COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MASSACHUSETTS GAMING COMMISSION

In the Matter of:	)
Ourway Realty, LLC	)

PHASE 1 SUITABILITY DECISION

Ourway Realty, LLC (hereinafter, "Ourway" or "applicant") submitted a Phase 1 application for a gaming license to the Massachusetts Gaming Commission (hereinafter, "Commission"). This decision results from the adjudicatory hearing conducted by the Commission relative to the suitability of Ourway to hold a gaming license. An adjudicatory proceeding on the matter was conducted by the Commission on July 25, 2013 at the Boston Convention and Exhibition Center, 415 Summer Street, Boston, MA. At the direction of the chair, the entire Commission presided over the matter. At the hearing, the applicant was represented by Dean Richlin, Esq. and Kevin Conroy, Esq. from the law firm Foley Hoag LLP. The Investigations and Enforcement Bureau (hereinafter, "Bureau") was represented by David Mackey, Esq. and Stephen Anderson, Esq. from the law firm Anderson & Kreiger. For the reasons set forth below, the Commission hereby finds by unanimous vote that Ourway has failed to meet its burden of proof and accordingly is issued a **NEGATIVE** determination of suitability in accordance with 205 CMR 115.05(2).

Background

The application for a gaming license consists of two parts. See 205 CMR 110.01. The first, called the Phase 1 application, essentially focuses on the qualifications and suitability of the applicant and its qualifiers to hold a gaming license. See G.L. c.23K, §12(a) and 205 CMR 115.00 through 117.00. The Phase 2 application focuses on the site, financing, design, operation and other attributes of the gaming facility itself. See generally 205 CMR 118.00 and 119.00. "The commission shall not entertain a Phase 2 application for any applicant unless and until the commission has issued a positive suitability determination on that applicant." 205 CMR 110.01(2); see also 205 CMR 115.05(4) and 118.01(1)(a). This hearing involved the Phase 1 segment of the process.

The applicant completed the submission of its Phase 1 application to the Commission on December 27, 2012. Upon receipt of the application, the Commission instructed the Bureau to commence an investigation into the suitability of the applicant. See G.L. c.23K, §12(a). The investigation was to include all qualifiers associated with the applicant. See G.L. c.23K, §14 and 205 CMR 116.00. The Bureau conducted such an investigation and reported its findings and recommendations to the Commission by way of an Investigative Report (hereinafter, "Report"). See 205 CMR 115.03(2). The Report contains information relative to the following areas:

(1) the integrity, honesty, good character and reputation of the applicant;
(2) the financial stability, integrity and background of the applicant;
(3) the business practices and the business ability of the applicant to establish and maintain a successful gaming establishment;
(4) whether the applicant has a history of compliance with gaming licensing requirements in other jurisdictions;
(5) whether the applicant, at the time of application, is a defendant in litigation involving its business practices;
(6) the suitability of all parties in interest to the gaming license, including affiliates and close associates and the financial resources of the applicant; and
(7) whether the applicant is disqualified from receiving a license under G.L. c.23K, §16; provided, however, that in considering the rehabilitation of an applicant for a gaming license, the commission shall not automatically disqualify an applicant if the applicant affirmatively demonstrates, by clear and convincing evidence, that the applicant has financial responsibility, character, reputation, integrity and general fitness as such to warrant belief by the commission that the applicant will act honestly, fairly, soundly and efficiently as a gaming licensee.

G.L. c.23K, §§12(a) and 16(a). "All applicants for a Phase 1 suitability determination must establish their qualifications by clear and convincing evidence." 205 CMR 115.01(2); see also G.L. c.23K, §13(a). "Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases. It has been said that the proof must be 'strong, positive and free from doubt', and 'full, clear and decisive.'" Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975)(internal citations omitted).

A copy of the Report was provided to the applicant along with a notice of this adjudicatory proceeding. See 205 CMR 115.04(1). The adjudicatory hearing was noticed for and convened on the Commission's own initiative on July 25, 2013. See 205 CMR 115.04(3). Karen Wells, the Director of the Bureau, appeared and testified at the hearing on behalf of the Bureau. John Grogan (hereinafter, "Grogan"), Stanley Fulton (hereinafter, "Fulton"), and Alfred Ross (hereinafter, "Ross") appeared and testified on behalf of Ourway. All witnesses were duly sworn. Despite being directed to do so, Timothy Petersen (hereinafter, "Petersen"), the Chief Financial Officer for Ourway, did not appear at the hearing. Instead, a petition for withdrawal of his application was submitted by the applicant to the Commission for consideration. A discussion of the petition will be incorporated into the *Findings and Discussion* section below. The exhibits identified in the *Exhibits* section below were taken into evidence at the proceeding without objection.

