

STATE OF NEW JERSEY  
CASINO CONTROL COMMISSION  
PRNs 2140705, 2910706 and  
2910708 and Dkt. No. 07-  
0646-VC

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AMENDED PETITIONS OF ADAMAR :  
OF NEW JERSEY, INC. FOR RENEWAL :  
OF ITS CASINO AND CASINO HOTEL :  
ALCOHOLIC BEVERAGE LICENSES, :  
AND OTHER MATTERS :

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OPINION  
AND  
ORDER

**NEW JERSEY CASINO CONTROL COMMISSION:**

Linda M. Kassekert, Chair  
Michael A. Fedorko, Vice-Chair  
Michael C. Epps, Commissioner  
Ralph G. Frulio, Commissioner  
William T. Sommeling, Commissioner

Appearance of Counsel

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**I. INTRODUCTION**

Before the Commission for disposition are the following four consolidated matters:

- A. The application of Adamar of New Jersey, Inc. (Tropicana) for renewal of its casino license and its casino hotel alcoholic beverage license for a five-year term (PRNs 2140705 and 2910706);
- B. The application of Tropicana Casinos and Resorts, Inc. (TCR) for plenary qualification as a holding company of Tropicana;
- C. The Restated and Amended Petition of Tropicana Casinos and Resorts, Inc., Adamar of New Jersey, Inc., *et al.*, for Declaratory Relief with respect to *N.J.A.C. 19:45-1.11(c)1* and *2*, and Other Related Audit Committee Issues (PRN 2910708); and
- D. *Division of Gaming Enforcement v. Tropicana Casino and Resorts, Inc.; Tropicana Entertainment, LLC; Adamar of New Jersey, Inc., d/b/a Tropicana Atlantic City*, CCC Docket No 07-0646-VC.

In addressing items I.A. and I.B., above, the Division filed four reports dated

October 30, 2007 (Exhibits D-1 through D-4, in evidence), along with separate reports on each of the individuals whose initial plenary qualification is required by the Casino Control Act. The Division on three occasions (October 19, 2007, November 1, 2007, and November 13, 2007) filed four reports that respond or supplement its response to item I.C., above. Essentially, all those reports, together with the aforementioned complaint, have framed the issues for decision, which the Commission considered as part of this hearing.

## **II. PROCEDURAL HISTORY and STATEMENT OF GENERAL FACTUAL BACKGROUND**

Tropicana is a casino licensee under the Casino Control Act (the Act). When the Commission renewed Tropicana's casino and casino hotel alcoholic beverage (CHAB) licenses in 2003, Tropicana was owned indirectly by a then publicly-traded Aztar Corporation (Aztar).

William J. Yung, III (Yung) wholly owns TCR, which owns and operates 14 casinos and resorts in the United States and Caribbean. Yung, along with family trusts for his children, also owns Columbia Sussex Corporation (Columbia Sussex), which owns and operates approximately 70 hotels and resorts (D-2,<sup>1</sup> p. 21) located throughout North America and the Caribbean.

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1. "D" refers to the Division's exhibits in this matter, "A" refers to the exhibits for the applicants for relicensure and plenary qualification, and "C" refers to the Commission's ...footnote continues on bottom of next page...

Essentially, Yung is the company. T1-122, 22-24; T2-60-21 to T2-61-3.

In spring 2006, a bidding war erupted as several companies vied to acquire Aztar. Ultimately, TCR and Columbia Sussex bested Pinnacle Gaming by offering to acquire Aztar for \$54 per share. T1-39-14 to T1-40-9; T6-29, 14-18; T6-31, 20.<sup>2</sup>

A. ICA and Licensure Matters

On May 19, 2006, Aztar and TCR, when the latter was known as Wimar Tahoe Corporation,<sup>3</sup> entered into an Agreement and Plan of Merger (the merger agreement) that, upon consummation, would result in Aztar and, through it, Tropicana, becoming indirect wholly-owned subsidiaries of TCR. In order to effectuate the merger agreement, TCR filed PRN 1570613 with the Commission on June 6, 2006, seeking, among other things, interim casino

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...footnote continued...  
exhibits.

2. "TA" refers to the transcript of the Commission's ICA proceedings on November 2, 2006; "T1" refers to the transcript of the Commission proceedings on November 20, 2007; "T2" refers to the transcript of the Commission proceedings on November 21, 2007, regarding item #10 of that day's regular public meeting; "T3" refers to the transcript of the A.M. session of the Commission proceedings on November 26, 2007; "T4" refers to the transcript of the P.M. session of the Commission proceedings on November 26, 2007; "T5" refers to the transcript of the A.M. session of the Commission proceedings on November 28, 2007; "T6" refers to the transcript of the P.M. session of the Commission proceedings on November 28, 2007; "T7" refers to the transcript of the A.M. session of the Commission proceedings on November 29, 2007; "T8" refers to the transcript of the P.M. session of the Commission proceedings on November 29, 2007; "T9" refers to the transcript of the Commission proceedings on November 30, 2007; and "T10" refers to the transcript of the Commission proceedings on December 4, 2007.
3. For convenience throughout the remainder of this opinion, and unless the context otherwise requires, "TCR" will be used to refer to Tropicana Casinos and Resorts as well as Wimar Tahoe, Columbia Entertainment and any variations thereof that TCR employed since entering into the merger agreement with Aztar.

authorization (ICA) pursuant to *N.J.S.A. 5:12-95.12, et seq.*, and ultimately plenary qualification as a Tropicana holding company. On November 2, 2006, the Commission issued ICA to TCR, which became effective on January 3, 2007, when the company closed on its purchase of Aztar (see, Resolution Nos. 06-11-02-02 and 06-12-13-10).

On June 26, 2007, TCR filed PRN 1770701 with the Commission seeking an extension of the ICA period through January 2, 2008. On September 5, 2007, the Commission approved the requested extension of the ICA period (see, Resolution No. 07-09-05-10).

On August 2, 2007, Tropicana filed PRN 2140705 seeking to renew its casino and CHAB licenses. On October 18, 2007, Tropicana, TCR and Columbia Sussex, which is subject to qualification under *N.J.S.A. 5:12-84b* and 85 as part of TCR's ICA, filed PRN 2910706 with the Commission seeking rulings that certain Columbia Sussex officers need not qualify in order for TCR to be found qualified.

On November 5, 2007, UNITE HERE Local 54 (Local 54) filed PRN 3090701 seeking permission to intervene or, in the alternative, participate in the matters listed at items I.A. and I.B., above. Although the Commission denied the intervention request on November 15, 2007, it afforded Local 54 the privilege of a limited participation in those matters.

On November 7, 2007, Tropicana and affiliates filed PRN 3110709

seeking to limit the scope of the hearing for the purpose of striking portions of the Division's report directed at item I.A., above (D-1, pp. 21 - 37). In denying the motion to strike on November 15, 2007, the Commission nevertheless indicated that it had no intent, in the context of the renewal hearing, to articulate standards for non-mandatory staffing or first class facilities, but certainly would consider the matters raised in the Division's reports as they related to all the affirmative renewal criteria in *N.J.S.A. 5:12-84*, particularly business ability.

B. Audit Committee

On March 8, 2007, Tropicana filed PRN 0790702 seeking approval pursuant to *N.J.A.C. 19:43-2.7(c)* for Jeffrey A. Silver (Silver), without first receiving plenary qualification, to serve on a temporary basis as one of the members of TCR's audit committee (the Silver petition). At the time the Silver petition was filed, TCR did not have an audit committee that satisfied *N.J.A.C. 19:45-1.11(c)*. On June 19, 2007, Tropicana amended the Silver petition to seek permission for Silver to serve instead as the sole member of the audit committee of Tropicana Entertainment, L.L.C. (TEL).

On May 8, 2007, Tropicana filed PRN 1280708 seeking approval pursuant to *N.J.A.C. 19:43-2.7(c)* for Karin J. Brugler (Brugler), without first receiving plenary qualification, to serve on a temporary basis as TCR's corporate director of internal audit (the Brugler petition) and thereby function,

for purposes of *N.J.A.C.* 19:45-1.11(c)2iii, as the liaison between Tropicana's supervisor of internal audit and the TCR audit committee. At the time the Brugler petition was filed, TCR did not have an audit committee that satisfied *N.J.A.C.* 19:45-1.11(c). On June 15, 2007, Tropicana amended the Brugler petition to seek permission for Brugler to serve also as TEL's director of internal audit.

On June 1, 2007, Tropicana filed PRN 1520709 seeking approval for TCR to have an audit committee consisting of three members, two from management but with a third "independent" member who would retain for all purposes a 51% majority vote on all matters before the committee (the TCR petition). At Tropicana's request, the Commission adjourned the scheduled consideration of the TCR petition from June 6, 2007, to June 20, 2007. On June 14, 2007, Tropicana filed an amended and restated TCR petition that sought approval for TEL, rather than TCR, to have an audit committee with a single member who would be independent (the TEL petition). On June 20, 2007, the Commission conditionally approved the TEL petition (Resolution No. 07-06-20-13), the Silver petition, as amended (Resolution No. 07-06-20-14(A)), and the Brugler petition, as amended (Resolution No. 07-06-20-14(B)).

