument is further

belied by the fact that the projections incorporated the potential upside of online sports betting, despite the uncertainty and regulatory hurdles that stood in the way of that venture. Moelis used two separate scenarios -- one with online sports betting and one without. A similar type of discounting or hedging could have been carried out for Orange County, if necessary, even though Orange County was more certain than online sports betting and was already legislatively authorized.

Legalized online sports betting required a New York State constitutional amendment, which was beyond Empire's control, but it was still included in Moelis's analysis. As such, there is no legitimate reason why Orange County should not have also been included, at least not based on the facts alleged.

Yet again, the committee didn't seek such an analysis. Their position that they shouldn't have tried to include the company's projections concerning Orange County is antithetical to their purpose and duty, which was to seek the highest value reasonably attainable for the minority stockholders.

The special committee's argument that,

even if they did include Orange County, it would not have mattered because "the optimistic case that New York legalized online sports betting -- another future contingency -- ... were still worth negative $5.45 per share."

This fails to recognize Orange County was projected to generate more than online sports betting was for Empire; two, that Moelis's analysis was additionally compromised, as I've discussed; and, further, Moelis's negative valuation analysis is undermined by the Union Gaming analysis.

Also, after only ten days of negotiations, the special committee accepted Kien Huat and the Genting entities' proposal, despite acknowledging the offer price reflected a relatively low premium to the company's closing price the prior trading day and that "the Proposal's offer price is not yet compelling."

The complaint alleges that the special committee approved a deal it knew undervalued Empire's minority shares, based on management projections that excluded the impact of plans and issues that were allegedly lucrative, discussed by the board in prior meetings. These allegations support a conclusion that

the special committee acted consciously with disregard for its duties and allowed management to taint the process so that the proposal was not adequate consideration for Empire's minority shares.

This supports an inference of bad faith at the pleading stage. It might not bear out at trial. It might not be proven. But at the pleading stage, it is sufficient. Accordingly, plaintiffs have pled a claim that the special committee defendants acted in bad faith and, therefore, breached their duty of loyalty.

I'll turn now to Gerard Lim, who admittedly lacked independence from both Kien Huat and Empire. The complaint pleads that he took action that affirmatively benefited Kien Huat in the merger process, at the expense of Empire. As such, plaintiffs' allegations demonstrate disloyal conduct. The fact that Gerard Kim did not vote at the final board meeting on the merger does not absolve him of potential liability for his actions throughout the process or relieve him of his fiduciary obligations as an Empire director.

Unlike in the cases cited by defendants, Gerard Lim's actions demonstrate that he

did participate in significant ways that allegedly contravened the process and his fiduciary obligations. The complaint alleges that Gerard Lim, against the special committee's instructions, coordinated with Pearlman to discuss a potential transaction with bet365 without the knowledge or consent of the special committee. It is reasonably conceivable that the intent of these communications was to solicit bet365's support of the eventual merger, considering that they were made by directors not independent of Kien Huat and that bet365 was Empire's largest stockholder after Kien Huat.

So plaintiffs have sufficiently alleged that Gerard Lim breached his fiduciary obligations.

As to Pearlman, who also admittedly lacked independence from Kien Huat, plaintiffs allege that he too took actions that benefited Kien Huat in the merger process at the expense of Empire's minority stockholders. The complaint sets forth in detail that Pearlman, a long-time Kien Huat designee to the board who owed his salary to Kien Huat, acted in furtherance of Kien Huat's interests. Pearlman selected the special committee's financial advisor despite not

being a member of the committee. He attended various special committee meetings. He attended the June 24 meeting with Moelis and Kien Huat. Without special committee authorization, he sent Kien Huat's July 25 letter to bet365 and had discussions with bet365 and Gerard Lim concerning the potential consequences of the merger on bet365's relationship with the company.

Plaintiffs further plead that either Pearlman or Eller, or both, worked against the interests of the special committee by leaking information about the events of the special committee's July 25 meeting to Kien Huat. These allegations are sufficient to state a claim that Pearlman acted disloyally or in bad faith.

Last, I address the allegations as to Eller. The complaint alleges that he breached his duties as CEO by taking actions in the merger process that benefited Kien Huat at the expense of Empire's minority stockholders. Plaintiffs allege that Eller worked behind the special committee's back to manipulate the company's projections that were used by Moelis. After repeatedly being questioned by Moelis, Eller instructed the financial advisor not to include the Orange County projected financial results in the

company's projections that Moelis used to value Empire in connection with its fairness opinion. This instruction had the effect of depressing Empire's valuation, according to plaintiffs and, in turn, worked to justify the price of $9.74 per share.

Plaintiffs' allegations that Eller worked to undermine this process to justify a lower price are sufficient to state a claim against Eller.

I'll turn next to whether the complaint states a claim as to the Genting entities. Plaintiffs allege that the Genting entities breached their fiduciary obligations as controllers of Empire or, in the alternative, aided and abetted in Kien Huat's breaches of fiduciary duty.

