

PAGE PROOF
REDACTED VERSION

04-6685-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C.,
MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY
DEVELOPMENT COMPANY, L.L.C.,

Plaintiffs-Appellants,

v.

PARK PLACE ENTERTAINMENT CORPORATION,

Defendant-Appellee,

ST. REGIS MOHAWK TRIBE,

Movant.

*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The three original plaintiffs—Catskill Development, LLC (“Catskill”), Mohawk Management, LLC (“Mohawk Management”), and Monticello Raceway Development Company, LLC (“Monticello”)—consolidated their assets in 2004 into the publicly-traded Empire Resorts, Inc. (“Empire”; formerly, Alpha Hospitality, Inc.). As part of the transaction, these plaintiffs assigned the entirety of their interests in this litigation to plaintiff Catskill Litigation Trust (“Trust”), which was added as a plaintiff by order of the district court dated March 1, 2004. Special Appendix (“SPA”) __.

The Trust states that it is not publicly traded and has no parent corporation; nor does any publicly-traded corporation hold 10% or more of the ownership units in the Trust.

Catskill states that it is not publicly traded and has no parent corporation; nor does any publicly-traded corporation own 10% or more of its membership interests.

Mohawk Management and Monticello state that they are entirely owned by Empire, which, as noted, is a publicly-traded corporation.

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PRELIMINARY STATEMENT

Plaintiffs appeal from a November 2004 judgment of the United States District Court for the Southern District of New York (McMahon, J.), 345 F.Supp.2d 360 (2004) (*Catskill V*) (SPA- ___), which reinstated an August 2002 judgment in favor of defendant Park Place Entertainment Corporation (“PPE”), which judgment had been vacated under Federal Rule of Civil Procedure (“FRCP”) 60(b)(3). 286 F.Supp.2d 309 (2003) (*Catskill IV*) (SPA-___).

The August 2002 judgment had dismissed plaintiffs’ claim for interference with contractual relations and granted PPE summary judgment on plaintiffs’ claim for interference with business relations. 217 F.Supp.2d 423 (2002) (*Catskill III*) (SPA-61); see also 144 F.Supp.2d 215 (2001) (*Catskill I*) (SPA-1); 154 F.Supp.2d 696 (2001) (*Catskill II*) (SPA-28).

JURISDICTION

Catskill, Mohawk Management, and Monticello invoked diversity jurisdiction under 28 U.S.C. § 1332, alleging that each was organized in and maintained a principal place of business in New York, whereas defendant PPE was a Delaware corporation with its principal place of business in New Jersey. JA 394-95. Plaintiffs’ Jurisdictional Statement on their previous appeal (from the district court’s August 2002 judgment, No. 02-9139) reiterated this jurisdictional basis, which was undisputed by PPE.

In reviewing the question of jurisdiction for the current appeal, we became aware of *Handelsman v. Bedford Village Associates Limited Partnership*, 213 F.3d 48 (2d Cir. 2000), which holds that “for purposes of diversity jurisdiction, a limited liability company has the citizenship of its membership.” *Id.* at 51-52. This rule renders the allegations in plaintiffs’ complaint inadequate to establish diversity jurisdiction.

Nevertheless, jurisdiction is not necessarily absent (or, if initially absent, can be salvaged by this Court at this stage). Indeed, this is a case where jurisdiction should, if possible, be preserved because “dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants wanting for judicial attention.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989).

First, although the original complaint lacks any allegations regarding the citizenship of the plaintiffs’ members, one of the plaintiffs—Monticello—indeed has only members diverse from PPE. (We respectfully request leave to amend our complaint under 28 U.S.C. § 1653 to allege such facts. See *Newman-Green*, 490 U.S. at 832 (Section 1653 allows an appellant to remedy defective jurisdictional allegations on appeal); *Advani Enters., Inc. v. Underwriters at Lloyd’s*, 140 F.3d 157, 160 & n.2 (2d Cir. 1998) (granting such request made in appellant’s brief).) Jurisdiction under

28 U.S.C. § 1367 may be recognized over the two non-diverse plaintiffs, Catskill and Mohawk Management; they could be deemed to have joined as plaintiffs under FRCP 20(a) because they assert rights to relief arising “out of the same transaction, occurrence, or series of transactions or occurrences” and present “questions of law or fact common to all these persons,” but are not indispensable parties. See *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996) (recognizing Section 1367 jurisdiction over claims of plaintiffs joined under FRCP 20(a) who do not meet amount-in-controversy requirement; stating that same principle would govern diversity requirement). A contrary conclusion was reached by the First and Third Circuits. *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 137 (1st Cir. 2004); *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 216 (3d Cir. 1999). This Court has noted the conflict but declined to weigh in. *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 297 n.9 (2d Cir. 2000). The issue is now before the Supreme Court in *Rosario Ortega* (No. 04-79; argued March 1, 2005).¹

Alternatively, we respectfully submit that *Handelsman* was wrongly decided and should be overruled: an LLC should be treated like a corporation in determining citizenship under Section 1332. *Handelsman* failed to address the features of an LLC that make it similar to a corporation: the members’ lack of liability for the entity’s debts

^{1/} The citizenship of the Trust, added as a plaintiff in 2004, is immaterial. *Freeport-McMoRAN, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991).

and the entity's direct interest in litigation. See Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. Small & Emerging Bus. L. 435, 465-66 (2001) (also listing characteristics that make an LLC unlike a limited partnership).

Failing those bases for jurisdiction, we note the Court's power to retain jurisdiction by dismissing the non-diverse plaintiffs, Catskill and Mohawk Management, pursuant to FRCP 21. *Newman-Green*, 490 U.S. at 837 ("courts of appeals have the authority to dismiss a dispensable nondiverse party [under FRCP 21]"); *LeBlanc v. Cleveland*, 248 F.3d 95, 98 (2d Cir. 2001) (dismissing non-diverse plaintiff pursuant to FRCP 21 and *Newman-Green*). Such dismissal "relates back" to the original filing of the complaint. *LeBlanc*, 248 F.3d at 99-100.

ISSUES PRESENTED

Plaintiffs entered into a series of contracts with the St. Regis Mohawk Nation ("Mohawks") to construct and manage a casino at a site adjoining the Monticello Raceway in the Catskills resort area. When, after years of effort and millions of dollars of expense by plaintiffs, a key governmental approval was obtained and prospects for the Project were substantially enhanced, PPE, the largest casino operator in the world and owner of Atlantic City casinos whose business would be threatened by Catskills casinos, induced the Mohawks to breach their contracts with plaintiffs and enter into

an exclusive relationship with PPE. The rejection of plaintiffs' suit for tortious interference with their contractual and business relations with the Mohawks raises the following issues:

1. Whether PPE could freely interfere with the contracts on the ground that they were void under federal law prior to the grant of required regulatory approvals:
 - a. Whether the voiding provisions in federal law apply prior to the existence of "Indian lands," which here could not exist until the contemplated casino site was taken into trust by the United States for the benefit of the Mohawks.
 - b. Whether any federal voiding provisions apply to the precursory obligation to submit applications for regulatory approval.
 - c. Whether the National Indian Gaming Commission ("NIGC") had power to promulgate the regulation relied on below as voiding the contracts.
 - d. Whether the regulation, if valid, applies only to the casino management contract and not the land-purchase or site-development contracts.
 - e. Whether a contract that is "void" only because it has not yet received federal regulatory approval is nevertheless protected by New York law against interference.
2. Whether summary judgment on the business-relations-interference count was properly granted on the grounds that plaintiffs would be unable to

prove (a) PPE's use of "wrongful means" to induce the Mohawks to terminate their relationship with plaintiffs or (b) that the interference with that relationship caused plaintiffs injury.

3. Whether the district court erred in summarily denying sanctions for PPE's (a) repeated non-production of crucial evidence that fell within the scope of plaintiffs' discovery requests; and (b) engineering the delay of a key witness's deposition and exploiting that delay to buy that witness's cooperation.

STATEMENT OF THE CASE

Plaintiffs brought this action to recover for harms suffered when defendant PPE, the world's largest casino company, induced tribal officials to terminate the Mohawks' contractual and business relationships with plaintiffs. PPE's interference deprived plaintiffs of extremely valuable contractual rights to develop and manage a Catskills casino, snatching away the fruits of six years of arduous effort and over ten million dollars plaintiffs had invested in the Project. JA 392-93.

Plaintiffs asserted causes of action under New York law for interference with contractual relations (Count I) and business relations (Count II). The district court dismissed Count I but denied dismissal as to Count II. Eventually, after some intervening changes of mind on Count I, the court in August 2002 adhered to its dismissal of that count and also granted PPE summary judgment on Count II.

Plaintiffs appealed. In January 2003, with briefing of the appeal nearly complete, plaintiffs fortuitously learned of six audiotapes containing telephonic conversations supportive of plaintiffs' position, which had not been produced by PPE during discovery though within the scope of plaintiffs' requests. Plaintiffs moved in the district court for relief under FRCP 60(b), and that court requested a remand, which this Court ordered.

On remand, the court temporarily granted the motion, ruling that PPE's failure to produce the tapes constituted "other misconduct" under FRCP 60(b)(3). (The court, however, summarily denied plaintiffs' motion for sanctions.) The court directed the parties to conduct highly expedited and narrowly limited discovery regarding two theories of wrongful means (an element of business-relations-interference). Thereafter, it ruled that plaintiffs had failed, even with the benefit of the tapes and additional discovery, to create a jury-submissible issue regarding whether PPE employed wrongful means in inducing the Mohawks to abandon plaintiffs. The court therefore reinstated its August 2002 judgment.

STATEMENT OF FACTS²

A. Regulatory Framework.

Plaintiffs' contracts with the Mohawks relating to the casino Project, and the district court's ruling denying them protection against third-party interference, cannot be understood without some background regarding the federal regime governing gaming on Indian lands.

^{2/} Because Count I was dismissed under Rule 12(b)(6), plaintiffs' allegations relating thereto must be accepted as true. *Tassy v. Brunswick Hosp. Ctr.*, 296 F.3d 65, 67 (2d Cir. 2002). The grant of summary judgment for PPE on Count II is reviewed taking the evidence in the light most favorable to plaintiffs. *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 253 (2d Cir. 2002).

1. 25 U.S.C. § 81: Federal Law’s General Safeguard Against Unwise Contracts Relating To Indian Lands.

Enacted in 1872, during an era when “extensive government supervisory power over the everyday life of Indians was essentially unchecked” (F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 143 (1982)), the statute now codified at 25 U.S.C. § 81 remained materially unchanged until amended in 2000.³ Prior to that amendment, Section 81 provided:

No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value * * * in consideration of services for said Indians relative to their lands * * * unless such contract or agreement * * * bear[s] the approval of the Secretary of the Interior * * * .

* * *

All contracts or agreements made in violation of this section shall be null and void * * * .

Congress sought by Section 81 “to protect the Indians from improvident and unconscionable contracts.” *In re Sanborn*, 148 U.S. 222, 227 (1893).

2. Indian Gaming Prior to IGRA.

The unique privilege of Indian tribes to conduct gaming on their lands essentially free from state regulation derives from the principle that tribes retain a measure of sovereignty “dependent on, and subordinate to, only the Federal Government, not the

^{3/} We discuss the 2000 amendment in Argument Point I.C, *infra*.

States.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (internal quotes omitted).

Although Congress has long regulated the sovereignty of Indian tribes in other areas, it first did so with respect to Indian gaming in 1988, when it enacted the Indian Gaming Regulatory Act (“IGRA”). See S. Rep. 100–446, at 3 (1988). Previously, protection of the tribes from ill-conceived contracts with non-Indian gaming management entities had been left to Section 81. *Cabazon*, 480 U.S. at 218 (Secretary had “authority to review tribal bingo management contracts under [§ 81]”); S. Rep. 106–150, at 7 (1999) (discussing pre-IGRA case law).

3. IGRA.

Congress sought through IGRA to provide a comprehensive regulatory regime for gaming on Indian lands, overseen by a new, independent agency, the NIGC. 25 U.S.C. §§ 2704-2708 (describing NIGC’s powers and functions).

IGRA divides Indian gaming into three categories: class I includes traditional forms of gaming engaged in during tribal ceremonies; class II is comprised essentially of bingo games; and class III includes all other forms of gaming, including casino “standards” such as roulette, blackjack, and slot machines. § 2703(6)-(8).

To conduct gaming, a tribe must satisfy numerous prerequisites. At the threshold, the gaming must take place “on Indian lands * * * located within a State that

permits such gaming for any purpose by any person, organization or entity * * *.”

§ 2710(b)(1)(A). The tribe must adopt and the NIGC must approve an ordinance regulating the proposed gaming. § 2710(b)(1)(B).

The first prerequisite, that the gaming take place “on Indian lands,” warrants elaboration. IGRA defines “Indian lands” as:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is * * * held in trust by the United States for the benefit of any Indian tribe * * *.

§ 2703(4). IGRA generally prohibits gaming on lands that became Indian lands subsequent to IGRA’s enactment in October 1988, unless the Secretary of Interior determines that it “would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community,” and the Governor of the relevant State “concur[s].” § 2719(b)(1)(A).