Exhibits

Bureau's exhibits:

EXHIBIT 1: notice of adjudicatory proceeding dated July 10, 2013 (3 pages)
EXHIBIT 2: cover letter dated July 3, 2013 from Director Wells to the Commission (11 pages)
EXHIBIT 3: executive summary relative to Ourway Realty, LLC (9 pages)

EXHIBIT 4: Investigative Report relative to Ourway Realty, LLC (Redacted)(85 pages)
EXHIBIT 5: audit letter from James L. Oslin, CPA dated February 7, 2012 (1 page)
EXHIBIT 6: Ourway Realty, LLC Manager's Action: Appointment of Officers dated July 17, 2013 (4 pages)
EXHIBIT 7: audit letter from Jeffrey S. Husted dated June 25, 2008 (2 pages)

Ourway's exhibits:

EXHIBIT 1: Ourway Realty, LLC Governance and Internal Control Plan (1 page)
EXHIBIT 2: Manager's Appointment of President / Authority and Duties, dated April 11, 2013 (2 pages)
EXHIBIT 3: Petition filed by Ourway Realty, LLC for withdrawal of Timothy Petersen, dated July 24, 2013 (3 pages)
EXHIBIT 4: Transcript of sworn interview of Timothy Petersen's conducted on April 4, 2013 (Redacted)(148 pages)

Findings and Discussion

The applicant bears the burden of establishing its suitability to hold a gaming license, and that of all its qualifiers, by clear and convincing evidence. In an effort to satisfy its burden, Ourway has subjected itself and all of its qualifiers to a comprehensive background investigation conducted by the Bureau, and to an adjudicatory hearing. The applicant stipulated to the accuracy of the Report. Subject to the clarifications elucidated below, the Commission accepts the factual findings contained in the Report. While the findings of the investigation support a conclusion that certain of the individual qualifiers are suitable, there are far too many unanswered questions and concerns to find Ourway itself to be suitable. That is, Ourway has failed to satisfy its burden of proving its suitability by clear and convincing evidence. As grounds for this conclusion, the Commission sets forth the following:

1. For many years leading up to and including the commencement of the Bureau's investigation into Ourway, Gary Piontkowski (hereinafter, "Piontkowski") was the functional head of the organization. The investigation unearthed a number of practices engaged in by Piontkowski that were deeply troubling. Though he is no longer part of the organization, we must consider the systemic issues that allowed those practices to take place, what has been done to remedy those deficiencies, and what the outlook for the future is vis-à-vis the operation of a category 2 gaming establishment. It is noteworthy that all of the adjustments, including the removal of Piontkowski, took place only after the Bureau brought the issues outlined in the Report to light. They were not detected by the principals of the organization themselves. Indeed, the principals, Fulton and Ross, purport to have been passive investors with no substantive oversight of the operation. Though we are unable to definitively determine what role Fulton and Ross played in the organization, we are able to conclude that they were either passive investors, as they claim, who offered little to no oversight or that they were more involved and poorly exercised their duties. In either event, we find their past involvement in the operation of Ourway troublesome.

The issue then, is whether the deficiencies were subsequently sufficiently addressed to leave the Commission satisfied that the applicant is suitable to operate a gaming establishment in Massachusetts. As set forth further, the evidence in that regard is sorely lacking.

2. We first look at how Piontkowski was able to engage in the money room practices that he did. As Ross and Grogan acknowledged, it appears as though too much authority was vested in the hands of one individual with no checks and balances in place. That deficiency falls primarily to Fulton and Ross. The suggestion that they were passive investors and were taken advantage of by someone they trusted does not change the fact that the organization was operated in a particularly haphazard fashion over a period of many years without many, if any, written protocols or procedures in place. Given the nature of the business and the amount of money at stake it is problematic to think that these practices were allowed to progress unchecked for so long. Fulton and Ross claim that they did not even take the time to review, or cause to be reviewed, the annual audit reports. Further, as discussed in section 5 below, despite evidence that they were alerted to the fact that there were issues relative to Piontkowski's compensation, they claim to have been wholly unaware of the issue. Instead, annual cash infusions appear to have been delivered without question. In even the most rudimentary business model it seems that there would reasonably be some level of accountability. Here Piontkowski had none.