On July 10, 2007, Tropicana filed with the Commission the minutes of the TEL audit committee held on June 29, 2007 (D-60). During the

investigation into Silver's plenary suitability, the Division discovered in August 2007 a copy of a legal representation agreement between Silver's law firm and TCR that had been executed on February 19, 2007 (the retainer agreement), but had not been supplied to the regulators as part of the Commission's consideration of the matters that were heard on June 20, 2007.

On September 26, 2007, Tropicana filed PRN 2690701 seeking permission to disband the TEL audit committee and reconstitute it as an audit committee of Ramada New Jersey Holdings Corporation (Ramada NJ) with Brugler assuming the duties of director of internal audit at Ramada NJ and thereby functioning, for purposes of *N.J.A.C.* 19:45-1.11(c)2iii, as the liaison between Tropicana's supervisor of internal audit and the Ramada NJ audit committee. Having omitted from PRN 2690701 any reference to the reporting lines for Tropicana's supervisor of surveillance, Tropicana attempted on October 18, 2007, to correct that deficiency by filing an amended and restated PRN 2690701, but such submission bore PRN "1520709," which corresponded with the closed-out TEL petition that the Commission had conditionally granted on June 20, 2007. Consequently, upon intake at the Commission the October 18, 2007, submission was assigned a new petition reference number, PRN 2910708 (the Ramada NJ petition), and on October 24, 2007, Tropicana withdrew PRN 2690701 given

that it had been superseded by the Ramada NJ petition. On October 26 and 29, 2007, Tropicana endeavored to supplement the Ramada NJ petition through a certification from Silver dated October 24, 2007 (A-82), and a letter (A-83) from Donna More (More), TCR's general counsel, directed to the effectiveness of the retainer agreement. By letters dated October 19, 2007 (D-67), November 1, 2007 (D-62), and November 13, 2007 (D-63 and D-64), the Division responded to the Ramada NJ petition. On November 9, 2007, and November 30, 2007, Tropicana and TCR responded to D-62 and D-64, respectively. A-84 and A-94. The Ramada NJ petition remains pending for disposition as part of this matter, and seeks, in addition to the matters previously discussed, a ruling that Silver is approved as the sole member of the independent audit committee for Ramada NJ.

On October 11, 2007, the Division filed a two-count complaint, CCC Docket No. 07-0646-VC, against Tropicana, TCR and TEL alleging violations of the Act and the Commission's regulations as a result of the failure to have a properly constituted and functioning independent audit committee. The respondents filed a notice of defense and a request for a hearing on October 19, 2007. Thereafter, the complaint was consolidated with the license renewal hearing.

The Commission held four pre-hearing conferences in these matters. The hearing itself spanned parts of eight days at the end of November 2007

through the beginning of December 2007. On the last day of testimony, the Commission ruled that Tropicana's casino and CHAB licenses, which bear a November 30, 2007, expiration date, do not lapse by operation of the Administrative Procedures Act until the Commission finally rules on the matter. T9-66-12 to T9-71-6.

During closing arguments on December 4, 2007, the Division recommended granting a renewal of the casino and CHAB licenses for a one-year period, subject to 26 separate conditions. On December 5, 2007, the applicant responded in writing, acquiescing to some of the Division's proposed conditions, but objecting to certain matters. Immediately prior to putting this matter to a vote on December 12, 2007, the Commission reopened the record with the consent of the parties to introduce additional exhibits without objection by the parties, whereupon the record was closed.

### **III. STATEMENT OF FACTS AS TO PARTICULAR TOPICS**

As with a typical hearing with multiple witnesses and exhibits, any attempt to categorize neatly each witness' testimony would be fruitless. Nevertheless, the salient facts in this case coalesce around the following topics:

1. The regulatory and related impact resulting from the layoffs that Tropicana implemented following TCR's acquisition of Aztar, including the cleanliness of the facility and the staffing levels in the security and slot departments;

2. The independent audit committee; and
3. The execution of contracts on January 3, 2007, the date the merger agreement closed, that facially are management agreements requiring Commission approval pursuant to *N.J.S.A.* 5:12-82b and c.

A. Layoffs

As part of the Commission's consideration on November 2, 2006, of TCR's request for ICA, Yung testified that, although "there may be some cuts" in staff, he would "try to make most of those reductions through attrition" as the "painless way to try to do it," but that "we have to get in there and analyze the whole thing first." TA-61-25 to TA-62-6. Despite that pledge, a different approach began to emerge later that autumn when the company met with prospective investors to which it was marketing \$960 million in high-yield notes that TEL would issue (the so-called "roadshow"). T6-30-13; T6-31-22 to T6-32-5.

The team on the roadshow consisted of Yung, Richard FitzPatrick (FitzPatrick), TCR's chief financial officer at the time, and Fred Buro (Buro). T6-32, 6-10. Although Buro was hired in 2003 as chief marketing officer for Columbia Sussex (T6-25-21 to T6-26-1), Yung approached Buro shortly after winning the bid for Aztar and asked Buro to consider becoming president and chief operating officer of Tropicana, which Buro accepted. T6-22-25 to T6-23-6; T6-33-14 to T6-35-12. At the urging of the investment

bankers, Yung invited Buro as Tropicana's president and COO to attend the roadshow. T6-86-4 to T6-87-5.

During the roadshow, one of the prime topics of discussion was the amount of savings that TCR could derive through eliminating between \$30 million and \$40 million in Aztar's payroll. T6-32-11 to T6-33-6; T6-30-7 to T6-31-11; T6-134-24 to T6-135-14. That roadshow estimate was never shared contemporaneously with the New Jersey regulators. T6-33, 7-10.

After TCR acquired Aztar on January 3, 2007, Tropicana at TCR's behest had by month's end laid off 161 employees and fired 35 others, with another 44 employees having resigned or left voluntarily. Although Tropicana also hired 34 employees in January, it essentially lowered its overall workforce by 206 employees for the month.

The same pattern materialized in each of the ensuing months, with terminations through August 31, 2007, of 1,059 employees whose total annual salaries were almost \$31 million, offset by almost \$8 million in salaries for the 381 employees hired during that period, resulting in a net salary reduction of almost \$23 million. D-6, Ex. G; see, D-12. By the end of October 2007, a total of 1,319 employees had been terminated since January 3, 2007, which Tropicana asserts was offset by a total of 422 employees who were hired during that period, for a difference of 897 fewer employees. A-80. Having begun January 2007 with over 4,000 employees

(D-1, p. 21), Tropicana at the end of ten short months was operating without at least one-fifth (20%) of its former workforce. The ramifications of those reductions manifested themselves in many ways.

For instance, following the reduction of cleaning staff that serviced the public areas, Tropicana faced what its witnesses described as a “cleanliness crisis” in March 2007. T2-138, 8-18; T7-23-1 to T7-24-6. According to Mark Giannantonio (Giannantonio), who at the time was executive vice president of hotel operations (T2-157, 8-10) but has now assumed Buro’s titles of president and COO, there were two main causes for the crisis. First, staff assigned to particular shifts, especially on busy weekends, would call out sick, thus straining the company’s available resources. T2-135-24 to T2-136-6; T7-29, 12-17. Further, some rest rooms may have been unsanitary resulting from what Giannantonio characterizes as acts of “sabotage” to the toilets. T2-136, 17-24. Giannantonio refused to acknowledge that the layoffs contributed at all to the deteriorating, unsanitary condition of the facility. His denial must be contrasted with the credible testimony of Buro, who described the layoffs as too many, too soon.

Although Giannantonio describes the crisis as past, thanks in part to intensive staff retraining and more effective scheduling (T2-136, 7-16; T2-137, 15-25), there were persistent cleanliness issues in June, some of which directly affected Tropicana’s convention trade. T7-15, 14-21; T7-21, 11-22;

T7-47-12 to T7-49-4. Further, Buro upon his August departure saw matters improving. T6-154, 12-25. As he testified, "so it wasn't consistently at the level but I think it was getting better all the time." T6-154, 23-25. While we can take solace in Buro's testimony, the salient point remains that it never should have been allowed to reach the crisis stage. A more effective and timely response should have been able to eradicate this problem or, at the very least, limit its duration.

Not surprisingly, the massive number of layoffs garnered the scrutiny of the regulators. More had not given them notice prior to the initial changes that had been made in January and February 2007. T3-109-17 to T3-110-7. For instance, on February 15, 2007, Tropicana's general counsel, Tama Hughes (Hughes), responded by e-mail to the Commission's then principal inspector at Tropicana, Bruce Ladd (Ladd), concerning an earlier request for information emanating from Commission Chair Linda M. Kassekert (Kassekert). According to Hughes' February 15, 2007, e-mail, a staff reduction of 249 had occurred since January, with 60 more employees to follow in the next two weeks. Hughes attributed the layoffs in part to Tropicana's recognition that it was spending more on salaries and wages than its comparably sized competitors, and opined that "the reductions which have occurred have not negatively impacted Tropicana's level of performance or service." A-3. However, the March crisis that Giannantonio

described was just on the horizon.

Although the Commission certainly remained concerned with overall staff reductions, paramount was the extent to which Tropicana was undertaking changes to the so-called "mandatory" departments enumerated in *N.J.A.C. 19:45-1.11(b)*. On April 2, 2007, Hughes supplied Ladd with a then-current breakdown of the staff reductions in Tropicana's mandatory departments since January 3, 2007, when TCR acquired Aztar. A-16; D-8, Ex. C, p.4.