Class III gaming is subject to an additional requirement: the gaming must be “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [§ 2710(d)(3)].” § 2710(d)(1)(C). The compact covers such matters as application of the State’s criminal and civil laws and payments to defray State regulatory costs. § 2710(d)(3)(C).⁴

^{4/} If tribe and State fail to agree on a compact, the Secretary may prescribe compromise procedures. 25 CFR part 291. In any event, the compacts are subject to Secretarial approval, which must be given unless they violate federal law or the

4. IGRA and Gaming Management Contracts.

IGRA also regulates retention of non-Indian entities to manage gaming operations. As already noted, while prior to IGRA the Secretary relied on Section 81 to regulate such contracts under Section 81, IGRA transferred the approval authority from the Secretary to the NIGC Chairman, §§ 2711(h), 2705(a)(4), and provided detailed standards to guide the exercise thereof, § 2711.

Again, IGRA's treatment of class II and class III diverged somewhat. IGRA sets forth the standards that a class II management contract must meet, and the process governing the Chairman's review. § 2711(a)-(i). Class III management contracts, however, are subject only to "the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 * * *." § 2710(d)(9). Thus, for example, subsection (a) of Section 2711, requiring submission of certain background information on owners of the management entity and defining "management contract" to include "all collateral agreements to such contract," does not apply by statute to review and approval of class III management contracts.

NIGC has implemented IGRA's provisions on management contracts through a series of essentially descriptive regulations. 25 CFR § 502.15 defines "management contract" as "any contract, subcontract, or collateral agreement between an Indian tribe

government's trust obligations. § 2710(d)(8)(A)-(B).

and a contractor * * * if such contract or agreement provides for the management of all or part of a gaming operation.” Other regulations set forth what must (and may not) be included in a management contract submitted for review (§§ 531.1-531.2), the procedures governing submission (§§ 533.2-533.5), and the standards governing the decision to approve or disapprove (§ 533.6). Finally, § 533.7 resembles Section 81, providing that management contracts “that have not been approved by * * * the Chairman * * * are void.”

B. The Rise and Fall of Plaintiffs’ Relationship With The Mohawks.

1. Origins.

In 1993, the Mohawks became one of only two Indian tribes successfully to negotiate a Class III compact in New York. The compact enabled them to open a small casino in 1996 on their Akwesasne Reservation. JA 398, 410.

During this period, several Sullivan County businessmen explored bringing Indian gaming to the Catskills to revitalize that once-flourishing region. They approached Alpha Hospitality, Inc. (“Alpha”),⁵ which had business relations with the Mohawks. Negotiations were commenced looking toward obtaining governmental approvals for a class III casino and planning the development and management thereof. JA 399.

^{5/} Alpha subsequently changed its name to Empire Resorts, Inc. and remains a publicly traded company.

This coalition then formed the three original plaintiffs to accomplish distinct aspects of the Project:

- **Catskill** would acquire land for the casino site and obtain approval to transfer the land to the United States in trust for the Mohawks for off-reservation gaming, and act for the other plaintiffs in obtaining all necessary government approvals for constructing and operating the casino. JA 400-01.
- **Monticello** would undertake the design and construction of the casino and would help the Mohawks obtain financing. *Ibid.*
- **Mohawk Management** would manage the casino. JA 400.

2. Plaintiffs' Contracts with the Mohawks.

Each plaintiff negotiated a separate contract with the Mohawks covering its role. Thus, Catskill—after itself acquiring title to the Monticello Raceway and surrounding property for \$10,000,000—negotiated a “Land Purchase Agreement” (“LPA”)⁶; Mohawk Management negotiated a “Gaming Facility Management Agreement” (“MA”), and Monticello negotiated a “Gaming Facility Development And Construction Agreement” (“DCA”).

^{6/} Catskill’s counterparty on the LPA was actually St. Regis Mohawk Gaming Authority, a Mohawk-affiliated entity. We refer to both as the “Mohawks.”

a. LPA.

The LPA provided for transfer of 29.31 acres from Catskill to the United States in trust for the Mohawks. Recognizing the need for governmental approvals, the LPA imposed the following obligations on the Mohawks:

Section 8.01 BIA Filing. The [Mohawks] shall use [their] reasonable best efforts to cause this Agreement together with any other documents necessary to effectuate the Transfer to be filed with the B.I.A. [⁷]

Section 8.02 BIA Approval. The [Mohawks] shall * * * cooperate with [Catskill] and any of its Affiliates and use their reasonable best efforts in good faith to assist in obtaining the approval of the B.I.A. of the Trust Conveyance and any other documents or transactions related thereto.

JA 446. Because the LPA conditioned the transfer on regulatory approval of the DCA and MA, see §§ 9.02(g), 9.03(f), 10.1(a)-(b), 10.02 (JA 447-48), the best-efforts obligation under LPA §§ 8.01 and 8.02 extended to the process of seeking approval of the DCA and MA.

b. DCA.

The DCA covered such matters as design and construction budgets, selection of architects and contractors, and Monticello's fee. These provisions would become effective only upon receipt of the required regulatory approvals; but the DCA also

^{7/} BIA (Bureau of Indian Affairs) is Interior's unit responsible for most non-gaming (and some gaming) matters relating to Indian tribes. Our references to BIA and Interior are interchangeable.

obligated the parties “to cooperate and to use their best efforts to satisfy [this] condition at the earliest possible date.” JA 602.

c. MA.

The MA detailed the duties and responsibilities of Mohawk Management, the fees for its management services, grounds for termination, and numerous other matters. Like the DCA’s main provisions, these provisions would not become operative until the “Effective Date,” JA 519, defined as follows (JA 515):

“Effective Date” shall mean the date on which written approval of this Agreement is granted by the Chairman of the NIGC. The parties agree to cooperate and to use their best efforts to satisfy the above condition at the earliest possible date.

3. Seeking Regulatory Approvals.

Consistent with these contracts, Catskill embarked upon the long, costly, and complex road to obtaining local, state, and federal approvals. In August 1996, Catskill applied to BIA to place the 29.31-acre casino tract in trust pursuant to 25 CFR part 151 and to approve the land for Class III gaming pursuant to 25 U.S.C. § 2719(b)(1)(A). The application, which took approximately a year to prepare, was extremely detailed—documenting everything from environmental and socio-economic issues to the countless meetings Catskill had already held with local, state, and federal officials. It attached the three agreements. JA 401-02. Plaintiffs made a simultaneous submission to NIGC. JA 403-04.

BIA then spent 3½ years reviewing and processing the application, finally approving it on April 6, 2000. Highlights of this review included: (1) conflicting recommendations of BIA's Acting Area Director and its Deputy Commissioner; (2) a visit by BIA and NIGC officials to the site; (3) renewal of the Acting Area Director's favorable recommendation; (4) a letter from the Mohawks to Senator Inouye, Vice-Chairman of the Senate Indian Affairs Committee, requesting his assistance in urging Interior to complete its review favorably; and (5) numerous conference calls and contract revisions to address Interior's concerns. JA 402-03, 405-06.

Interior's approval finally arrived by letter dated April 6, 2000, from Assistant Secretary Kevin Gover to Governor Pataki notifying the Governor that the application had been approved and requesting his concurrence. JA 407.

Meanwhile, Governor Pataki had strongly indicated likely concurrence. On March 14, 2000, his advisor on Indian casino issues stated: "The Governor has expressed his strong support for a casino in the Catskills and I am confident that when the St. Regis Mohawks have obtained federal permission, the Governor will respond expeditiously." The next day, Governor Pataki himself was quoted as having stated that "[w]hether in the Catskills or in western New York, we must be in the best position to move forward if the federal government gives the go ahead." JA 406.⁸

^{8/} Plaintiffs also obtained needed local and state approvals. Most notably, plaintiffs guided the Project through the State Environmental Quality Review Act process, an

4. PPE Induces the Mohawks To Abandon Their Contracts With Plaintiffs.

Before the Governor could formally concur or NIGC could approve the MA, PPE induced the Mohawks to renounce their agreements with plaintiffs and instead commit themselves exclusively to PPE.

PPE was created in 1998 as successor-in-interest to the Hilton and Bally casino operations and in 1999 acquired Caesar's, becoming the world's largest gaming company and the largest operator in Atlantic City. As of May 2000, PPE's three Atlantic City casino properties generated approximately one-third of the company's cash flow. JA 408.

PPE's Atlantic City profitability depended vitally on attracting customers from the New York City area. JA 397. A Catskills casino, being much closer to New York City, posed a substantial threat to PPE's Atlantic City casinos. JA 402. To respond to this threat, which became far more immediate upon Interior's approval of the LPA and Governor Pataki's expression of his views, PPE engaged in a concerted effort to defeat the Project. JA 393. A centerpiece of this effort was inducing the Mohawks to abandon their contracts with plaintiffs in favor of PPE.

expensive undertaking involving submission of numerous environmental impact studies. JA 401-02. The Project also procured support in Sullivan County and endorsements by political figures such as Senators Inouye and Schumer, then-Senate candidate Clinton, and then-Mayor Giuliani. JA 407.

In August 1999, PPE Executives Arthur Goldberg and Clive Cummis were introduced to Gary Melius, a real estate developer with connections to the Mohawks, and Ivan Kaufman, whose company ran the Mohawks' Akwesasne casino; Kaufman in turn introduced Goldberg and Cummis to the Mohawks. JA 410-11. The complaint alleged that PPE gained this introduction by making false promises to Melius and Kaufman, and then, through numerous other wrongful acts (described in Argument Point II.A, *infra*, including a promise that switching to PPE would cause no delay), PPE induced the Mohawks to breach their contracts with plaintiffs and sign an exclusive with PPE.

In an agreement executed April 14, 2000, the Mohawks agreed to abandon plaintiffs and the Project in consideration for \$3,000,000 cash and PPE's promises to indemnify the Mohawks against litigation by plaintiffs and obtain swift regulatory approvals. JA 416. PPE and the Mohawks further agreed on contracts like those between plaintiffs and the Mohawks. JA 416.

C. Plaintiffs' Lawsuit.

1. As described above, plaintiffs sued PPE asserting, as relevant to this appeal, New York law claims for interference with contractual relations (Count I) and business relations (Count II).

2. The district court issued a decision (*Catskill I*) granting PPE's motion to dismiss as to Count I but not Count II. SPA-1, 21, 25. In dismissing Count I, the court read IGRA to deem void any gaming management contract or contract collateral thereto not yet approved by NIGC. Since plaintiffs' contracts had not yet been approved, the court concluded that each was void and therefore unprotected by New York law against third-party interference.

As to Count II, the court ruled that the claim did not require the existence of a valid contract.

3. Plaintiffs sought reconsideration of the dismissal of Count I, arguing that, in the context of Class III gaming, contracts *collateral* to a gaming management contract—as distinguished from the management contract itself—are not subject to regulatory approval or “void” pending such approval. The court agreed and accordingly issued a decision (*Catskill II*) reinstating the count as applied to the LPA, which the court concluded was the only non-management contract. SPA-28, 38.

4. However, upon PPE's untimely motion for reconsideration, the court in August 2002 issued a decision (*Catskill III*) reversing itself yet again. SPA-61, 71. Although neither party had briefed the point, the court reasoned that, while IGRA itself subjects collateral contracts to NIGC approval/disapproval only for Class II and not Class III gaming, NIGC's regulations, namely 25 CFR §§ 533.1, 533.7, and 502.5,

required approval of Class III collateral contracts and declared such contracts void until approved. Accordingly, the court held that the LPA—an unapproved collateral Class III contract—was also void.

In that same opinion, the court granted PPE summary judgment on the business-relations-interference count. SPA-84. It held that plaintiffs had failed to establish genuine issues of fact that (1) PPE used “wrongful means” to induce the Mohawks to terminate their relationship with plaintiffs and (2) the contracts would have been approved but for PPE’s actions.

5. Plaintiffs appealed (No. 02-9139). While the appeal was pending, plaintiffs fortuitously learned of six audiotapes containing telephonic conversations (many involving PPE’s Clive Cummis) that support plaintiffs’ wrongful means contention. Specifically, plaintiffs learned of the tapes from an unpublished decision in *President R.C.-St.Regis Mgmt Co. v. Park Place Entertainment Corp.*, Index No. 8931/00 (Sup. Ct. Nassau County Oct. 2, 2001), *aff’d in part*, 751 N.Y.S.2d 880 (2d Dep’t 2002), which indicated that certain audiotapes had been produced to PPE and ordered that the plaintiffs disclose to PPE the circumstances surrounding their creation. Ex. N to Puccio 60(b) Decl. Neither the tapes nor this state-court decision had been produced by PPE during discovery, though they indisputably fell within the scope of plaintiffs’ discovery request and had been in PPE’s possession.

Plaintiffs filed a FRCP 60(b) motion to vacate the August 2002 judgment, based upon PPE's misconduct in failing to produce the tapes. The district court requested a remand to enable it to consider the motion, and this Court remanded on October 2, 2003. SPA-__.