3. Piontkowski was replaced by Grogan as the president of Ourway on April 3, 2013. To Grogan's credit, he acknowledged Ourway's deficiencies and did not dispute them. Grogan does have an impressive background. Unfortunately, little to none of his experience is in the gaming arena; nor does he have any relevant experience as a Chief Operating Officer, an organizational change agent, or a manager of performance standards and metrics. In any event, though Grogan has undertaken efforts to cast the organization in a new direction, he has only been at it for a relatively short period of time. Accordingly, it is impossible to measure the efficacy of his efforts in any meaningful way.

   The following factors must be considered in determining what value to assign the changes Grogan described. In the four months since Grogan took over as president of Ourway, no convincing evidence has been presented that a comprehensive structural plan for going forward has been implemented. Instead, the Commission was presented with a one page outline of a plan (Ourway exhibit 1), and a second organizational plan (Bureau exhibit 6), created on the eve of the hearing, that puts Fulton and Ross in charge of overseeing management. Additionally, although he had taken approximately $1.4 million from the money room, Piontkowski was relieved of his duties without an obligation to repay the monies he had taken, a $1.8 million share repurchase, and a separation agreement paying him an $180,000 annual salary for the next two years. Finally, there has never been a comprehensive investigation initiated by Ourway to review or find out what exactly occurred or who else might have been involved. Indeed, Grogan stated that he had not done anything in that regard.

Where the burden is on the applicant to demonstrate its suitability these shortcomings must be laid at their doorstep. With all of the instability in the recent past and small sample size with which to measure the effectiveness of the new administration, the Commission is unable to find, by clear and convincing evidence, that the business practices and the business ability of the applicant to establish and maintain a successful gaming establishment are present. There is far too much uncertainty to conclude that there is. All of the improvements Grogan claims to have implemented, however positive, serve neither to entirely neutralize the past transgressions, nor to have the substance or commitment to ensure the dramatic operational and cultural changes that are required. The burden is on the applicant to demonstrate its suitability; not merely demonstrate that deficiencies are being addressed.

4. The situation involving the resignation of Petersen as the Chief Financial Officer ("CFO") adds further uncertainty to the situation. Though it was made clear that Petersen was unlikely to be retained as the CFO in the event that Ourway was awarded a gaming license, he was none-the-less the organization's primary financial administrator since 1999. The loss of an individual of his level at this stage of the application process calls the stability of the organization into question. Moreover, Petersen's failure to appear at the adjudicatory hearing begs the question as to what exactly he did not wish to discuss in public. Ultimately, it seems clear that the issues uncovered within the organization and his involvement in them are of such a character that he would rather leave his job than answer questions about them in a public setting. Of the many inferences that can be drawn by Petersen's sudden resignation and failure to appear at the hearing, none of them cast Ourway in a positive light and do nothing by way of establishing clear and convincing evidence of sound business practices. Introduction of Petersen's sworn statement (Ourway exhibit 4) does not fill the void caused by his absence, for that statement raises far more questions than it answers; including questions about his role as a paid consultant to Plainridge while he was acting as an employee, his observations of the role in management played by Fulton and Ross, when and how frequently Fulton and Ross received audit reports detailing Piontkowski's money room withdrawals, Petersen's interest in a company that was providing services to Plainridge and who knew about that interest, the circumstances under which he obtained a sizeable loan from Plainridge, who authorized that loan and who knew about it, his participation with others in making political contributions, and whether Plainridge funds were used to make any of those contributions.

5. The most notable problem raised by the Report centered on Piontkowski's withdrawals from the money room. Fulton and Ross were each adamant that they were unaware of the withdrawals. If they had been aware, they testified, they would have put a stop to them. There were along the way, however, a number of indicators suggesting that there was something amiss. Perhaps the brightest red flag came in the form of the February 7, 2012 letter from auditor James Oslin to Fulton and Ross (Bureau exhibit 5). The letter advises Fulton and Ross that "[f]rom January, 2004 through December, 2010, Gary Piontkowski (GTP) received advances from the company, net totaling $1,044,670.76. Those advances were charged as a distribution against his capital account." The letter was signed in acknowledgment of receipt by both Fulton and Ross. Neither Fulton nor

Ross, though, recalls affixing their signature to the document. In fact, both suggested that it was possible that they signed the letter because the other had signed it first.

