



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.

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.

C.A. No. 2020-0619-KSJM

**PUBLIC [REDACTED]  
VERSION AS FILED  
ON JULY 29, 2020**

**VERIFIED STOCKHOLDER CLASS ACTION COMPLAINT**

Plaintiffs Matthew H. Haberkorn, Kiley Rose Haberkorn, The MH Haberkorn 2006 Trust, and the Tippy Living Trust U/A DTD September 10, 2013 (collectively, “Plaintiffs”), by and through their undersigned counsel, allege on personal knowledge as to their own conduct, and on inspection of corporate books and records obtained pursuant to 8 *Del. C.* § 220 in the action captioned *The MH Haberkorn*

*2006 Trust, et al. v. Empire Resorts, Inc.*, C.A. No. 2019-0909-KSJM (Del. Ch.) (the “220 Action”), and on information and belief as to all other matters, for their Verified Stockholder Class Action Complaint against defendants as follows:

### **NATURE OF THE ACTION**

1. This case concerns a controlling stockholder that used public stockholder financing to help secure a coveted New York state casino license and build a premier casino resort in furtherance of the controller’s grand design to build a New York State casino empire. However, after loading the company up with debt to build the casino resort and just as a lucrative new opportunity had presented itself, the controller threatened to cut off further funding while the company was experiencing liquidity issues in order to force through a take private transaction to reap all of the future upside of the company for itself. With the help of loyal company insiders manipulating the company’s financial projections, the controller purposely hid the company’s tremendous future upside in order to secure stockholder approval of the transaction. In spite of this and other false and misleading proxy disclosures, the transaction only barely passed a flawed majority-of-the-minority vote that included a large stockholder with significant business ties to the casino, which rendered it differently situated from the company’s other minority stockholders and supremely interested in the transaction. At bottom, this

squeeze-out transaction was plainly unfair to the company's minority stockholders and cannot pass muster under the entire fairness standard of review.

2. Plaintiffs, who collectively owned approximately 6.6% of the minority shares of Empire Resorts, Inc. ("Empire" or the "Company"), challenge the August 18, 2019 Agreement and Plan of Merger ("Merger Agreement") by which Empire's controlling stockholder, Kien Huat Realty III Limited ("Kien Huat" or "KH") and its affiliates bought out the remaining shares of the Company (the "Merger"). Kien Huat, which is controlled by Malaysian billionaire Tan Sri Lim Kok Thay ("KT Lim"), has controlled Empire since 2010, installing numerous members of management and the Company's Board of Directors (the "Board") along the way. In fact, over a six year stretch, it steadily increased its equity ownership from just below 50% to nearly 90% by causing the company to raise money through a series of related party loans convertible into equity and backstopping numerous warrant issuances that were structurally cumbersome for minority investors to exercise (thus maximizing Kien Huat's ability to buy cheap shares pursuant to the backstop agreements).

3. Prior to 2016, Empire only operated Monticello Casino and Raceway ("Monticello"), a video gaming machine and harness horseracing facility located in Monticello, New York. Monticello generated large losses, but Empire's owners

(including the minority stockholders) made a long term investment in order to secure a full-scale casino license.

4. In early 2016, after heavy lobbying, Empire secured one of only four highly-coveted licenses to operate a full gaming casino that New York State awarded. Empire took on significant debt to finance and open Resorts World Catskills (“Resorts World” or “RWC”), a premier casino and resort located just down the road from Monticello, pursuant to the terms of the casino license.<sup>1</sup> KT Lim, through his other majority-controlled corporations Genting Malaysia Berhad (“Genting Malaysia”) and Genting (USA) Limited (together with Genting Malaysia, “Genting”), had failed with two other proposals attempting to secure one of these four New York gaming licenses.

5. As the casino license was becoming a reality, Kien Huat caused Empire to proceed with a rights offering that increased Kien Huat’s ownership by more than 20% from approximately 67% to 89%. In connection with Kien Huat’s increased ownership, on February 17, 2016, Kien Huat and Empire entered into a letter agreement (the “2016 Letter Agreement”) prohibiting Kien Huat from taking the Company private without a majority-of-the-minority vote of stockholders and a

---

<sup>1</sup> Empire was obligated to spend no less than \$853,925,880 as a condition to secure the casino license.

majority approval by disinterested directors or a special committee for a period of time, which was ultimately extended to February 2020.

6. Empire opened Resorts World in February 2018. As Empire was beginning to ramp up Resorts World's operations, the Company required additional liquidity for operations and to fund additional expansion obligations as required by the license. Consequently, in the fall of 2018, Empire entered into a financing agreement with Kien Huat, wherein Kien Huat agreed to purchase up to \$126 million of Series F Preferred Stock (the "KH Preferred Stock Commitment Letter"). Empire also entered into an agreement on November 14, 2018 with Hillside (New Media Holdings) Limited, an affiliate of bet365 Group Limited ("bet365"), to sell \$50 million of Empire common stock in exchange for, among other things, bet365's right to operate Empire's sportsbook at Resorts World, if the New York regulators made sports betting legal.

7. In February 2019, with Resorts World performing well, but Monticello and various corporate overhead costs dragging down the Company's performance, Empire retained its longtime banker Moelis & Company ("Moelis") to provide strategic financial and business advice.

8. Around this same time, an opportunity presented itself to Empire to move its failing Monticello video lottery terminal ("VLT") operations to a new location. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] a location in Orange County, New York  
("Orange County"), [REDACTED]

9. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

10. On June 20, 2019, the New York legislature approved Empire's move to the Orange County facility.

11. With Empire and its long-suffering investors on the verge of a massive growth opportunity, Kien Huat moved decisively to misappropriate that benefit for itself and its affiliates. [REDACTED] the Board shifted its focus from operations to engaging Moelis to advise the Company on, *inter alia*, a "Related Party M&A Transaction," despite having not received a proposal from any related party. The Board next formed a "Special Committee" to evaluate a

potential related-party transaction. Oddly, though the Board formed the Special Committee on June 21, 2019, [REDACTED]

12. Stacking the proverbial deck, the Special Committee immediately re-engaged Moelis as its financial advisor, while retaining Empire’s longstanding outside counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”), to advise the Special Committee on a potential transaction with Kien Huat.

13. On June 24, 2019 (i.e., after the Board formed the Special Committee [REDACTED]), two Kien Huat loyalists on Empire’s Board, along with Moelis and Paul Weiss, met in person in New York City with representatives of Kien Huat and its counsel, Cleary Gottlieb Steen & Hamilton LLP (“Cleary”). The topic of this meeting was a potential transaction among Kien Huat and the Company. No Special Committee member was present.

14. [REDACTED]

[REDACTED]

[REDACTED] Kien Huat sent a letter threatening to stop providing any additional funding to the Company while it remained public (the “July 25 Letter”).

[REDACTED]

[REDACTED]

15. During this period, Kien Huat and Genting were preparing their bid, having engaged Union Gaming Securities LLC (“Union Gaming”) to provide a buy-

side fairness opinion on a specific price of \$9.74 per share for Empire, which Union Gaming delivered to Genting on July 22, 2019. Union Gaming's analysis, [REDACTED]

[REDACTED] determined that Empire was worth far more, up to \$15.95 per share.

16. Upon receiving Union Gaming's fairness letter, Kien Huat immediately delivered the threatening July 25 Letter to Empire, which then "invited" the Special Committee to make a proposal for Kien Huat to acquire the Company.

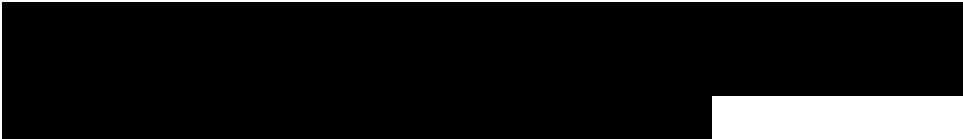
17. After this shot across the bow, Kien Huat leveraged its power and control over the Company to force through a transaction on an artificially expedited timeline. [REDACTED]

[REDACTED] Also, as soon as other potential financing parties expressed interest in providing financing for Empire, Kien Huat threatened on a Friday to walk away if a deal could not be reached before the end of the weekend. Indeed, Kien Huat made absolutely no effort to self-disable its control over Empire, but rather explicitly used its control to exert pressure on the Special Committee to do a deal on Kien Huat's terms and timeframe.



18. The Special Committee capitulated quickly, approving a deal at the very \$9.74 price that was predetermined by Union Gaming’s pre-bid fairness opinion just 11 days after Kien Huat made its offer.

19. The Merger comes nowhere close to meeting the procedural safeguards set forth in *Kahn v. M & F Worldwide Corporation*, 88 A.3d 635 (Del. 2014). As detailed below, the Special Committee repeatedly failed to manage actual and potential conflicts of interest with management and Kien Huat and to actively oversee the negotiation process. Among other things, and as further detailed at Sections L–T below, the Special Committee:

- a. simply accepted a financial advisor and legal counsel selected by Kien Huat-affiliated management,
- b. failed to attend a June 24 meeting with Moelis, management and Kien Huat where a proposed transaction was discussed,
- c. 
- d. continued thereafter to permit management to run the negotiation process and manipulate the Company’s financial projections with no oversight, and
- e. accepted Kien Huat’s opening offer of \$9.74 per share on an unnecessarily rushed deadline and in the face of an alternative financing offer.

20. Management and Moelis, for their part, both undermined the Special Committee process and manipulated the Company’s financial projections to justify the unfair Merger price.

21. For instance, Empire’s Executive Chairman of the Board, Emanuel R. Pearlman (“Pearlman”), [REDACTED]

[REDACTED] but nevertheless Moelis advised the Special Committee to preliminarily approve the Merger with a mere ten-day go-shop (the “Go-Shop”) that would effectively prohibit an alternative financing offer for less than a full acquisition of the Company.

22. Even more egregiously, management worked with Moelis to manipulate the Company’s financial projections during the Merger “negotiations,” drastically reducing the Company’s projected upside in a manner completely inconsistent with management and the Board’s use of projections for business planning purposes. Indeed, between Moelis’ first presentation to the Special Committee on August 6, 2019 and its fairness presentation on August 18, 2019, management and Moelis cut *tens of millions of dollars of EBITDA* over the projection period.

23. Most importantly, and as detailed in Section W below, management, without any input or approval from the Special Committee, decided to *exclude* the hugely positive impact of Orange County from the Company’s future financial prospects, [REDACTED]

[REDACTED] In other words, this toggling of scenarios to exclude an anticipated upside [REDACTED] [REDACTED] was completely untethered from logic or reality and is only explicable as a brazen attempt to understate value. [REDACTED]

[REDACTED] was conveniently re-included in the immediate post-Merger approval forecasts.

24. Stockholders barely approved the Merger on November 15, 2019, in an invalid majority-of-the-minority vote that was grossly uninformed. First, bet365’s substantial stockholdings were included in the purported majority-of-the-minority vote even though bet365’s interest in the sportsbook joint venture left it very differently situated from Empire’s public stockholders. Without bet365’s shares included in the majority-of-the-minority vote, the Merger vote would have failed.

25. Second, the Schedule 14A (Definitive Proxy Statement) filed with the Securities and Exchange Commission (“SEC”) on October 11, 2019 (the “Proxy”) contained numerous misleading or apparently false disclosures related to the Merger that materially impacted the vote. As discussed in paragraphs 181–208 below, these disclosure violations related to: the creation and manipulation of projections by management in connection with Moelis’ fairness opinion, the timing and treatment

of third parties presenting alternative financing proposals to the Company, and, most importantly, the financial prospects and status of Orange County.

26. This controlling stockholder-led squeeze-out Merger is subject to entire fairness review. The Merger delivered an unfair price to Empire's minority stockholders and was the result of an unfair process designed to favor Kien Huat and Genting. Because the Merger was not entirely fair, Empire's former minority stockholders are entitled to equitable relief and damages.

## **PARTIES**

### **A. Plaintiffs**

27. Plaintiff Tippy Living Trust U/A DTD September 10, 2013, was the beneficial owner of [REDACTED] shares of Empire common stock and was a holder at all relevant times hereto.

28. Plaintiff Matthew H. Haberkorn was the beneficial owner of [REDACTED] shares of Empire common stock and was a holder at all relevant times hereto.

29. Plaintiff Kiley Rose Haberkorn was the beneficial owner of [REDACTED] shares of Empire common stock and was a holder at all relevant times hereto.

30. Plaintiff The MH Haberkorn 2006 Trust was the beneficial owner of [REDACTED] shares of Empire common stock and was a holder at all relevant times hereto.

## **B. Defendants**

31. Defendant Empire is a Delaware corporation with its principal place of business at 204 State Route 17B, Monticello, New York 12701. Empire operates gaming and resort facilities in and near Monticello, New York. Empire was formerly publicly traded on the NASDAQ under the ticker symbol “NYNY” prior to it being acquired by affiliates of Kien Huat and Genting in the Merger.