6. Five days later, the district court issued a decision (*Catskill IV*) ruling that PPE's failure to produce the tapes constituted "other misconduct" under FRCP 60(b)(3). 286 F.Supp.2d at 315. The court directed the parties to conduct "highly expedited" discovery, limited in time to "thirty days" and in scope to two theories of wrongful means: "[1] Park Place's conspiracy with President RC to 'squeeze' the Tribe and [2] Park Place's tortious interference with President RC's fiduciary duty" (*ibid.*), following which it would decide whether the previous judgment should be reinstated or permanently vacated. *Id.* at 320-21.

7. On December 19, 2003, plaintiffs moved for sanctions against PPE for its numerous acts of discovery misconduct, including the failure to produce the tapes. The district court effectively denied this motion by ordering that PPE "NOT respond to that motion." 12/29/03 endorsement. It has ignored plaintiffs' subsequent requests for more explicit disposition of the motion. 4/26/04 and 12/3/04 letters.

8. On January 5, 2004, the district court notified the parties that it had become aware of *Carvel Corp. v. Noonan*, 350 F.3d 6 (2d Cir. 2003), which certified to the

New York Court of Appeals two questions concerning wrongful means. The court expressed its intent to wait for the Court of Appeals' answers before finally deciding plaintiffs' FRCP 60(b) motion.

9. On October 14, 2004, the Court of Appeals answered the questions. 3 N.Y.3d 182 (2004). On November 15, 2004, the district court issued a decision (*Catskill V*) that, while agreeing with plaintiffs that *Carvel* has no bearing here, held that the tapes and the fruits of the post-remand discovery did not alter its decision that PPE was entitled to summary judgment on Count II. 345 F.Supp.2d 368.

SUMMARY OF ARGUMENT

The fruits of years of effort and millions of dollars of expense were snatched from plaintiffs, just as they were on the verge of realizing them, by PPE's actions inducing the Mohawks to breach their contracts and abandon further dealings with plaintiffs. The district court found the contracts, which constituted an entirely proper, by-the-book effort to obtain approval for an Indian gaming operation, were nevertheless void under federal law and therefore unprotected by New York law. It further found no factual basis for the allegation that PPE had engaged in wrongful means or that the business relationships with which PPE interfered would in fact have yielded an approved Project. These rulings rest on numerous legal errors, any one of which requires reversal.

I.

New York's contract-interference tort requires, among other things, a showing that the contract in question was valid. Nothing in New York law would invalidate the contracts at issue, and the district court erred in concluding that the federal regulations rendered these contracts invalid.

First, the court incorrectly assumed that the federal regulatory regime applies to contracts concerning land that is not yet "Indian land," simply because the parties contemplated it becoming such in the future. IGRA's structure, however, and

analogous case law under Section 81, establish that IGRA does not void such contracts. Here, at the time of PPE's interference and the Mohawks' breach, the Monticello tract was not "Indian land"; the federal voiding provisions were therefore inapplicable.

Second, and in any event, neither Section 81 nor the NIGC regulation relied upon below deems void a contract expressly and scrupulously drafted to *comply* with the approval procedure by (1) binding the parties to cooperate in good faith in applying for approval (the "precursory" obligations) and (2) postponing effectiveness of the "operational" provisions until approval is obtained. Rather, the language and structure of Section 81, bolstered by this Court's precedent under a similar federal Indian statute, confirm that precursory obligations are binding and enforceable.

Third, the regulation relied on below, § 533.7, which derives from Section 81, is contrary to law insofar as interpreted to declare the contracts void. The version of Section 81 in effect since March 2000 covers only those contracts that "encumbe[r] Indian lands for a period of 7 or more years." None of plaintiffs' contracts do so. Because Section 81 was the source of § 533.7, the 2000 amendment removed the basis for its application here.

Fourth, § 533.7 is in any event inapplicable to the DCA and LPA. The district court, finding those agreements "collateral" to the MA, overlooked that § 533.7 applies only to "management contracts," a term that covers agreements "provid[ing] for the

management of all or part of a gaming operation.” Neither the DCA (covering construction) nor the LPA (covering sale of land to the United States in trust for the Mohawks) provided for casino management; accordingly, neither falls under the regulation.

Finally, regardless of any federal “voiding,” *New York* law, which governs here, does not strip contracts of protection from interference solely because their principal provisions cannot be implemented without regulatory approval.

II.

The grant of summary judgment to PPE on plaintiffs’ business-relations-interference count was also erroneous.

First, plaintiffs tendered evidence sufficient to permit reasonable jurors to conclude that PPE employed “wrongful means” to interfere with plaintiffs’ relationship with the Mohawks. PPE gained introduction to tribal leaders by making fraudulent promises to two individuals with connections to the Mohawks. PPE participated with or knowingly benefited from actions of the manager of the Mohawks’ Akwesasne casino slowing payroll to casino employees, thereby aggravating the Mohawks’ tenuous financial situation and impelling them to accept from PPE a \$3 million infusion, which PPE conditioned on the Mohawks’ abandonment of plaintiffs in favor of an exclusive Catskills deal with PPE. And PPE overcame the Mohawks’ final concerns

by falsely representing that it could obtain federal land-into-trust approval without significantly delaying the project. Contrary to the district court's holding, those acts amply suffice to constitute "wrongful means."

Second, the district court erred in requiring plaintiffs to show that "they would have * * * opened a casino at the Monticello Raceway but for [PPE's] alleged wrongful conduct." SPA-78. Any uncertainty surrounding plaintiffs' ability to obtain additional approvals went to damages, not liability. In any event, there was ample evidence allowing a finding that the casino would probably have been approved but for PPE's interference; the district court's contrary conclusions usurped the jury's function.

III.

PPE failed during discovery to produce several audiotapes, indisputably within plaintiffs' discovery requests, containing telephonic conversations (many involving PPE's Clive Cummis) that are relevant to this case and supportive of plaintiffs' position. Moreover, during the limited discovery allowed on remand, plaintiffs uncovered numerous boxes of helpful documents that PPE had unjustifiably withheld. Among these were documents indicating that PPE had delayed plaintiffs' deposition of a key witness and exploited that delay to buy the witness's cooperation.

Plaintiffs filed a comprehensively supported sanctions motion for this flagrant pattern of discovery abuse, which the district court summarily denied. In doing so, it

abused its discretion. Several circuits have held that a trial court abuses its discretion simply by failing to undertake plenary consideration of a colorable motion for sanctions. Plaintiffs' motion was more than colorable. It detailed a prolonged and troubling pattern of discovery abuse that requires some significant sanction.

ARGUMENT

I. THE CONTRACT-INTERFERENCE CLAIM SHOULD NOT HAVE BEEN DISMISSED.

In 1872, Congress enacted what is now Section 81 to protect Indians from entering improvident contracts involving their lands; no such transaction could be validly consummated unless first approved by the Secretary of Interior and the Commissioner of Indian Affairs. Similar protection has been extended to Indians seeking to employ non-Indian managers for gaming operations: any such contracts must receive approval from the NIGC Chairman.

Plaintiffs, in scrupulous compliance with this regime, entered into contracts with the Mohawks whose operational portions depended upon obtaining the required regulatory approvals. Pursuant to the precursory provisions of these contracts, plaintiffs expended tens of millions of dollars and years of effort, overcoming the biggest hurdle to consummation of the Project when they secured Interior's approval to take the land into trust and its finding that the Project would serve the best interests

of the Mohawks and the surrounding community. PPE thereupon intruded itself and destroyed the fruits of plaintiffs' labors.

It is counterintuitive, to say the least, that a contracting party should be exposed to such depredations without meaningful legal protection. Moreover, as shown below, the district court's holding fails to advance any interests underlying the federal statutory and regulatory scheme. It is unsurprising, therefore, that the decision dismissing Count I is multiply flawed.

* * * * *

To state a contract-interference claim under New York law, a plaintiff must allege: (1) existence of a valid contract; (2) defendant's knowledge thereof; (3) that defendant intentionally procured a contract breach; and (4) resulting damages to plaintiff. *E.g., Int'l Minerals and Res., S.A. v. Pappas*, 96 F.3d 586, 595 (2d Cir. 1996); *Lama Holding Co. v. Smith Barney, Inc.*, 668 N.E.2d 1370, 1375 (N.Y. 1996). Only the first element is at issue here.

In holding that federal law deems plaintiffs' contracts with the Mohawks void prior to NIGC approval, the district court relied on 25 CFR § 533.7, which provides that "[m]anagement contracts * * * that have not been approved by * * * the Chairman * * * are void." The court implicitly held that New York law accepts this characterization at face value for purposes of the first element of contract-interference.

(There is no suggestion of any independent state-law basis for stripping the contracts of protection. Indeed, the court observed that New York law does not void contracts “where the parties’ *performance* is conditioned on [] governmental approvals, rather than one where the agreement itself is so conditioned.” SPA-37 (citing *Buffardi v. Parillo*, 563 N.Y.S.2d 948, 950 (3d Dep’t 1990)).⁹)

The district court’s dismissal of Count I is sound only if (1) the federal voiding provisions apply to contracts concerning lands that are not yet “Indian lands”; (2) the voiding provisions invalidate not only implementation of operational provisions but also precursory obligations to seek required approvals; (3) § 533.7 is valid as applied here despite its inconsistency with the 2000 amendment to Section 81; (4) § 533.7 applies to “collateral agreements,” such as the LPA and DCA, that do not cover gaming management functions; and (5) New York law treats this kind of pre-regulatory-approval “voidness” as defeating the first element of the tort. If any one of these premises is erroneous, the decision below cannot stand. In fact, all are wrong.¹⁰

^{9/} See also Restatement (Second) of Contracts § 245, Illust. 4 (1981) (“A contracts to sell and B to buy A’s rights * * * under a mining lease in Indian lands. The contract states that it is ‘subject only to approval by the Secretary of the Interior,’ which is required by statute. B files a request for approval but A fails to support B’s request by giving necessary cooperation. Approval is denied and A cannot convey his rights. B has a claim against A for total breach of contract.”) (citing *Vanadium Corp. v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947)).

^{10/} This Court reviews *de novo* the grant of a motion to dismiss. *Tassy*, 296 F.3d at 66.

A. The Federal Voiding Provisions Do Not Apply To Contracts Concerning Land That Is Not Yet “Indian Land.”

Although urged repeatedly to consider the point, the court never addressed plaintiffs’ contention that neither § 533.7 nor Section 81 applies at all to contracts, like those here, relating to land that is not “Indian land.”

The prominence of the term “Indian lands,” both in the central provisions of IGRA authorizing class II and III gaming, 25 U.S.C. § 2710(b), (d), and in Congress’s declarations of findings and purpose, §§ 2701(3), 2702(3), makes clear that IGRA as a whole—including the required preapproval of class III management contracts, § 2710(d)(9)—applies only to gaming on “Indian lands.” See NIGC/Interior Memorandum of Understanding (SPA-238) (NIGC Chairman “must first decide whether gaming is being conducted on Indian lands” before asserting NIGC’s jurisdiction). Likewise, Section 81 applies only to a “contract with an Indian tribe that encumbers Indian lands * * *.” § 81(b).

IGRA defines “Indian lands” as “lands within the limits of any Indian reservation” or “lands title to which *is* * * * held in trust by the United States for the benefit of any Indian tribe * * *,” § 2703(4) (emphasis added).¹¹ Section 81(a)(1)

¹¹ IGRA imposes an additional prerequisite to “Indian lands” status: the tribe must “exercise governmental power” over the lands. § 2703(4)(B). This prerequisite was clearly not satisfied here.

defines “Indian lands” nearly identically: “lands the title to which *is* held by the United States in trust for an Indian tribe * * *” (emphasis added).

The proposed casino site was obviously not “Indian land” under this definition, never being held by or for any tribe. Rather, the land was held by *plaintiff Catskill*.¹² And, although the LPA contemplated transfer from Catskill to the United States in trust for the Mohawks, the relevant prong of the definition of “Indian lands” requires that the land “*is* held” in such trust status. Accordingly, neither Section 81 nor IGRA (nor any related voiding provision) applies to plaintiffs’ contracts.

Exactly this analysis was dispositive in the nearly identical case of *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061 (N.D. Cal. 2005). There, NGV’s predecessor had contracted with the Pomo Indians regarding a proposed gaming facility on land to be taken into trust. The agreements “contemplate[d] the necessity for regulatory approval before certain aspects of the Agreements could occur” (*id.* at 1064) and obliged the parties to seek such approval, including of the land-to-trust transfer. *Id.* at 1064 n.2. The plaintiff alleged that defendants, rival casino development groups, tortiously interfered with these agreements before plaintiff and the Pomo could obtain approval. *Id.* at 1063-64.

^{12/} The land is currently held by Empire Resorts, Inc.

The court held that nothing in federal law invalidated the agreements, rejecting, *inter alia*, the defendants' contention that Section 81 voids such agreements prior to approval. *Id.* at 1065-66. Focusing on Section 81(b)'s limiting clause—"encumbers Indian lands"—the court observed that Section 81(a)(1) expressly defines "Indian lands" in the *present* tense. *Id.* at 1066.¹³ It concluded that "the Transaction Agreements were not void for lack of approval under § 81, since no Indian trust lands were yet acquired." *Ibid.* (footnote omitted). Cf. *First Am. Casino Corp. v. Eastern Pequot Nation*, 175 F.Supp.2d 205, 211 (D. Conn. 2000) (holding management contract not void where tribe was not federally recognized and therefore not an "Indian tribe" within the meaning of IGRA or Section 81).

