



## 1 APPEARANCES:

2 GREGORY V. VARALLO, ESQ.  
Bernstein, Litowitz, Berger & Grossman LLP

3 -and-

4 J. DANIEL ALBERT, ESQ.  
GRANT D. GOODHART III, ESQ.  
MARIA STARLING, ESQ.  
5 of the Pennsylvania Bar  
Kessler Topaz Meltzer & Check, LLP  
6 for Plaintiffs

7 JOHN D. HENDERSHOT, ESQ.  
Richards, Layton & Finger, PA

8 -and-

9 ROGER A. COOPER, ESQ.  
RAHUL MUKHI, ESQ.  
KAL BLASSBERGER, ESQ.  
10 of the New York Bar  
Cleary Gottlieb Steen & Hamilton LLP  
11 for Defendants Empire Resorts, Inc., Kien  
Huat Realty III Limited, Emanuel R. Pearlman,  
12 Gerard Ewe Keng Lim, Ryan Eller, Genting  
Malaysia Berhad, Genting (USA) Limited, and  
13 Hercules Topco LLC

14 MATTHEW D. STACHEL, ESQ.  
Paul, Weiss, Rifkind, Wharton & Garrison LLP

15 -and-

16 GEOFFREY CHEPIGA, ESQ.  
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17 Paul, Weiss, Rifkind, Wharton & Garrison LLP

-and-

18 JESSICA E. PHILLIPS, ESQ.  
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19 Paul, Weiss, Rifkind, Wharton & Garrison LLP  
for the Special Committee Defendants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8           The terms of the 2016 letter agreement  
9 were extended by an additional year, by agreement, on  
10 December 28, 2017. Resorts World opened in 2018. As  
11 a result, the restriction extended through February 8,  
12 2020, two years after the opening of Resorts World.

13           In November 2018, Empire entered into  
14 a series of agreements with bet365 Group Limited,  
15 which I'll refer to as "bet365," a British online  
16 gambling company. The agreements provided that bet365  
17 would operate and manage Empire's retail sports book,  
18 online sports book, and online table games once all  
19 were legally authorized. Empire and bet365 agreed to  
20 split the revenues from these three ventures on a  
21 50-50 basis.

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

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

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

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



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

3           In March 2019, Empire engaged Global  
4 Gaming & Hospital Capital Advisors, LLC, which I'll  
5 refer to as "GGH Morowitz," to provide an analysis of  
6 Orange County's revenue potential. According to a GGH  
7 Morowitz report, the potential VLT facility in Orange  
8 County could generate annual revenue between  
9 \$104.3 million to \$208.1 million, with a likely range  
10 of \$130.2 million to \$156.2 million. By comparison,  
11 Resorts World had generated \$139.7 million of gaming  
12 revenue in 2018.

13           The board was presented with the  
14 Orange County plan at an April 9, 2019 meeting, and  
15 management told them that Orange County could generate  
16 \$154 million of annual gaming revenue in its first  
17 full year of operation, potentially twice the amount  
18 of Empire's prior year's revenues. Then, on May 7,  
19 2019, the board received an additional presentation on  
20 the company's financial condition and the potential of  
21 Orange County, this time from Moelis. The May 7  
22 presentation noted that the Orange County scenario  
23 "impl[ied] a potentially meaningful positive net  
24 levered free cash flow impact."

1                   Specifically, the impact of Orange  
2 County was projected to translate to \$32 million in  
3 EBITDA in Orange County's first year and help  
4 Montreign's adjusted EBITDA rise from \$26 million in  
5 2019 to \$95 million by 2023 and Empire's EBITDA rise  
6 from \$14 million in 2019 to \$80 million by 2023. The  
7 projections were even higher when including the  
8 potential impact of legalized online sports betting.

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

18                   By June 4, 2019, MGM had demanded \$10  
19 million in mitigation payments per year from Empire,  
20 and Empire had countered with a base \$5 million  
21 payment that could scale up to \$7.5 million. On June  
22 20, 2019, the New York State Legislature passed  
23 legislation approving Orange County.