32. Defendant Kien Huat, an Isle of Man company limited by shares, was the controlling stockholder of Empire prior to the closing of the Merger. Billionaire casino magnate KT Lim indirectly controls Kien Huat and Genting Berhad (an investment holding and management company), which controls Genting Malaysia. Prior to the close of the Merger, Kien Huat owned over 15.7 million shares of Empire common stock and 1,040 shares of Series F Preferred Stock. Together with shares held through Genting, Kien Huat’s ownership represented approximately 86% of Empire’s total voting power prior to the Merger. On November 4, 2019, Genting acquired from Kien Huat 13.2 million shares of Empire common stock in connection with Kien Huat and Genting’s joint acquisition of Empire in the Merger.

33. Defendant Pearlman served as an Empire director from May 2010 until the closing of the Merger, and as the Executive Chairman of the Empire Board since June 2016. Pearlman was a Kien Huat designee to the Board pursuant to a November 12, 2009 investment agreement (the “2009 Investment Agreement”)

allowing Kien Huat to designate three directors. Empire admitted that Pearlman was not an independent director in its annual proxy materials filed with the SEC.

34. Defendant Keith L. Horn (“Horn”) served as a director of the Company from April 2016 until the closing of the Merger. Mr. Horn was Chairman of the purported Special Committee of the Board charged with evaluating the transaction.

35. Defendant Gerard Ewe Keng Lim (“Gerard Lim”) served as a director of the Company from September 2017 until the closing of the Merger. Gerard Lim has been a director of Kien Huat since 2010 and was designated by Kien Huat as a director of the Company pursuant to the 2009 Investment Agreement. Empire admitted that Gerard Lim was not an independent director in its annual proxy materials filed with the SEC.

36. Defendant Edmund Marinucci (“Marinucci”) served as a director of the Company from March 2014 until the closing of the Merger. Mr. Marinucci was a member of the Special Committee. From 2009 until 2014, Marinucci served alongside Pearlman as a director on Fontainebleau Miami JV LLC, which operates the famed Fontainebleau Hotel in Miami Beach.

37. Defendant Nancy A. Palumbo (“Palumbo”) served as a director of the Company from June 2009 until the closing of the Merger. Ms. Palumbo was a member of the Special Committee.

38. Defendant Ryan Eller (“Eller”) served as President and Chief Executive Officer (“CEO”) of the Company from June 2017 to December 2019, and previously served as President and Chief Operating Officer from March 2017 through June 2017. Eller was a Kien Huat designee to the Board, serving as a director of the Company from September 2017 until July 17, 2019, when he resigned from the Board. Empire admitted that Eller was not an independent director in its annual proxy materials filed with the SEC. Immediately prior to coming to Empire, from June 2013 to March 2017, Eller served in various executive officer positions with Genting New York LLC (“Genting NY”), which operates Resorts World Casino New York City (“RWNY”). From June 2013 to October 2014, Eller served as Chief Financial Officer (“CFO”) and from October 2014 to March 2017, Eller served as President of Genting NY. Concurrently with his position at Genting NY, from October 2014 to March 2017, Eller served as Senior Vice President of Development of Genting Americas Inc. (“Genting Americas”), an indirect, wholly-owned subsidiary of Genting Malaysia, which is also the parent entity of Genting NY.

39. Defendant Genting Malaysia, is a Malaysian public company limited by shares whose principal place of business is in Malaysia and is indirectly controlled by KT Lim. Genting Malaysia owns and operates RWNY through its wholly owned subsidiary Genting NY d/b/a RWNY. RWNY is a casino located in Queens, New York that offers over 6,500 slots and electronic table games. RWNY

is a high performing casino for Genting, generating over \$850 million in gross gaming revenue in 2018, and averaging \$386 per day per slot in 2018, which was the second highest of all New York casinos. As a result of the Merger, Genting Malaysia with Genting (USA) Limited acquired a 49% equity interest in Empire. KT Lim is the Chairman and CEO of Genting Berhad, which owns 49% of Genting Malaysia.

40. Defendant Genting (USA) Limited is an Isle of Man company limited by shares and is a subsidiary of Genting Malaysia. Genting (USA) Limited's principal business is to act as an investment holding company for investments indirectly held by Genting Malaysia. On November 4, 2019, Genting (USA) Limited acquired 13,200,000 shares of Empire common stock, purchased at \$9.74 per share, from Kien Huat. Genting (USA) Limited contributed an amount of cash equal to 49% of the aggregate merger consideration to acquire the outstanding shares of Empire Common stock not owned by Kien Huat or itself in the Merger (the other 51% contributed by Kien Huat). As a result of the Merger, Genting (USA) Limited with Genting Malaysia acquired a 49% equity interest in Empire. Genting Malaysia and Genting (USA) Limited are collectively referred to herein as "Genting."

41. Defendant Hercules Topco LLC ("Hercules") is a Delaware limited liability company formed in connection with the Merger and is an affiliate of Kien Huat and Genting.



42. Defendants Pearlman, Horn, Gerard Lim, Marinucci, and Palumbo are referred to herein as the “Director Defendants.” Defendants Pearlman and Eller are referred to herein as the “Executive Defendants.” The Director Defendants and the Executive Defendants with Empire, Kien Huat, Genting Malaysia, Genting (USA) Limited, and Hercules are referred to herein collectively as the “Defendants.”

### **FACTUAL ALLEGATIONS**

#### **A. Background on Empire’s Casino Business**

43. Empire was organized as a Delaware corporation in March 1993 and, since that time, has served as a holding company for various subsidiaries engaged in the hospitality and gaming industries. Prior to being awarded a Gaming Facility License to develop Resorts World, Empire’s business was owning and operating Monticello, which is located about five miles away from Resorts World. Until April 2019, Monticello featured video gaming machines and harness horseracing. As discussed below, video gaming machine operations ceased and the Company renamed the property Monticello Raceway in April 2019.

#### **B. Kien Huat Acquires and Expands Its Control of Empire**

44. On August 19, 2009, Kien Huat agreed to invest up to \$55 million into the Company to acquire Empire common stock representing just under 50% of the Company’s voting power.

45. Kien Huat has had actual voting control of Empire since March 2011, when Empire commenced a rights offering giving all holders of Empire's common stock the non-transferrable right to purchase 0.56750 shares of Empire's common stock at a price of \$0.8837 per share for each share they held. Pursuant to a November 5, 2010 agreement, Kien Huat had already committed to exercise its entire allocation of subscription rights. After the consummation of the rights offering, Kien Huat held approximately 61% of the Company's total outstanding shares.

46. Kien Huat increased its ownership in Empire in 2013 to approximately 62.7% by entering into a standby purchase agreement in connection with an April 2013 rights offering. At the completion of the April 2013 rights offering, the Company issued a total of 3,650,849 shares to Kien Huat, upon exercise of its basic subscription rights, and 784,347 shares to Kien Huat pursuant to the terms of the standby purchase agreement.

47. Kien Huat again increased its ownership in Empire in 2015—this time to approximately 67%, again pursuant to a standby purchase agreement in connection with a January 2015 rights offering. At the completion of the January 2015 rights offering, the Company issued a total of 4,321,798 shares to Kien Huat, upon exercise of its basic subscription rights, and 2,667,165 shares to Kien Huat pursuant to the terms of the standby purchase agreement.

**C. Kien Huat Uses Its Control to Become Empire’s Main Funding Source**

48. With its equity control, Kien Huat caused Empire to enter into significant loan agreements that kept Empire dependent on Kien Huat for liquidity.

49. Commencing with an original loan of \$35 million (the “Loan Agreement”), Empire entered into multiple amendments to the Loan Agreement over a period of years to extend the maturity date, and each time paying fees to Kien Huat and/or agreeing to increases in the annual interest rate. The third amendment to the Loan Agreement in March 2015, added a default trigger if the Company were denied a Gaming Facility License by the State of New York for Resorts World.

50. Subject to the Loan Agreement, Kien Huat had the right to convert all or any portion of the principal sum of Empire’s debt under the Loan Agreement into shares of Empire common stock.

51. On June 25, 2018, Kien Huat and the Company entered into a second loan agreement, which provided for loans of up to \$30 million (the “Kien Huat Subordinate Loan”). The proceeds of the Kien Huat Subordinate Loan must be used exclusively to make capital contributions to Empire’s operating subsidiary, Montreign Operating Company (“Montreign”). All amounts due under the Kien Huat Subordinate Loan were to mature on December 28, 2020, which could be extended at Kien Huat’s discretion. The Kien Huat Subordinate Loan’s interest rate

was 12% per annum, which could accrue and be added to the principal repayment upon maturity.

**D. The 2016 Letter Agreement Was Supposed to Restrain Kien Huat's Exercise of Control**

52. In January 2016, Kien Huat substantially increased its ownership of Empire through another rights offering with a backstop. The January 2016 rights offering increased Kien Huat's ownership to approximately 88.7% of the Company's outstanding stock.

53. As a result of Kien Huat's increased ownership, Empire and Kien Huat entered into the 2016 Letter Agreement. The 2016 Letter Agreement required that for a period commencing on February 17, 2016 and ending on the earlier of (a) February 17, 2019 and (b) the one-year anniversary of the opening of Resorts World, Kien Huat would not take certain actions in furtherance of a "going-private" transaction involving the Company unless the transaction was subject to the approval of both (i) a majority of the shares outstanding entitled to vote that were unaffiliated with Kien Huat and (ii) either a majority of disinterested members of the Board or a special committee of the Board composed of disinterested members of the Board.

54. On December 28, 2017, the Company and Kien Huat amended the 2016 Letter Agreement to extend by one year Kien Huat's obligation not to engage in a "going-private" transaction with the Company without the prior approval of the majority of the Company's minority stockholders and a majority of the disinterested

directors of the Company. As a result of the amendment, the restriction extended through February 8, 2020.

**E. Empire Is Awarded a License to Develop a Casino at Resorts World Catskills**

55. Pursuant to the Upstate New York Gaming and Economic Development Act, the New York State Gaming Commission awarded Montreign— Empire’s operating company—the sole Gaming Facility License in the Hudson Valley-Catskills Region, effective March 1, 2016.

56. Genting had applied with two separate proposals to receive a Gaming Facility License, but was unsuccessful.

57. This Gaming Facility License provides a seven-year exclusivity period for its holders, commencing March 1, 2016, during which time no further gaming facilities can be licensed without legislative action. As of July 2, 2018, Montreign was one of only four casino resort license holders in the State of New York permitted to offer on-site sports betting.

58. After obtaining the Gaming Facility License, Kien Huat took a number of steps to refashion the Board and management. In April 2016, the Board expanded from six directors to seven, with Horn joining as the seventh director.

59. In June 2016, Kien Huat elevated Pearlman, who is deemed a Kien Huat Board designee, to Executive Chairman of the Board from the position of Chairman. Pearlman’s executive position entitled him to an annual salary of \$650,000. Then,

in June 2017, Kien Huat brought in former Genting NY executive officer Ryan Eller to be the Company's CEO and a Board member.

60. Three months later, in September 2017, Kien Huat appointed Gerard Lim as a director of the Board. Eller and Gerard Lim replaced former CEO Joseph D'Amato and James Simon (who retired in July 2016) on the Board. Neither Joseph D'Amato nor James Simon had previously been affiliated with Kien Huat or Genting. Finally, in December 2017, Kien Huat moved Jamie Sanko ("Sanko") from his position as CFO of Genting Americas to Chief Accounting Officer of the Company. Through these moves, Kien Huat now had complete visibility into the Board and the Company's financial operations.

61. Once the reshaping of the Company's Board and management were complete, on February 8, 2018, Empire opened Resorts World, which is "New York State's largest integrated commercial casino resort." Resorts World sits on a 1,700-acre site and is a four-season destination resort located in Sullivan County, New York, approximately 90 miles northwest of New York City.

62. Resorts World also includes a 101-room lifestyle hotel—"The Alder"—adjacent to the Casino. The Alder is owned and operated by a wholly-owned subsidiary of Montreign. Montreign is also developing a golf course at Resorts World. Pursuant to the Gaming Facility License granted to Montreign, the

development of Resorts World and all of its associated, yet to be completed attractions required a minimum capital investment of \$853,925,880.

63. Accordingly, Montreign took on significant debt to fund Resorts World. According to Empire's SEC filings shortly after the opening of Resorts World, the Company had indebtedness to the tune of \$466 million.

**F. Empire Enters into a Long-Term Agreement with bet365 to Manage Its Sports Betting Operations**

64. On November 14, 2018, Empire entered into a series of agreements with bet365. The first was a "Collaboration Agreement" wherein bet365 and Empire would collaborate to offer retail sports betting, an online sportsbook, online casino/table games, and online poker in New York if and when permitted by law.