#### *Slot Technicians*

The slot department was among those affected, despite the fact that previously the Commission's general counsel, Dianna W. Fauntleroy (Fauntleroy), had expressed reservations about reductions in Tropicana's locksmiths and slot technicians to Hughes. Buro had assured Fauntleroy that staffing levels in those areas would be maintained pending further discussions and a thorough assessment. A-7.

At the end of May, Hughes and Buro met with Kassekert and Fauntleroy to discuss a proposed reorganization of Tropicana's slot department with an articulated goal of reducing the number of slot technicians. A-26. Before proceeding with those changes, on July 20, 2007, Tropicana agreed, per the request of Kassekert and Fauntleroy, that it would undertake a "slot tech impact analysis," A-43, which Hughes

submitted on August 6, 2007. A-48. That analysis omitted a discussion concerning the rejection of gaming vouchers, which Hughes received the next day (A-49) and supplied to the Commission by letter dated August 13, 2007. A-54. In any event, Hughes informed Fauntleroy on September 5, 2007, that Tropicana was adding two slot technicians. A-63, p.3.

### *Security*

Between January 1, 2007, and August 31, 2007, Tropicana terminated 91 employees in its security department with annual total salaries of \$2.1 million and hired 58 employees in that department with annual total salaries of \$1.2 million, resulting in a net security department loss of 33 employees for an annual total salary savings for the department of almost \$900,000. D-6, Ex. G. As Hughes discusses in her April memorandum (A-16, p.3), 30 of the security department staff reductions occurred during the first three months of the year. Those resignations or terminations for cause so reduced the staffing level on Tropicana's grave shift that there was inadequate security personnel to perform trolley drops and bill changer pickups. To compensate, Tropicana impermissibly removed personnel assigned to mandatory posts to perform the drops and pickups, leaving the mandatory posts unattended. A-18; D-9, Ex. DGE-1; D-1, p. 19.

To address that security staffing problem, Michael Lyons (Lyons),

Tropicana's security director at the time, produced a scheduling regimen in late April 2007 that he described as a "power shift," whereby certain officers worked extended hours on an overlapping shift, thus creating a security detail that could draw upon a pool of officers from multiple shifts that would be available to perform as escorts on the drops and pickups. D-9-51-10 to D-9-54-22; D-9, Ex. DGE-2 and 3. Nevertheless, on at least one occasion Tropicana used an unlicensed hotel security officer to staff a casino entrance at a shift change. D-9-55-3 to D-9-57-14.

By early June 2007, Howard J. Reinhardt (Reinhardt), who resigned in May 2007 but remained as TCR's vice president of casino operations until his replacement was installed, wanted an evaluation performed regarding Tropicana's security staffing levels. T6-66, 4-11; T8-17, 1-4. For that task Reinhardt turned to Glenn Koehler (Koehler), TCR's director of security, risk management and surveillance, T8-9-22 to T8-10-1, to whom he assigned the project during a meeting in a conference room at the MontBleu Casino in Lake Tahoe where he, Koehler and Reinhardt's replacement, Kevin Preston (Preston), who started in early June 2007 as TCR's senior vice president of operations (T5-25, 5-9; T5-27, 11-19), were present. T8-17, 8-24. Preston knew that Koehler was coming to Atlantic City to make a security assessment, and Koehler understood, given the transition from Reinhardt to Preston, that he was to forward any report he issued to Preston. T8-18, 3-

12.

Koehler arrived in Atlantic City during the week of June 18, 2007, and, with Lyons as his escort, conducted a three-day inspection that included Tropicana, Borgata and Trump Taj Mahal. T8-17, 5-7; T8-18-22 to T8-20-6; D-9-32, 18-25. At the end of that inspection, Lyons took Koehler to meet Buro and Hughes. Buro initially was unavailable, so Lyons and Hughes separately met with Koehler, whereupon he advised them that he would recommend that Tropicana add staff to its security department. T6-67, 7-21; T9-22-22 to T9-24-11; D-9-30, 22-25. After leaving Hughes' office, Lyons and Koehler returned to Buro's office and Koehler repeated that he would recommend that Tropicana should add staff to its security department, especially for perimeter coverage. T6-67-7 to T6-68-17; T6-131, 6-14; T9-24-12 to T9-25-11; D-5-57-23 to D-5-58-2; D-9-30, 7-20. Immediately following those conversations with Koehler, Lyons hired six officers for Tropicana's perimeter bicycle patrol, which was low on staff and consequently had outstanding hiring requisitions for those positions. T6-69-4; T6-131, 11-14; D-9-28, 12-24; T9-26, 18-20.

Approximately one week later, on June 24, 2007, Koehler issued a report to Preston regarding security at Tropicana that Preston received by e-mail. D-65; T5-130, 7-11. Although Koehler acknowledges that security coverage of the garages and exterior areas is "very, very limited" and "could

prove to be a serious liability," his report offers that a "reassignment of personnel" be considered as the means to address the perimeter understaffing without at all mentioning the hiring of additional personnel.

D-65, p.3.

Ultimately, Koehler identified in his report 20 employees that could be eliminated who were either supervisors, report writers, or patrol officers assigned to guard the hotel towers on day shift or to guard the Quarter, an indoor public entertainment and dining complex at Tropicana. D-65. Although Koehler's report affixes a salary cost-savings of approximately \$400,000 for the approximately 10% security workforce reduction that he identified, D-65, his inclusion of that figure was gratuitous because it had "not much, if anything" to do with how well Tropicana's security detail was staffed. T8-49, 5-15.

Significantly, Koehler's written report was in stark contrast to his prior representation to Lyons, Buro, and Hughes that he would recommend additional staffing. Moreover, as both Buro and Lyons testified, Koehler told them that he would be submitting his findings and recommendations to Yung. The implication is clear and unmistakable. Something transpired after Koehler left Atlantic City that convinced him to alter his findings.

For his part, Koehler never indicated that he simply changed his mind. He offered the implausible denial and refutation of what Lyons and

Buro had so credibly described. The fact that Koehler remains employed is telling. Was his perjured testimony really a surprise? Or was it just a reflection of how upper management, if not Yung himself, pressured Koehler into revising his recommendation?

In early July 2007, Buro met in his office with Preston and Lyons from where they eventually telephoned and spoke to Koehler about his report. T5-88, 19-25; T9-26-25 to T9-27-6. Addressing security concerns was one of Preston's initial responsibilities. T6-69, 1-2. Consequently, in the face of Koehler's report, which never mentioned the hiring of additional staff for the bicycle patrol and which ultimately proposed a total security staff reduction of 20, D-65, Preston questioned Buro and Lyons about why they had hired the additional staff. T6-69, 2-4; T9-29, 5-13.

Based on their earlier conversations with Koehler, both Buro and Lyons were genuinely surprised by his report because it was completely contrary to what Koehler told them that he would recommend, T9-32-21 to T9-33-4, and Buro and Lyons so apprised Preston. T6-69, 15-16. Preston then got Koehler on the telephone, who "waffled," and the call and meeting ended shortly thereafter without Preston or Buro giving direction to Lyons as to how to proceed. T5-93, 13-19; T6-69, 23-24; T9-29-20 to T9-30-1. The experienced Lyons adamantly opposed any cuts to his security force.

In an effort to "really give finality to the Commission as to where [TCR

and Tropicana] were with [Tropicana's] employee staffing levels," T5-69, 10-12, and to "help lessen everybody's frustration with [TCR] as a company," Tropicana and TCR devised a strategy by mid-summer 2007 to inform the regulators about the company's "end game plan" for layoffs. D-7-75, 1-6. The goal was to compile a list of potential additional layoffs involving both mandatory and non-mandatory departments that Tropicana and TCR would supply to the regulators in advance of implementing those changes so as to minimize "blindsiding" them. T3-41-11 to T3-42-3; D-7-75, 22-25. Towards that end, Preston collected information from Tropicana and produced an August 7, 2007, written narrative of an additional 320 "Potential Department Layoffs." A-50; T5-67-23 to T5-68-11; T5-127, 10-15.

In separate meetings with the Commission and the Division on August 8, 2007, A-52, Yung, More and Preston on behalf of TCR discussed the August 7, 2007, written narrative with the regulators, who reacted fairly strongly against any further staff reductions. T3-119, 14-17. Of the 320 potential layoffs, 70 were slated to come from the security department, derived, in part, by a comparison of Tropicana's security staff with that of Showboat Atlantic City. A-50, p.2.

Although the August 7, 2007, proposal described Showboat as "approximately [Tropicana's] same size," Preston acknowledged that such

equality was based on a comparison of revenues, which would not be relevant to a casino hotel's physical size or its security needs. T5-95, 13-18; T5-96, 13-20; T5-117, 1-22. Rather, he put the Showboat information in the report simply because he was able to obtain it from someone with whom he used to work. T5-96-24 to T5-97-6; T5-128, 10-18. As for incorporating the information from Koehler's report into the August 7, 2007, narrative, Preston did not rely on Koehler's report as the basis for making any security changes or recommendations because he wanted to do a further analysis. T5-130-21 to T5-131-18.

Yung, More and Preston, during their August 8, 2007, meeting with Kassekert and Fauntleroy, represented that their analysis of the potential layoffs, as set forth in the August 7, 2007, narrative, was ongoing and would be finalized by September, thereby allowing the regulators an adequate opportunity to consider the proposal and discuss its impact. The lone exception concerned the proposed 70-employee reduction in security, which Yung wanted to implement during the week of August 13, 2007, and thus Fauntleroy advised that that aspect of the proposal would be addressed as quickly as possible. A-52.

