UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Eldorado Resorts and Caesars Entertainment
Commission File No. 191-0158
June 26, 2020

Summary

- The Commission should not agree to merger settlements unless divestitures are completed promptly to a qualified buyer ready and willing to compete on day one.
- It is risky and makes little sense to propose a complex settlement with a prolonged divestiture period and unorthodox terms to justify a merger that has no meaningful benefits, particularly given the financial uncertainties stemming from the COVID-19 crisis.
- I am concerned that the Commission's standard process for vetting divestiture buyers minimizes or ignores major financial red flags. We should revamp our approach.

Caesars Entertainment (NASDAQ: CZR) is selling itself to one of its smaller competitors, Eldorado Resorts (NASDAQ: ERI). The transaction has no noteworthy benefits to customers, workers, suppliers, or competition. If anything, the transaction is risky for everyone involved.

The enormous amount of debt financing could materially increase the likelihood of financial distress of the combined casino conglomerate, and rating agencies have already started to downgrade Eldorado's debt.[1] Given the major financial uncertainties looming over the gaming industry stemming from the pandemic, as well as the industry's past experiences with leveraged buyouts, the proposed transaction might make conditions even more fragile and precarious.

The agreement is subject to review by state gaming regulators and the Federal Trade Commission. In comparison to state regulators, who must weigh a number of public interest factors, the Federal Trade Commission's mandate is more specific: to determine whether the transaction violates U.S. antitrust laws. Based on the Commission's investigation, I agree that the transaction is illegal and I support the complaint.

However, I have serious reservations about the terms of the settlement. As a policy matter, I disagree that the Commission should enter into risky, complicated settlements with delayed divestitures – like the resolution proposed here.

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[1] *See e.g., Moody's downgrades Eldorado Resorts CFR to B2, rates new debt for Caesars acquisition; outlook*, MOODY'S INVESTOR SERVICE (June 17, 2020), https://www.moodys.com/research/Moodys-downgrades-Eldorado-Resorts-CFR-to-B2-rates-new-debt--PR_426702?cid=7QFRKQSZE021.

The Proposed Buyer Will Not Immediately Restore Competitive Intensity

To remedy an illegal transaction, the FTC should only agree to settlements when divestitures will quickly restore the competitive intensity killed off from a merger. It is not enough to have some of the competition restored; it must be fully restored. A new competitor should be able to step in on day one to compete.

For example, in 2015, the FTC prevailed in its challenge of the merger of Sysco and US Foods, the nation's two largest food distributors, when divestitures could not cure the harmful merger on "day one." The companies proposed to divest a lengthy list of US Foods' assets to an entity controlled by the Blackstone Group. The FTC argued this was insufficient, and the court agreed that the new competitor could not replicate the same level of competitive intensity of US Foods.[2]

The Commission's proposed remedy will definitely not cure this harmful casino merger on day one. Under the terms of the Commission's proposed settlement, Eldorado is required to divest one property in Nevada and another in Louisiana to Twin River Worldwide Holdings (NYSE: TRWH) – but after a prolonged period of time.[3] Allowing a lengthy divestiture only compounds the problems with this settlement, as it necessitates the addition of other risky settlement provisions.

To mitigate the anticompetitive harm from the prolonged divestiture schedule, the FTC's proposed settlement sets up a complex arrangement where some casinos will be operated separately by Commission-appointed casino property managers until a buyer is ready to take over the assets. I do not believe that the Commission should be in the business of appointing casino property managers here.[4]

The Commission will also appoint a monitor. It is particularly unclear how the Commission and the appointed monitor can remove or discipline the casino property managers. In addition, the casino property managers will operate under a similar compensation and bonus plan as provided by the prior owner, which could easily lead to anticompetitive distortions. The anticompetitive harms could grow if Twin River is rejected as a suitable buyer by state regulators.

There may be rare circumstances where unusual settlement terms are warranted, but this isn't one of them. The proposed remedy is also a gamble on several other fronts.

First, the Commission's due diligence on Twin River did not adequately analyze the role of new investors exerting enormous control. The FTC must always consider the incentives and plans for those in control of a divestiture buyer. Sometimes, new investors can help a stagnant company change strategic direction. But too often, new investors find ways to buy, strip, and flip, rather

[2] *Fed. Trade Comm'n v. Sysco Corp*., 113 F. Supp. 3d 1, 73 (D.D.C. 2015).
[3] The divestitures must be complete by the earlier of 12 months from the closing of the merger or within 30 days of state regulatory approval. In theory, the divestitures may be completed before 12 months. However, past experience suggests that the approval process requires significant due diligence over an extended period of time.
[4] If the state gaming regulators had already approved the transaction (as well as the corresponding divestitures) and selected casino property managers, this would raise fewer concerns.

than create a strong, long-term competitor. This is particularly true for certain private equity and hedge fund investors, so careful due diligence is critical.

In 2019, a Wall Street hedge fund, Standard General, accumulated a major ownership stake in Twin River. Standard General now has significant control over the company and is, by far, its largest shareholder. Its stake is roughly equivalent to the maximum amount allowable under state law.[5] Another hedge fund, HG Vora, has also emerged as a major holder of Twin River.[6] Standard General and similar funds often seek to accumulate board seats to implement their desired investment strategy. Indeed, just a few months ago, Twin River's longtime chairman "reluctantly" stepped down and was replaced by Standard General's managing partner, Soohyung Kim.[7]

By approving Twin River as the divestiture buyer, I am concerned that the Commission is relying on Twin River's past track record, rather than analyzing how changes in ownership and control of the company will impact their future business strategy.