65. Under the Collaboration Agreement, once permitted under law, bet365 would operate and manage Empire's retail sports book, online sports book, and online table games/online poker. Under the Collaboration Agreement, in return for bet365's services, Empire and bet365 would split the revenues from these ventures on a 50-50 basis. Empire's sportsbook at Resorts World opened in September 2019, after New York gaming authorities promulgated sports betting regulations in February 2019 that became effective later that year.

66. bet365 and Empire also entered into a purchase agreement pursuant to which bet365 agreed to purchase up to 2,500,000 shares of common stock of the Company at a purchase price of \$20.00 per share for an aggregate investment of up

to \$50 million (“bet365 Purchase Agreement”). Empire’s stock price jumped to over \$13 per share upon the announcement of the agreements with bet365.

67. In accordance with the bet365 Purchase Agreement, bet365 purchased 1,685,759 shares of common stock immediately upon execution.

**G. Empire and Kien Huat Agree on a Financing Package to Fund Future Explosive Growth**

68. Also, in November 2018, Empire entered into the KH Preferred Stock Commitment Letter to sell up to \$126 million of Series F convertible preferred stock (entitled to 5,000 votes per share) to Kien Huat. The KH Preferred Stock Commitment Letter was instituted to provide financing while Resorts World continued to ramp up following its opening in February 2018.

69. [REDACTED]

70. [REDACTED]

71. The Board met again on February 1, 2019. [REDACTED]



[REDACTED]

72. [REDACTED]

[REDACTED] the Board determined, at a February 15, 2019 meeting ([REDACTED]), to retain Moelis to advise the *Company* on capital structure issues and matters relating to near-term debt and debt covenant obligations.

73. In a presentation analyzing the Company's strategic options made to the Board on March 12, 2019, Moelis [REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
------------	------------	------------	------------	------------	------------

74. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
------------	------------	------------	------------	------------	------------

75.

[REDACTED]

76. During this same March 12, 2019 meeting, the Board

[REDACTED]

77. In April and May 2019, the Board received subsequent updates regarding Empire's performance.

[REDACTED]

[REDACTED]

[REDACTED]

78. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

79. Moelis also advised the Board on a recapitalization or refinancing plan that would help stabilize Resorts World's operations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**H. Empire Begins to Enact the Orange County Plan**

80. In early 2019, because of Monticello's poor performance (and the opening of Resorts World), the Company was considering a plan to close Monticello to drive gamblers to Resorts World down the road and stop Monticello's cannibalization of the newly opened casino. [REDACTED]

[REDACTED]

81. However, Empire then was presented with an opportunity to relocate the Monticello VLT facility to Orange County, New York. This much higher traffic area provided the opportunity for huge potential revenue growth with the same number of VLT machines. The move would also significantly decrease any cannibalization of Resorts World's performance because Orange County was located much farther away than Monticello.

82. [REDACTED]

[REDACTED]

83. [REDACTED]

[REDACTED]

[REDACTED] Yonkers Casino and

Raceway ("Yonkers") [REDACTED]

[REDACTED]

[REDACTED]

**I. Empire’s Orange County Opportunity Materially Improves Its Financial Outlook**

84. [REDACTED]

[REDACTED]

85. The Board held another meeting on May 7, 2019 to discuss, among other things, [REDACTED] Moelis made a presentation that analyzed the Company’s leverage capacity and potential funding options. [REDACTED]

[REDACTED]

[REDACTED]

86. [REDACTED]

[REDACTED]

[Redacted text block]

[Large redacted text block]

---

2 [Redacted footnote text]

3 [Redacted footnote text]

87.

[REDACTED]

[REDACTED]

[REDACTED]

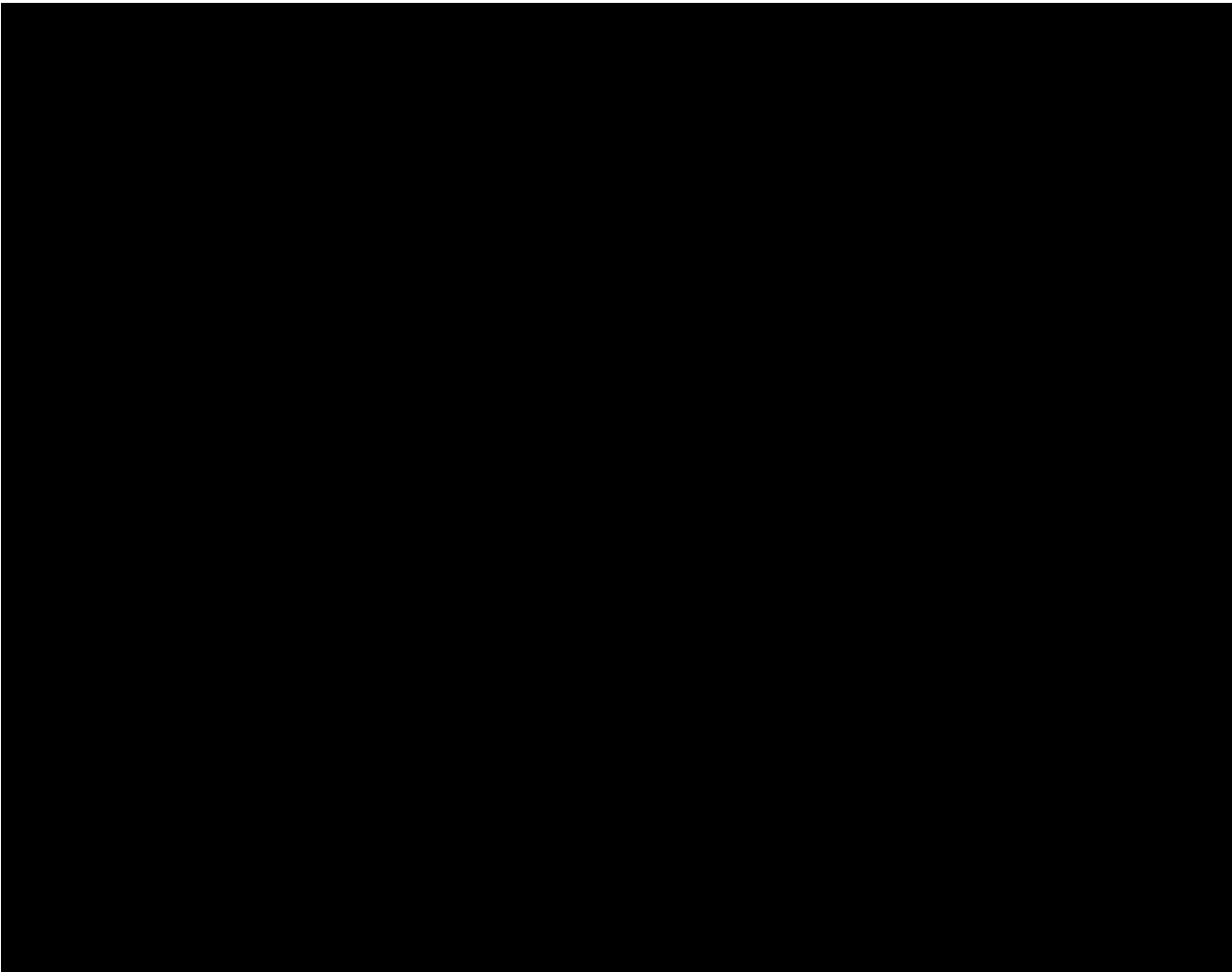
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



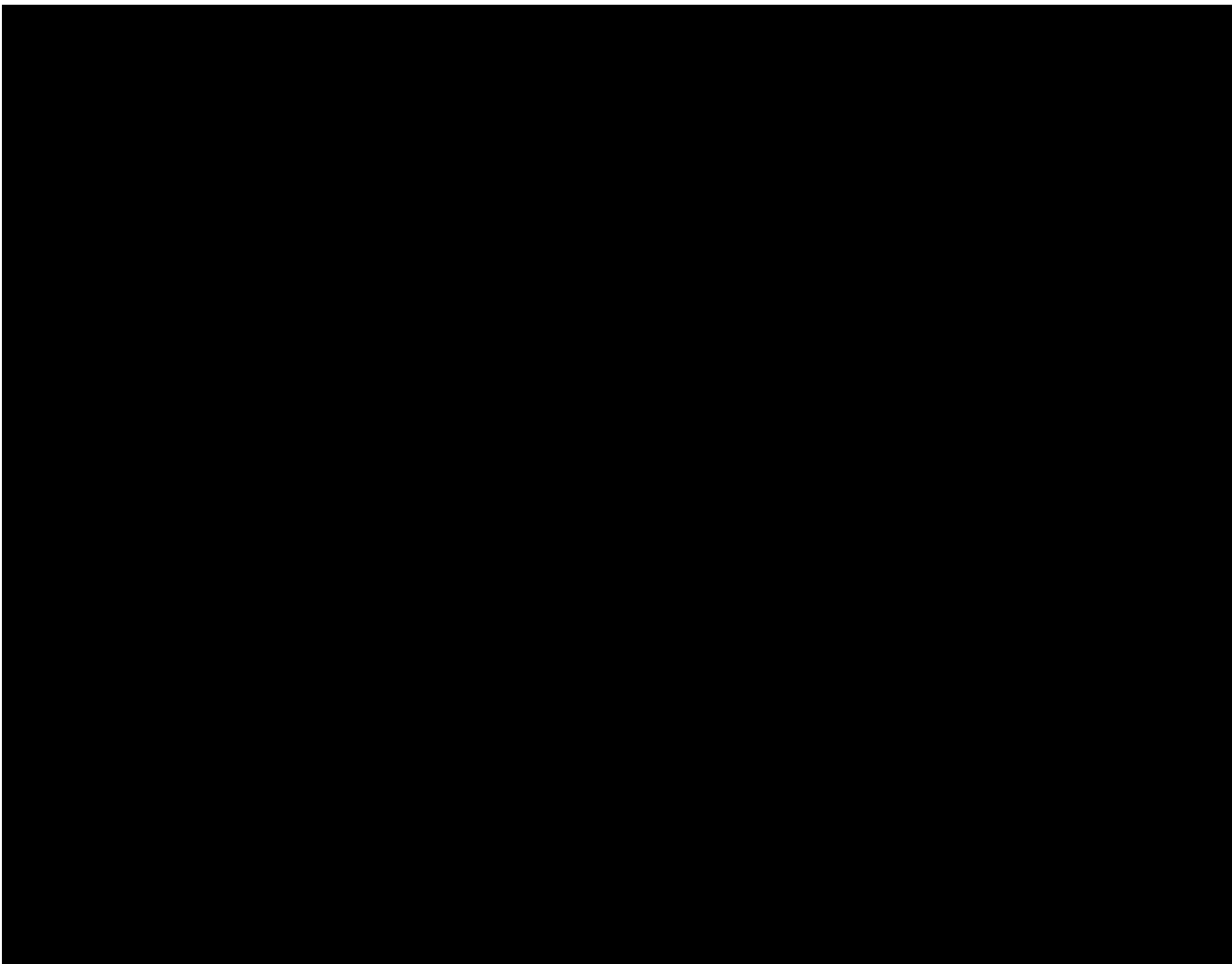
88. [Redacted]

[Redacted]

[Redacted]

[Redacted]





89. [Redacted]



**J. Empire Takes Steps to Secure Regulatory Approval of Orange County**

90. Development of Orange County required certain government approvals from the State of New York. This included, among other things, (a) review under the New York State Environmental Quality Review Act that required environmental impact studies, (b) local municipal boards to amend the local zoning laws to allow for the VLT facility and (c) legislative approval, which required coming to an

agreement with MGM Resorts International (“MGM”) regarding mitigation payments to MGM from Empire to offset Orange County’s potential cannibalization of MGM’s VLT facility, Yonkers.

91. On June 5, 2019, the Board met again to discuss [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

92. [REDACTED]

[REDACTED]

[REDACTED]

**K. Kien Huat Decides to Misappropriate the Imminent Success of the Orange County Strategy for Itself**

93. [REDACTED]

[REDACTED] Rather, Kien Huat and Empire quickly shifted course to pursue a take-private plan that would allow Kien Huat to realize 100% of the enormous upside of Orange County.

94. [REDACTED]

[REDACTED] (Emphasis added). [REDACTED]

(Emphasis added). [REDACTED]

95. On June 20, 2019, the New York State Legislature passed legislation approving Orange County.

**L. The Passive and Poorly Functioning Special Committee Is Formed the Day After Orange County Is Approved**

96. On June 21, 2019, only one day after the New York State Legislature approved Empire’s development of Orange County, the Board met.

97. During the June 21, 2019 meeting, the Board first discussed the legislation authorizing the Orange County facility. [REDACTED]

[REDACTED]

[REDACTED]

Notably, the authorizing legislation for Orange County included provisions that required the Company to maintain racing at Monticello, which contrasted with Empire’s previous plan to close down Monticello. The legislation also required the Company to maintain its labor force and enter into a mitigation agreement with MGM for its Yonkers facility.