In an 11:34 A.M. e-mail to Hughes on August 10, 2007, Fauntleroy confirmed that, as to the non-security aspects of the proposal, the regulators expected that Tropicana and TCR would not implement them

until after the requisite dialogue with the regulators occurred. As for security, Fauntleroy further advised Hughes that, following a brief meeting of Commission staff that had occurred in the interim, it became immediately apparent that an in-depth analysis of the proposed security reductions would be necessary before implementation. A-52. In a subsequent e-mail exchange later that day, Fauntleroy and Hughes confirmed the substance of the morning e-mail, which did not preclude TCR and Tropicana from proceeding with their plans to reduce the number of administrative assistants/secretaries, on which Fauntleroy took no adverse position. A-53.

On August 14, 2007, Tropicana terminated Lyons as director of security and replaced him with Thomas Kelly on an interim basis until Ronald Pisko assumed the duties of executive director of security on August 27, 2007. A-55.

In a series of August 17, 2007, e-mails, Hughes broached the prospect of reducing the number of "relief rover" security positions by four. Fauntleroy apprised Hughes that, although that reduction was acceptable to the Division and the Commission staff, such assessment was nevertheless subject to the outcome of the regulators' review of the reductions proposed for security escorts. A-56 to A-59. By day's end, Hughes wrote to Fauntleroy to summarize the results of the various discussions that had occurred throughout the day. A-60.

On August 20, 2007, Commission principal inspector Carol DeFoor, who was assigned to the Tropicana, apprised Hughes that the Tropicana security supervisor assigned to the casino was also overseeing hotel security in violation of regulatory requirements. DeFoor further explained that, as a result of security officers taking their scheduled break time, one of the teams assigned to pick up bill changers started its rounds forty-five minutes later than permitted under the Commission's regulations. To address those problems, Hughes notified DeFoor on August 23, 2007, that Tropicana had reexamined its security supervisory staffing level and concluded that returning to the original complement of eight security supervisors was appropriate. A-61.

Hughes wrote to Fauntleroy on September 5, 2007, to follow-up on the early August meeting that TCR and Tropicana had with the regulators to discuss the Preston narrative. A-63. Among other things, Hughes notified Fauntleroy that Tropicana would not reduce further its locksmith or security departments. A-63, p. 3.

Even with Tropicana maintaining its security department staffing levels, the Division nevertheless charged the company with regulatory violations that allegedly occurred on September 5, 2007. Specifically, the Division alleges that Tropicana impermissibly failed to replace three security officers who were serving on mandated roving security posts when it

reassigned them during a bill-changer pick-up to escort trolleys that were moving the bill-changers containing cash, gaming vouchers and coupons from the slot machines to the count room. D-1, p. 19. These allegations are similar to the incidents that Hughes reported had occurred back in April. A-18.

B. Independent Audit Committee

Undeniably, Tropicana as of “day one” (*i.e.*, January 3, 2007, when TCR closed on its purchase of Aztar) needed to have an independent audit committee that satisfied the requirements of *N.J.A.C.* 19:45-1.11(c)2, and it evinced an understanding of that requirement as early as December 20, 2006, two weeks before the closing. A-92; T10-61, 12-19. Equally undeniable is the fact that it did not have such a committee in place. T3-32, 6-11; T10-61, 19-25. Critically, the explanation as to “why” it did not has proven to be elusive.

By letter dated December 28, 2006, John J. Mercun, Esq. (Mercun), counsel for Tropicana and TCR, notified counsel at both the Commission and the Division that he had been informed that TCR would have a five member audit committee consisting of TCR’s chief financial officer, its vice president of casino accounting, its corporate counsel (*i.e.*, More), its vice president of casino operations “and a fifth outside member to be named.” Mercun goes on to say in the letter that he had advised More that “the

outside person, once selected, will need to be qualified.” D-55.

Within a week of the closing on the merger agreement, Guy S. Michael, Esq. (Michael), another of TCR’s and Tropicana’s counsel, wrote to Assistant Attorney General Mitchell A. Schwefel (Schwefel) at the Division about four topics, one of which was the audit committee. D-53, p.1. Michael echoes Mercun’s earlier advice that four TCR officers will sit on the independent audit committee, along with “an independent member yet to be named.” D-53, pp. 3 and 6. Michael then goes on to apprise Schwefel that, upon speaking with the Commission staff, the proposed composition of the audit committee “might be unacceptable if the ‘independent’ structure necessary for the Audit Committee was lacking.” D-53, pp. 3 and 6. Michael closes the topic by advising Schwefel that Tropicana is examining the audit committee structure (Hughes is copied on the letter), has talked to Columbia Sussex about it and will keep the regulators informed throughout the process. D-53, pp. 3 and 6.

During Tropicana’s transition from publicly-traded Aztar ownership to TCR ownership and continuing to the present, William Edwards has served as Tropicana’s executive director of surveillance. D-51, pp. 1-2. Prior to the January 3, 2007, closing on the merger agreement, Edwards reported to Ned Armstrong, Aztar’s vice president of administration. D-51, p. 2; T6-13, 8-13. Immediately thereafter, Edwards reported to Buro on all matters,

including as to policy, procedures and authority. D-51, p. 2; T6-12, 15-22.

Following the resignation of Tropicana's executive director of internal audit, Buro in January 2007, began looking for a replacement through his contacts at the recently closed Sands Casino Hotel. T6-75, 15-18. Eventually, Buro interviewed William King, who had worked at the Sands, for the internal audit post at Tropicana. T6-75, 18-23. Pleased with William King's performance during the interview, Buro called TCR's CFO FitzPatrick about offering William King the internal audit position, and FitzPatrick said, "you better get him on board." T6-75-18 to T6-76-10. When Buro called William King to discuss offering him the position, William King reminded Buro that the hiring of a casino licensee's internal audit supervisor is the prerogative of the independent audit committee. T6-76, 18-20. Buro concurred, and advised William King to call FitzPatrick, who actually did the hiring, rather than an approved audit committee. T6-76, 20-23; T4-104, 1-12; T4-111, 18-23.

Despite the absence of an approved independent audit committee with the authority to hire and fire the supervisors of a casino licensee's internal audit and surveillance departments, William King became Tropicana's new executive director of internal audit and met in Kentucky with Larry King, TCR's corporate vice president of casino accounting, on February 15-16, 2007. D-50, p.1. During that time, Larry King indicated an awareness of

the New Jersey audit committee requirements and that the company's initial audit committee proposal was unacceptable "due to it consisting of too many officers that lacked independence." D-50, p.1.

Although William King reported to Buro for administrative and day-to-day operational matters, on anything of a policy nature he reported to Larry King. For instance, when Larry King requested a report of first quarter 2007 completed audits, William King supplied it to him. Further, at the end of March 2007, William King sent Larry King an e-mail regarding activity in Tropicana's internal audit department, and included therewith Tropicana's 2007 audit plan and budget, along with the requested completed audits report. D-50, p. 2.

Although William King reported to Larry King, the latter did not report directly to anyone, although he "was acting as a 'dotted line' report to [CFO] FitzPatrick until a committee was in place." Any reports that Larry King received from William King were given to More and FitzPatrick. D-50, p. 5.

In February 2007, More met with the former director of the Division and discussed the creation of a joint audit-compliance committee for TCR's Atlantic City and Nevada operations. D-50, p.3; D-51, p. 3; T4-28, 22-25. She also sought his reaction to Silver as a possible outside member of the committee. T4-29, 4-7.

On February 19, 2007, More on behalf of TCR executed the retainer

agreement with Silver's law firm, Gordon & Silver, Ltd., which had been engaged to:

continue or commence the legal representation of [TCR] regarding consulting services, involving membership on [TCR's] Compliance and Audit Committees. Jeffrey A. Silver will be the [supervising] attorney...

[TCR] may also engage [Silver's law firm] to represent [TCR] in different or additional matters, and the terms of this Agreement shall apply to all such representation. D-54, p.1.

In March 2007, the "combined compliance committee" held its initial meeting. D-51, p. 3; T4-110, 5-8. That same month More concluded, following discussions with FitzPatrick, Silver (D-50, p.3) and the Commission (D-51, p.3), that Atlantic City would need an audit committee that was separate from the joint compliance committee structure that she had previously contemplated. D-50, p.3; D-51, p.3; T3-32, 18-25. Further, on March 8, 2007, Tropicana sought Commission approval for Silver to serve on the TCR audit committee. PRN 0790702.

More was aware that outside counsel for TCR drafted a petition in early April 2007 for approval of a charter for a TCR audit committee with Silver, More and FitzPatrick as co-equal members where a majority vote would control any decision of the committee. D-50, pp. 3-4. Outside counsel produced a second draft charter that required voting unanimity among committee members. D-50, pp. 3-4. A third draft charter gave Silver 51% of the vote, for which Tropicana and TCR sought approval by

filing the TCR petition, PRN 1520709, on June 1, 2007. D-50, pp. 3-4; D-56. Tropicana and TCR eventually amended and restated the TCR petition with the TEL petition, wherein they sought approval for the TEL audit committee charter with Silver as the sole committee member. More was aware that TCR's outside counsel was discussing these various changes with the regulators. T3-33, 1-7. The Commission conditionally granted the TEL petition on June 20, 2007, D-50, Ex. G, and also granted Silver and Brugler permission to serve in their respective capacities on a temporary basis. Resolution Nos. 07-06-20-14(A) and 14(B). Currently, Edwards reports to Silver and William King reports to Brugler who in turn reports to Silver. T4-110, 11-17.