24                   As Orange County's legislative

1 approval neared, Empire's financing strategy shifted  
2 to a take-private plan. After the board discussed the  
3 legislation authorizing Orange County during the June  
4 17, 2019 meeting, it discussed a modification of  
5 Moelis's engagement terms to include advising the  
6 company on a related-party M&A transaction.

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

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

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

3           Before the special committee was  
4 formed, KT Lim, through the Genting entities, began  
5 valuing Orange County in preparation for a potential  
6 transaction. In May 2019, the Genting entities  
7 engaged Union Gaming to evaluate the future prospects  
8 of Orange County. The analysis evaluated potential  
9 locations in Orange County for the VLT facility and  
10 projected that the facility could generate between  
11 \$111 million and \$138 million in gross gaming revenue.

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

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

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

7           Prompted by the July 25 letter, the  
8 special committee met for the first time on July 25,  
9 2019. During this first meeting, Moelis and Paul  
10 Weiss discussed negotiation strategies for Kien Huat  
11 with the special committee. Pearlman and Eller were  
12 also present for the meeting.

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

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

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

6           The special committee met on August 5,  
7 2019, to discuss the proposal, with Eller and Pearlman  
8 in attendance. Among other things, the special  
9 committee discussed that the proposal reflected a less  
10 than 2 percent premium to Empire's then-current  
11 trading price.

12           The full board met later that day, on  
13 August 5, 2019, and reconvened on August 6, 2019, to  
14 discuss an update on Orange County. During those two  
15 days, the board was advised that management was  
16 projecting four potential Orange County scenarios in  
17 2021: one, a low case EBITDA of \$20.2 million; two, a  
18 base case EBITDA of \$29.2 million; three, a  
19 highlighted case EBITDA, supported by mitigation  
20 negotiations with MGM, of \$42.8 million; and, four, a  
21 pro forma EBITDA, including Resorts World slots, of  
22 \$66.7 million.

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

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

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

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

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

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

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

11           Likewise, during negotiations over a  
12 confidentiality agreement that occurred between August  
13 6 and August 11, 2019, Kien Huat refused to agree to a  
14 standstill provision that would extend beyond the time  
15 frame set forth in the 2016 letter agreement. These  
16 refusals signaled that Kien Huat was not binding  
17 itself to the 2016 letter agreement protections for  
18 any longer than contractually required. At least that  
19 conclusion is reasonably inferable.

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

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



1 11 bankruptcy proceedings should its financial  
2 condition not improve, causing the company's stock  
3 price to fall to \$8.18 by market's close on August 12,  
4 2020.

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

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

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

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

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

1           At the special committee's August 16,  
2 2019, meeting, Paul Weiss informed the committee that  
3 Kien Huat had rejected the special dividend request  
4 but had offered a ten-day go-shop period where the  
5 special committee could attempt to solicit alternative  
6 proposals. Moelis advised that the proposed ten-day  
7 go-shop would be adequate to negotiate with third  
8 parties even after signing the merger agreement. The  
9 special committee bought into this advice and, at the  
10 end of the meeting, determined that the special  
11 committee was prepared to accept Kien Huat and the  
12 Genting entities' latest offer.

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

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

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

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

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

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

3           Those August 6 cases were not used by  
4 Moelis for its fairness analysis. Instead, management  
5 provided new projections to Moelis on August 14, 2019,  
6 which eliminated the base case plus management  
7 agreement case and included online sports betting as  
8 an assumption in only one scenario. Also, the August  
9 14 projections included an across-the-board reduction  
10 of approximately \$5 million per year in EBITDA over  
11 the projection period, thereby reducing Empire's  
12 projected EBITDA.

13           Neither the proxy accompanying the  
14 merger vote nor the special committee materials  
15 explained why these revisions were made in the August  
16 14 projections. Documents obtained through Section  
17 220 proceedings indicated that management was working  
18 with Moelis to make numerous negative changes that  
19 drove down the company's projections, without the  
20 special committee's involvement.

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

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

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

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

24           The projections included EBITDA from

1 Orange County alone rising from \$42 million in 2022 to  
2 \$54.1 million by 2026. Empire's consolidated EBITDA,  
3 including Orange County, was projected to jump from  
4 \$15 million in 2021 to \$57.2 million in 2022, after  
5 the opening of Orange County, and then continue to  
6 increase to \$74.2 million in 2023 and \$91.5 million in  
7 2024. Further, Empire had made progress on selecting  
8 a Cabella's location for Orange County.

