

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

MASSACHUSETTS GAMING COMMISSION

_____)
In the Matter of:)
)
 Sterling Suffolk Racecourse, LLC)
 _____)

PHASE I SUITABILITY DECISION

Sterling Suffolk Racecourse, LLC (hereinafter “Applicant” or “SSR”) submitted a Phase 1 application for a gaming license to the Massachusetts Gaming Commission (hereinafter “Commission” or “MGC”). This decision results from the adjudicatory proceeding conducted by the Commission on October 29, 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 Bruce Falby from the firm of DLA Piper and Thomas Reilly from the law firm of Cooley Manion Jones LLP. The Investigations and Enforcement Bureau (“IEB”) was represented by David Mackey, Esq. and Nina Pickering-Cook, Esq., from the firm of Anderson & Kreiger. For the reasons set forth below, the Commission finds by a unanimous vote that Applicant, Sterling Suffolk Racecourse, LLC has met its burden of proof and accordingly is issued a **POSITIVE** determination of suitability in accordance with 205 CMR 115. The positive determination is subject to certain conditions which are set forth below.

I. 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, 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; see also 205 CMR 115.05(4) and 118.01(1) (a). This hearing involved the Phase 1 segment of the process.

The Applicant initiated the Phase 1 application process on December 6, 2012. Upon receipt of the application, the Commission instructed the IEB 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.¹ See G.L. c. 23K, §14 and 205 CMR 116.00. The IEB

¹ Vornado Suffolk LLC, a subsidiary of Vornado Realty Trust (“Vornado”), holds a 19.9 percent membership interest in the Applicant. Vornado elected not to submit to the RFA-1 application process. Accordingly, Vornado was required by the IEB to place its entire interest in the Applicant into a divestiture trust. Upon divestiture,

conducted such an investigation and reported its findings and recommendations to the Commission by way of an Investigative Report (hereinafter the "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 prospective 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.

"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 October 29 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. Thomas Reilly, Charles Baker, William Mulrow, and Paul Tuttle appeared and testified on behalf of Applicant. All witnesses were duly sworn and found to be credible.

The Commission closed the adjudicatory hearing on October 29, 2013.

II. Exhibits

The exhibits identified below were taken into evidence at the proceeding without objection. All exhibits were considered, in conjunction with witness testimony, in reaching the final decision.

Vornado was deemed by the Commission to no longer be a qualifying entity of the Applicant. The trustee, Steven Kidder, however, was deemed to be a qualifier and required to submit to the background check process. For the reasons outlined in the Report, and articulated below, Mr. Kidder is issued a positive determination of suitability. To date, the Commission is satisfied that the arrangement between the Applicant and Vornado has achieved the desired results.

IEB Exhibits

- EXHIBIT 1: Notice of Adjudicatory Proceeding (October 24, 2013)
- EXHIBIT 2: Pre-hearing memorandum between the parties
- EXHIBIT 3: Letter from Karen Wells to Commission re: Investigative Report (October 18, 2013)
- EXHIBIT 4: Investigative Report for the MGC, Applicant: Sterling Suffolk Racecourse, LLC (October 14, 2013) (Redacted)
- EXHIBIT 5: Letter from SSR to Caesars requesting withdrawal (October 18, 2013)
- EXHIBIT 6: Letter from Caesars to Commission withdrawing as qualifier (October 21, 2013)

Applicant Exhibits

- EXHIBIT 1: Memorandum re: Sterling Suffolk Racecourse's Plan for Finding a New Operator (October 25, 2013)
- EXHIBIT 2: Sterling Suffolk Racecourse, LLC's Check Cashing Policy and Procedures

Findings and Discussion

The Report contains a description of the investigation conducted by the IEB and detailed findings of fact. The Commission generally adopts the findings of fact therein though certain facts are set forth below for purposes of discussing the specific areas of focus at the hearing. The IEB recommended that the Applicant be found suitable subject to the following conditions:

1. The applicant must identify for the Commission the new operator of the proposed casino project;
2. The new operator and any qualifiers, must be found suitable by the Commission;
3. The applicant must present a plan to the Commission for working with the host community to bring on a new operator.

One of the qualifiers that was investigated as part of the SSR application was Caesars Massachusetts Investment Company, LLC (hereinafter "Caesars").² On October 2, 2013 members of the IEB met with representatives from SSR and Caesars to discuss certain information of concern that was learned during the course of the investigation. In particular, the discussion revolved around Caesars' involvement with the Gansevoort project³ among other issues. This was the first time that SSR representatives, in particular Charles Baker, the Secretary of SSR, learned of the scope of this issue. On October 9, the parties again met to

² Caesars Massachusetts Investment Company, LLC is a limited liability company, formed on March 18, 2011, in Delaware. The sole member of the Company is Caesars Massachusetts Acquisition Company LLC. This entity was created to hold the interest in the Applicant on behalf of Caesars. Caesars Massachusetts Investment Company, LLC owns a 4.2 percent interest in the Applicant.

³ See IEB Exhibit 4 at pages 219-240.

discuss issues of concern. It was made clear to the Applicant that these issues would be included in the IEB Investigative Report and a recommendation as to whether the applicant met its burden of proof regarding suitability would also be included; but ultimately it was the sole discretion of the Commission whether to deem an applicant and qualifiers suitable. On October 18, 2013 the IEB provided a copy of the Report to the Applicant and to the Commission. Shortly thereafter, also on October 18, 2013, a letter was sent from Mr. Tuttle to Caesars essentially requesting that it withdraw as a qualifier due to the information contained in the Report. On October 21, 2013 Caesars sent a letter to the Commission withdrawing as a qualifier to the SSR application. Accordingly, the Commission will not make any finding as to the suitability of Caesars.