Analogous precedent under Section 81 confirms this conclusion and elucidates the underlying policy. In *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538 (1st Cir. 1997), the Penobscot Nation sought to escape its contract by invoking Section 81's voidness provision. *Id.* at 544. It had recently acquired the land in fee simple, and the crucial inquiry was whether the concerns inspiring Section 81 were limited to alienation of long-held trust lands or extended to recently acquired lands held

^{13/} The court also noted NGV's reliance upon *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538 (1st Cir. 1997), a non-gaming but analogous Section 81 case discussed in text. 2005 WL 318646, at *4. Accord, *Forrest Assocs. v. Passamaquoddy Tribe*, 719 A.2d 535, 537-39 (Me. 1998) (following *Penobscot* and rejecting Indian tribe's invocation of Section 81 to escape contractual obligations regarding proposed bingo operation on non-reservation land held in fee simple).

in fee simple. *Id.* at 546. The First Circuit concluded that applying Section 81’s voiding provision would “frustrate Indian tribes’ efforts to promote economic development and fiscal autonomy”:

This analysis reflects the modern trend in federal Indian policy away from outmoded paternalistic practices and policies. Particularly during the last forty years, Congress has endeavored to afford Indian tribes the latitude to pursue their social, political, and economic goals as they determine appropriate * * *. To find § 81 applicable to a tract of real property that [the Nation] purchased in fee simple to promote its business interests would contravene modern efforts to secure tribal self-determination.

112 F.3d at 554-55.¹⁴

From a practical perspective, it should be emphasized that inapplicability of Section 81 and IGRA prior to attainment of “Indian lands” status creates no danger of unregulated gaming. Any proposed gaming would be regulated by state law at that stage, and nothing in IGRA would require States to allow Indian gaming on the site. And if state law chooses to protect such contracts and require performance of obligations associated with conditions precedent to implementation of the contract, no federal policy is thereby offended.

^{14/} Although *Penobscot* did not involve land that was to be transformed into “Indian lands,” the court clearly intended its holding to apply to such circumstances: it specifically repudiated (see 112 F.3d at 552-53) *Narragansett Indian Tribe v. RIBO, Inc.*, 686 F.Supp. 48 (D.R.I. 1989), *aff’d* on other grounds, 868 F.2d 5 (1st Cir. 1989), in which the district court found Section 81 applicable prior to the land-into-trust transfer. In *NGV*, discussed in text, the court applied *Penobscot* in exactly those circumstances.

B. Federal Law Renders “Void” Only The Operational Portions Of Not-Yet-Approved Gaming Management Contracts, Not Precursory Obligations To Seek Regulatory Approvals.

We discussed above (p. 30, *supra*) the principle that state law does not declare a contract void merely because its operative provisions are contingent upon a certain condition (such as regulatory approval) being satisfied. Nothing in federal law requires a contrary result.

This “precursory obligations” argument stands independently of the “Indian lands” argument. We contend, relying upon clear precedent of this Court, that any federal voiding provisions in Section 81 or the NIGC’s regulations apply only to the operational provisions of the contract, not the *precursory* obligation to seek approval in good faith. As noted, each contract expressly recognized the need for federal regulatory approvals, required the parties to use “reasonable best efforts” to secure them, and made the effectiveness of the appropriate provisions contingent on their receipt.

The district court erred in holding these precursory obligations “void” under federal law. In failing to distinguish precursory from operational provisions, the court overlooked dispositive language in Section 81 and contravened this Court’s decision in *Vanadium Corp. v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947).

Section 81, the fountainhead for IGRA and the NIGC regulations thereunder, is the appropriate starting point for determining the reach of § 533.7's declaration of voidness. Section 81 provides in relevant part that “[a]ll contracts or agreements *made in violation of this section* shall be null and void * * *.” (Emphasis added). Where, as here, a contract is carefully drafted *to comply with Section 81* by (1) binding the parties to cooperate in good faith in applying for approval and (2) postponing effectiveness of its operational provisions until approval is obtained, the contract is not “made in violation” of Section 81. Accordingly, such a contract is not “null and void.” NIGC's regulation (§ 533.7), which was adopted on authority of Section 81, see 58 Fed. Reg. 5818, 5829 (Jan. 22, 1993), should be similarly interpreted.

This Court's decision in *Vanadium* confirms this “plain language” reading of Section 81 and its import for § 533.7. The statute at issue in *Vanadium*, 25 U.S.C. § 396a, closely resembles Section 81 and § 533.7: it required pre-approval of a contract relating to Indian lands—specifically, a mining lease or assignment thereof—and rendered unapproved contracts void. *United States v. 9,345.53 Acres of Land*, 256 F.Supp. 603, 605 (W.D.N.Y. 1966) (upholding this interpretation by Interior). The parties executed a contract assigning mineral rights on Indian lands. The contract expressly required “approval by the Secretary of Interior,” and the assignee made a deposit toward acquisition of the rights. 159 F.2d at 106. Soon thereafter,

however, the assignee determined that the contract was unfavorable, refused to cooperate in seeking approval (which consequently was denied), and sought return of his deposit, arguing that the contract was “dead” without approval. *Id.* at 107-108.

This Court disagreed. Notwithstanding the federal statute requiring Secretarial approval (and Interior’s gloss declaring unapproved contracts “void”), this Court held (*id.* at 108 (internal citations omitted)):

[A]n obligation to attempt in good faith to secure the prerequisite of the Secretary’s approval would appear to rest upon both parties. * * * It was surely not the intent of the parties when they made an apparently binding assignment that the plaintiff should have the power to invalidate the assignment by not filing it for approval. On the contrary, it must have been assumed that plaintiff would reasonably file it and in good faith seek its approval.

In other words, the impact of the statute requiring approval of the assignment was to void only *implementation* of the assignment (*i.e.*, actual commencement of mining operations thereunder) pending approval, not to void the precursory obligation to seek approval. Cf. *Match-E-Be-Nash-She-Wish Band v. Kean-Argovitz Resorts*, 383 F.3d 512, 518 (6th Cir. 2004) (enforcing contract’s arbitration clause even though NIGC had not yet approved contract). Analogously here, the impact of Section 81 and its offspring, § 533.7, is to void only any preapproval implementation, not the Mohawks’ precursory “obligation to attempt in good faith to secure the prerequisite of the [regulatory] approval * * *.” 159 F.2d at 108.

PPE has argued that because neither party in *Vanadium* was an Indian or tribe, the paternalistic concerns underlying Section 396a were inapplicable, and that *Vanadium* should not apply where the contract involves an Indian party. This seems self-evidently wrong, an artificial distinction conveniently selected for its value in this case. In fact, Section 396a applied equally to assignments (which would usually involve two non-Indian parties) as to original leases (which would usually involve one Indian and one non-Indian party); nothing in the statute's text or its administrative and judicial constructions drew PPE's distinction. NIGC's voiding regulation too applies equally to the initial management contract as to the contractor's assignment of his interest. See 25 CFR §§ 533.7 (“Management contracts ***and changes in persons with a financial interest in or management responsibility for a management contract,*** that have not been approved by the Secretary of the Interior or the Chairman * * * are void.”); 25 CFR § 535.2 (similar). Thus, § 533.7, like the statute in *Vanadium*, makes no distinction between Indian and non-Indian parties in deeming not-yet-approved contracts void. *Vanadium*'s interpretation of the scope of the voidness declaration therefore applies here.

To be sure, the Ninth Circuit took a different view of Section 81 in *A.K. Management Company v. San Miguel Band of Mission Indians*, 789 F.2d 785 (1986), upon which the court below relied, SPA-19, but that pre-IGRA decision is factually

distinguishable and unpersuasive. AK contracted with the San Miguel Band for the exclusive right to construct and manage a bingo facility on the Band's reservation; the contract was expressly conditioned upon approval under Section 81. 789 F.2d at 786. Three days after signing, the Band renounced the agreement, claiming it was void because approval had not been obtained. *Ibid.* AK sought a declaration that the agreement was enforceable to the extent of the precursory obligation to seek approval. The Ninth Circuit rejected the argument without ever explaining how the agreement there was "in violation" of Section 81, as the "null and void" provision requires. The court held the agreement void "in its entirety," giving rise to "[no] obligation by the Band, including an obligation of good faith and fair dealing." *Id.* at 789.

Aside from its total failure to grapple with Section 81's text, *A.K.* is materially distinguishable factually. The putative management entity in *A.K.* incurred minimal (if any) expenses in reliance on the agreement, which was renounced almost immediately after execution. *Id.* at 786. Here, by contrast, plaintiffs spent tens of millions of dollars over four years, in reliance on their contracts, pursuing the approvals. This reliance interest—present here but not in *A.K.*—highlights the inequity of deeming void the Indian tribe's obligation to cooperate in seeking approval simply because that very

approval has not yet been obtained. *A.K.* is properly viewed as a case of “no harm, no foul.”¹⁵

In any event, the *A.K.* rule creates untoward policy consequences for Indian tribes and was expressly disapproved by the Congress that amended Section 81 in 2000. As to policy, it hardly serves tribal interests to have “freedom” to walk away from a bargained-for obligation to seek approval after its contracting partner has spent much time and money doing the arduous legwork involved in the approval process; rather, this will only imperil a tribe’s ability in the first instance to find worthy partners prepared to contract on favorable terms. In addition, *A.K.* gives tribes no recourse if their non-Indian partners abandon *them*—say, for another tribe offering a more lucrative deal.

Congress acknowledged this very concern in amending Section 81 to narrow that statute’s scope from contracts “relative to Indian lands” to contracts that “encumber[] Indian lands for a period of 7 or more years.” Pub. L. No. 106–179, § 2, 114 Stat. 46 (March 14, 2000). The Senate Report expressly criticizes *A.K.*, describing it as prescribing a “draconian remedy * * * [that] might cause more harm than good.” S. Rep. No. 106–150, at 7 (1999); see also *ibid.* (“[i]t seems likely that tribes may be

^{15/} Although the Ninth Circuit subsequently followed *A.K.* where the non-Indian party had incurred substantial reliance expenses, the court neither discussed the precursory obligation to seek approval nor acknowledged the different equities from those in *A.K.* See *Barona Group v. Am. Mgmt. & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987).

hurt rather than protected by the disruption of their successful business relationships”)) (quoting *United States v. D&J Enters.*, No. 93-C-233-C, 1993 WL 767689 (W.D. Wis. Dec. 23, 1993)). The Senate Report rejects the notion that Indian tribes lack competence to incur binding precursory obligations, explaining that “[t]here is no justification for such an assumption to provide the basis for federal policy in this era of tribal self-determination.” S. Rep. No. 106–150, at 8. Plainly, Congress viewed federal pre-approval of the *operational portion* of a management contract (and the invalidity of that portion pending approval) as all the “paternalistic” protection Indian tribes require. This legislative policy furnishes additional justification, were any necessary, for adherence to the *Vanadium* rule.

Scutti Enterprises, LLC v. Park Place Entertainment Corporation, 322 F.3d 211 (2d Cir. 2003), did not effect a *sub silentio* overruling of *Vanadium*.¹⁶ *Scutti* arose from a contract between Scutti and the Mohawks concerning management of a casino

^{16/} This Court’s passing citation in *Scutti* to the district court’s decision in this case (*Catskill I*), see 322 F.3d at 215 n.2, cannot fairly be viewed as anything more than dictum. Plaintiffs sought to file an amicus brief in *Scutti* and apprised the panel, before it rendered its decision, that our appeal (No. 02-9139; from the district court’s August 2002 judgment) was pending. See Motion in No. 02-7371 (filed Feb. 19, 2003). Leave to file was denied on February 26, 2003. It would be implausible to attribute to the *Scutti* panel, which did not even have before it most of the arguments made in this appeal, an intent to resolve by its decision this pending and substantially distinguishable case.

Of course, *Scutti* does not even touch on our other arguments (Point I.A, *supra*, and Points I.C-E, *infra*) why plaintiffs’ contracts were not void.

(the Bingo Palace) on the Mohawks' Akwesasne Reservation. *Id.* at 213. While that contract was awaiting NIGC approval, the Mohawks contracted with PPE to manage a separate casino, the Akwesasne Casino. *Id.* at 213-14. PPE exacted a promise that the Mohawks would not increase the number of video lottery terminals ("VLTs") at the Bingo Palace. *Ibid.* Learning of this limitation, Scutti concluded that its management role at the Bingo Palace could not succeed because that casino needed more VLTs to be viable. *Id.* at 213-14. Scutti sued PPE, claiming that its insistence upon the VLT limitation tortiously interfered with Scutti's contract.

The *Scutti* district court dismissed the complaint, observing that the contract-interference tort requires "the existence of a valid, enforceable contract" (SPA-290), which, it held, Scutti's complaint failed to allege. This Court affirmed, incorporating by reference the district court's analysis:

Although Scutti makes several arguments as to why [NIGC's] lack of approval should not be determinative of its claim, we agree with the district court that, in the absence of an enforceable contract, it was appropriate to dismiss Scutti's cause of action for [contract interference].