The TEL audit committee met for the first time on June 29, 2007. D-60. Silver chaired the telephonic meeting, which More and FitzPatrick attended. D-60, p. 3. During that meeting, those in attendance heard the reports on internal audit activity and issues from William King and Brugler, his new supervisor at TEL. D-60, p. 3. More, who was by then not a member of the committee, did not vote when the committee voted to adopt the form of charter that had been submitted to the Commission for approval, and viewed the purpose of her presence as "informational" rather than governance. T4-105, 15-21. The meeting's attendees also discussed the then upcoming July 16, 2007, meeting of the TCR audit committee,

whose members at the time were Silver, More and FitzPatrick. D-60, p. 3. That meeting never occurred. T4-105-22 to T4-106-9.

In the course of the field investigation of Silver's qualifications, the Division discovered in August 2007, a copy of the retainer agreement, which, as noted previously, had not been supplied to the regulators for consideration in connection with the hearing on the TEL petition. D-64. In any event, the parties to the retainer agreement have rescinded it, A-83, A-84 and A-93, Silver has resigned from the TCR audit committee, A-93, p. 3; T4-106, 16-23; A-94, and TCR expects that Silver will also resign from its compliance committee. A-94.

In responding to the Ramada NJ petition, the Division notes that the proposed audit committee charter (A-81) does not include oversight for the Tropicana surveillance department, D-67, p. 2, and, accordingly, the Division recommends that the Ramada NJ committee add such function to its charter. D-67, p. 3. In any event, no surveillance representative was present at the initial TEL audit committee meeting. T4-112-22 to T4-113-8.

In early November, the TEL audit committee held its second meeting, which Silver chaired and More, Preston, Brugler, Larry King and John Jacob, who replaced FitzPatrick, attended. T4-113, 9-24; T4-115-14. At one point, Silver met separately with Brugler. T4-113-25 to T4-114-1. As before, no one from surveillance attended, T4-114, 2-15, but More testified

that necessary arrangements would be made to ensure their presence at future meetings. T4-115, 19-24. Although Brugler took minutes of the meeting, T4-116, 18-20, in the normal course those minutes will not be ratified until the committee convenes for its first quarter 2008 meeting. T4-114, 16-21; T4-115, 1-18.

C. Management Agreements

Upon closing the merger agreement, Aztar executed, among other things, the following contracts:

1. A casino services agreement with TCR, D-18; and
2. A service agreement with Columbia Sussex. D-19

These were but two of a litany of similar agreements that were executed and dated as of the closing of the merger whereby TCR and Columbia Sussex were to provide various TCR subsidiaries with certain specified "management" services, such as:

1. In the case of TCR:
  - a. Supervision of casino operations including employment matters, staffing, processing of payrolls, marketing and advertising programs, casino layout, casino operations and procedures, gaming equipment and supply purchases and inventory levels, and other matters related to the casino operations;
  - b. Regulatory oversight and regulatory compliance as it relates to casino operations and internal audit procedure and operation;
  - c. Financing matters including financial reporting, borrowing

funds, investing excess funds, and other financial matters related to the casino operations; [D-18] and

2. In the case of Columbia Sussex (“\*” indicates hotel related services; “\*\*” indicates casino related services):
  - a. \*Maintenance of general ledger and preparation of monthly financial statements;
  - b. \*Approval and processing of vendor invoices for payment and preparation of various accounts payable reports;
  - c. \*Approval and processing of payroll including payment of wages, withholdings, payroll taxes and benefits, and preparation of various payroll reports and tax returns;
  - d. \*Maintain cash position; reconcile bank accounts and preparation of various reports;
  - e. \*Supervise operation of hotel including employment decisions, purchasing services and products, and sales and marketing decisions;
  - f. \*Monitor accounts receivable billings and collection
  - g. \*\*Process approved vendor invoices including coding invoices, entering invoices in accounts payable system, processing payments to vendors and preparation of various accounts payable reports and computer files
  - h. \*\*Process approved payroll including entering hours, new hires, terminations, pay rate changes and withholdings, preparation of payroll checks, payment of withholdings, garnishments, payroll taxes, and benefits, and preparation of various reports and computer files;
  - i. Prepare consolidated balance sheet, income statement and cash flow statement at the end of each quarter for submission to bank; and
  - j. Prepare bank covenant compliance report each quarter. D-19.

To assuage concerns that the regulators had raised regarding whether the two agreements implicated the provisions of *N.J.S.A. 5:12-82b(3)* and *c(7)* involving agreements for the complete management of a casino, D-2, pp.12-13, TCR's counsel wrote to the Division and to the Commission staff on April 17, 2007, to advise that those "agreements will not be effective with respect to New Jersey until the required regulatory approvals are received." D-20. Yung wrote to the regulators in a similar vein on May 2, 2007. D-22.

Despite those assurances, a Division investigation disclosed that Columbia Sussex had charged fees to Tropicana for services that Columbia Sussex provided, which the casino licensee accrued but did not pay. D-21 and D-23. Larry King advised the Division that the accrual was in error and would be reversed, D-23, which the Division confirms. D-21.

By separate letters dated November 8, 2007, TCR and Columbia Sussex each wrote to Aztar to obtain its agreement and understanding that their respective contracts executed on January 3, 2007, would not be implemented until formally approved by the Commission.

#### **IV. ANALYSIS**

##### **A. Relicensure and Plenary Qualification**

The primary criteria for the issuance or a renewal of a casino license

are found in *N.J.S.A.* 5:12-84. However, those section 84<sup>4</sup> affirmative criteria are not the only guide to which the Commission looks in assessing the suitability of a casino license renewal applicant. Certainly, section 86, which contains the disqualification, or “negative” criteria, is instructive, particularly in that it requires the Commission to deny renewal to any relicensure applicant that has failed “to prove by clear and convincing evidence that [it] is qualified in accordance with the provisions of” the Act. *N.J.S.A.* 5:12-86a. Thus, the Act in its totality and the purposes it is intended to serve truly are the measure against which a casino license renewal applicant’s suitability will be judged. Likewise, an applicant for plenary qualification as it emerges from ICA faces the same daunting task. As the Commission explained in its opinion when first granting Resorts Casino Hotel a casino license:

[T]he broad scope of [the specific licensing standards of the Act] reveals that no precise, mechanical formulation is possible or even desirable. In deciding whether [an] Applicant should receive a license, the overall sense and purpose of the Act must be brought to bear on the particular facts as found. Careful evaluation of the evidence must be combined with a conscientious effort to achieve the true intent of the law. *In re Resorts Casino Application*, 10 *N.J.A.R.* 244, 257 (CCC 1979).

The litany of the section 84 criteria is a familiar one:

1. Financial stability, integrity and responsibility, *N.J.S.A.* 5:12-84a;

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4. Throughout this opinion the provisions of the Casino Control Act will be referred to simply by section number, *e.g.*, section 84.

2. Integrity of all financial backers, *N.J.S.A.* 5:12-84b;
3. Good character, honesty and integrity, *N.J.S.A.* 5:12-84c;
4. Sufficient business ability and casino experience as to establish the likelihood of creation and maintenance of a successful, efficient casino operation, *N.J.S.A.* 5:12-84d; and
5. The suitability of the casino and related facilities subject to *N.J.S.A.* 5:12-83i, and whether its proposed location will not adversely affect casino operations, *N.J.S.A.* 5:12-84e.

Although no one criterion takes precedence over another, past circumstances generally have dictated that the Commission be most attuned to good character and financial stability. While certainly those criteria bear upon this case, the sufficiency of Tropicana's business ability with TCR at the helm has drawn the most attention, as has the suitability of the facility as one that is superior, first class and of exceptional quality.

The Commission has long viewed the meaning of business ability as plain and not in need of explanation. *Resorts, supra*, 10 *N.J.A.R.* at 252. Although a company's performance in other jurisdictions is certainly relevant, nevertheless, "the Applicant's experience...while operating in Atlantic City under the Commission's regulations should be the primary factor in assessing ability to operate under the New Jersey scheme in the future." *Id.*

In a word, Tropicana's regulatory performance since the TCR acquisition has been abysmal, and there is no more glaring example of that

than what transpired with the attempts to establish an independent audit committee.

The supervisors of two of the mandatory departments – internal audit and surveillance – generally are required to report directly for matters of policy, purpose, responsibility and authority to an independent audit committee, which can be constituted at the casino licensee or at an appropriate holding company thereof. *N.J.A.C.* 19:45-1.11(c)2. The lone exception to such a direct report between those supervisors and an independent audit committee is found in *N.J.A.C.* 19:45-1.11(c)2iii, which allows each such supervisor to report directly to a holding company senior executive within the supervisor's area of expertise, provided that the senior executive reports directly to the independent audit committee at the holding company where he or she is an officer. In any event, the hiring, firing and salary of the supervisors of internal audit and surveillance are directly or indirectly within the exclusive province of the independent audit committee. *N.J.A.C.* 19:45-1.11(c)2.