This was not the first time this flag was raised by an auditor, however. A letter was sent to Fulton, Ross, and Richard Tuch, then the Managing Member of Ourway, from Jeffrey Husted on June 25, 2008 in which they were advised "[t]hrough June 2008, Gary has received advances from the company net totaling $488,088 (Gary presently is having payroll withholdings to repay certain credit card charges). The amount, which is approximately $450,000 through December 31, 2007, is made up of various transactions, some of which are certain note agreements between he and the ownership group originally totaling $156,800." The letter was signed in acknowledgement of receipt by Ross and Tuch. The point is, it is not enough for Fulton and Ross to simply assert that they were taken advantage of by Piontkowski and pledge that they will be more involved moving forward. The burden is on them to demonstrate their suitability to operate a gaming establishment. This lack of attention to detail, interest in the operation, and blind trust does not advance their case.

Furthering this point, none of the Ourway witnesses had any understanding as to how the audits of Ourway were conducted or who conducted them; none of them reviewed the audit reports; and there was apparently a culture in place that would have dissuaded anyone from bringing problematic issues to Fulton's or Ross' attention. Again, none of this supports a finding of clear and convincing evidence of sound business practices. In fact, it clearly counsels a contrary finding.

6. The manner in which Fulton and Ross concluded Piontkowski's reign raises doubts about Ourway's suitability. Not only was he granted a separation agreement providing for future compensation, but his ownership shares in the company were purchased by Fulton and Ross, and the amounts of his withdrawals from the money room, which had been reclassified as withdrawals from his capital account thus creating a negative balance, were essentially forgiven ending any obligation he had to repay those monies to Ourway. Grogan branded the deal as an acknowledgement of what Piontkowski had done in the past to bring the company to where it was. Considering Fulton's characterization of the situation as one in which he was misled by Piontkowski and that Piontkowski took money that did not belong to him, however, the terms of Piontkowski's separation do not evidence the fresh outlook of an organization that will hold its employees accountable for their actions. Though the principals described the decision not to hold Piontkowski accountable as one that would essentially help them avoid the disruption of likely protracted litigation at a critical juncture, it sends the wrong message not only to the Commission, but to the other employees who see this wrongdoing being rewarded in this fashion. Indeed, this was seemingly the first big decision of the new administration. As before, the decision certainly does nothing to support a finding of clear and convincing evidence of sound business practice or integrity.

7. A gaming establishment is a highly complex, heavily regulated business. It is incumbent upon an applicant to demonstrate that it has the wherewithal to successfully operate such a business. The applicant has chosen Grogan to lead them in this venture. Grogan,

however, has described himself as an "entrepreneurial manager" and lacks any actual experience or expertise in the operation of a gaming establishment. His one page, 1 week/1 month plan (Ourway exhibit 1) is underwhelming to say the least. While Ross and Fulton do have experience in the operation of gaming and/or racing establishments, and have taken on bigger titles and seemingly bigger roles in Ourway (Bureau exhibit 6), there is a lack of any indication that they will actually be involved in the operation of either the gaming establishment or Ourway in any meaningful way. Each has unquestionably enjoyed considerable success in their careers. Indeed, according to the Executive Director of the New Mexico Gaming Control Board, Sunland Park in New Mexico, under Fulton's ownership, is presently a well-run operation. However, it is less than clear that by assuming the titles they have with Ourway that their involvement will actually be expanded, or that, even if it is expanded, that it will assure a better operation. For example, there seemed to be a lack of clarity as to the precise terms and effect of the agreement between IGT and Ourway for the provision of gaming equipment. The uncertainty includes whether the agreement includes a service component or is solely for the provision of equipment. This would seemingly be a key contract in the operation of the gaming establishment. Fulton, for one, suggested that one of his own people got "snookered" in the negotiation of the deal. The manner in which the deal was negotiated and Fulton's explanation as to its terms does not instill great confidence that Fulton's service as CEO will have great effect on the operation of Ourway.