Defendants contend that neither theory is viable. As to the first, they say that plaintiffs failed to adequately allege that the Genting entities controlled Empire or were part of a control group with Kien Huat. As to the second, they argue that plaintiffs failed to adequately allege the element of knowing participation.

Let's start with the first. The Delaware Supreme Court addressed the requirements for pleading a control group in *Sheldon v. Pinto*

Technology Ventures, L.P., adopting the "legally significant connection" standard applied in multiple decisions of this Court.

And I quote: "To demonstrate that a group of stockholders exercises control collectively, the [Plaintiffs] must establish that they are connected in some legally significant way -- such as by contract, common ownership, agreement, or other arrangement -- to work together toward a shared goal. To show a legally significant connection, the [Plaintiffs] must allege that there was more than a mere concurrence of self-interest among certain stockholders. Rather, there must be some indication of an actual agreement, although it need not be formal or written."

In applying this standard, the *Sheldon* court compared the allegations at issue in two cases of this Court that sit "on opposite ends of the [control group] spectrum." Those cases were *van der Fluit v. Yates* and *In re Hansen Medical, Incorporated Stockholders Litigation*.

In *Yates*, the Court found that the plaintiff failed to adequately allege facts sufficient to identify a legally significant connection between

two venture capital investors and the company's co-founders. There, the plaintiffs relied on two agreements to show that the required legally significant connection existed. The first was the investors rights agreement that gave information rights to early-stage investors. That was executed by all investors in the financing round, not only the alleged control group members, and the agreement had nothing to do with the challenged transaction.

The second was a tender and support agreement executed in connection with the challenged transaction. The agreement was executed, however, by some, and not all, of the control group members. The Court concluded that the two agreements failed to "evidence the presence of a control group rather than a 'concurrence of self-interest among certain stockholders.'"

In *Hansen*, by contrast, the Court found that the plaintiffs adequately alleged facts sufficient to infer the existence of a control group among stockholders who agreed to roll over their equity in the challenged merger. The plaintiffs pled "more than a mere concurrence of self-interest" by identifying an array of plus factors that allowed the

Court to infer "some indication of an actual agreement." These factors included both historical ties and transaction-specific ties.

In this case, it's reasonably conceivable that the Genting entities formed a control group with Kien Huat. Kien Huat brought in GenM and Genting USA to fund the merger acquisition, sold a substantial portion of their controlling bloc to Genting USA in order effectuate the merger.

GenM, Genting USA, and Kien Huat entered into a binding term sheet pursuant to which Kien Huat would sell 13.2 million Empire shares to Genting USA and to form a joint venture to hold such shares with GenM. The proxy states that "the Merger Agreement makes it a condition to the parties' obligations ... that the holders of a majority of the voting power of the outstanding shares of Voting Stock not belled by [Kien Huat], [GenM], [and] their respective affiliates, ... entitled to vote thereon as of the Record Date of the Special Committee, voting as one class, vote in favor of the Merger Proposal," suggesting that there's a connection between Kien Huat and the Genting entities.

As alleged in the complaint, Kien Huat

and GenM jointly negotiated against the special committee. In light of these facts, I would say this situation is more analogous to *Hansen* than to *Yates*. This is not a mere correlation of interests. Instead, it was a concerted effort to act in unison. As such, defendants' attempts to deny that GenM and Genting USA owed duties to Empire's minority stockholders during the merger's negotiations fail.

I won't dilate now as to whether it's significant that GenM and Genting USA didn't, at certain times, own stock of Empire, because I view the plaintiffs' alternative theory as equally viable. That is, if the Genting entities did not form a control group with Kien Huat, plaintiffs' alternative theory that they aided and abetted a fiduciary breach is well-pled.

Defendants argue that plaintiffs failed to allege the required element of knowing participation. To plead knowing participation, a plaintiff must allege that the aider and abettor acted with scienter, or knowingly and intentionally, with reckless indifference. Mere actual or constructive knowledge of the breach is sufficient.

This Court held, in *Carr v. New*

Enterprise Associates Incorporated: "A claim of knowing participation need not be pled with particularity. But there must be factual allegations in the complaint from which knowing participation can be reasonably inferred."

To support their claim that the Genting entities knowingly participated in Kien Huat's alleged breach, plaintiffs allege the following: Kien Huat and the Genting entities are controlled by the same person, KT Lim.

On July 9, 2019, GenM retained Union Gaming to provide buy-side financial advisory service with respect to the merger. On July 22, 2019, Union Gaming delivered its analysis to GenM, determining that Empire was worth up to $15.95 per share. Based on the valuation ranges in Union Gaming's DCF analysis, it is reasonable to infer that Union Gaming used Empire projections that included Orange County, which the Genting entities provided to Union Gaming.