322 F.3d at 215 (footnote omitted). Thus, this Court approved the district court's rationales, which relied on two factors not present here:

First, the contract between Scutti and the Mohawks, which conferred no express right to additional VLTs, was by its own terms not "*in any way* effective or binding upon either party [until approved]." SPA-291 (emphasis added). The situation is quite

the opposite here: plaintiffs' contracts had no such language, instead expressly requiring the parties' "best efforts" to obtain approval. JA 446, 515, 602.

Second, the district court rejected Scutti's precursory-obligations argument not as an incorrect statement of law, but because the Mohawks had in fact complied fully with those obligations by submitting and "staunchly" supporting the application for approval of Scutti's management contract. SPA-293. Here, of course, the heart of plaintiffs' contract-interference claim is that the Mohawks, at PPE's instigation, withdrew their support and thereby breached the obligation.

C. The 2000 Amendment To Section 81 Withdrew NIGC's Power To Declare The Project Contracts Void.

Even if former Section 81 and § 533.7 apply to non-Indian land and to precursory as well as operational contract provisions, Section 81 was amended on March 14, 2000 to narrow the statute's scope, so that, by the time of the interference in April 2000, § 533.7 could no longer be applied to contracts falling outside the circumscribed scope of the statute.

As previously described, when Congress enacted IGRA, it had to address a potential redundancy between NIGC's responsibilities under IGRA and the Secretary's Section 81 responsibilities. Congress resolved the problem in 25 U.S.C. § 2711(h): "The authority of the Secretary under section 81 * * * relating to management contracts regulated pursuant to [IGRA], is hereby transferred to the Commission." Since the

Secretary's only "authority" under Section 81 is to approve (or disapprove) contracts, only that power was transferred to NIGC. The remainder of Section 81, including the portion declaring contracts made in violation thereof "void," is self-executing and hence continued to apply to gaming management contracts. 58 Fed. Reg. 5818, 5818 (Jan. 22, 1993) ("[S]ection 81 remains in full force and effect * * *"). NIGC's voiding regulation (§ 533.7) was adopted on authority of Section 81. 58 Fed. Reg. at 5829.

On March 14, 2000, Congress amended Section 81, narrowing its scope from contracts "relative to [Indian] lands" to contracts that "encumbe[r] Indian lands for a period of 7 or more years." Pub. L. No. 106-179, § 2, 114 Stat. 46. Section 81 never applied to the LPA (see SPA-21), and the DCA and MA were both amended after March 14, 2000. Consequently, as none of the contracts encumber Indian lands for a period of 7 or more years, they are not covered by amended Section 81, and § 533.7 cannot lawfully be applied to them.¹⁷

To be sure, NIGC, in promulgating § 533.7, invoked not only Section 81 but also its general rulemaking authority, 25 U.S.C. § 2706(b)(10). See 58 Fed. Reg. at 5829. But an agency "cannot rely on its general authority to make rules necessary to carry

^{17/} This does not mean that NIGC deliberately exceeded its enabling statutes, but simply that it failed to adjust a previously valid regulation in the wake of statutory change. Cf. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) ("When a statute has been repealed, the regulations based on that statute automatically lose their vitality.").

out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area.” *Nat’l Mining Ass’n v. U.S. Dep’t of the Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997) (quoting *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995)). Here, Congress has directly spoken, in Section 81, to what types of contracts are deemed void while awaiting regulatory approval. Even if the contracts at issue had such status before March 2000, they no longer did by the time of the interference. Since § 533.7 is the only conceivable basis for declaring these contracts void, and certainly the only basis invoked by the district court, the contract-interference claim must be reinstated.

D. Even If § 533.7 Reached Precursory Obligations Regarding Non-“Indian Lands,” It Would Not Apply To The DCA or LPA.

The district court assumed that any agreement that qualifies as collateral to a management contract, which the LPA and DCA do, is deemed void by § 533.7. SPA-71. A closer examination of the pertinent regulations, however, reveals that only those collateral agreements that “provide for the management of all or part of a gaming operation” fall within § 533.7. The DCA and LPA, unlike the MA, do not even remotely concern casino management. Thus, even if the MA was void, the DCA and LPA were not.

§ 533.7 provides (emphasis added):

Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements if this part, are void.

The term “management contract” is defined (§ 502.15 (emphasis added)) as

any contract, subcontract or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor ***if such contract or agreement provides for the management of all or part of a gaming operation.***

“Collateral agreement” is defined (§ 502.5) as

any contract * * * that is related, either indirectly or directly, to a management contract.

The district court went astray in focusing on the definition of “collateral agreement” without considering the definition of “management contract,” because § 533.7 applies only to the latter. As NIGC’s rulemaking statements confirm, collateral agreements that do not provide for management are not management contracts and hence are neither subject to approval/disapproval nor within the scope of the declaration of voidness. 58 Fed. Reg. at 5820 (“The definition [of ‘management contract’] adopted by the Commission is not overly broad and covers those ***contracts where a management role is present.***”) (emphasis added); 57 Fed. Reg. 12382, 12388 (April 9, 1992) (“The Commission views documents or agreements, whatever they are labeled, ***when the subject matter is management of a gaming operation,*** as management contracts * * *.”) (emphasis added); NIGC Bulletin 94–5 (Oct. 14, 1994)

(SPA-241) (consulting agreements lacking management features are not management contracts).

A recent NIGC opinion synthesizes the regulatory framework. *Re: NIGC Management Contract Review President R.C.-St. Regis Management Company* (Jan. 9, 2004), begins by quoting the definitions of “management contract” and “collateral agreement,” and then explains (*id.* at 1-2):

In reviewing a management contract, the NIGC chairman requires as a matter of practice that the tribe and manager submit all other agreements between the parties * * * for review in an effort to determine the full extent of the relationship between the parties and/or whether the management agreement itself defines the full relationship. The reason for this document review is to determine if there are other gaming management duties, responsibilities, and obligations in the other agreements that are placed on the tribe and/or the manager, or entities related to the manager, or third parties, which might affect the contractual relationship, or compliance with IGRA, that is otherwise defined in the basic management contract. As an example, in a situation where a pre-opening development agreement establishes a gaming management role of some kind for the manager-developer, that development agreement will also be subject to review and approval or disapproval along with the basic management contract.

Another purpose for reviewing the other agreements is to determine if there is additional compensation for the manager, as a consequence of the intended gaming management activity, that may have been placed in some other agreement. IGRA establishes ceilings on the level of compensation that can be paid for management of a gaming operation and the length of time for an agreement to operate. Terms of a collateral agreement may indicate that compensation is being paid in addition to that specified in the basic management contract.

* * *

While review of a collateral agreement may affect the approval or disapproval of a management contract, ***the Chairman does not approve the collateral agreement itself.*** The scope of the NIGC Chairman's review is for approval of a management contract. The Chairman's approval does not necessarily extend to the entire contractual relationship that may exist between the parties but to the document or documents that establish the terms and conditions of the management activity—the management agreement and, possibly, ***collateral agreements that have gaming management provisions.*** * * *

Id. at 1-2.

To the same effect is *BouncebackTechnologies.com, Inc. v. Harrah's Entertainment, Inc.*, No. 98-2058, 2003 WL 21432579 (D. Minn. June 13, 2003). The case arose from a 1996 contract between two partners (CRC and Harrah's) and the Pokagon Band regarding the ***development*** of an Indian casino; the contract contained a non-compete provision prohibiting the parties from engaging in gaming development within 125 miles of the contemplated casino. (Harrah's and the Band entered a separate contract concerning ***management*** of the casino.) Harrah's subsidiary subsequently became involved with a riverboat casino operating within this radius, and CRC sued for breach of contract. Harrah's defended on the ground that the contract was not legally enforceable because it had not yet been approved by NIGC. 2003 WL 21432579, at *3 (court's observation that, under § 533.7, "Management * * * contracts that are not approved are void"). The crucial question, then, was "whether the [contract] is a management contract." *Ibid.*

The court rejected Harrah's argument, concluding that the contract was not a "management contract" subject to § 533.7 because:

[T]he contract that 'provide[d] for the management of all or part of [the Band's proposed] gaming operation' was the Management Agreement between Harrah's [] and the Band. The contract [between CRC and Harrah's] does not alter the Management Agreement's allotment of management authority, nor does it grant any management authority to CRC.

Ibid. (quoting § 502.15). Accordingly, the court held the contract "legally enforceable" despite the absence of NIGC approval. 2003 WL 21432579, at *3.

Here, while the MA unquestionably "provides for the management of * * * a gaming operation," the LPA and DCA clearly do not. The DCA's operative provisions concern the "planning, design, engineering, construction and operational start-up of the Gaming Facility" (JA 600); they make no mention of a management role. And the LPA covers transfer of title to the Monticello tract from Catskill to the United States in trust for the Mohawks. Although it is certainly true that the *Project* contemplated eventual operation of a casino by Mohawk Management under the MA, neither the DCA nor the LPA "provides" for the management of gaming. Accordingly, while they may be collateral agreements, they are not management contracts, and neither is declared void by § 533.7.

It is especially clear that the LPA, as a contract to supply land, is not a management contract. For one, IGRA provides that management contracts shall not

“transfer * * * any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.” 25 U.S.C. § 2711(g). Relatedly, NIGC’s review of land-transfer contracts would overlap and interfere with the Secretary’s responsibility to review such contracts for approval/disapproval under 25 CFR part 151 (land-to-trust transfer) and 25 U.S.C. § 2719(b) (authorization of gaming activities on land recently acquired in trust)—in the exercise of which he here concluded that the site should be taken into trust for use in Indian gaming.

As for the DCA, we acknowledge that NIGC’s April 19, 2000 letter requesting revisions to the MA and DCA stated that the agency had “determined that the [MA] and DCA together are management contracts and are subject to NIGC approval. As such, the combined agreements must contain a total cap * * * as required by 25 C.F.R. § 531.1(i).” JA 1904.¹⁸ But this statement merely articulated, albeit

^{18/} The district court criticized plaintiffs for failing to disclose NIGC’s letter to PPE or the court in timely fashion. SPA-67 n.2. That criticism was wholly unwarranted. PPE’s motion to dismiss (which led to *Catskill I*) did not even refer to NIGC’s definitional regulations, instead relying on *A.K.* and contending that all the Project contracts were void absent regulatory approval. JA 640-42. PPE having presented no question whether the Project contracts were “management contracts” or “collateral agreements,” plaintiffs had no reason to discuss the letter. In *Catskill I*, the district court *sua sponte* explored the import of NIGC’s regulations, introducing the management contract-collateral agreement terminology into the case for the first time. SPA-19. At the first subsequent opportunity and prior to *Catskill II*, plaintiffs acknowledged NIGC’s statement regarding the DCA. JA 665-66. Moreover, PPE never claimed that it was unaware of the letter; there is no basis for the court’s contrary

imprecisely, NIGC’s policy that it will *review* all contracts that relate to a management contract (*i.e.*, collateral agreements) before deciding whether to *approve the management contract*. This allows NIGC to police attempts to hide compensation in collateral agreements by requiring changes to those agreements as a precondition to approving a proposed management contract. The statement does not imply that NIGC has power to approve or disapprove the collateral agreements themselves. See 57 Fed. Reg. at 12389 (“the revised definition of management contract and the definition of collateral agreement would give the Commission the *authority to review but not necessarily approve* all contracts”) (emphasis added). NIGC’s recent opinion makes this crystal clear, explaining that *one purpose* for NIGC’s review of all agreements between the parties (even those not labeled “management contract”) is to determine whether such agreements “establish[] a gaming management role of some kind,” in which case—their labels notwithstanding—they will be treated as management contracts. NIGC 1/9/04 Op., at 2. The opinion goes on to explain, however, that “[a]nother purpose for reviewing the other agreements is to determine if there is additional compensation for the manager * * * that may have been placed in some other agreement.” *Ibid.* (emphasis added). But only “the management contract and, possibly, collateral agreements that have gaming management provisions” (*ibid.*) are

suggestion.

subject to approval. In the case of collateral agreements reviewed for hidden compensation, NIGC “does not approve the collateral agreement itself.” *Ibid.*

The district court rejected our reliance on this NIGC opinion (345 F.Supp.2d at 362 n.2), but none of its rationales withstand scrutiny. First, the court reasoned, without citation, that the opinion “post-dates the events in issue by many years, was issued by an entirely different administration in Washington, and relates to an entirely different set of contracts between the [] Mohawk[s] and parties who are not involved in this lawsuit.” *Ibid.* But the court’s apparent premise that the opinion represents an NIGC shift is incorrect; nothing in the opinion so suggests, there has been no change in the regulation, and in fact the opinion echoes NIGC’s prior pronouncements.

Further, it is incorrect to say that the opinion “was issued by an entirely different administration in Washington.” 345 F.Supp.2d at 362 n.2. NIGC is an independent agency whose commissioners are not answerable to this or any Administration but may be removed prior to expiration of their terms only for “neglect of duty, or malfeasance in office, or for other good cause shown.” 25 U.S.C. § 2704(b)(6). Finally, the district court entirely failed to address the reasoning of *Bounceback* or explain how the regulations could be interpreted to require approval of collateral agreements that lack management provisions.