8. The investigation has revealed that there appears to have been a culture of fear and concealment pervasive in the operations of Plainridge. For example, the Report indicates that Piontkowski ordered at least one employee not to speak with the State Police troopers assigned to the track, and directed the employee not to write anything down. Further, it also appears that Plainridge was something less than fully cooperative with law enforcement when it came to the 2000 investigation into unlawful interstate telephone wagering at Plainridge (pages 34-35 of the Report), the 2003 'ten percenting' investigation (page 35 of the Report), and the 2003 withholding from law enforcement of a loaded syringe containing a banned substance (pages 35-36 of the Report). Though these issues occurred under Piontkowski's leadership and Grogan has pledged to change the culture to one of "integrity, accountability, and responsibility," there is insufficient evidence as to how or when this will be accomplished. In any case, none of this does anything to advance any claim of historical cooperation with regulators or law enforcement.

9. Understanding the potential repercussions relative to the future of the Plainridge racetrack in the event of a negative finding of suitability of Ourway, the Commission attempted to view the present situation in the most positive light possible. Even in that light, however, clear and convincing evidence as to business practices that will likely lead to a successful gaming operation is lacking. Even if we are to set aside Piontkowski's money room withdrawals, Petersen's sudden resignation, the lack of any written policies and protocols or accountability, and the lack of cooperation with law enforcement, and we were to evaluate Ourway's application solely on the merits of the present version of the operation, we are still unable to find that there is clear and convincing evidence that Ourway possesses the requisite business practices and business ability to establish and

maintain a successful gaming establishment. In its best light it is a case of way too little, way too late. Given the stakes, it is incumbent upon the Commission to ensure that only qualified applicants are deemed suitable for a gaming license based on a fair evaluation of the evidence. Ourway has not demonstrated that it is so qualified.

Further supporting this conclusion, it does not appear that the applicant has any clear strategy as to how it would proceed in the event that it was actually awarded a gaming license. Fulton suggested that Ourway was unable to hire any individuals in critical positions prior to the licensing decision being made since nobody of the caliber that would be sought would want to come into such an uncertain situation. Be that as it may, there does not appear to even be any thoughtful, viable plan or strategy in place to ensure that competent individuals will actually be put into place in the future.

10. The applicant's petition for the withdrawal of Petersen as a qualifier, as outlined in Ourway exhibit 3, is denied. As grounds therefor, the Commission finds that no good cause exists for the withdrawal. In this instance, where this hearing on the RFA-1 application had been scheduled prior to the petition being submitted, express Commission approval for the withdrawal would have to be obtained. See 205 CMR 111.05(2)(a). In this case, it is clear that Petersen preferred to resign his position, and correspondingly as a qualifier, rather than appear before the Commission to answer questions as to his knowledge and involvement of the issues raised in the Report. This does not constitute "good cause" of the sort required by the regulation.

11. The Commission finds that Peterson is not suitable to hold a gaming license. He is therefore issued a negative determination of suitability in accordance with 205 CMR 115.05(2). All qualifiers must demonstrate integrity, honesty, and good character in order to be deemed suitable. The burden of proof relative to Petersen's RFA-1 application has not been met. In addition to failing to appear at the proceeding as directed by the Commission, numerous questions, as detailed in section 4 above, remain unanswered including those relative to his involvement with and knowledge of Piontkowski's money room withdrawals, the 2000 investigation into unlawful interstate telephone wagering at Plainridge, and the overall financial workings of Plainridge.

Conclusion

For the aforementioned reasons, the Commission hereby finds by unanimous vote that Ourway Realty, LLC has failed to demonstrate its suitability and qualifications by clear and convincing evidence. Accordingly, the Commission must issue a **NEGATIVE** determination of suitability to Ourway Realty, LLC in accordance with 205 CMR 115.05(2). The applicant may not submit a Phase 2 application to the Commission. Similarly, Timothy Petersen has also failed to demonstrate his suitability by clear and convincing evidence and is accordingly issued, by unanimous vote of the Commission, a **NEGATIVE** determination of suitability in accordance with 205 CMR 115.05(2).

SO ORDERED.

MASSACHUSETTS GAMING COMMISSION

Stephen P. Crosby
Chair

Gayle Cameron
Commissioner

James F. McHugh
Commissioner

Bruce Stebbins
Commissioner

Enrique A. Zuniga
Commissioner

DATED: August 5, 2013

The applicant is not entitled to further review from this decision. See G.L. c.23K, §17(g) and 205 CMR 115.05(5).