Second, buyers of divested assets need to prioritize competing on day one, but they cannot if other high-priority mergers and acquisitions distract them. In this matter, Twin River is in the midst of a string of other takeovers.

In 2019, it completed an acquisition of Dover Downs Hotel and Casino in Delaware,[8] and then in January of this year, Twin River acquired three casinos in Colorado.[9] Several other acquisitions are pending: in the last twelve months, it has inked deals to purchase casinos in Missouri and Mississippi.[10] Outside of this settlement, it has also struck a deal to purchase Bally's, its first

[5] In a recent Schedule 13D securities filing, Standard General revealed that it was managing its holdings of Twin River, given Twin River's share repurchase plan that could lead to Standard General violating the Rhode Island casino ownership cap of 39%. *See* Twin River Worldwide Holdings, Inc., Amendment No. 6 to Schedule 13D at 4 (Feb. 20, 2020).

[6] Recent securities filings reveal significant ownership of Twin River by HG Vora Capital Management. *See* HG Vora Capital Management, LLC, Form 13F Information Table (Form 13F) (Aug. 8, 2019). Standard General and HG Vora are currently on the same side of a major battle in another public company. *See* Svea Herbst-Bayliss, *EXCLUSIVE-Hedge fund HG Vora wants Tegna to consider a sale or merger –sources*, REUTERS (Jan. 21, 2020), https://www.reuters.com/article/tegna-hgvora/exclusive-hedge-fund-hg-vora-wants-tegna-to-consider-a-sale-or-merger-sources-idUKL1N29Q0KT.

[7] Ted Nesi, *John Taylor out at Twin River*, 12 WPRI.COM (Dec. 9, 2019), https://www.wpri.com/business-news/john-taylor-out-at-twin-river/.

[8] Press Release, Twin River Worldwide Holdings, Inc., Dover Downs Stockholders Approve Merger with Twin River; Merger Set to Close on March 28, 2019 (Mar. 26, 2019), https://investors.twinriverwwholdings.com/news/news-details/2019/Dover-Downs-Stockholders-Approve-Merger-with-Twin-River-Merger-Set-to-Close-on-March-28-2019/default.aspx.

[9] Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings Completes Acquisition of Three Colorado Casinos (Jan. 24, 2020), https://investors.twinriverwwholdings.com/news/news-details/2020/Twin-River-Worldwide-Holdings-Completes-Acquisition-of-Three-Colorado-Casinos/default.aspx.

[10] Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings Signs Definitive Agreement To Acquire Two Casinos From Eldorado Resorts (July 11, 2019), https://investors.twinriverwwholdings.com/news/news-details/2019/Twin-River-Worldwide-Holdings-Signs-Definitive-Agreement-To-Acquire-Two-Casinos-From-Eldorado-Resorts/default.aspx.

foray into the large Atlantic City market.[11] These acquisitions will require significant management attention, and I did not find any compelling evidence that Twin River will prioritize the divested assets to fully restore competitive intensity in the markets that the Commission believes would suffer from killed-off competition.

Finally, the Commission should avoid acting without the benefit of a full review by the state gaming regulators. State regulatory agencies have unique insights and expertise into the industries they regulate; their findings inform the issues the Commission takes into consideration, and not just relating to the appointment of casino managers. Some states have a specific mandate to look at the ownership and financial conditions of the transacting firms, and we would benefit from that expertise. Their analysis is particularly important during this period of uncertainty, as the industry is roiling from closures due to the current COVID-19 pandemic. It is important that we consider all of the information and work across government bodies to protect competition. While the Commission does work with some of these authorities, I am not convinced that acting before state regulators have completed their analysis is the right approach.

Conclusion

The proposed resolution in this transaction offers a unique window into the assumptions and philosophy of the Federal Trade Commission. The merger is clearly anticompetitive in the markets where the Commission alleged a violation, and offers no meaningful benefits to the public. Since the Commission would not need to go to trial to block the transaction because the state regulators have yet to act, there is no immediate concern about limiting FTC resources or weighing the litigation risk. Given these facts, why would the Commission put the public at risk with delayed divestitures to a questionable buyer that has no guarantee of obtaining a license?

I am concerned that the Commission is rolling the dice with this complex settlement that will clearly not lead to an immediate restoration of lost competition. It is also clear that we must revamp our approach when it comes to vetting proposed divestiture buyers, particularly when a new financial investor is in charge in the boardroom.

Our state partners will obviously need to scrutinize the financial aspects of the proposed transaction between Caesars and Eldorado, given the harms inflicted on the public and regional economies from past leveraged buyouts – and resulting bankruptcies – in the industry.[12] They will also need to carefully assess whether the restoration of competition will come too late, and whether Twin River can guarantee that it will actually accomplish this goal. The stakes are high right now. For these reasons, I dissent.

[11] Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings to Acquire Three Casinos from Eldorado and Caesars (Apr. 24, 2020), https://investors.twinriverwwholdings.com/news/news-details/2020/Twin-River-Worldwide-Holdings-to-Acquire-Three-Casinos-from-Eldorado-and-Caesars/default.aspx.

[12] *See, e.g.*, Sujeet Indap, *What happens in Vegas...the messy bankruptcy of Caesars Entertainment*, THE FIN. TIMES (Sept. 16, 2017), https://www.ft.com/content/a0ed27c6-a2d4-11e7-b797-b61809486fe2.