Second, the district court asserted that “back in the late 1990s—the relevant time period for our purposes—the NIGC *did* insist on approving collateral agreements.” 345 F.Supp.2d at 362 n.2. Specifically, the court pointed to plaintiffs’ behavior in “[1] submitt[ing] the [LPA] to the NIGC for its review and [2] engag[ing] in a lively debate with the NIGC over whether the LPA was part and parcel of the [MA] * * * because the proposed payment for the land was * * * a disguised management fee.” *Ibid*. The court is mistaken on both counts. First, plaintiffs’ submission of the LPA and DCA for NIGC’s review is consistent with (indeed, necessary under) the agency’s requirement that collateral agreements be submitted for review in connection with the approval/disapproval of related management contracts. Second, while plaintiffs did disagree with NIGC on whether the price of the land in the LPA was a “disguised management fee,” that dispute has nothing to do with whether the LPA constituted a “management contract.” As explained above, NIGC’s recent opinion clearly states that even collateral agreements that it may view as providing additional compensation to the manager beyond that provided by the management agreement itself are not reviewed for approval/disapproval.

Third, the court concluded that, even under the NIGC opinion, the LPA would have been subject to review for approval/disapproval. 345 F.Supp.2d at 362 n.2. As just explained, that conclusion simply reflects the court’s misunderstanding of the

opinion, which states that collateral agreements containing a disguised management fee—but not providing for any management role—are subject to review only in connection with NIGC’s decision whether to approve the associated management contract.

In short, since the DCA and LPA do not come within the scope of § 533.7’s declaration of voidness, federal law presents no obstacle to satisfying the “valid contract” element as to those contracts.

E. New York Law Does Not Withhold Protection From Contracts Labeled “Void” Only Insofar As They Await Regulatory Approval.

The district court unwarrantedly assumed that a federal characterization of the Project contracts as “void” would control their status under New York law. It is undisputed that one of the elements of the contract-interference tort is the existence of a valid contract, but that merely poses the question of what constitutes a valid, and therefore protected, contract. At heart, the valid-contract concept means that, if the parties themselves could not enforce the contract against one another, they cannot sue a third party for interfering with it. Examples are contracts that lack consideration, violate the statute of frauds, or are against public policy, such as a contract for prostitution.

Contracts that require government approval before performance may occur, but that contain precursory obligations, present a substantially different situation, and we

have found no New York case holding that a third party may, with impunity, interfere with such obligations. Indeed, although case law dealing with this topic is scant, it indicates that New York law protects contracts notwithstanding that their operative provisions are subject to regulatory approval before they can be performed.

In *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.–Houston [1st Dist.] 1987), Pennzoil had negotiated an agreement to purchase shares of Getty Oil directly from Getty and the Getty trust on terms different from those in Pennzoil’s tender offer for Getty Oil shares to the general public. (Such an agreement in the midst of a tender offer is illegal under SEC Rule 10b-13 unless the SEC has granted an exemption.) Texaco then made a better offer, causing Getty Oil and the Getty trust to breach their agreement with Pennzoil and accept Texaco’s offer. In response to Pennzoil’s suit against Texaco for contract-interference, Texaco argued that Rule 10b-13 made the Getty-Pennzoil contract “void” (729 S.W.2d at 806), precluding the claim.

Applying New York law, the court rejected the contention, reasoning that (1) the exemption in the rule demonstrated that the contract was at most voidable, not void; and (2) if the contract was voidable, Texaco had no standing to void it because the rule is meant to protect the interests of shareholders who have already tendered to a general tender offer. *Id.* at 806-07. Accord, *SCEcorp v. Superior Court*, 4 Cal.Rptr.2d 372, 377 (Ct. App. 4th Dist. 1992) (explaining that “contracts subject to conditions

precedent can be the basis for tortious interference claims,” and that “[c]onditions precedent of regulatory approval should be treated no differently than other conditions precedent requiring other third party approvals or actions”).

Thus, *Texaco* holds that as long as the rule subjecting a contract to regulatory approval is not meant to protect the interests of the interferer, the contract’s voidability by some other party is irrelevant under New York law. Just as the securities rule in *Texaco* was not intended to protect Texaco, IGRA and its regulations are not designed to protect PPE.¹⁹ Accordingly, even if federal law declares the Project contracts “void,” New York law does not equate that to invalidity in the context of an otherwise valid contract whose operative provisions are simply subject to regulatory approval.

II. SUMMARY JUDGMENT WAS NOT WARRANTED ON PLAINTIFFS’ CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONS.

The district court offered alternative bases for dismissing Count II. First, it held that no reasonable juror could conclude that PPE used “wrongful means” to induce the Mohawks to terminate their relationship with plaintiffs. Second, it ruled that plaintiffs were required to but could not show that, but for PPE’s actions, the contracts would

^{19/} Denying PPE the right to interfere with the contracts does not require that it remain silent. See *SCEcorp*, 4 Cal.Rptr.2d at 377 (rather than interfering with contracts pending regulatory approval, third parties should “intervene directly in the regulatory approval process * * * [by] presenting evidence as to why [they] believ[e] [that] the merger would not be in the public interest * * *”).

have been approved and the Project would have come to fruition.²⁰ Neither holding withstands scrutiny.²¹

A. Reasonable Jurors Could Find “Wrongful Means.”

Interference with a business relationship is tortious if it involves “wrongful means.” *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 449-450 (N.Y. 1980). A defendant’s commission of a “crime or an independent tort” clearly satisfies wrongful means, *Carvel*, 3 N.Y.3d at 190, but is not essential. *Hannex v. GMI, Inc.*, 140 F.3d 194, 206 (2d Cir. 1998).²² Thus, this Court has identified as wrongful means at least two acts that may not be independently tortious: (1) exertion upon a third party of “economic pressure unrelated to th[e] business” in which the plaintiff and defendant compete (*Scutti*, 322 F.3d at 217); and (2) “knowing

^{20/} Under New York law, the elements of a claim for interference with business relations (also called prospective economic advantage) are: “(i) the plaintiff had business relations with a third party; (ii) the defendants interfered with those business relations; (iii) the defendants acted for a wrongful purpose or used dishonest, unfair, or improper means; and (iv) the defendants’ acts injured the relationship.” *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 214 (2d Cir. 2002). The adequacy of the evidence regarding the first two elements is undisputed.

^{21/} A grant of summary judgment is reviewed *de novo*. *Lucente*, 310 F.3d at 253.

^{22/} The New York Court of Appeals, unlike this Court in *Hannex*, has refrained from deciding whether the interfering conduct must rise to the level of an independent tort or crime. See *Carvel*, 3 N.Y.3d at 190-91.

acceptance” of the benefits of a third party’s breach of fiduciary duty. *S&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 849 (2d Cir. 1987).

The record contains ample evidence allowing reasonable jurors to conclude that PPE’s displacement of plaintiffs was achieved by “wrongful means”:

- PPE defrauded two individuals to obtain favorable introductions to the Mohawks and then defrauded the Mohawks by representing that switching to PPE would occasion no delay;
- PPE committed the tort of knowing participation in another’s breach of fiduciary duty (specifically, the Akwesasne casino manager’s breach of his fiduciary duty to the Mohawks by intentionally slowing payroll to induce the Mohawks to look to PPE for an infusion of funds);
- PPE knowingly accepted the benefits of that breach by positioning itself as the Mohawks’ financial savior; and
- Relatedly, PPE exerted economic pressure on the Mohawks in an area unrelated to that in which PPE and plaintiffs compete by making the non-Catskills-related \$3 million bailout contingent upon the Mohawks abandoning plaintiffs.

Though these acts were part of a broad scheme by PPE to induce the Mohawks to abandon the Project with plaintiffs, any one of them satisfies the “wrongful means” element. Whether they occurred as claimed raises questions for the jury.

1. Reasonable Jurors Could Find That PPE Committed Fraud.

a. *PPE’s defrauding of Melius and Kaufman.*

To gain access to the Mohawks, PPE defrauded two individuals, Gary Melius and Ivan Kaufman, both of whom were induced by false promises to help PPE obtain access to the Mohawks.

Melius: Gary Melius is a real estate developer and acquaintance of former U.S. Senator Alfonse D’Amato. Melius had “established a favorable relationship with the Tribe” during his early involvement in the Akwesasne casino, both through his construction company and as an investor. JA 1546 (D’Amato affidavit). According to former Senator D’Amato, in October 1999 PPE’s Arthur Goldberg offered Melius \$15 million for an introduction to the Mohawks: \$5 million to secure PPE’s acquisition of the Akwesasne management contract and an “additional 10 million if and when Park Place secured an agreement with the Tribe regarding gaming operations in the Catskills/Monticello area.” JA 1545-46 (D’Amato affidavit); see also JA 198 (Melius dep. 20). After Melius provided the introduction, however, PPE disavowed the

agreement. JA 153-54 (Cummis dep. 140-42). (Melius ultimately sued, and PPE settled the suit under confidential terms. JA 200 (Melius dep. 111-12).)

Kaufman: Kaufman headed Presidents Resorts Casino, Inc. (“Presidents”), the manager of the Mohawks’ Akwesasne casino. In that position, he was uniquely placed to assist a prospective casino manager in gaining access to, and the trust of, the Mohawks. As part of its effort to disrupt plaintiffs’ business relationships with the Mohawks, PPE fraudulently induced Kaufman to use his goodwill and influence with the Mohawks to foster PPE’s relationship with them. PPE accomplished this by falsely representing to Kaufman that it would reward his efforts by buying out \$12 million of his investment in, and taking over management of, the struggling Akwesasne casino.²³ Again, PPE disavowed the agreement. (Kaufman, like Melius, ultimately resorted to litigation against PPE; PPE settled this suit for \$8 million, half payable immediately and the remainder upon approval of PPE’s Catskills casino.

<http://www.sec.gov/Archives/edgar/data/1070794/000104746904016527/a2135421z10-q.htm>.)

^{23/} See 1/12/00 Letter from Ivan Kaufman to Arthur Goldberg (JA 1548) (memorializing terms discussed the previous day); JA 194-95 (Kaufman dep. 26-31). According to Kaufman, PPE also promised him a finder’s fee, plus the opportunity to participate financially in its anticipated Catskills casino, in exchange for an introduction to the Mohawks. JA 196 (Kaufman dep. 33-34).

The district court did *not* find insufficient evidence of fraud in PPE’s treatment of Melius and Kaufman. Rather, it ruled that PPE’s actions toward the two men, even if fraudulent, could not satisfy the “wrongful conduct” requirement because the wrongful conduct was not directly injurious to either plaintiffs or the Mohawks. SPA-77. This ruling is neither logical nor compelled by the New York cases. The wrongdoing at issue need not directly victimize a party to the relationship; it need only bear a direct nexus to the endeavor to interfere.

Consider, for example, if PPE had threatened physical harm to Kaufman and Melius unless those men helped PPE induce the Mohawks to terminate their relations with plaintiffs. Is it conceivable that such conduct would fail to satisfy the “wrongful means” element? We think not.

This conclusion is confirmed by *Sommer v. Kaufman*, 399 N.Y.S.2d 7, 7-8 (1st Dep’t 1977). The plaintiff was a builder; the defendants were landowners and leaseholders. The plaintiff was held to have adequately alleged business-relations-interference by claiming that the defendants bribed public officials, causing plaintiff to be denied permits, which in turn caused a delay in plaintiff’s construction of an office building and thus \$5,000,000 in damages. The defendant’s wrongful acts were bribes of third parties—the public officials—and the consequent direct injury was to the public and the government entities that employed the officials. But because those acts were

intended to and did injure the plaintiff's business relationships, they satisfied the "wrongful means" requirement.

Similarly, in *Hannex*, which presented a claim of wrongful means based on knowing participation in a breach of fiduciary duty, this Court described New York law as requiring only "a breach by a fiduciary of obligations *to another*" (140 F.3d at 203 (internal quotes omitted; emphasis added)), rather than "to plaintiff."

The primary case relied upon by the district court, *Excel Group, Inc. v. Permis Construction Corporation*, 678 N.Y.S.2d 778 (2d Dep't 1998) (cited at SPA-78), does not compel the opposite conclusion. There, the defendant had brought an action to require the City of New York to award it a contract rather than the plaintiff. It included in its court submissions a Dun & Bradstreet ("D&B") report regarding plaintiff. The plaintiff then sued for business-relations-interference, using as its evidence of wrongful means that the defendant's use of the report violated its agreement with D&B. The court held this inadequate as a matter of law because the wrongdoing—which, significantly and in contrast to this case, was not *malum in se*—was directed at "an *unrelated* third party," *id.* at 779 (emphasis added). In such circumstances, there simply was no sufficient nexus between breach of the D&B use agreement and the disruption of plaintiff's business relations with the City.²⁴

^{24/} Dictum in *Excel* notes that the case involved no "wrongful act by the defendant against the plaintiff." 678 N.Y.S.2d at 779. But there plainly is no such categorical

PPE fraudulently induced Kaufman and Melius to leverage their goodwill with the Mohawks to facilitate an agreement that, by its exclusivity, destroyed plaintiffs' relationship with the Mohawks. Reasonable jurors could conclude that, without the privileged access to the Mohawks imparted by an introduction from trusted business associates, PPE would have been unable to convince the Mohawks to forsake their relationship with plaintiffs and the four years already invested in the approval process. Under New York law, nothing more need be shown to satisfy the "wrongful means" element.

requirement; for example, wrongdoing directed against the plaintiff's partner in the business relationship suffices to ground a business-relations-interference claim. *Pagliaccio v. Holborn Corp.*, 734 N.Y.S.2d 148, 149 (1st Dep't 2001) (wrongful conduct (threatening frivolous litigation) directed at plaintiff's new employer was adequate for claim of tortious interference with plaintiff's employment relationship).