There are four significant investigative issues that arose during the course of the investigation: (1) The Gansevoort license agreement, (2) an issue pertaining to Caesars' executive Mitchell Garber, (3) the highly leveraged financial position of Caesars, and (4) the Watanabe incident.⁴ Each of these situations, however, in substance implicates acts and decisions made by Caesars, not SSR. Where Caesars has withdrawn as a qualifier we will not delve deeply into each situation except as it relates to the suitability of SSR and its remaining qualifiers.

The Commission finds that the evidence collectively demonstrates that the Applicant, as presently constituted, has met its burden of proving its qualification for licensure by clear and convincing evidence. In reaching this conclusion, the Commission has taken into account the following: (1) when confronted with the aforementioned significant investigative issues the Applicant took swift and decisive action, (2) the Applicant has taken a non-defensive posture with regard to the significant issues, and (3) the Applicant has a sound performance record when it comes to the operations of Suffolk Downs. Though there are most certainly areas that gave the Commission pause during its review, on the whole, the Commission is satisfied that SSR has learned from these incidents, taken necessary steps to correct such practices, and that the Applicant is suitable to proceed to the next phase of the application process.

In reaching this conclusion, it is essential to expound upon a few points. First, it is important to clarify the manner in which determinations are made as to the suitability of individual qualifiers; that is, how one's character is evaluated. As the Commission has noted in past decisions, the New Jersey Casino Control Commission has best described the standard for evaluating the good character, honesty and integrity of an individual applicant. In *In re Bally's Casino Application*, 10 N.J.A.R 356, 393 (1981), the New Jersey Casino Control Commission stated:

The law requires us to judge each applicant's character. We find this a most difficult task for several reasons. First "character" is an elusive concept which defies precise definition. Next we can know the character of another only indirectly, but most clearly through his words and deeds. Finally, the character of a person is neither uniform nor immutable.

Nevertheless, we conceive character to be the sum total of an individual's attributes, the thread of intention, good or bad, that weaves its way through the experience of a lifetime. We must judge a [person's] character by evaluating his words and deeds as they appear from the testimony and from all of the evidence in the record before us. We must focus

⁴ See IEB Exhibit 4 at pages 219-250.

particularly on those attributes of trustworthiness, honesty, integrity and candor which are relevant to our inquiry.

In employing those principles we find that each individual qualifier of SSR has demonstrated their good character, honesty, and integrity. In conjunction with the other important factors outlined in the Report, each has satisfied their burden of proving their suitability.

Second, there are clear issues with the due diligence process that led the Applicant to partner with Caesars, and to a degree, with Vornado. Clearly, the manner in which SSR vets future partners is an area in need of improvement. It appears as though SSR was too trusting of a partner and paid insufficient attention to investigating, detailing and documenting the background and intentions of their prospective partners. In particular, it is clear that greater scrutiny should have been afforded to Caesars' management of the Watanabe matter. The issue was squarely in front of the Applicant, and instead of asking the difficult questions and demanding higher level information about the situation, it appears to have placed its trust in Caesars to handle the matter properly having itself performed only a perfunctory review. This approach does not fall within the arena of that which is to be expected in an industry in which regulatory compliance is paramount. It is expected that a far more stringent vetting process will be employed by SSR moving forward. Indeed, Mr. Baker testified to some of the measures the Applicant is putting in place to help ensure a better result. In particular, where the Applicant is in the process of searching for a gaming operator it is critical that new, stricter measures be carefully implemented.

Third, the swift, decisive action taken by the Applicant upon learning of the significant issues is noteworthy and instructive. In evaluating the business practices and the business ability of the Applicant to establish and maintain a successful gaming establishment in the future, we must look to the way it has dealt difficult situations in the past. Here, upon learning of the issues it sought the assistance of Thomas Reilly as special counsel to provide an independent review of the situation. The Commission recognizes the remarkable background and great integrity of Mr. Reilly. With the counsel of Mr. Reilly in hand, the Applicant made the difficult decision to part ways with Caesars. Given the great import of regulatory compliance to the gaming industry, the Commission has frequently considered the ability of an Applicant to make thoughtful, difficult decisions and take decisive action when confronted with taxing situations. The Applicant has demonstrated its abilities in this situation.

III. Conclusion

Based upon the testimony provided to the Commission as well as the exhibits provided by the IEB and the Applicant the Commission, by unanimous vote, finds that the Applicant has met the burden of proving by clear and convincing evidence that it meets the standards for suitability under M.G.L. 23K, §12. This finding, however, is conditioned upon the occurrence of the following:

1. The Applicant must identify a gaming operator to the Commission, and such operator and all of its qualifiers must be issued a positive determination of suitability in accordance with 205 CMR 115.05, by December 30, 2013.
2. By November 8, 2013 the Applicant must either provide proof to the IEB that the ownership interest by Caesars in SSR has been divested or a specific plan for divestiture is in place.
3. The Applicant must present a plan to the Commission for working with the host communities and surrounding communities relative to the new operator.

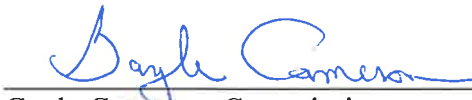
In light of this positive determination of suitability, the Applicant will be eligible to submit an RFA-2 application in accordance with 205 CMR 118.01(1) upon satisfaction of the three conditions.

SO ORDERED.

MASSACHUSETTS GAMING COMMISSION



By: _____
Stephen P. Crosby, Chairman



By: _____
Gayle Cameron, Commissioner



By: _____
James F. McHugh, Commissioner



By: _____
Bruce Stebbins, Commissioner



By: _____
Enrique Zuniga, Commissioner

DATED: October 30, 2013