98. The Board then determined to modify its engagement of Moelis as the Company’s financial advisor. [REDACTED]

[REDACTED] (emphasis added) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

99. On June 24, 2019, Empire issued a Form 8-K confirming that the “*Company* has retained Moelis & Company LLC as its financial advisor to evaluate strategic alternatives for the Company as a whole.” (Emphasis added).

100. At the end of the June 21, 2019 meeting, the Board determined to form a Special Committee consisting of Horn, Palumbo, and Marinucci to, among other things, evaluate “an acquisition . . . of the Company by a related party . . . .” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

101. Despite authorizing the formation of the Special Committee at the June 21 meeting, [REDACTED]

[REDACTED]

[REDACTED]

As discussed herein, the Special Committee, however, merely retained the Company’s existing and long-standing legal counsel, Paul Weiss, and financial advisor, Moelis,

[REDACTED]

102. Indeed, the Special Committee had to paper over the Board’s existing retention of Moelis on behalf of the Company, which took place at the very same meeting. As such, on June 25, 2019, despite no meeting of the Special Committee taking place, the Special Committee executed a revised engagement agreement with

Moelis purporting to engage Moelis to represent the Special Committee rather than the Company.

103. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Augusto Sasso (“Sasso”) [REDACTED]

[REDACTED]

104. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ramy

Ibriham (“Ibriham”) [REDACTED]

[REDACTED] is all the more troubling

considering, as discussed in greater detail below, Moelis attended a meeting with

Empire management and Kien Huat representatives concerning a potential

transaction on June 24, 2019, the day before being “retained” by the Special

Committee.

105. [REDACTED]

[REDACTED] Moelis, which had been advising the

Company on its liquidity issues since at least February 2019, and had been Empire’s

go-to financial advisor since 2014 for a litany of financial services (likely as a result of former Empire director Gregg Polle being a managing director at Moelis). [REDACTED]

[REDACTED]

106. Following its “formation” on June 21, 2019, the Special Committee [REDACTED]

[REDACTED]

**M. Everybody but the Special Committee Meets to Plan the Going Private Transaction**

107. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

108. Then just days after Orange County’s enabling legislation was passed, on June 24, 2019, Pearlman, Eller, Moelis, and Paul Weiss met in person in New York City with certain unnamed “representatives of Kien Huat” and its counsel, Cleary. The Proxy expressly states that there were discussions at this meeting about “the possibility of a potential transaction involving Kien Huat and the Company.” Despite the purported formation of the Special Committee just three days earlier, no member of the newly formed Special Committee was present at or participated in this meeting.

**N. Union Gaming’s Pre-Bid Fairness Opinion at the Ultimate Deal Price Makes Clear that the Process Was a Sham**

109. On July 9, 2019, Genting [REDACTED] Union Gaming—[REDACTED] to evaluate whether Genting’s and Kien Huat’s pre-planned \$9.74 per share takeout price was a fair price for Genting to acquire Empire.

110. Union Gaming issued a letter to Genting on July 22, 2019 on the fairness of a \$9.74 transaction price. The letter stated that Union Gaming “understands that Genting . . . together [with Kien Huat], is contemplating the acquisition of all outstanding equity in Empire Resorts . . . .” The letter further



indicated that “Genting and Kien Huat (affiliated companies) have agreed . . . that a subsidiary of Genting will acquire 13.2 million shares of Kien Huat’s Common Stock in [Empire] at the same price per share in the contemplated transaction, which will ultimately result in a formation of a joint venture between Genting and Kien Huat where Genting will own 49% and Kien Huat will own 51% of the joint venture . . . .”

111. Union Gaming—utilizing financial projections of Empire that it received from Genting [REDACTED]  
[REDACTED]  
[REDACTED]—opined that \$9.74 per Empire share was fair to Genting based on three valuation analyses (Discounted Cash Flow (“DCF”), comparable companies, and precedent transactions).

112. Union Gaming’s DCF analysis valued Empire as high as \$15.95 per share. The public market comparable companies analysis yielded a valuation as high as \$13.11. And the precedent transaction analysis yielded a valuation range of \$9.79 to \$14.77—which wholly exceeds the \$9.74 price agreed to. Notably, none of the analyses performed by Union Gaming came even close to implying a negative value for Empire, as Moelis’ analyses ultimately found as discussed below.

113. Three days after receipt of Union Gaming’s fairness opinion, on July 25, 2019, Kien Huat delivered the July 25 Letter to Empire, stating that Kien Huat

no longer believed Empire was viable as a standalone company and threatening to cease providing equity financing “while Empire remains a public company.” Despite that Kien Huat and Genting had already agreed between themselves to a take-private proposal at \$9.74 per share, rather than make an acquisition proposal, the July 25 Letter stated that, if invited by Empire to do so, Kien Huat was willing to make a proposal to acquire Empire.

114. Kien Huat made the July 25 Letter public in a 13D filing, thereby ensuring its threat to cut off Empire’s funding was absorbed by Empire’s public stockholders. In reality, however, KT Lim would not permit Empire to go bankrupt because of the potential negative effects on his plans for a U.S. casino empire. First, KT Lim desperately wanted the full scale casino license that Empire possessed, which he had failed to secure with two alternate proposals through Genting, and a bankruptcy would put his possession of that license at risk. Second, KT Lim had plans to convert Genting’s already extremely profitable RWNV VLT property into a full scale casino and was extremely concerned about negative publicity impacting those plans—an Empire bankruptcy would jeopardize these plans. Third, an Empire bankruptcy could even expose KT Lim to additional scrutiny and monitoring by regulators of Genting’s Las Vegas operations.

**O. The Special Committee Finally Meets, But Lets All of the Conflicted Parties and Advisors Ram Through the \$9.74 Deal**

115. Upon receipt of the July 25 Letter, the Special Committee met for the first time on July 25, 2019. In addition to Special Committee members Horn, Palumbo, and Marinucci, in attendance at the July 25 meeting were Pearlman, Eller, and various representatives of Moelis.

116. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moreover, as made plain in the Union Gaming fairness opinion letter, Kien Huat and Genting had already reached an agreement to jointly acquire the Company weeks before, and thus [REDACTED]

[REDACTED]

117. Moelis and Paul Weiss then discussed negotiation strategy for Kien Huat with the Special Committee, [REDACTED]

[REDACTED]

[REDACTED] Ultimately, the Special Committee decided not to formally invite a proposal from Kien Huat in response to Kien Huat's July 25 Letter, [REDACTED]

[REDACTED]

118. Three days later, on July 28, 2019, the Special Committee held a meeting attended by all members of the Special Committee and representatives of Moelis and Paul Weiss.

119. [REDACTED]

120. [REDACTED] the

Special Committee [REDACTED]  
[REDACTED] as discussed further herein, let management exclusively control and modify the financial projections of the Company that Moelis would utilize for its fairness opinion without Special Committee input or oversight. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**P.** [REDACTED]

121. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

122. Considering bet365's large position in the Company as a result of the bet365 stock purchase agreement (and consequently the impact that bet365's vote would have on approval of a transaction), [REDACTED] call into question the Special Committee's proper functioning and the sanctity of the purported majority-of-the-minority vote provision of the Merger.

**Q. Kien Huat Threatens the Special Committee**

123. Also at the July 28, 2019 Special Committee meeting, Paul Weiss

[REDACTED]

124. [REDACTED]

[REDACTED]

[REDACTED] The capitalized “Letter Agreement” appears to refer to the 2016 Letter Agreement, which required Kien Huat to condition any acquisition on special committee approval and a majority-of-the-minority vote.

125. [REDACTED]

[REDACTED]

126. Also during the July 28, 2019 meeting, the Special Committee was advised that Kien Huat “[REDACTED]” to submit a proposal on August 2, 2019. The

Special Committee then discussed strategic outreach with its advisors. Moelis

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**R. Kien Huat Submits a Proposal at \$9.74 per Share While the Board and Management Focuses on Executing on Orange County**

127. On August 5, 2019, Kien Huat and Genting submitted their one and only proposal to take Empire private at \$9.74 per share (the “Proposal”). Pursuant to the Proposal, Genting would acquire 13.2 million shares of Empire common stock currently held by Kien Huat, such that post-transaction, Kien Huat and Genting would own 51% and 49% of Empire, respectively.

128. The Special Committee briefly met on August 5, 2019, after receiving the Proposal, with Pearlman and Eller also attending the meeting. The Special Committee noted that the Proposal “[REDACTED] [REDACTED]’ potentially limiting the Company’s alternatives to solicit superior alternatives if true . . . .” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

129. The full Board met [REDACTED]  
[REDACTED] on August 6, 2019, to discuss various updates. Part of the Board's  
discussion during this regularly scheduled [REDACTED] meeting focused on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

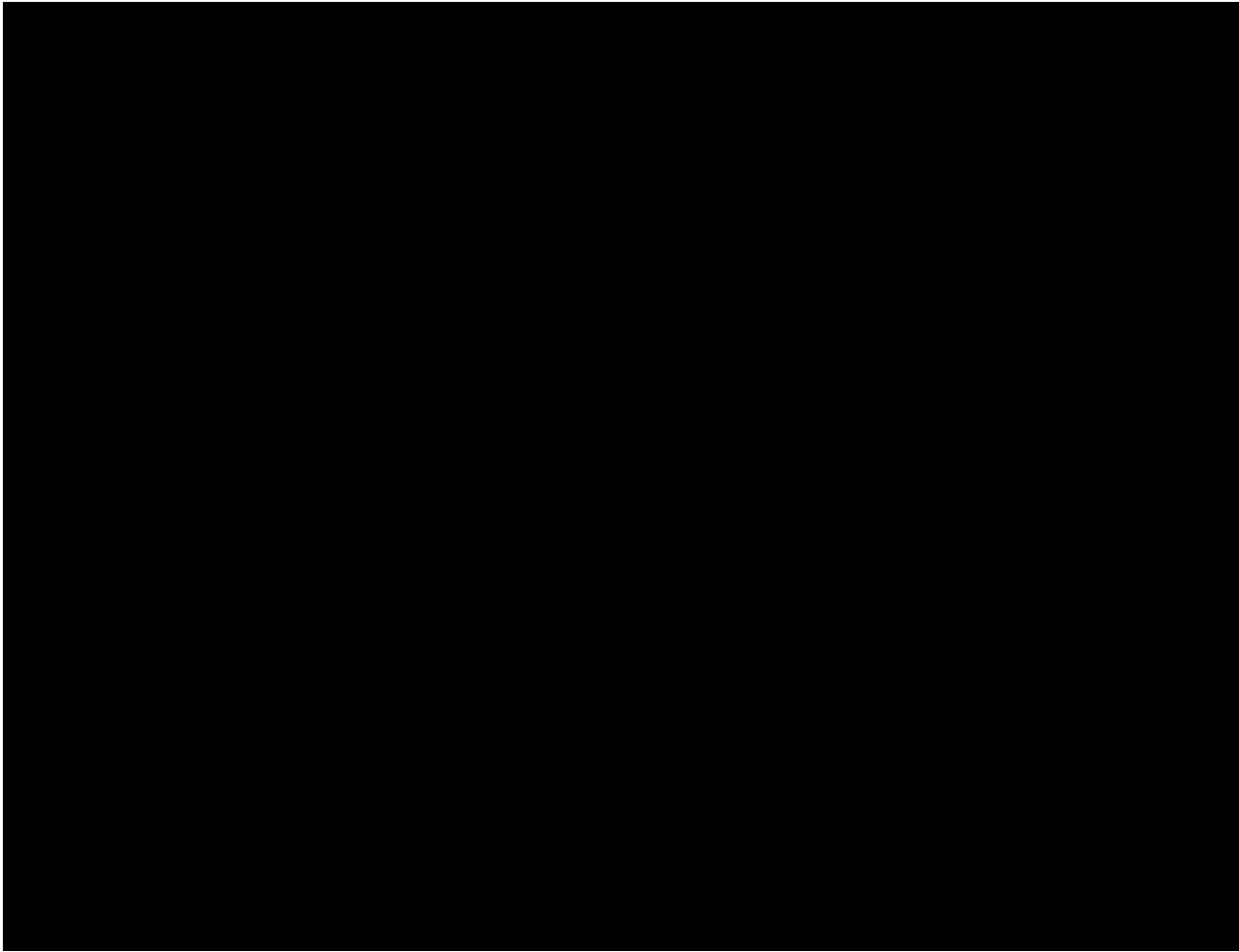
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





130.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

131.

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

132. Directly following the August 6, 2019 Board meeting, the Special Committee held a meeting to discuss the Proposal. Moelis’ presentation noted in its “key terms” page that the “[a]cquirers are not willing to sell any equity to a third-party and would not vote in favor of any alternative transactions[.]”