The other case cited by the district court, *World Wide Communications, Inc. v. Rozar*, No. 96 Civ. 1056, 1997 WL 795750, *9 n.23 (S.D.N.Y. Dec. 30, 1997), involved conduct "completely unrelated" to the relationship allegedly interfered with and thus sheds no light here.

- b. *PPE's fraudulent misrepresentation that switching to PPE would not delay the Project.*

An additional, independent instance of wrongful conduct occurred when, during the final stages of PPE's negotiations with the Mohawks, PPE promised that it could "switch" the approval plaintiffs had obtained to PPE's site (Kutsher's) without any significant loss of time.

The district court held that PPE's representations were non-actionable "puffery," SPA-75, but that holding did not take into account the recently obtained evidence from the tapes, which shows that PPE's representation was a bargained-for condition, not an abstract guess or opinion. PPE's Cummis recounts on the tapes that the Chiefs' final condition to doing a deal with PPE was that PPE "could switch it to Kut[s]hers **without any significant loss of time.**" Ex. Q to Frey WM Decl. (emphasis added). See also JA 161-62 (Cummis dep. 420-21) (Cummis's admission that he told tribal representatives, during negotiations leading to the April 2000 agreement, that a Mohawk-PPE application would be approved in four months, rather than the usual four years); JA 342 (Thompson dep. 128).

"It is a hornbook principle * * * that statements of opinion may constitute actionable fraud where a present intent to deceive exists." *Magnaleasing, Inc. v. Staten Island Mall*, 563 F.2d 567, 569 (2d Cir. 1977) (*per curiam*) (citing *Gray v. Richmond Bicycle Co.*, 60 N.E. 663 (N.Y. 1901)); see also *Harsco Corp. v. Segui*,

91 F.3d 337, 346 n.7 (2d Cir. 1996) (“fraud liability may attach when a person ‘state[s] that something was to be done when he kn[ows] all the time it was not to be done and that his representations were false’”) (quoting *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 151 N.E.2d 833, 836 (N.Y. 1958)). Cummis’s representations clearly are actionable under these cases.

Indeed, the facts of *Magnaleasing* are not meaningfully distinguishable from those here. The plaintiff rented space in a mall under construction, after receiving estimates of the charges tenants would have to pay for tax and common area costs. 563 F.2d at 568. At the time of the representation, the rates had not yet been definitively fixed, and were at least partially out of the defendant’s control. *Ibid.* Nevertheless, the defendant, though actually anticipating much higher rates, significantly “low-balled” the estimates given to the plaintiff. *Ibid.* This Court held the representations actionable, rejecting the defendant’s assertion that, as predictions of future events, they could not support a fraud claim. *Id.* at 569.

So too here, in contrast to the Chiefs’ deposition testimony denying that they relied on Cummis’s representations, JA 342 (Thompson dep. 128), Cummis reported that the Chiefs’ final condition to doing a deal with PPE was that the switch from plaintiffs to PPE would not cause “any significant loss of time.”

Ex. Q to Frey WM Decl.²⁵ This clearly indicates that PPE's remarks were not boastful opinions, but affirmative assurances to the Mohawks that they would suffer no significant delay in switching the Project to the site PPE controlled. As described above (p. 11, *supra*), BIA's land-to-trust process is highly site-related and requires extensive environmental and economic studies as well as numerous local approvals. Indeed only three tribes have successfully navigated the process to conclusion as of March 17, 2005. Testimony of Ernest L. Stevens, Jr., NIGC Chairman, Before House Committee On Resources (March 17, 2005) (available at <<http://resourcescommittee.house.gov/archives/109/testimony/2005/erneststevens.pdf>>).

Reasonable jurors could easily conclude that Cummis, the experienced General Counsel for one of the largest gaming companies in the world, did not believe the promise that the approvals could be "switched" to its site without significant delay but made it to deceive the Mohawks. (Cummis certainly seemed to believe the Mohawks were ripe for such a tactic, describing them in one taped conversation as "the kingdom of the deaf." Ex. C to Puccio 60(b) Decl.) Indeed, there is no other plausible reason for making such a baseless representation. And the Mohawks had reason to rely on

^{25/} Even aside from Cummis's account, there is reason to doubt the veracity of the Chiefs' deposition testimony in view of their alliance with PPE in a joint-defense agreement signed on the eve of depositions. Ex. D to Frey Reply WM Decl.

Cummis's assessment. He had been leading PPE's campaign regarding Indian gaming in the Catskills for months. Cummis plainly was someone "reasonably presumed to have expertise" concerning the subject. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1131 (2d Cir. 1994). The district court therefore was wrong to rule that reasonable jurors could not conclude that Cummis's misrepresentation constituted "wrongful means" sufficient to support a business-relations-interference claim.

2. Reasonable Jurors Could Find That PPE Knowingly Participated in Kaufman/Presidents' Breach of Duty.

In *Hannex*, this Court held that commission of the tort of knowing participation in a breach of fiduciary duty supports a finding of "wrongful means sufficient to support a tortious interference with * * * prospective business relations claim." 140 F.3d at 206. The evidence permitted such a finding here.

The participation tort consists of three elements, which we address in turn: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damages [from] the breach." *Id.* at 203 (quoting *S&K*, 816 F.2d at 847-48).

a. *Kaufman's breach of fiduciary obligations to the Mohawks.*

As explained, Kaufman headed Presidents, the manager of the Mohawks' Akwesasne casino. The evidence shows that Kaufman, who was aiding PPE's effort to establish a relationship with the Mohawks, improperly used his position at Akwesasne to slow the casino payroll and thereby induce the Mohawks to do business with PPE.²⁶ The fiduciary breach is described in a February 16, 2000 conversation between Kaufman and PPE's Clive Cummis:

KAUFMAN: * * * But you got to remember the pressure on them with how we're squeezing them in Akwesasne is huge. I mean they—you know, I have kind of delayed their payrolls and—

CUMMIS: Yeah.

KAUFMAN: —slowed it down so badly that, you know, they're looking at Arthur as the savior [*i.e.*, Arthur Goldberg, PPE's then-CEO].

CUMMIS: Yep, they are.

KAUFMAN: And it is great. I mean I never thought that you would have gotten where you have gotten, but I guess Arthur is a genius.

CUMMIS: He's pretty good. I'm not bad. He's pretty good.

KAUFMAN: You must be a hell of a team.

CUMMIS: Yeah.

^{26/} The district court assumed *arguendo* that “slowing down of the payroll * * * was a breach of Kaufman's fiduciary duty to the Tribe.” 345 F.Supp.2d at 366. It relatedly held that “[t]he taped conversation at the very least creates a disputed issue of fact [whether there was a payroll slowdown].” *Id.* at 365.

KAUFMAN: I mean I have been around a little bit, but not as much as you guys. But to take a situation—remember we started out with a letter of intent and they said never would they give us an exclusive.

CUMMIS: Yeah.

KAUFMAN: But you guys can maneuver. I'm impressed.

CUMMIS: They've given it to us now. Now, we had better get together about the financial situation.

* * *

Ex. B to Frey WM Decl.

Reasonable jurors could easily conclude from this conversation and related evidence that Kaufman owed and breached a fiduciary duty to the Mohawks. That he owed such a duty is established by his company's management agreement with the Mohawks, which required him to "establish the Payroll Account[,] * * * which shall be listed with the bank as held in trust for TRIBE by MANAGER as agent of TRIBE."

Ex. E to Frey WM Decl. This provision employs not one but two "magic words" of fiduciary duty: "trust" and "agent." See *Canron Corp. v. City of New York*, 674 N.E.2d 1117, 1122 (N.Y. 1996) (trustee "holds * * * trust assets in a fiduciary capacity"); *Northeast Gen. Corp. v. Wellington Adver., Inc.*, 624 N.E.2d 129, 164

(N.Y. 1993) (“agents * * * are bound to exercise the utmost good faith toward their principals”).²⁷

Reasonable jurors could also conclude that Kaufman’s payroll slowdown breached this fiduciary duty. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992), overruled on other grounds, *Gerosa v. Savasta & Co.*, 329 F.3d 317, 327 (2d Cir. 2003), is instructive. There, a construction workers’ union official named Senyshyn “was a trustee * * * of the [union’s] Pension Fund * * *.” *Id.* at 274. Under the collective bargaining agreement (“CBA”), contractors were obligated to contribute to the Fund based on total wages paid, regardless whether the workers belonged to the union. *Ibid.* Senyshyn also served as shop steward, a role that required him “to complete and file with the union weekly reports listing all workers, hours worked, and wages” (*ibid.*), which reports the union compared “with the weekly payroll reports submitted by the employer to determine whether the employer is making the fund contributions required under the labor contract.” *Ibid.* Senyshyn’s reports, however, routinely failed to list non-union members working at the site. *Ibid.* This

^{27/} Kaufman’s comparative expertise in gaming vis-à-vis the Mohawks independently created a fiduciary duty. See *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996) (fiduciary duty arises where party “is relied upon for advice or the exercise of judgment based on superior information or professional expertise”); Ex. E to Frey WM Decl. (“TRIBE requires the *** expertise to develop, construct, manage, operate and maintain *** gaming facilities *** [and] MANAGER is experienced in the financing, development, construction, operation and maintenance of gaming facilities.”).

Court affirmed the district court’s finding that Senyshyn had breached his fiduciary duty to the union by “failing to inform the funds that the [non-union] workers were doing work covered under the [CBA] so that contributions owing them could properly be calculated” (*id.* at 275), and hence failing to ensure that the union received “all funds to which it [was] entitled.” *Ibid.* (internal quotes omitted; alteration in original).

Reasonable jurors could find that Kaufman, like Senyshyn, breached his fiduciary duty. By slowing payroll, Kaufman jeopardized Tribal employees’ receipt of “funds to which [they] [were] entitled” (*id.* at 275), causing not only a loss of the time-value of money but also substantial anxiety. See Thompson dep. 44 (Ex. F to Frey WM Decl.) (“[T]here was a possibility that he may falter on the payments to the employees. And that was * * * a big concern to us.”).

Thus, the direct evidence of Kaufman’s apparent motive for the slowdown—forcing the Tribe to “loo[k] at [PPE’s] Arthur [Goldberg] as the savior” (Ex. B to Frey WM Decl.) and thereby obtain the rewards, discussed below, that PPE had promised for such a result—surely furnishes a sufficient basis for reasonable jurors to reject suggestions of a more innocuous motive.

b. PPE knowingly participated in the breach.

“One participates in a fiduciary’s breach if he or she affirmatively assists, helps conceal, or by virtue of failing to act when required to do so, enables it to proceed.”

Diduck, 974 F.2d at 284. See also *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 170 (1st Dep’t 2003) (similar). Here, reasonable jurors could find that PPE participated in Kaufman’s breach in any of four ways:

- i. Devising a scheme involving the primary actor’s breach.

PPE’s participation in the payroll slowdown occurred most prominently at the very conception of the scheme, for PPE’s Arthur Goldberg was the mastermind. The February 16, 2000 conversation is nothing short of “smoking gun” evidence on this point. In that conversation (set forth above), Kaufman tells Cummis to “**remember *** we’re** squeezing them in Akwesasne,” which reasonable jurors could easily infer to be a reference to a plan formulated and implemented by both Kaufman **and** PPE, especially in view of (1) Kaufman’s antecedent agreement to use his relationship with the Mohawks to induce the Mohawks’ cooperation with PPE and (2) Kaufman’s characterization in this same conversation of Goldberg as a “genius” (likely for concocting the slowdown-squeezing stratagem) and his observation that “you guys [*i.e.*, Cummis and Goldberg] can maneuver” (again, a likely reference to the stratagem).

Ex. B to Frey WM Decl. (emphasis added).²⁸ From this, reasonable jurors could surely conclude that PPE devised, and *a fortiori* knowingly participated in, the breach.

ii. Providing advice or encouragement to act.

“[A]dvice or encouragement to act operates as moral support and has [the] same effect on liability as participation or physical assistance.” *Diduck*, 974 F.2d at 284 (citing *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983)). Here, even if reasonable jurors could not infer from the February 16 conversation that PPE (alone or in tandem with Kaufman) hatched the payroll slowdown, they could infer that PPE’s Cummis provided “advice or encouragement to act” with his responses of “Yeah,” “Yep, they are,” “He’s [*i.e.*, Goldberg] pretty good,” and “They’ve given it to us now.”