The importance of the independent audit committee cannot be emphasized enough. The committee essentially serves as a *quasi*-regulatory body with broad oversight in some of the most sensitive regulatory areas involving the casino's internal watchdog mechanism. Any breakdown or compromising of that function could readily lead to calamitous results, both

for the licensee directly and in terms of the public's overall "confidence and trust in the credibility and integrity of the regulatory process and of casino operations." *N.J.S.A. 5:12-1b(6)*. Manifestly, the requirement of an independent audit committee, operating outside the ambit, control, and domination of management, is a critical component of the regulatory apparatus.

Nevertheless, Tropicana and TCR callously disregarded the importance of the independent audit committee. From the outset, counsel in correspondence (D-55; A-92) referred to the committee, not as independent, but as "internal," with the implication that the committee was just for the company's own internal use and not designed to serve a broader regulatory purpose. Given what ultimately transpired, a more jaundiced view might be taken of why "independent" was excised: to provide deniability for the company's intransigent desire to retain management dominance on the committee.<sup>5</sup>

In that regard, this record is devoid of any explanation as to how a five-member committee with 80% of its members from management could thereby constitute an "independent" committee, but that in fact was the company's initial proposal to the regulators that it intended to implement

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5. Of course, by calling it the "internal audit committee" might explain why the company was so late to appreciate that oversight of surveillance was also within the independent audit committee's functions. T4-115, 19-24.

on "day one." D-55; A-92. The company steadfastly clung to that template for the committee, or as slight a modification thereto as possible, for as long as it could, despite having no reasonable basis for that structure to pass muster as "independent."

More's testimony that this all might have been avoided had she only known that management could not serve on the committee sounds hollow. T3-37, 2-4. So is her suggestion that a reading of the Commission's regulations leaves one in doubt as to what exactly is required, T3-33, 18-19, especially as she professes to have been aware of the requirement from the outset. T3-86, 10-19. Even more extraordinary is that, despite More's testimony that she brings important complaint matters to Yung, he professed to have little knowledge about the audit committee. T1-98-23 to T1-101-8.

Just as troubling is More's view as to how the company could solve the reporting lines for the supervisors of internal audit and surveillance in the absence of an independent audit committee (T3-38, 4-10), which she and the company concede was not in place at the start. T3-32, 6-11; T10-61, 19-25. Her legal status as an officer of the court is no substitute for the reporting lines clearly articulated in the regulation, T3-144-7 to T3-145-4, and whatever credence that may be given is certainly diminished by the fact that she also serves as a member of management, and thus presumptively

is not entitled to receive the reports of concerns that arise from internal audit and surveillance.

Even more egregious was the hiring of William King as the internal audit supervisor. He and Buro recognized that the decision had to come from the independent audit committee, yet it was made by then-CFO FitzPatrick. Plainly, the repercussions for non-compliance continued to escalate by failing to have a functioning independent audit committee once the merger agreement closed, but the company was in no hurry to proceed with any more alacrity than it did. Certainly, as the casino licensee's chief legal officer Hughes bears some of the blame as to the reporting lines for Edwards and William King, and for how the latter was hired.

Likewise, More's complicity in the audit committee fiasco is unsettling and somewhat puzzling. With her impressive credentials, one is left to speculate as to how she allowed, by her inaction, the matter to spiral downward. Certainly, the vastness of the responsibilities that she oversees could explain much, but not all, since when additional staff are needed, sometimes they simply must be hired, despite the cost. Then the challenge is to ensure that only delegable matters are assigned to qualified staff or outside counsel. Certainly, the audit committee matter should have been among the non-delegable.

Even after obtaining Commission approval in June for the audit

committee structure, problems still persisted. That ruling left no doubt that management could not serve on the committee, yet the minutes of the initial TEL audit committee meeting disclose the presence of More and FitzPatrick. D-60. Although their presence at the invitation of the committee to address a specific agenda topic might have been understandable, their seemingly unrestricted attendance certainly sent the wrong signal to the regulators, which had determined to exclude management from the committee. Further, those same minutes disclose a then-upcoming TCR audit committee meeting where More and FitzPatrick would have served with Silver as co-equal members of that committee, with the clear implication that he would do TCR's bidding as the lone member of the TEL audit committee, although in testimony the company refutes that notion.

Speaking of Silver, while the Commission has always understood the importance of the independent audit committee, this case has certainly underscored the vulnerability of having only one person on such a committee. It also points up an essential feature of the committee that was lacking here: each independent committee member must also have a seat on the board of directors. Without that prerogative, any such committee would be toothless, and the Commission has so recognized in other cases.

*In the matter of the Applications of Resorts International Hotel, Inc. for Renewal of Casino License and Lectrolarm Custom Systems, Inc. and*

*International Intelligence, Inc. For Renewal of Casino Service Industry Licenses* (CCC 1985); *Cf., In re Application of GNOC, CORP. for a Renewal of a Casino License*, 11 N.J.A.R. 433, 448-449 (CCC 1986). Thus, those casino licensees that rely upon a single-member audit committee should consider revising that structure because certainly in the context of a renewal hearing the Commission would expect the parties then before it to address that question.

In sum, despite applicants' protestations to the contrary that they were endeavoring to develop an acceptable audit committee structure, it was palpable that a delay in producing a truly independent committee was their goal. Thus, the only appropriate response to the audit committee issue is to deny the renewal of Tropicana's casino license<sup>6</sup> and to find that TCR has failed to establish its suitability for plenary qualification, but in so doing the Commission need not rely on that basis alone.

The massive layoffs are another factor that inevitably leads to a denial of the applications for relicensure and plenary qualification. Critically, Yung minimized the extent of the planned cuts when he testified before the Commission in 2006, yet shortly thereafter he was much more forthcoming on the roadshow when it was plain that salary savings of between \$30 million to \$40 million were proclaimed to the investment community as an

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6. Necessarily, the failure to renew the casino license would result in the failure to renew the ...footnote continues on bottom of next page...

inducement to purchase the company's high-yield debt.

What changed? Even if one accepts Yung's explanation about a miscalculation of the impact of the opening of the Philadelphia area slot facilities, T1-39, 9-10; T1-81, 8-24, and that he should have added that as a caveat to his 2006 testimony, T1-42, 7-19, it does not address why he did not follow-up with the regulators before instituting the massive layoffs.

The Atlantic City model works well because it involves a mutual level of cooperation and trust between the regulators and the regulated that is unparalleled worldwide. Simply put, Yung exhibited a lack of cooperation on a grand scale that did nothing to earn regulatory trust in his ability to operate in this marketplace. Moreover, his decision-making process was seriously flawed.

Calculus is a marvelous discipline: you start with the answer, and work backwards. In certain respects, that was Yung's approach in dealing with the Tropicana. He needed to get to a certain answer, and it mattered little whether there was a cogent analysis to justify the outcome.

Most telling was the interaction between Yung and Buro when Yung delivered his handwritten note of the latest "cut sheet" to Buro on June 5, 2007, where Yung had costed-out the further staff reductions he wanted to occur both in the hotel and at the casino by week's end. D-6, Ex. B; D-5,

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...footnote continued...  
CHAB license.

Ex. A; T6-61-15 to T6-64-17. Plainly, no reasonable analysis was possible in that brief period to determine whether those cost reductions were feasible, as proved to be the case in the player development area.

According to Buro, Yung directed him to make the player development cuts, D-5-96, 18-24; T6-64, 18-21, yet Yung insists it was Buro who unilaterally made those cuts and brought in his friends, T2-28-19 to T2-29-12, which Buro vehemently denies. T6-64-22 to T6-65-5. The notations on Yung's handwritten note, D-6, Ex. B and D-5, Ex. A, certainly seem to bear out Buro's explanation of events, and are corroborated by Yung's belated realization of the hard lesson that Atlantic City is such a "player relationship business," T2-31, 6-11, so much so that to correct the "big mistake," T2-31-19, of letting go player development representatives, the company is now trying to rehire them and add others as well. T2-31, 15-18. Despite Yung's insistence that his many years of experience are his guide, D-6-45-15 to D-6-46-6, his reliance on his experience with his other casinos in much smaller markets simply did not translate into an ability to understand and run a property of the magnitude of Tropicana. T6-35, 20-21; T1-76, 12-20. And certainly Yung's experience and wealth could not alone justify the confidence that the company hoped to engender during the roadshow. T6-127-3 to T6-128-7.

That proved true in the slot attendant staff reductions as well, which

increased slot payout times with a consequent diminution in customer service. T2-153, 10-17; T5-65, 10-25. To rectify that mistake the company had to rehire staff. T1-84-25 to T1-85-8; T1-88, 2-8. Again, relying on experience that was not comparable proved faulty and an inadequate substitute for performing the type of analysis that, had it been undertaken, might have prevented the reductions and negative impact on customer service in the first place. Likewise, Yung's failing to appreciate the significance of the locksmith function resulted in staff reductions that would have been preventable by actually examining what is required to operate in New Jersey, T1-88-9 to T1-89-11, a trait that truly has never manifested itself.

Certainly, there were successes. The Commission has no reason to doubt that the hotel check-in wait times have improved.

Significantly, one of the few times that the company actually conducted research into whether staff reductions were appropriate, independent of being asked to do so by the regulators, ultimately resulted in the company rejecting that research. As Lyons testified, Koehler's report on security department staffing had serious flaws. T9-33-5 to T9-39-23. However, from the company's perspective Koehler's report had one flaw that Lyons did not catch: it recommended too few cuts, given that by early August the company was looking, not for 20 security staff reductions as

Koehler recommended, but for 70 such reductions. A-50, p. 2. With that as the target, clearly the company had no use for Koehler's analysis.