133. Moelis then reviewed certain management projections, which according to the Proxy, were prepared and provided to the Special Committee in July 2019 (the “July Projections”). The July Projections as summarized in Moelis’ August 6 presentation included a Base Case and a Base Case + Management Agreement Case (where Resorts World would be run by a Genting affiliate for an \$8-\$10 million annual fee). The projections excluded Orange County, despite the significant modeling work Empire had done on it over the preceding months and despite the fact that the full Board had just received an extensive presentation on the development and financial projections of Orange County.

134. Under the Base Case, management projected the following EBITDA numbers for Empire through 2023:

	<b>2020E</b>	<b>2021E</b>	<b>2022E</b>	<b>2023E</b>
Management Base Case	\$17	\$20	\$36	\$49

EBITDA (in millions)				
-------------------------	--	--	--	--

135. Under the Management Agreement Case, projected EBITDA numbers were significantly higher through 2023:

	2020E	2021E	2022E	2023E
Management Base Case + Management Agreement EBITDA (in millions)	\$29	\$33	\$50	\$63

136. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

137. Following its presentation of its financial analysis, Moelis concluded that “[t]he *Special Committee requires more time to negotiate with Kien Huat and Genting Malaysia . . .*” (emphasis added). The Special Committee then instructed its advisors to communicate a counter-proposal to Kien Huat/Genting seeking (a) an undefined increase in the transaction price because “[t]he *Special Committee concluded that the Proposal’s offer price was not yet compelling,*” (emphasis added), (b) a commitment to continue financing Empire until the closing of a

transaction with Kien Huat/Genting, and (c) permission in the merger agreement to solicit alternatives.

**S. The Special Committee Promptly Succumbs to Kien Huat's Pressure**

138. As discussed above, the 2016 Letter Agreement prohibited Kien Huat from undertaking a going-private acquisition of Empire before February 8, 2020 that was not the subject of a majority-of-the-minority stockholder vote and subject to disinterested director approval. During confidentiality agreement negotiations that occurred between August 6, 2019 and August 11, 2019 with the Special Committee, Kien Huat again refused to agree to a standstill provision in the confidentiality agreement that would extend beyond the timing of the 2016 Letter Agreement.

139. The Special Committee bowed to the threat of a February 2020 deal without special committee or minority stockholder approval and executed a confidentiality agreement that [REDACTED] for a standstill through February 8, 2020. At a meeting on August 9, 2019, the Special Committee [REDACTED]

[REDACTED]

[REDACTED]

140. The Special Committee [REDACTED] despite Kien Huat having thus far refused to increase the merger consideration, which the Special Committee said just three days earlier was inadequate, and irrespective of the advice of Moelis just three days earlier that the Special Committee needed more time to

negotiate. Thus, by August 9, 2019—only 15 days after its first meeting—the Special Committee had accepted that the proposed transaction was a foregone conclusion.

141. On August 8, 2019, the last trading day before Empire filed its August 9, 2019 Quarterly Report (“August Form 10-Q”), the Company’s stock closed at \$9.37. Then, on August 9, 2019, for the first time ever, the Company disclosed in the August Form 10-Q multiple risk factors indicating that the Company may have to enter Chapter 11 bankruptcy proceedings should its financial condition not improve. Thereafter, on August 12, 2019, the Company’s stock closed at \$8.18. Kien Huat and Genting thus ensured that, with every passing day, its \$9.74 per share purchase price looked better-and-better to the Board and to the market.

142. Then, on August 12, 2019, the Special Committee met and received an update from Paul Weiss, with Pearlman, Eller, and Moelis also in attendance. The Special Committee was first informed that Kien Huat would not raise the offer from \$9.74 per share—in fact noting that Kien Huat had stated \$9.74 was its “best and final offer.” Paul Weiss also informed the Special Committee that (a) Kien Huat would only provide \$15 million in additional capital support to the Company for payment of principal and interest on debt, [REDACTED]

[REDACTED] (b) Kien Huat would not agree to support a “[REDACTED]” if one emerged, effectively

killing any chance of effectively marketing the Company, and (c) Kien Huat desired that Empire would not have the right to terminate the merger agreement to accept any superior proposal.

143. In response to Kien Huat’s position, the Special Committee determined to: (a) request a \$15 million capital commitment from Kien Huat to help Empire pay down debt and interest, along with an additional \$15 million to fund both a potential bankruptcy filing and a \$5 million dividend to minority stockholders to be used as additional consideration; (b) authorize Moelis to begin outbound solicitations for third party offers prior to signing a deal with Kien Huat; and (3) revise the merger agreement to allow the Board to terminate the merger agreement to support a superior third party transaction.

**T. Kien Huat Accelerates the Timeline for Negotiations in Light of an Alternative Financing Proposal**

144. The Proxy states that on August 16, 2019, Pearlman received an unsolicited call from an investment fund, termed in the Proxy as “Party A,” regarding potential capital support for the Company. This disclosure materially misrepresents the timeline of events.

145. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

146. [REDACTED] Kien Huat’s counsel suddenly told Paul Weiss on August 15, 2019, that it was targeting signing the merger agreement by August 19, 2019. [REDACTED]

[REDACTED] which in turn caused Kien Huat to accelerate its signing timeline. This is because if the Company was able to find an alternative source of financing to get through its liquidity issues, Kien Huat’s bargaining leverage based on withholding further capital from Empire while it was public would be diminished.

147. Then on Friday, August 16, 2019, a [REDACTED] Kien Huat decided a Monday signing was not quick enough, and through its counsel relayed to Paul Weiss the thinly-veiled threat that “[REDACTED]” they “could not guarantee” that they would be willing “to continue negotiations beyond Sunday, August 18, 2019 [REDACTED]

[REDACTED]

[REDACTED] Thus, Kien Huat now wanted the Merger finalized before the weekend ended, giving [REDACTED] no realistic time to pursue an equity investment.

148. At a Special Committee meeting in the afternoon of August 16, 2019, Paul Weiss advised the Special Committee [REDACTED]

[REDACTED] Moelis then advised the Special Committee of Party A's outreach indicating that management had received at least one unsolicited inbound expression of interest from a third party and that Moelis had had a preliminary discussion with that party and would be speaking to them again later that day.

**U. The Special Committee Pursues a Truly Illusory Ten-Day Go-Shop**

149. Also at the August 16, 2019 Special Committee meeting, Paul Weiss informed the committee members that while Kien Huat had refused to raise its offer above \$9.74 per share, it had offered a ten-day "go-shop" period where the Special Committee could attempt to solicit alternative proposals. Moelis then suggested that the proposed ten-day go-shop would be adequate to negotiate with third parties even after signing the Merger Agreement, and the Special Committee reached a

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

150. This advice from Moelis (and Paul Weiss) and the Special Committee’s acceptance of the ten-day go-shop ignores reality. The language in the go-shop required any discussions with a third-party to involve a “Takeover Proposal,” which was defined to require a minimum threshold offer affecting at least 20% of the Company’s assets or voting power. And to ultimately agree to a deal with such third party, the Merger Agreement required the alternative proposal to 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.”

151. There is no indication that Party A’s offer of financing was for 20% or more of the Company’s assets or stock, let alone 75%. Nor would it be realistic for Party A to offer such a proposal, due to both Kien Huat’s ability to block a deal for 75% of the Company [REDACTED]

[REDACTED]

[REDACTED]

152. Unsurprisingly, the Go-Shop terms thus appear to have prevented Party A from pursuing its financing proposal during the Go-Shop. As the Company disclosed in the Proxy, as amended by a November 6, 2019 Form 8-K providing supplemental disclosures related to discussions with Party A during the go-shop:

The Company also continued its discussions with Party A and received a second inbound indication of interest from another potential financing source.

*Ultimately, however, neither of these potential financing sources proposed any transactions with the Company other than supplemental financing to or replacement financing of a portion of the Company's outstanding indebtedness.*

(Emphasis added).

153. Thus, by signing the Merger Agreement before negotiations with Party A could occur, the Board (and Kien Huat) effectively killed any potential financing offer from Party A as they would be contractually prohibited from entering into any financing offer with them after the Merger Agreement was executed.

#### **V. The Special Committee Approves the Merger**

154. Kien Huat's threats worked. Before even receiving a fairness presentation by Moelis, the Special Committee "[REDACTED]" concluded it was prepared to accept Kien Huat's offer on its accelerated deadline. The Special Committee made this determination despite the facts that just ten days earlier it had determined that the \$9.74 price was inadequate and was informed by Moelis that the appropriate timeframe for negotiations should stretch into September 2019.

155. Pursuant to Kien Huat's demand, the Special Committee and full Board met on August 18, 2019 to approve the Merger—a mere thirteen days after Kien Huat delivered the Proposal. [REDACTED]

[REDACTED]

[REDACTED]

156. Moelis further advised that the Company's market price had suffered as a result of the market's "concern[] about the Company's liquidity and about [Kien Huat]'s comments around not intending to provide further equity or debt financing to the Company." Moelis' analysis demonstrated how Kien Huat's actions had worked to depress the Company's stock price in the midst of negotiations.

157. Finally, Moelis delivered its financial analysis and oral fairness opinion. Thanks in large part to Moelis' exclusion of Orange County from the Company's projections, Moelis' valuation analysis yielded negative equity values and share prices for Empire. Specifically, Moelis' DCF analysis yielded an implied per share value of Empire of (\$14.58) to (\$13.68) when excluding online sports betting, and (\$8.30) to \$5.45 assuming online sports betting was approved. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moelis' finding of negative equity values is contrary to Union Gaming's analysis performed for Genting, as described earlier.

158. In the end, the Merger price of \$9.74 was identical to the Proposal price, and, unsurprisingly, in the less than two weeks of negotiations, the Special Committee was unable to secure any increase in the merger consideration that Kien

Huat offered. This hardly replicated arm's-length bargaining by a properly functioning special committee.

**W. Management and Moelis Manipulate the Company's Projections to Make the Merger Price Appear Fair**

159. [REDACTED] the management cases used by Moelis in its August 6, 2019 presentation to the Special Committee (Base Case and Management Agreement Case, both of which assumed online sports betting) were completely abandoned for purposes of Moelis' fairness analysis. The elimination of the Management Agreement Case completely wiped out Empire's projected EBITDA rising from \$29 million in 2020 to \$63 million in 2023. Further, management's two new sets of projections provided to Moelis on August 14, 2019, rather than both assuming the legalization of online sports betting, now only assumed in one scenario that online sports gambling was approved.

160. Furthermore, the Base Case presented by Moelis on August 6, which should have corresponded to the August 14 management projections including online sports betting, had been dramatically altered, again without any explanation. Indeed, management imposed an across the board reduction of approximately \$5 million per year in EBITDA over the projection period. This alteration reduced Empire's EBITDA in 2020 from \$17 million to \$12 million, in 2021 from \$20 million to \$15 million, in 2022 from \$36 million to \$32 million, and in 2023 from \$49 million to \$44 million.

161. Neither the Proxy nor [REDACTED] contain an explanation anywhere as to why these revisions were made in the August 14 projections, when the decision was made to revise the July Projections, or what parties were involved in making the revisions. However, based on books and records produced in the 220 Action, it is apparent that [REDACTED]  
[REDACTED]  
[REDACTED] to help justify the Merger price.

162. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

163. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

164. It simply makes no sense to reduce Resorts World revenue [REDACTED]  
[REDACTED] while management—without Special Committee

involvement—determined that the base case for Moelis’ projections would exclude the positive impact of the VLT facility at Orange County. There would be no basis to presume [REDACTED] if Orange County were not opened, and including the cannibalization effects without the Orange County upside made no sense.

165. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

166. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[Redacted]

[Redacted]

167. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

168. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

169. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

**X. While Orange County is Ignored for Deal Purposes, Management Continues Incorporating Those Forecasts for Regular Business**

170. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

171. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





172.



173. In addition, after the Board had already approved the Merger based on Moelis' valuation analysis excluding Orange County, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moelis used to support its fairness opinion just weeks before and what the Board presented to stockholders in the Proxy a few weeks later.

174. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Y. The Merger Price Was Unfair**

175. The Merger price of \$9.74 per share is patently unfair. The \$9.74 Merger price represents less than a 2% premium to the \$9.56 closing price on August 2, 2019, the last trading day prior to the Proposal being made, and a negative premium to the 3-, 6-, and 12-month volume weighted average price of the Company's stock price.

176. The Merger price was below where Empire's stock had traded for most of 2019. During 2019, other than brief dips in June and July, Empire's stock had not closed below \$10 per share (and had traded as high as \$15.31 per share as recently as March 5, 2019). Moelis noted on post-offer trading performance that "Empire's stock has traded down 11.6% [between August 6, 2019 and August 15, 2019] as a result of liquidity concerns and [Kien Huat's] comments around not intending to provide further equity or debt financing to the Company." Thus, even Moelis acknowledged that Kien Huat's conduct was contributing to the decline in the trading price of Empire's common stock.