On July 25, 2019, three days after the delivery of Union Gaming's analysis to GenM, Kien Huat publicly threatened to cut off Empire's funding.

On August 5, 2019, Kien Huat and the Genting entities submitted their one and only proposal

to take Empire private at exactly $9.74 per share. An August 16, 2020, Kien Huat and the Genting entities conveyed the threat that they would walk away immediately and cease funding Empire if the company did not capitulate to their offer.

Taken together, and affording plaintiffs all reasonable inferences, the above facts render it reasonably conceivable that the Genting entities knowingly participated in Kien Huat's breaches.

I'll next address briefly Empire and Hercules. Both have moved to dismiss the claims against them, and plaintiffs responded to neither set of arguments. So that is granted.

I'll turn now to GenM's motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

When defendants move to dismiss a complaint pursuant to Court of Chancery Rule 12(b)(2), plaintiff bears the burden of showing a basis for the Court's exercise of jurisdiction over the defendant. In ruling on a 12(b)(2) motion, the Court may consider pleadings, affidavits, and any discovery of record. But where no evidentiary hearing has been held,

plaintiffs need only make a *prima facie* showing of personal jurisdiction on a record construed in the light most favorable to the plaintiff.

Delaware courts employ a two-step analysis in determining whether they may exercise personal jurisdiction over a nonresident defendant. As this Court held in *Focus Financial Partners*: "Initially, the court must determine whether a statutory basis exists for the exercise of jurisdictions, such as Delawares' long arm statute ...."

Next, as a second step, the Court must determine whether the defendant has sufficient minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Plaintiffs rely on Delaware's long-arm statute as the statutory basis for jurisdiction. Under that statute, "a court may exercise personal jurisdiction over any nonresident, or personal representative, who in person or through an agent ... [c]auses tortious injury in the State by an act or omission."

The Delaware Supreme Court has

recognized the conspiracy theory of jurisdiction as a basis to satisfy the long-arm statute. Under that theory, a person's co-conspirators are their agents, such that forum-directed activities by the co-conspirator can give rise to personal jurisdiction over all conspiracy members.

This court held in *Reid v. Siniscalchi* that, at the pleading stage, a plaintiff need not "produce direct evidence of a conspiracy," but must assert "specific facts from which one can reasonably infer that a conspiracy existed."

The Delaware Supreme Court established the elements of a conspiracy theory of jurisdiction in *Istituto Bancario Italiano SpA v. Hunter Engineering Company*. I won't quote those elements here. They're well-known to the litigants in this case.

The elements of the *Istituto Bancario* test functionally encompass both prongs of the jurisdictional test that must apply. The first and second factors of the test ask whether a conspiracy existed and whether the nonresidents were members of that conspiracy.

Where a complaint adequately alleges the legally significant connection required to support

a control group claim or the knowing participation required to support an aiding and abetting claim, then the first and second elements of the *Istituto Bancario* test will be met as to the alleged control group members or alleged aiders and abettors. Because the complaint adequately pleads these theories here, it is reasonably conceivable that GenM is part of a control group with Kien Huat and Genting USA or, alternatively, that it aided and abetted Kien Huat's breach of fiduciary duty. So the first two *Istituto Bancario* elements are met.

The third element of the test requires a substantial act in the forum state. As this Court held in *Dubroff v. Wren Holdings*, "[t]he formation of a Delaware entity or the filing of a corporate instrument in Delaware to facilitate the challenged transaction satisfies [the third factor)."

In this case, the merger agreement stipulated the merger between Empire, a Delaware corporation, and a merger subsidiary formed in Delaware for this purpose. Plaintiffs therefore satisfy the third element.

The fourth and fifth elements require that GenM knew or had reason to know of the merger and

that the acts in Delaware, such as the formation of the merger sub, were in furtherance of the alleged conspiracy.

The complaint satisfies these factors as well. GenM retained Union Gaming for the express purpose of analyzing the merger, and Union Gaming provided GenM with an analysis of the merger. Plaintiffs therefore have satisfied these elements.

Plaintiffs have adequately pled each factor of the *Istituto Bancario* test, thus establishing personal jurisdiction over GenM under Delaware law.

All right. To sum it up, Empire's motion to dismiss is granted. Hercules' motion to dismiss is granted. And the rest of the motions are denied.

I apologize for the long bench ruling on a Friday afternoon, counsel, but with that, are there any questions?

MR. VARALLO: Not from plaintiffs, Your Honor.

MR. HENDERSHOT: Not from the nonspecial committee defendants, Your Honor.

THE COURT: All right. Well --

MR. STACHEL: None from the special committee defendants.

THE COURT: All right. Thank you. I assume that if defendants have questions, you'll raise them now.

Otherwise, I hope you-all have a great weekend. Thank you for your patience this afternoon.

We are adjourned.

(Proceedings concluded at 5:05 p.m.)

- - -

CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 55, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 27th day of July, 2021.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public