It also defies credulity that Koehler as head of security apparently has had so little contact with Yung, T8-52, 9-23, of whom it has been said that he tends to micromanage. T2-62, 10-12. TCR's counsel took great pains in pointing out that he did not call Koehler as a witness, whose report was contrary to the oral suggestions that Koehler had given to Buro, Hughes and others regarding the need for increased security changes. T10-53, 8-12. Rhetorically, counsel asks, did Koehler perjure himself? T10-53, 12-13.

Certainly, by itself whether Koehler's report varies from his conversations may matter little, except that it gives rise to an inference that the change resulted from some intervening pressure that was brought to bear upon Koehler. With Yung desirous of reducing security further during the week of August 13, 2007, A-52, certainly Koehler's testimony of his limited contact with Yung is favorable to Yung, and applicant's counsel elicited that testimony. T8-41, 1-4. But if Koehler lied about the inconsistencies between his report and his conversations with Buro, *et al.*, then the Commission can fairly infer that Koehler also testified falsely as to the limited scope of his contact with Yung. Those implications are grave for Yung, especially since he never resumed the witness stand to corroborate his limited contact with Koehler.

In any event, Koehler tells Lyons (D-9-34, 9-15; D-9-41-20 to D-9-42-1) and Buro (T6-68, 2-4) that his report was going to Yung. According to Koehler, Yung never spoke to Koehler about the report, other than a brief telephone conversation during the course of these proceedings. T8-14, 4-15; T8-40, 1-12; T8-72, 22-24. Incredibly, despite Koehler's job as head of security for TCR's casino operations in five states, later in his testimony he says that he has never had a communication with Yung, and even omits to qualify his statement by the brief conversation he had earlier admitted having. T8-52, 9-23.

In his sworn interview, Yung clearly was of the mind that Tropicana's security staffing should be on par with what the other casinos are allowed to do. D-6-64, 3-5. Based on advice from Hughes, Yung thought that Tropicana should have a security staff of 95 employees. D-6-63, 21-25. On that basis, he calculated that Tropicana had 65 more security staff than regulatorily required. D-6-64, 2-3.

The parallels between Yung's sworn interview and what Preston included in his August 7, 2007, list of potential layoffs is uncanny. A-50. Where Yung identified the "right" number of Tropicana security staff as 95 employees derived from a comparison of Tropicana with other unnamed casinos, Preston pegged his number at 96, based on his comparison, albeit faulty, of Tropicana with Showboat. By Yung's calculation, 65 Tropicana

security staff were expendable; for Preston, it was 70.

Despite Yung attending the meetings in early August with the regulators to discuss specifically Preston's report, he claimed on September 27, 2007, to have never seen the first two pages of it wherein Preston sets forth the narrative of the potential layoffs. D-6-49, 20-23.

Into this mix comes the Koehler report. D-65. As TCR's proposal to reduce Tropicana security was evolving, Koehler is assigned to assist in the evaluation of what reductions TCR and Tropicana would propose. Yung says he never met Koehler, D-6-65-18, and he may be forgiven for forgetting if it were only for that brief time that Koehler testified that they had met in 2003. T8-13-23 to T8-14-15. However, according to Buro, Preston told him that Yung met with Koehler "and they agreed that in fact we needed to further reduce staff at Tropicana." D-5-59, 2-6.

Seemingly, the following quote from Yung corroborates that: "yeah, we had called our guy in from Lake Tahoe to come in and take a look at it and see what he thought." D-6-64, 12-14. Further, at the time of his sworn interview, Yung remembered the approximate length of Koehler's stay in New Jersey, and that Koehler was to take "a look at how they had everything, and then reported back what he thought." D-6-65, 2-5.

From that clarity on Yung's part, the interview then becomes murky. Although he did not know to whom Koehler reported his findings (but

suggested Reinhardt as a possibility), Yung was positive that Koehler did not report to him. D-6-65, 6-18. Yung knew Koehler made recommendations, but could not recall them. D-6-65, 19-22. When asked whether he was consulted about the recommendations or brought in to the discussion about them, Yung responded, "no, I don't think so." D-6-65-23 to D-6-66-1.

Unbelievable. Yung clearly wanted to reduce Tropicana's security staff to a level that he believed was justified by a comparison with other Atlantic City casinos. Preston's narrative provided the structure to do that. However, if the company gave any credence to Koehler's report, the rationale for Yung's predetermination would be undermined, so Koehler's report was buried. Unfortunately for Yung, that report has come back to life, only to bury him. That Koehler is a liar there is no doubt, and now it is plain why: to shield Yung. That Koehler remains in the company's employ is also telling.

During cross-examination Yung was asked to discuss various matters involving other jurisdictions where TCR operates casinos, whether land-based, riverboats or otherwise. T1-102-15 to T1-145-24. Despite the identity between him and TCR, T1-101, 1-6, he repeatedly could not answer questions about his operating companies' regulatory compliance in those other jurisdictions. If he truly does not know the answers to some

fundamental questions, a fair inference is that he does not pay sufficient attention to regulatory matters to merit his company's plenary admission in New Jersey.<sup>7</sup> The alternative – that he knows the answers but chose to testify as he did – carries no less grave a consequence for his suitability here. Moreover, the Commission has a right to expect that TCR and all its senior officials in general, and Yung in particular, would have taken this matter sufficiently seriously and prepared accordingly. However, the lack of preparation was manifest, which also does not bode well for a company that is attempting to convince this body that it has the acumen to operate in this marketplace. T1-75-23 to T1-76-20.

Yung's professed lack of understanding regarding Aztar's management contracts with TCR and Columbia Sussex also strains credulity. T2-55, 10-15. Those types of contracts are part of the business model that TCR and Columbia Sussex routinely use. T3-148, 2-20; T3-150, 11-14; T3-151, 9-21. If Yung does not understand their significance, then presumably he also would not understand the significance of any of his subsequent correspondence that the applicants have submitted to the regulators in support of the contention that the January agreements are inoperative in New Jersey. D-22.

Quite apart from the layoffs, TCR has had turnover in key senior

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7. This malady seems to have infected many of the applicants' witnesses.

management positions in the short 18 months or so since bidding for Aztar and undergoing the New Jersey regulatory process. For instance, on the eve of last year's ICA proceeding, TCR hired FitzPatrick as CFO, who had only started at Columbia Sussex in March 2006 without any appreciable prior experience in casino financial matters. After FitzPatrick's brief tenure, TCR hired as CFO John Jacob, who also had no demonstrable experience with casino financial matters. In a bizarre twist, Jacob left the company in the course of these proceedings, to be replaced as CFO by a long-time TCR and Columbia Sussex senior accounting official, Theodore Mitchel, for whom Columbia Sussex is seeking a replacement to become its chief accounting officer with responsibility for that company's treasury function.

Long-time senior casino operation officer Reinhardt left in June. Preston, his replacement, has not previously had any extensive experience in overseeing casino operations on a scale commensurate with that of TCR post-Aztar merger. Further, compliance officer Brian Doyle's experience is less than stellar.

At Tropicana, the prior general counsel was not retained post-merger, but instead a less experienced staff attorney was promoted to general counsel. Buro, whose post immediately prior to becoming Tropicana's COO was in marketing, has an extensive casino résumé, including a brief tenure running another Atlantic City operation, but Yung summarily dismissed him,

ostensibly because of the player development matter, but which the Commission concludes was a result of Buro's fealty to the regulatory process. Likewise, Lyons, with extensive law enforcement and casino security experience, was hired to head Tropicana's security department soon after the merger, only to be dismissed shortly following the Koehler episode.

Lyons' objection to further reductions in the security workforce cannot be deemed coincidental to his departure. In this respect, he suffered the same fate as Buro, whose growing opposition to staff reductions incurred the wrath of Yung and ultimately led to his termination.

These officer changes, in some of the most sensitive areas for regulatory purposes, inevitably raise questions about the ability of TCR and, through it, Tropicana, to make the necessary choices to assemble and retain a competent team to operate in the highly regulated Atlantic City casino environment. Having one or two of these types of changes in so brief a time might in other cases be attributed to happenstance. However, their collective weight in this case is but another reason to conclude that the applicants have failed to carry their burden for relicensure and plenary qualification.

After all the cost cutting, one would have expected Tropicana at least to be reaping some financial rewards. However, the Commission's own public records that it compiles on the Atlantic City casino industry unfortunately reflect that Tropicana's 2007 monthly casino revenues,

through as most recently November of this year, consistently have trailed those of its competitors, and by a significant margin compared to the industry average. Although the Philadelphia area slot operations and the Atlantic City partial ban on smoking have affected Tropicana, nothing in this record even remotely establishes that Tropicana is disproportionately suffering from those effects, so its precipitous decline necessarily must have a uniquely Tropicana cause. Consequently, the company is now scrambling to find ways to drive the "top number," such as by rehiring some of its player development representatives in the hopes of recapturing their customers. Although that may be a start, there is no assurance of success.