---

4 [REDACTED]

177. Moelis’ fairness opinion and analysis do little to refute the unfairness of the Merger. Moelis delivered its fairness opinion to the Board on August 18, 2019. Moelis’ financial analyses were based on the new consolidated five-year financial projections purportedly running through 2024 that were provided by management just four days earlier on August 14, 2019: a management case without online sports betting, and a management case with online sports betting.

**Summary of Empire Financial Projections – Excluding Online Sports Betting**

MOELIS & COMPANY

Empire’s financial projections assume it will increase its Adjusted EBITDA from (\$12mm) in 2019E to \$19mm in 2024E, excluding the impact of online sports betting

(\$ millions)	Fiscal Year End December 31,							CAGR
	2018A	2019E	2020E	2021E	2022E	2023E	2024E	19E-'24E
<b>Net Revenue</b>								
MOC	\$156	\$232	\$268	\$283	\$295	\$306	\$312	6.1%
% Growth		48.9%	15.3%	5.5%	4.4%	3.5%	2.0%	
<b>EBITDA</b>								
Adjusted MOC <sup>1</sup>	(\$31)	(\$0)	\$25	\$27	\$30	\$32	\$32	NM
Other <sup>2</sup>	(8)	(11)	(12)	(13)	(13)	(13)	(13)	3.2%
<b>Adjusted EBITDA</b>	<b>(\$39)</b>	<b>(\$12)</b>	<b>\$12</b>	<b>\$15</b>	<b>\$17</b>	<b>\$18</b>	<b>\$19</b>	<b>NM</b>
% Growth		NM	NM	16.7%	14.0%	10.8%	1.8%	
% Margin <sup>3</sup>	(25.0%)	(5.1%)	4.7%	5.2%	5.6%	6.0%	6.0%	
<b>Capital Expenditures</b>								
MOC	9	13	15	11	11	11	11	(3.7%)
Other	1	0	0	0	0	0	0	-
<b>Total Capital Expenditures</b>	<b>\$11</b>	<b>\$13</b>	<b>\$15</b>	<b>\$11</b>	<b>\$11</b>	<b>\$11</b>	<b>\$11</b>	<b>(3.7%)</b>
% Margin	7.0%	5.6%	5.7%	3.8%	3.6%	3.5%	3.4%	

## Summary of Empire Financial Projections – Including Online Sports Betting

MOELIS & COMP.

Empire’s financial projections assume it will increase its Adjusted EBITDA from (\$12mm) in 2019E to \$59mm in 2024E, including the impact of online sports betting, assuming fully remote mobile registration<sup>1</sup>

(\$ millions)	Fiscal Year End December 31,							CAGR 19E-24E
	2018A	2019E	2020E	2021E	2022E	2023E	2024E	
<b>Net Revenue</b>								
MOC	\$156	\$232	\$268	\$283	\$295	\$306	\$312	6.1%
% Growth		48.9%	15.3%	5.5%	4.4%	3.5%	2.0%	
<b>EBITDA</b>								
Adjusted MOC <sup>2</sup>	(\$31)	(\$0)	\$25	\$27	\$30	\$32	\$32	NM
Other <sup>3</sup>	(8)	(11)	(12)	(13)	(13)	(13)	(13)	3.2%
<b>Adjusted EBITDA</b>	<b>(\$39)</b>	<b>(\$12)</b>	<b>\$12</b>	<b>\$15</b>	<b>\$17</b>	<b>\$18</b>	<b>\$19</b>	<b>NM</b>
Online Sports Betting	-	-	-	1	15	26	40	NM
<b>Total Adjusted EBITDA</b>	<b>(\$39)</b>	<b>(\$12)</b>	<b>\$12</b>	<b>\$15</b>	<b>\$32</b>	<b>\$44</b>	<b>\$59</b>	<b>NM</b>
% Growth		NM	NM	20.7%	109.6%	40.5%	32.2%	
% Margin <sup>4</sup>	(25.0%)	(5.1%)	4.7%	5.2%	5.6%	6.0%	6.0%	
<b>Capital Expenditures</b>								
MOC	9	13	15	11	11	11	11	(3.7%)
Other	1	0	0	0	0	0	0	-
<b>Total Capital Expenditures</b>	<b>\$11</b>	<b>\$13</b>	<b>\$15</b>	<b>\$11</b>	<b>\$11</b>	<b>\$11</b>	<b>\$11</b>	<b>(3.7%)</b>
% Margin	7.0%	5.6%	5.7%	3.8%	3.6%	3.5%	3.4%	

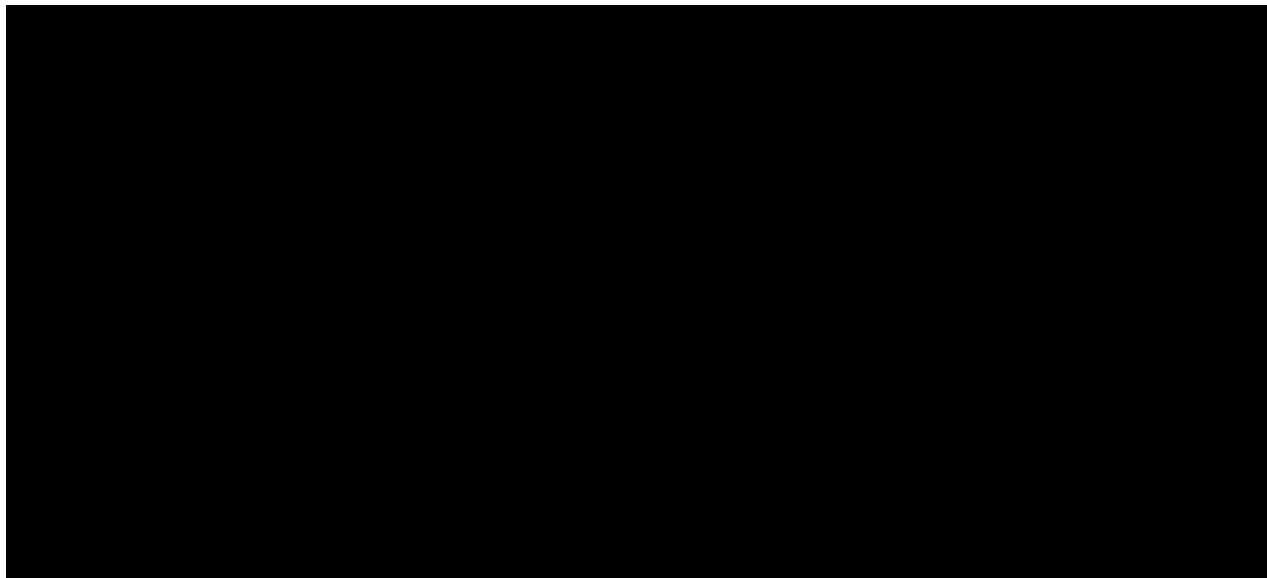
178. Critically, however, Moelis’ analyses excluded the positive impact of Orange County that the Board and management were projecting. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 [REDACTED]



179. Further, Union Gaming delivered a DCF analysis to Genting valuing Empire’s publicly held stock as high as \$15.95 per share. Union Gaming’s public market comparable companies analysis yielded a valuation range as high as \$13.11 per share. And the precedent transaction analysis—an analysis that Moelis did not even conduct because it purportedly could not find enough comparable transactions—yielded a valuation range of \$9.79 to \$14.11 per share, wholly exceeding the \$9.74 per share Merger price.

180. None of the analyses performed by Union Gaming came even close to implying a negative value for Empire, as Moelis’ analyses ultimately found. That Moelis’ analyses yielded negative values for Empire is highly questionable, and the Special Committee’s acquiescence to Moelis’ negative valuation without questioning it and instructing Moelis to include the value of Orange County in the

analysis calls into serious question the Special Committee process and the fair value of the Merger.

**THE STOCKHOLDER VOTE WAS UNINFORMED AND TAINTED**

***The Majority-of-the-Minority Vote Improperly Included bet365's Interested Shares, Without Which the Condition Was Unmet***

181. The Merger Agreement provided that the Merger needed to be approved by “holders of a majority of the voting power of the outstanding shares of the Company’s Common Stock and Series B Preferred Stock, voting as a single class, that are not owned by Kien Huat, [Genting Malaysia], their respective affiliates or any officer or director of the Company” (the “Requisite Company Vote”).

182. Upon information and belief, the Requisite Company Vote did not exclude bet365’s 1,685,759 shares from the requisite majority of shares unaffiliated with Kien Huat or Genting necessary to approve the Merger. However, bet365 had contractual arrangements with Empire to operate Empire’s existing in-house sportsbook and to manage the future exceedingly profitable online sports betting operations of Empire.

183. Thus, bet365 was very differently situated than Empire’s public minority (and truly unaffiliated) stockholders. [REDACTED]

[REDACTED]

[REDACTED]

As such, inclusion of bet365's shares in the Requisite Company Vote renders the majority-of-the-minority vote an inadequate procedural protection for the Empire minority stockholders against Kien Huat's controlling influence.

184. On November 15, 2019, Empire stockholders just barely approved the Merger, with only 52.7% of the 5,410,507 "minority" shares voting in favor of the Merger (2,853,256 shares). Upon information and belief, bet365 voted its shares in favor of the Merger and its shares were counted in connection with the Requisite Company Vote.<sup>6</sup> Simply subtracting bet365's 1,685,759 shares from the numerator of votes in favor and from the denominator of minority shares outstanding, demonstrates that if bet365's shares had not been included in the Requisite Company Vote and voted in favor of the Merger, then the Merger would not have been

---

<sup>6</sup> Based on the total number of shares outstanding and entitled to vote (5,410,507 shares) minus the number of shares Empire disclosed voted in favor of the Merger (2,853,256), there were 2,557,251 shares that voted against, abstained or that did not vote in connection with the Merger. Adding bet365's 1,685,759 shares to the shares held by certain of the 220 Action plaintiffs (432,754) and shares held by certain appraisal petitioners that voted against or did not vote in favor of the Merger, based on publicly available information (560,928), results in 2,679,441 shares voting against or not voting in favor of the Merger. As this number would be higher than the number of shares that Empire disclosed voted against, abstained from voting or did not vote in connection with the Merger, it is reasonable to infer that bet365 voted its shares in favor of the Merger.



approved (1,167,497 for votes out of 3,724,748 shares outstanding equals 31.1% majority-of-the-minority vote in favor of the Merger).

***The Disclosures Concerning the Merger Were False and Misleading***

185. Empire issued its Proxy on October 11, 2019. The Proxy makes various misleading or false disclosures that create confusion concerning the Company's projections, the status of Orange County, and the Company's opportunities to pursue alternative transactions.

*The Proxy Misleads About Empire's Financial Projections*

186. As an initial matter, the Proxy completely misrepresents the background of the financial projections prepared by management and provided to Moelis in connection with the Merger. Specifically, the Proxy states that:

[T]he Company had prepared, and subsequently made available to the Special Committee and its advisors a set of management projections in July 2019, which included projected financials for fiscal years 2019 through 2024. Management prepared two sets of projections with one to include the introduction of online sports gambling beginning in 2021.

187. The Proxy's description of the July 2019 projections are not accurate. As described above, management prepared projections in July that were delivered to Moelis on August 1, 2019 and presented to the Special Committee at its August 6, 2019 meeting. (See charts from Moelis presentation below). Those projections did

not run through 2024, but only through 2023, and they are vastly different from what is disclosed in the Proxy.

188. Indeed, management did not prepare a scenario without online sports betting in July at least in so far as management's projections were presented to the Special Committee at the August 6, 2019 meeting to consider the Merger. Likewise, the two management scenario projections presented to the Special Committee in connection with their evaluation of the Merger on August 6, 2019, were a base case scenario and a base case + management agreement scenario. However, the base case + management agreement scenario was never provided to Empire stockholders in the Proxy.