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

18                   On July 24, 2020, Matthew H.  
19 Haberkorn, Kiley Rose Haberkorn, the MH Haberkorn 2006  
20 Trust, and the Tippy Living Trust U/A dated September  
21 10, 2013, which I'll refer to collectively as the  
22 "plaintiffs," filed a stockholder class action in this  
23 Court against Empire, Kien Huat, Pearlman, Horn, KT  
24 Lim, Marinucci, Palumbo, Eller, GenM, Genting USA, and

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

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

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

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

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

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

24 On September 3, 2020, Horn, Marinucci,



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

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

11 (Brief discussion off the record.)

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

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

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

24                   In this case, plaintiffs plead facts

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

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

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

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

24           As the Supreme Court held in *Flood v.*

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

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

17           Defendants argue that, because the  
18 2016 letter agreement was in place prior to the  
19 commencement of the negotiation, *MFW's ab initio*  
20 requirement was satisfied. And there's a degree of  
21 truth to this contention. It is true that, by virtue  
22 of the letter agreement, the requirement was in place  
23 upfront.

24           Unfortunately, however, this timing

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

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

17           First, in connection with its Section  
18 203 waiver request, Kien Huat refused to agree to the  
19 protections requested by the special committee beyond  
20 February 2020, when the 2016 letter agreement would  
21 expire. Then, while negotiating a confidentiality  
22 agreement, Kien Huat refused to agree to the special  
23 committee's request for a standstill provision that it  
24 would extend beyond the 2016 letter agreement. Kien

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

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

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

1 to operate Empire's sports book.

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

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

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

1                   Application of the entire fairness  
2 standard typically precludes dismissal on a Rule  
3 12(b)(6) motion. As this Court held in *Hamilton*  
4 *Partners L.P. v. Highland Capital Management, L.P.*,  
5 the Court cannot dismiss claims subject to entire  
6 fairness review unless defendants are "able to show,  
7 conclusively, that the challenged transaction was  
8 entirely fair based solely on the allegations of the  
9 complaint and the documents integral to it."  
10 Defendants have not met this burden.

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

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

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



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

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

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

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

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

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

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

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

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

1 allegedly compromised.

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

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

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

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

1 their duties.

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

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

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

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

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

11 In the projections, the upside Orange  
12 County case was stripped out, the downside of the  
13 Monticello Raceway was included, the management  
14 agreement case was excluded, and an approximate \$5  
15 million per year EBITDA reduction over the projected  
16 period was included. Orange County's exclusion had  
17 the effect of eliminating additional annual EBITDA of  
18 \$25.6 million beginning in 2022, growing to 39.9  
19 million in 2024, based on the August 14 projections.  
20 And by September 2019, Orange County's EBITDA  
21 projections had increased to \$42 million in 2022,  
22 rising \$49.7 million by 2024.

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

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

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

24           The uncertainty argument is further

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

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

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

24           The special committee's argument that,

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 As alleged in the complaint, Kien Huat

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

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

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

24 This Court held, in *Carr v. New*



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

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

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

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

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

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

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

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

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

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

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

4           Delaware courts employ a two-step  
5 analysis in determining whether they may exercise  
6 personal jurisdiction over a nonresident defendant.  
7 As this Court held in *Focus Financial Partners*:  
8 "Initially, the court must determine whether a  
9 statutory basis exists for the exercise of  
10 jurisdictions, such as Delaware's long arm statute  
11 ...."

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

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

24           The Delaware Supreme Court has

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

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

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

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

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

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

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

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

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

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

4           The complaint satisfies these factors  
5 as well. GenM retained Union Gaming for the express  
6 purpose of analyzing the merger, and Union Gaming  
7 provided GenM with an analysis of the merger.

8 Plaintiffs therefore have satisfied these elements.

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

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

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

20           MR. VARALLO: Not from plaintiffs,  
21 Your Honor.

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

24           THE COURT: All right. Well --

1                   MR. STACHEL:  None from the special  
2 committee defendants.

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

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

8                   We are adjourned.

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

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CERTIFICATE

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

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

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