Moreover, early in the hearing Yung testified that TEL failed a covenant test under the Credit Suisse credit facility to trigger an event of default. T1-64-17 to T1-65-21. Although the testimony indicated that the company plans to negotiate for a more favorable covenant test, which it expects to achieve, the Commission has taken official notice of a recent company press release announcing that TEL was in the acceptable covenant range all along. While from a financial stability perspective that result may be positive, it was financially irresponsible to announce previously an event of default when none existed. Certainly, the Commission is not thereby suggesting that the mere restatement of financial results will always place an applicant in jeopardy under section 84a. Rather, it is the totality of the

circumstances in this case that dictates the outcome here.

The testimony makes clear that Yung's personal investment in Tropicana and Aztar, although recorded as a loan, is really an equity contribution. T4-93, 19-24. The companies structured the transaction as a loan, now valued at in excess of half a billion dollars, fully intending that by doing so they would avoid subjecting Columbia Sussex to the additional regulatory scrutiny it would have faced as a holding company. T4-94, 10-13. At a minimum, there is thus a demonstrated lack of financial integrity.

Although Columbia Sussex has been subjected to the qualification process, it is unknown whether the additional glare of holding company scrutiny would have revealed anything untoward, and it is unreasonable to expect that the regulatory agencies revisit that matter in the few short weeks remaining before the ICA expires. In that regard, Columbia Sussex, notwithstanding Resolution No. 06-11-02-02, Condition No. 10, was not subjected to the need to comply with *N.J.S.A. 5:12-82d(7 - 10)* and 85b(1), see, Resolution No. 06-11-02-02, Condition Nos. 12 and 13, and thus a component essential to the completion of the ICA application is lacking and provides an additional basis for the denial of the application for plenary qualification.

Thus far, this opinion has only briefly touched upon the issue of whether the Tropicana casino hotel is a first class facility. Whether that

should be an issue in this matter was hotly contested as a procedural issue during the pre-hearing phase of this case. Let there be no mistake or misunderstanding: the previously articulated reasons and their corresponding statutory or regulatory underpinnings set forth earlier in this opinion form a sufficient independent basis upon which to deny the applications for renewal and plenary qualification. The following brief discussion of the first class facility issue is only for purposes of completeness, given the attention that it has drawn.

Giannantonio's efforts to confine the "cleanliness crisis" to a few short weeks this past spring are belied by the record. Buro saw improvement by the time of his departure, but that was not until August. In the interim, Tropicana hosted at least one convention where the attendees through their representative have certainly raised serious questions about the suitability of the facility and the responsiveness of Tropicana's staff to their concerns. D-66. Moreover, the complaints from patrons that are in this record came only from the files of the player development office, and may represent just the proverbial "tip of the iceberg" when one considers that those customers are only a small part of Tropicana's overall client base. However, given the number of room nights that Tropicana has in inventory, the number of those complaints in the record does not seem disproportionate to what one might expect from an operation the size of Tropicana's. Beyond that

comparison, and to note that some of those complaints refer to incidents that allegedly occurred nearer in time to the start of these proceedings than would have been expected if the crisis were only confined to the spring, those complaints carry no additional weight. The individual patrons making them did not testify here and, simply put, the documents alone do not rise to the level that would support a finding in this matter.

As for the notion that the crisis was attributable to any one organized group within Tropicana's employ, again, the record does not sustain that conclusion. In particular, to the extent that Tropicana invites the Commission to conclude that union officials directed a certain union faction to engage in a job action that resulted in unclean public areas, no such conclusion is possible on this record given that concededly another faction of the same union took steps to assist Tropicana through the crisis.

Significantly, what must not be lost sight of is why there is a need for a first class facility, and the Legislature has made that plain: to help restore Atlantic City as a resort, tourist and convention destination, which directly ties to the unique role that the casino industry serves in the redevelopment of Atlantic City. Plainly, the adverse publicity that Tropicana has drawn highlights the need for every casino hotel to be ever vigilant in maintaining a facility that meets the statutory standard.

Undoubtedly, Tropicana did not meet the standard at some point

during the past year while under TCR's control. On this record, Giannantonio's testimony at least offers the prospect that Tropicana is presently a cleaner facility, but that hardly is sufficient to satisfy the Commission for purposes of section 84e and 83i. In any event, given the overall outcome in this matter, certainly the Commission will have the opportunity to monitor the situation closely in the near term.

#### B. Violation Complaint

As previously mentioned, the respondents do not contest liability as to Count I of the complaint. They offered limited opposition to the allegations contained in Count II. The record clearly supports a finding of liability under Count II, insofar as the mere existence of the Legal Services Agreement, executed in February 2007, undermines Silver's independence, as that term is defined for audit committee purposes. Accordingly, we find that the Division proved the allegations set forth in the audit committee complaint.

We now turn to the imposition of an appropriate penalty. In evaluating the penalty, we take cognizance of the factors enumerated in the Act at Section 130. In this case, obviously, the gravity of the violation is of paramount importance. With respect to Count I, relating to the failure to constitute an independent audit committee, the violation extended over a period of 168 days, from January 3 to June 20, 2007, when the

Commission first ruled on this matter. Pursuant to Section 123a of the Act, the Commission may deem this violation to be of a continuing nature, whereby the licensee may be fined on a per day basis. Certainly, the daily absence of the necessary reporting lines for surveillance and internal audit is but one justification for finding that the violation here was of a continuing nature.

Although section 123a authorizes the Commission to calculate a daily penalty in this case, it does not preclude the Commission, once the maximum penalty is discerned, from assessing the actual penalty based on a weekly or monthly computation, or some other period of time in excess of a day, so long as in doing so the Commission does not assess a penalty that exceeds the statutory maximum. Given the seriousness of the violations that have now been established as to Count I of the complaint, the penalty here should exceed the highest amount that the Commission has heretofore assessed as a penalty. Consequently, a penalty of \$720,000 for which the three respondents in Count I would be jointly and severally liable is appropriate. We reached this figure by allocating \$30,000 per week, for 24 weeks, for a total of \$720, 000 as to Count I.

As for Count II, which goes to Silver's lack of independence, a flat penalty of \$30,000 would be appropriate, bringing the total civil penalty to \$750,000.00.

**V. CONCLUSION**

In some respects, this has been the most difficult of cases because the Commission has had to apply its institutional regulatory expertise derived over the life of this agency to tell a long-time and otherwise apparently successful businessman that he lacks business ability. Although some may question whether the government should ever be making such a determination, the Legislature has unmistakably so charged the Commission, which cannot and will not shirk from that responsibility.

In other respects, the decision has not proven to be difficult at all, given the applicants' demonstrated failure to appreciate the workings of the Atlantic City casino marketplace. The applicants could have taken the time to educate themselves in what it takes to operate successfully here, or they could have hired and retained sufficient staff knowledgeable in those processes. They have done neither, and must bear the consequence. So too must their applications fail for lack of good character, honesty and integrity and contumacious defiance of the regulatory process.

Thus, the Commission cannot support the Division's recommendation for a one-year license, subject to the enumerated 26 license conditions. Unfortunately, the proposed conditions, however well intentioned, cannot dissipate the taint that permeates this record. In this regard, we emphasize

that it is a privilege and not a right to hold a casino license in this state. Perhaps if Yung had come to that realization at the outset, the record may have been entirely different.

Based on the entirety of the record in this matter, and consistent with the reasons previously expressed in this opinion, (a) the applications for renewal of Tropicana's casino and CHAB licenses and for plenary qualification of TCR be and are hereby DENIED and (b) there is hereby imposed a civil penalty of \$720,000.00 on Count I and \$30,000.00 on Count II of the Division's complaint that has been consolidated in this matter (Dkt. No. 07-0646-VC).

With this disposition, the remaining relief requested in PRN 2910708 as to the composition and charter of the proposed audit committee for Ramada NJ has been rendered moot. More importantly, the ICA trust has now become operative, and arrangements are being made to ensure an orderly transition to the trustee.

Among the first order of business is to obtain the resignation of Yung as the sole member of Tropicana's board of directors. Until he does so or is removed by the trustee as the owner of Tropicana's equity securities, Yung shall be barred from invoking or exercising any privileges or rights attendant thereto.

Further, by having invoked the provisions of the Administrative

Procedures Act to prevent the lapse of Tropicana's casino and CHAB licenses, and now having denied those renewal applications, it is necessary to summarily institute a conservatorship in order for the casino to remain in continuous operation pursuant to the existing operation certificate, and to ensure that all prerogatives attendant to the former CHAB license remain in place. Plainly, time has not allowed for the appointment of a specific conservator at this juncture. In the brief interim, the trustee, in cooperation with the Chair (or her designee), who is delegated all authority

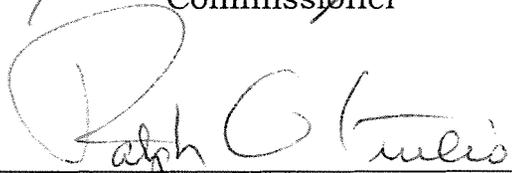
necessary to effect an orderly transaction, shall be empowered to act in the matter.

**IT IS SO ORDERED** on this 12<sup>th</sup> day of December 2007.

NEW JERSEY CASINO CONTROL COMMISSION

By:   
Linda M. Kassekert  
Chair

By:   
Michael C. Epps  
Commissioner

By:   
Ralph G. Frulio  
Commissioner

By:   
William T. Sommeling  
Commissioner

By: Michael A. Fedorko  
Michael A. Fedorko  
Commissioner

Dissenting, except as to Disposition of the Violation  
Complaint and Imposition of Penalty