Management Base Case  
Overview of Management's Base Case Financial Projections

MOELIS &amp; COMPANY

The below highlights Management's base case financial projections

## SUMMARY OF FINANCIAL PLAN

	Fiscal Year End December 31,				
	2019E	2020E	2021E	2022E	2023E
<i>(\$ millions)</i>					
(A) Slot Machines	\$155	\$172	\$181	\$188	\$194
Tables	96	113	118	123	127
Poker	5	5	6	6	6
(B) Retail Sportsbook	3	7	8	10	12
<b>Gross Gaming Revenue</b>	<b>\$259</b>	<b>\$297</b>	<b>\$313</b>	<b>\$327</b>	<b>\$339</b>
% Growth	45.2%	15.0%	5.3%	4.4%	3.5%
Hotel	\$14	\$16	\$17	\$18	\$18
Other Non-Gaming	40	45	48	49	51
<b>Gross Non-Gaming Revenue</b>	<b>\$55</b>	<b>\$61</b>	<b>\$64</b>	<b>\$67</b>	<b>\$69</b>
% Growth	73.2%	12.1%	5.4%	4.0%	3.0%
<b>Total Revenue</b>	<b>\$313</b>	<b>\$359</b>	<b>\$378</b>	<b>\$394</b>	<b>\$408</b>
% Growth	49.4%	14.5%	5.4%	4.3%	3.4%
(-) Comps	(\$78)	(\$88)	(\$93)	(\$97)	(\$100)
<b>Net Revenue</b>	<b>\$235</b>	<b>\$270</b>	<b>\$285</b>	<b>\$297</b>	<b>\$308</b>
% Growth	52.5%	14.9%	5.5%	4.4%	3.5%
(C) (-) Operating Expenses	(232)	(241)	(253)	(263)	(271)
<b>MOC EBITDA</b>	<b>\$4</b>	<b>\$29</b>	<b>\$32</b>	<b>\$35</b>	<b>\$37</b>
% Growth	NM	NM	11.0%	8.3%	6.6%
% Margin	1.1%	8.1%	8.5%	8.8%	9.1%
(-) Corporate Overhead	(\$2)	(\$3)	(\$3)	(\$3)	(\$3)
(+) Ground lease Adjustment	2	2	2	2	2
(D) <b>Adjusted MOC EBITDA</b>	<b>\$4</b>	<b>\$29</b>	<b>\$31</b>	<b>\$34</b>	<b>\$36</b>
% Growth	NM	NM	8.8%	7.9%	6.5%
% Margin	1.2%	8.0%	8.3%	8.5%	8.8%
(-) MCR EBITDA	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)
(-) ERI Corporate Overhead	-	(9)	(9)	(9)	(9)
(E) (+) Incremental Online Sportsbook EBITDA	-	-	1	15	26
<b>ERI EBITDA</b>	<b>\$0</b>	<b>\$17</b>	<b>\$20</b>	<b>\$36</b>	<b>\$49</b>
% Growth	NM	NM	16.5%	84.6%	35.5%
% Margin	0.0%	4.7%	5.2%	9.3%	12.1%
<b>KPIs</b>					
Win / Unit / Day	\$246	\$294	\$309	\$322	\$332
Win / Table / Day	3,704	4,358	4,589	4,772	4,916
RevPAR	85	95	100	104	107

## COMMENTARY

- (A) Top line growth is largely driven by an increase in slot machine and table gaming performance
- Combined slot and table revenue projected to grow 47% and 10% in 2019E and 2020E, respectively
- (B) Meaningful Retail Sportsbook opportunity as revenues ramp to \$12mm by 2023E
- (C) Operating expenses include impacts of a possible Hotel Trades Commission (HTC) concession, as well as a salary and marketing reduction
- (D) Adjusted MOC EBITDA accounts for the ground lease which adjusts for the delta between cash and accrual accounting for the land lease
- Adjusted MOC EBITDA is used for covenant testing
- (E) Online Sportsbook projected to come online in January 2021E and set to contribute \$15mm and \$26mm in EBITDA in 2022E and 2023E, respectively
- Excludes impacts of VLT facility and downstate casino openings

[ 17 ]

Management Base Case + Management Agreement  
Management Based Case + Management Agreement Bridge

MOELIS & COMPANY

The below highlights the pro forma financial impact from the Management Agreement

SUMMARY OF FINANCIAL PLAN

(Millions)	Fiscal Year End December 31,				
	2019E	2020E	2021E	2022E	2023E
(A) Slot Machines	\$155	\$184	\$193	\$200	\$206
Tables	96	124	131	136	140
Poker	5	5	6	6	6
Retail Sportsbook	3	7	8	10	12
<b>Gross Gaming Revenue</b>	<b>\$259</b>	<b>\$320</b>	<b>\$337</b>	<b>\$352</b>	<b>\$364</b>
% Growth	NM	23.9%	5.3%	4.4%	3.5%
Hotel	\$14	\$16	\$17	\$18	\$18
Other Non-Gaming	40	45	48	49	51
<b>Gross Non-Gaming Revenue</b>	<b>\$55</b>	<b>\$61</b>	<b>\$64</b>	<b>\$67</b>	<b>\$69</b>
% Growth	877.9%	12.1%	5.4%	4.0%	3.0%
<b>Total Revenue</b>	<b>\$313</b>	<b>\$382</b>	<b>\$402</b>	<b>\$419</b>	<b>\$433</b>
% Growth	NM	21.9%	5.3%	4.3%	3.4%
(B) (-) Comps	(\$78)	(\$93)	(\$97)	(\$101)	(\$104)
<b>Net Revenue</b>	<b>\$235</b>	<b>\$289</b>	<b>\$304</b>	<b>\$318</b>	<b>\$329</b>
% Growth	NM	22.9%	5.4%	4.4%	3.5%
(C) (-) Operating Expenses	(232)	(240)	(251)	(260)	(269)
<b>MOC EBITDA</b>	<b>\$4</b>	<b>\$49</b>	<b>\$54</b>	<b>\$57</b>	<b>\$60</b>
% Growth	NM	1,298.1%	9.6%	6.6%	5.2%
% Margin	1.1%	12.9%	13.4%	13.7%	13.9%
(-) Corporate Overhead	(\$2)	(\$3)	(\$3)	(\$3)	(\$3)
(+) Ground lease Adjustment	2	2	2	2	2
<b>Adjusted MOC EBITDA</b>	<b>\$4</b>	<b>\$49</b>	<b>\$53</b>	<b>\$56</b>	<b>\$59</b>
% Growth	NM	NM	8.3%	6.3%	5.1%
% Margin	1.2%	12.8%	13.1%	13.4%	13.6%
(-) MCR EBITDA	(\$3)	(\$3)	(\$3)	(\$3)	(\$3)
(-) ERI Corporate Overhead	-	(9)	(9)	(9)	(9)
(+) Incremental Online Sportsbook EBITDA	-	-	1	15	26
(-) Management Agreement Payment	-	(8)	(9)	(9)	(10)
<b>ERI EBITDA</b>	<b>\$0</b>	<b>\$29</b>	<b>\$33</b>	<b>\$50</b>	<b>\$63</b>
% Growth	NM	NM	13.2%	52.6%	26.6%
% Margin	0.0%	7.5%	8.1%	11.9%	14.5%
<b>KPIs</b>					
Win / Unit / Day	\$246	\$313	\$330	\$343	\$354
Win / Table / Day	3,704	4,807	5,061	5,264	5,422
RevPAR	85	95	100	104	107

COMMENTARY

- Impacts to Management's base case scenario are based on an Management's estimates of a potential agreement with RWNY
- (A) Meaningful additional gross revenue throughout the projection period is generated from increased slot and table revenue
- (B) Management assumes significant gaming tax savings by shifting table and slot revenues from RWNY to RWC
- (C) Annual labor cost savings of \$9-10mm from combined New York regional leadership and support departments
  - Labor cost savings include impacts of a possible HTC concession and salary reduction, while operating expenses include impacts from a marketing reduction
- (D) The Management Agreement includes a \$8-10mm annual payment to RWNY for operating the venue
  - The payment is equal to 2% of net revenue + 5% of adjusted MOC EBITDA

[ 21 ]

189. Then, management provided new sets of projections on August 14, 2019 that were used by Moelis to render its fairness opinion, and which, among other things, (a) eliminated the Management Agreement Case projections which projected far higher EBITDA over the projection period, (b) eliminated \$5 million in EBITDA annually, and (c) ran through 2024.

190. Further, even in the August 14, 2019 projections, management did not actually create a set of projections that excluded online sports gambling.

[REDACTED]

191. The Proxy also misleadingly suggests that management's projections were based on management's ordinary course projections, specifically stating that:

As part of its annual financial planning process, the Company prepares management projections for its upcoming fiscal year and multi-year treasury models, which the Company then updates from time to time. In this capacity, the Company had prepared, and subsequently made available to the Special Committee and its advisors a set of management projections in July 2019, which included projected financials for fiscal years 2019 through 2024.

192. However, these projections were in fact prepared for the Special Committee for the purposes of considering the Proposal, and thus excluded the impact of Orange County and other issues that management had been projecting for the last several months. Thus, the Proxy's disclosure here is misleading at best, if not outright false.

193. Consequently, the Proxy's description of the management projections used by Moelis for its financial analyses is false and misleading.

*The Proxy Misleads About Management's Blocking of Party A*

194. The Proxy also misleadingly and incompletely describes the events of August 14 to August 16, 2019. The Proxy suggests that Kien Huat's August 16, 2019 threat to withdraw if negotiations extended beyond August 18, 2019 took place before Pearlman received a call from Party A on August 16, 2019 inquiring about potential capital support for Empire.

195. As discussed above, this appears completely inaccurate. Books and records provided in the 220 Action, [REDACTED]

[REDACTED]

[REDACTED]

196. The chronology of Party A's outreach regarding financing as detailed in the Proxy appears to be purposely obscured. When put in context of Kien Huat's actions starting on August 15, 2019 to try to accelerate the timeline for Merger approval, it seems likely, [REDACTED]

[REDACTED] that someone tipped Kien Huat about Party A's offer, which prompted Kien Huat's acceleration of the timetable and threat to withdraw from the process. This is clearly material information to Empire stockholders as it calls into question the sanctity of the Merger negotiations and the treatment of potential alternative financing transactions by the Board and Moelis.

*The Proxy Misleads About the Orange County Plan*

197. On November 6, 2019, Empire filed a Form 8-K purporting to supplement the Proxy (“Supplement”). For the first time ever, Empire acknowledged that Orange County was excluded from the Company’s financial projections, stating:

The summary financial projections excluded any impacts associated with the positive effect of a potential VLT facility in Orange County due to the inherent uncertainty of any such facility’s future operations, including due to the facts that no site for the facility had yet been approved by applicable county or local authorities, that no terms for the required mitigation agreement between the Company and the VLT facility operating at the Yonkers racetrack had yet been agreed to or approved by applicable gaming authorities and that various other necessary regulatory approvals had not yet been obtained.

198. This is a misleading disclosure at best, and in fact materially misrepresents the actual substantial headway that had been made on Orange County and the costs that Empire was expending to ensure that it moved forward. Material facts regarding the progress on Orange County that the Proxy omits, include:

a.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b.

[REDACTED]

c.

[REDACTED]

d.

[REDACTED]



[REDACTED]

e.

[REDACTED]

f.

[REDACTED]

199. Moreover, the primary reason that [REDACTED] for Orange County had not yet been confirmed is because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] KT  
Lim was planning to develop Genting's existing RWNY into a full-scale casino in the heart of New York City (it currently being only an electronic-game casino), which considering the population density and potential clientele could unlock incredible value and make RWNY's already highly profitable operations exponentially larger. However, to convert RWNY into a full-scale casino, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

200. Thus, the holdup on securing approval for Orange County's location was not as the Supplement states because of any concern over approval by county and local authorities ([REDACTED]), but was a result of Empire's controlling stockholder exercising control over Orange County's

location to address Genting's other business interests in New York before Empire had even taken control of the Company in the Merger. [REDACTED]

[REDACTED]

[REDACTED] None of this information was disclosed to Empire stockholders and renders the Proxy and Supplement materially incomplete and misleading.

201. Additionally, the Supplement's representation that no terms for the required mitigation agreement with MGM Yonkers had yet been agreed to is also misleading and arguably outright false, as:

a. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

b. [REDACTED]  
[REDACTED]  
[REDACTED]

c. [REDACTED]  
[REDACTED]

202. Moreover, the Proxy and Supplement also failed to disclose the extent to which [REDACTED] [REDACTED] when discussing the Merger, despite the representation that Orange County was too uncertain.

203. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

204. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

205. When compared to the projections disclosed in the Proxy, [REDACTED]  
[REDACTED]

[REDACTED] In the Proxy, projected EBITDA for 2021–2024 (exclusive of online sports betting) is \$14.6 million, \$16.6 million, \$18.4 million, and \$18.8 million, respectively. When including projected online sports betting, the numbers for 2021–

2024 are \$15.1 million, \$31.6 million, \$44.4 million, and \$58.8 million, respectively.

[REDACTED]

[REDACTED]

206. [REDACTED]

[REDACTED]

[REDACTED] when management had apparently decided to exclude Orange County from the Company's projections in Moelis' fairness analysis for the Merger because it was too uncertain.

207. By (a) failing to provide stockholders with Orange County's projections, (b) misrepresenting the planning and development of Orange County that was already underway, and (c) instead claiming on November 6, 2019 that Orange County was so inherently uncertain that it could not be included in the Company's financial projections in connection with Moelis' analysis of the Merger, the Company was materially dishonest about the true prospects of Orange County and its likely future impact on Empire's financial results.

208. Finally, Empire also failed to disclose that its EBITDA projections in the Proxy were artificially low because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is materially

misleading for the Proxy to include [REDACTED]

[REDACTED]

[REDACTED]

209. For all the foregoing reasons, the stockholder vote on the Merger was not fully informed, and consequently entire fairness is the standard of review.

### **CLASS ACTION ALLEGATIONS**

210. Plaintiffs bring this action on their own behalf and as a class action pursuant to Delaware Court of Chancery Rule 23, on behalf of all holders of Class A Stock who were harmed by Defendants' actions described herein (the "Class"). Excluded from the Class are Defendants and any person, firm, trust, corporation or other entity related to or affiliated with any Defendants.

211. This action is properly maintainable as a class action.

212. The Class is so numerous that joinder of all members is impracticable. Empire had 5,410,507 shares of common stock unaffiliated with Kien Huat outstanding, held by 200 stockholders of record, and likely held beneficially by many more.

213. There are common questions of fact and law including, *inter alia*, the following:

- a. Whether Kien Huat and Genting, as controlling stockholders, breached their fiduciary duties to Empire's public stockholders

by orchestrating the Merger for their own benefit at the expense of the minority stockholders;

- b. Whether the Director Defendants have breached their fiduciary duties by favoring Kien Huat's interests at the expense of Empire's public minority stockholders;
- c. Whether the Executive Defendants have breached their fiduciary duties by favoring Kien Huat's interests at the expense of Empire's public minority stockholders;
- d. Whether the Merger was entirely fair to Empire's minority stockholders;
- e. Whether the Proxy made false and misleading statements and/or withheld material information from Empire stockholders; and
- f. Whether Plaintiffs and other members of the Class are entitled to damages and/or any other relief.

214. The common questions of law and fact predominate over questions affecting individual class members and a class action is superior to other adjudication methods.

215. Plaintiffs' claims are typical of the claims of the other members of the Class, and Plaintiffs do not have any interests adverse to the Class.

216. Plaintiffs are adequate representatives of the Class, have retained skilled counsel with extensive experience in litigation of this nature, and will fairly and adequately protect the interests of the Class.

217. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class.

218. Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

### **COUNT I**

#### **(Breach of Fiduciary Duty against Kien Huat and Genting)**

219. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

220. As a controlling stockholder of Empire, Kien Huat owed Plaintiffs and the Class fiduciary duties of loyalty and care. As a result, in connection with the Merger, Kien Huat had a duty to not benefit itself at the expense of Empire's public minority stockholders.

221. By the acts alleged herein, Kien Huat breached its fiduciary duty of loyalty to Empire's minority stockholders by acting in its self-interest and against



the interests of Empire's minority stockholders. The Merger was the product of unfair dealing, was initiated, timed, structured, negotiated, priced, and approved by the Board and disclosed to stockholders to serve the interests of Kien Huat at the expense of Empire's public minority stockholders.

222. Kien Huat leveraged the Company's liquidity concerns to cause the Company to disclose a going concern risk, thereby depressing the stock price, and allowing Kien Huat to take the Company private at an unfair price that would also allow Kien Huat to benefit from the upside of the Company as it launched Orange County, while stockholders went uncompensated for that asset but suffered the downside of financing Empire's development.

223. Moreover, Kien Huat wielded its position as controlling stockholder to manipulate the Special Committee, receive inside information from loyalists present during Special Committee meetings, exert influence over the Special Committee in the negotiation process, force the Special Committee to negotiate the Merger faster than it desired, and otherwise to extract buyout terms that were unfair to Plaintiffs and the Class. Kien Huat engaged in a buyout process that was consistently unfair, to the detriment of Plaintiffs and the Class.

224. Kien Huat also breached its fiduciary duties to the Empire public stockholders as a controlling stockholder by disseminating a materially misleading

and deficient Proxy, thereby depriving Plaintiffs and the Class of the opportunity to cast votes informed by all material information on the Merger.

225. Furthermore, by July 22, 2019, Kien Huat and Genting had reached an agreement and understanding that Genting would acquire 13.2 million shares of Empire common stock from Kien Huat prior to the Merger and they would thereafter jointly acquire Empire with Genting to own 49% and Kien Huat to own 51%. This agreement was then reflected in a binding term sheet dated August 5, 2019. Therefore, by at least July 22, 2019, but no later than August 5, 2019, Genting and Kien Huat—both controlled by KT Lim—constituted a control group as Empire’s controlling stockholders. Genting participated in Kien Huat’s scheme to deprive Empire stockholders of the fair value of their shares and thereby breached its fiduciary duty as a controlling stockholder.

226. As a result of the foregoing, Plaintiffs and the Class have been harmed. Plaintiffs and the Class are entitled to equitable relief, damages based on the fair value of their Empire shares and other relief.

## **COUNT II**

### **(Breach of Fiduciary Duty against the Director Defendants)**

227. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

228. The Director Defendants, as directors of Empire, owed Plaintiffs and the Class fiduciary duties of loyalty and care.

229. The Director Defendants have violated their fiduciary duties of loyalty and care by agreeing to the Merger which favors the interests of Kien Huat at the expense of Empire's former public minority stockholders.

230. Gerard Lim, a Kien Huat designee to the Board and a long-time director of Kien Huat, was privy to Kien Huat's strategy and acted in furtherance of Kien Huat's interests. Gerard Lim attended the June 24, 2019 meeting with Moelis and other Kien Huat representatives to discuss the eventual Merger which inexplicably excluded the Special Committee.

231. By the actions described herein, Pearlman engaged in a variety of actions that worked to the detriment of Empire's public stockholders and benefited Kien Huat in the Merger. Pearlman worked to engage Moelis as the Company's financial advisor, a decision which was then thrust on the Special Committee who did not have the opportunity to consider other advisors. Pearlman further attended the June 24, 2019 meeting with Moelis and other Kien Huat representatives to discuss the eventual Merger which inexplicably excluded the Special Committee. Pearlman further stepped into the Special Committee's authority when, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

232. With respect to the Special Committee member defendants, Horn, Palumbo, and Marinucci, they breached their fiduciary duties by failing to oversee and manage conflicts between management and Moelis, on one hand, and Kien Huat and Genting on the other, including from the beginning failing to select independent financial and legal advisors. They further completely abdicated their negotiating responsibilities, including, by (a) failing to even provide a concrete counter offer to Kien Huat with a higher proposed price per share, despite acknowledging that the Proposal price was too low, (b) ignored their advisor's advice that more time was needed to negotiate the terms of the Merger into September 2019 and caving to the pressure exerted by Kien Huat to accelerate the process, and (c) approving the Merger at a price which they knew undervalued the shares of Empire common stock, based on projections that totally excluded the future prospects of Orange County despite their knowledge that Orange County was moving forward and would constitute a significant portion of the Company's future business.

233. The Director Defendants further approved the materially misleading and incomplete disclosures included in the Proxy that was sent to stockholders soliciting their vote on the Merger. The disclosures in the Proxy, as described above,

were materially deficient and prevented minority stockholders from casting an informed vote on the Merger.

234. As a result of the foregoing, Plaintiffs and the Class have been harmed. Plaintiffs and the Class are entitled to equitable relief, damages based on the fair value of their Empire shares and other relief.

### **COUNT III**

#### **(Breach of Fiduciary Duty against the Executive Defendants)**

235. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

236. As executives of Empire, defendants Pearlman and Eller owed Plaintiffs and the Class fiduciary duties of loyalty and care.

237. The Executive Defendants have violated their fiduciary duties of loyalty and care by their actions taken in furtherance of the Merger which favored the interests of Kien Huat at the expense of Empire's former public minority stockholders.

238. The Executive Defendants made concerted efforts to undermine the Special Committee process and the negotiations of a transaction with Kien Huat for the benefit of Kien Huat and to the detriment of Empire's public stockholders.

239. Pearlman worked to engage Empire's long-standing banker Moelis as the Company's financial advisor, a decision which was then thrust on the Special Committee [REDACTED]

240. Pearlman further attended the June 24, 2019 meeting with Moelis and other Kien Huat representatives to discuss the eventual Merger which inexplicably excluded the Special Committee.

241. Eller worked to the detriment of the minority stockholders and in the favor of Kien Huat and Genting by working behind the Special Committee's back to manipulate the Company's projections. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] had the effect of depressing Empire's implied valuation and in turn worked to justify the unfair price of \$9.74 per share.

242. One or both of Pearlman and Eller also worked against the interests of the Special Committee by [REDACTED]

[REDACTED]

243. [REDACTED]

[REDACTED]

[REDACTED]

244. Pearlman and Eller further approved the materially misleading and incomplete disclosures included in the Proxy that was sent to stockholders soliciting their vote on the Merger. The disclosures in the Proxy, as described above, were materially deficient and prevented minority stockholders from casting an informed vote on the Merger.

245. As a result of the foregoing, Plaintiffs and the Class have been harmed. Plaintiffs and the Class are entitled to equitable relief, damages based on the fair value of their Empire shares and other relief.

#### **COUNT IV**

##### **(Aiding and Abetting Breach of Fiduciary Duty against Genting)**

246. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

247. To the extent that Genting is found not to be a controller of Empire, in the alternative, Plaintiffs bring this claim against Genting for aiding and abetting Kien Huat's breaches of fiduciary duty.

248. Genting had knowledge that it was aiding and abetting Kien Huat's breaches of fiduciary duty owed to Empire stockholders, and thus knowingly participated in those breaches.

249. Genting provided substantial assistance to Kien Huat in its breach of fiduciary duties by engaging Union Gaming to provide an analysis of an Empire squeeze-out at \$9.74 per share and providing proprietary Empire company financial information to Union Gaming. As a result of Genting's relationship with Kien Huat and affiliation with KT Lim, Genting was aware of Kien Huat's plan to take Empire private quickly while the Company was facing liquidity problems, thereby allowing Kien Huat to capitalize on Empire's depressed price and realize the upside of Orange County without sharing such upside with public stockholders.

250. Genting then reached a binding agreement with Kien Huat to split Kien Huat's Empire stock between the two of them, jointly acquire Empire, and jointly realize the benefits of the unfair take-private, thereby forming a control group.

251. As a result of Genting aiding and abetting Kien Huat's breaches of fiduciary duties, Plaintiffs and the other members of the Class were damaged in that they were prevented from obtaining a fair price for their shares of Empire common stock.

## **COUNT V**

### **(Aiding and Abetting Against Hercules)**

252. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.



253. Hercules is sued herein as an aider and abettor of the breaches of fiduciary duty by Kien Huat and/or Genting.

254. Hercules was formed by and jointly owned by Kien Huat and Genting for the purposes of effectuating the unfair acquisition of Empire described herein.

255. Hercules, being jointly controlled by Kien Huat and Genting, had knowledge that it was aiding and abetting Kien Huat's and Genting's breaches of fiduciary duty owed to Empire stockholders, and thus knowingly participated in those breaches.

256. Hercules participation was necessary for Kien Huat's and Genting's effectuation of the unfair Merger in breach of their fiduciary duties.

257. As a result of Hercules aiding and abetting Kien Huat's and/or Genting's breaches of fiduciary duties, Plaintiffs and the other members of the Class were damaged in that they were prevented from obtaining a fair price for their shares of Empire common stock.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs demand relief in their favor and in favor of the Class and against all Defendants as follows:

- A. Declaring that this action is properly maintainable as a class action;
- B. Declaring that Kien Huat, Genting, the Director Defendants, and the Executive Defendants breached their fiduciary duties by agreeing to the

Merger and issuing the materially false and misleading Proxy and are liable to Plaintiffs and the Class;

- C. In the alternative with respect to Genting, declaring that Genting aided and abetted Kien Huat's breaches of fiduciary duty if Genting is not found to be Empire's controlling stockholder as a member of a control group with Kien Huat for purposes of the Merger;
- D. Declaring that Hercules aided and abetted Kien Huat's and Genting's breaches of fiduciary duty;
- E. Certifying the proposed Class;
- F. Awarding damages to Plaintiffs and the Class including pre- and post-judgment interest;
- G. Awarding Plaintiffs the costs and disbursements of this action, including attorneys', accountants', consultants' and experts' fees; and
- H. Granting such other and further relief as is just, proper and equitable.

Dated: July 24, 2020

**BERNSTEIN LITOWITZ BERGER  
& GROSSMANN LLP**

*/s/ Gregory V. Varallo*  
\_\_\_\_\_  
Gregory V. Varallo (Bar No. 2242)  
500 Delaware Avenue, Suite 901  
Wilmington, DE 19801  
(302) 364-3601

*Counsel for Plaintiffs*

OF COUNSEL:

**KESSLER TOPAZ MELTZER  
& CHECK, LLP**

Lee D. Rudy

Geoffrey C. Jarvis

J. Daniel Albert

Grant Goodhart

280 King of Prussia Road

Radnor, Pennsylvania 19087

(610) 667-7706

*Counsel for Plaintiffs*