The district court rejected this argument based on its factual determination “that [it] is self-evident from the tape of the February 16 conversation [that] the payroll

^{28/} Although Kaufman’s statements alone would suffice for a reasonable juror to find that PPE played a part in devising the scheme, we note that Cummis’s responses—“Yeah,” “Yep, they are,” “He’s [*i.e.*, Goldberg] pretty good,” and “They’ve given it to us now”—would permit a reasonable juror to treat Kaufman’s assertions as those of Cummis (and hence of PPE). See *United States v. Shulman*, 624 F.2d 384, 391 (2d Cir. 1980) (response of “Right” is an “express manifestation * * * [of] acquiesc[ence] in the truth of [the] statements [to which the response is made]”); *United States v. Tocco*, 135 F.3d 116, 129 (2d Cir. 1998) (similar). While *Shulman* and *Tocco* so held in the context of deciding whether the statement was admissible under Fed. R. Evid. 801(d)(2)(B), that inquiry is closely analogous to the summary-judgment inquiry here. In either case, the Court’s “determination [is] preliminary to a decision as to what inference should be drawn from [the party’s response], which [is] ultimately a question for the jury to assess * * *.” *Tocco*, 135 F.3d at 129.

squeeze had already happened[,] so any statement by Cummis could not reasonably be interpreted as encouraging Kaufman to initiate a payroll squeeze.” 345 F.Supp.2d at 366. But the court simply misreads the transcript, which is quite clear (or at least sufficient for reasonable jurors to find) that the payroll slowdown was ongoing on February 16. Kaufman plainly uses the present tense in stating that “[w]e’re squeezing them in Akwesasne” and the “pressure * * * *is* huge.” Ex. B to Frey WM Decl. (emphasis added). Moreover, encouragement to continue the “squeeze,” which ultimately contributed to the Mohawks acquiescence in PPE’s demands, is sufficient.

iii. Providing financial comfort to the primary actor.

In *S&K*, 816 F.2d 843, this Court held that a defendant knowingly participates in a breach by providing financial comfort to the primary actor that facilitates the breach. *S&K* involved a breach of fiduciary duty by one Johnson to his employer, S&K, a firm engaged in representing apparel manufacturers. *Id.* at 844. While an S&K employee, Johnson proposed, in breach of his fiduciary duty to S&K, that Nike terminate its relationship with S&K and instead hire Johnson directly. Nike agreed, Johnson resigned from S&K, and Nike hired him. *Id.* at 846-47. This Court held that a reasonable juror could find that Nike knowingly participated in the breach, pointing, *inter alia*, to the fact that “Nike accepted Johnson’s proposals that it terminate S&K’s relationship with Nike and substitute Johnson * * * as Nike’s military sales

representative.” *Id.* at 850. In other words, Nike’s promise to hire Johnson upon his resignation from S&K gave Johnson sufficient security to risk damaging his current relationship with S&K. See also *Hannex*, 140 F.3d at 204 (reasonable jurors could find that defendant knowingly participated in the primary violator’s breach of fiduciary duty by providing advice about ramifications of the primary violator’s non-compete agreement with his current employer).

Here, Kaufman is akin to Johnson, the Mohawks to S&K, and PPE to Nike. Like Nike, PPE aided the primary actor’s breach by providing financial comfort—here, a promise to protect him from the Mohawks’ displeasure by purchasing his interest in the failing casino at Akwesasne and granting him an interest in PPE’s contemplated Catskills casino. Ex. G to Frey WM Decl. (Jan. 20, 2000 proposed letter agreement wherein PPE would (1) “acquir[e] the interest of the Manager in the [Akwesasne] management agreement between the St. Regis/Mohawk Tribe (the ‘Tribe’) and the Manager”; and (2) afford Kaufman “the opportunity to participate with the Tribe in gaming/hotel facilities at Monticello, New York”). These promises remained on the table even after the February 16 payroll-slowdown conversation. Ex. B to Frey WM Decl. Thus, on February 23, 2000, Walter Horn, Presidents’ General Counsel (Horn dep. 5; Ex. J to Frey WM Decl.), wrote that during a meeting “in Chatham, [New Jersey] * * * CC [Clive Cummis] reiterated that our deal was done

and that we would have a part of the Catskills.” Ex. K to Frey WM Decl.; see also Horn dep. 104 (Ex. J to Frey WM Decl.) (this notation meant that “Park Place was going to recognize President[s] with some form of compensation”). Indeed, as late as April 4, 2000, PPE led Kaufman to believe the deal was still alive. Ex. L to Frey WM Decl. (“KAUFMAN: I just want to get the deal done. CUMMIS: I’m trying to do it. And I will be back to you.”).

Not surprisingly, the payroll slowdown did not endear Kaufman to the Mohawks. Chief Thompson explained that, as of February 29, 2000, payroll “became a big concern to us.” Ex. F to Frey WM Decl. Thompson further reported that on several occasions “gaming commission employees didn’t get their checks on time[.]” *Ibid.* See also Ex. D to Frey WM Decl. (Thompson’s statement that such occurrences were a “serious situation * * * [t]hat’s always been priority number one because without payments to these people, it just sends a bad message to all of us”).

Kaufman himself, during the February 16 conversation with Cummis, directly linked the decline in his relationship with the Mohawks with the benefit he anticipated if PPE followed through on its promised buy-out of Kaufman’s stake in Akwesasne and grant to Kaufman of a Catskills casino interest:

KAUFMAN: I mean it went from them liking me to hating me. Which is okay if—

CUMMIS: Yeah.

KAUFMAN: —it gets the deal done.

Ex. B to Frey WM Decl.

As in *S&K* and *Hannex*, reasonable jurors could readily find from this evidence that PPE’s promises provided Kaufman with sufficient comfort to risk the fallout with the Mohawks that could (and did) result from the payroll slowdown.²⁹

The district court distinguished *S&K* on the ground that there was here no enforceable agreement between the defendant (PPE) and the party to whom the fiduciary duty was owed and breached (the Mohawks). 345 F.Supp.2d at 367. It did not explain why this should matter, and in fact the distinction is irrelevant and unsupported by any authority of which we are aware. To the contrary, in *Diduck*, no contract existed between the defendant (the builder, Trump-Equitable) and the party to whom the fiduciary duty was owed (the union workers). 974 F.2d at 274. See also *Hannex*, 140 F.3d at 204 (no contract between defendant (GMI) and party to whom the fiduciary duty was owed (Hannex)). All that is needed to constitute “wrongful means”

^{29/} Kaufman’s poor performance on payroll and other matters eventually damaged his standing with the Mohawks so severely that the tribal gaming commission revoked his license and fired him. Horn dep. 52 (Ex. J to Frey WM Decl.). Unfortunately for Kaufman, the security blanket that PPE had led him to expect while the squeezing stratagem was being pursued was pulled away—PPE neither purchased Kaufman’s stake in Akwesasne nor granted him an interest in the contemplated Catskills casino. See p. 61, *supra*.

is that PPE was involved in Kaufman’s breach of fiduciary duty—which, as explained above, it was.

iv. Ratifying the primary actor’s breach.

In *Diduck*, it was alleged that the builder, Trump-Equitable, participated in Senyshyn’s fiduciary breach. This Court rejected Trump-Equitable’s argument that its conduct simply involved “failing to bring the fiduciary’s breach to the attention of the trust beneficiaries.” 974 F.2d at 284. It instead held that Trump-Equitable’s continued association with Senyshyn and underpayments to the union, after Trump-Equitable was put on notice of the breach, constituted a “ratification” of the breach and crossed the threshold of tortious participation (*ibid.*):

Once put on notice of the breach, Trump-Equitable could not continue its association with Senyshyn as if his conduct were not questionable. Its failure to inquire into the propriety of that conduct and take appropriate action was a substantial factor facilitating the breach. Making payments that Trump-Equitable knew or should have known “short-changed” the funds effectively ratified Senyshyn’s conduct.

Similarly here, PPE “ratified” Kaufman’s breach by extracting from the Mohawks an exclusive commitment to PPE in exchange for PPE’s infusion of desperately needed funds, well after PPE indisputably learned (if it didn’t already know) of Kaufman’s breach. Also like the defendant in *Diduck*, PPE wrongfully “continue[d] its association with [Kaufman] as if his conduct were not questionable” (974 F.2d at 284), as evidenced, for example, by the numerous draft “tripartite”

agreements between PPE, Presidents, and the Mohawks that PPE circulated in March 2000. Exs. M and N to Frey WM Decl.³⁰

c. Plaintiffs were damaged as a result.

As noted, a plaintiff asserting a participation claim must show that the fiduciary breach caused its injury.³¹ In granting temporary relief to plaintiffs under FRCP 60(b)(3), the district court concluded that a reasonable juror could so find. 286 F.Supp.2d at 319 (“a jury could infer from the tapes that * * * the economic pressure that slowing payroll produced forced the Tribe to agree to an exclusive with [PPE] * * *”). Without even acknowledging this holding, the court subsequently held (in reinstating its judgment for PPE) that “plaintiffs have not identified any evidence tending to show that the payroll squeeze occasioned the non-payment of the \$3 million [owed by the Mohawks to the State], which in turn occasioned the State’s demand for

^{30/} Without explanation, the district court deemed our reading of *Diduck* “strained.” 345 F.Supp.2d at 367.

^{31/} The district court rejected PPE’s argument that only a breach of fiduciary duty toward plaintiffs could qualify as wrongful means. While it found that to be “the normal posture of [participation] cases,” it relied upon this Court’s statement of the participation tort’s first element as “a breach by a fiduciary of obligations to another” (quoting *Hannex*, 140 F.3d at 203), rather than “to plaintiff.” 286 F.Supp.2d at 318 n.5. The district court later retreated from that conclusion without explanation. 345 F.Supp.2d at 367 n.4. It was correct the first time.

payment, which in turn occasioned the Tribe's immediate need for a loan." 345 F.Supp.2d at 367.

The district court was correct the first time. The tapes clearly support a reasonable inference that the payroll slowdown forced the Mohawks to agree to PPE's demand for a Catskills exclusive to obtain an immediate \$3 million lump-sum payment.³² As recounted in more detail *supra*, at 69-70, Kaufman boasted to Cummis (with Cummis's nodding approval) that the slowdown had forced the Mohawks to "look[] at Arthur as the savior" and that PPE's "maneuver[ing]" had caused the Mohawks to go from an initial position of "never would they give an exclusive" to an agreement where, in Cummis's words, "[t]hey've given it to us now." Ex. B to Frey WM Decl.

Ignoring this powerful evidence, the district court seized upon another of the taped conversations, wherein Cummis and Horn discuss the Mohawks' plan for the \$3 million. Cummis states that "they intend[] to use that \$3 million to pay off the State of New York. Apparently they owe the State of New York not only a million five for the state police, * * * but a million five * * * [t]o the Racing [] and Wagering Commission." Ex. Q to Frey WM Decl. The district court assumed that if the

^{32/} Contrary to the district court's characterization, the \$3 million was not a "loan" but an outright lump-sum payment contingent only on the Mohawks moving forward with PPE exclusively. JA 726.

Mohawks had earmarked the \$3 million for the State, then the payroll slowdown had nothing to do with the Mohawks' need for the \$3 million.

But the Mohawks' financial plight cannot be so superficially pigeonholed; at bottom, the Mohawks' financial obligations had to draw on the same resources. Thus, Kaufman's delinquency in making payments *from his company* to the Akwesasne casino employees would have created pressure upon the Mohawks to satisfy payroll *from their own general funds*, to the detriment of others (such as the State) who consequently would not be paid. See Thompson 10/29/03 dep. 51 (Ex. F to Frey WM Decl.) ("Q: [W]hen [Kaufman] didn't live up to [his fiduciary responsibility to pay the gaming commissioners], the tribe stepped up to the plate and put up the money, is that right? A: Yes."); *id.* at 34 ("Q: [C]ould you have paid the vendors and the payroll without the \$3 million from Park Place? A: No.").

3. Reasonable Jurors Could Find That PPE Knowingly Accepted The Benefits Of Kaufman's Breach.

Even if reasonable jurors could not find that PPE "ratified" Kaufman's breach, they surely could find that PPE knowingly accepted its benefits. A Ninth Circuit decision endorsed by this Court in *Diduck* holds that such knowing acceptance is itself tortious. See *S&K*, 816 F.2d at 849 (describing the Ninth Circuit's decision in *American Republic Ins. Co. v. Union Fidelity Life Ins. Co.*, 470 F.2d 820 (9th Cir. 1972), as holding that mere "knowing acceptance" of the benefits of a

fiduciary's breach is tortious); *Diduck*, 974 F.2d at 284 (endorsing *American Republic*).

But even if “knowing acceptance” is not independently tortious, reasonable jurors could still find that it satisfies the wrongful-means element. As explained *supra*, at 58, this Court has held that commission of a crime or independent tort is not a *sine qua non* of wrongful means. *Hannex*, 140 F.3d at 206 & n.9 (it is “unduly narrow” and an “apparently incorrect characterization of New York law” to assert that a wrongful-means theory “will fail unless the means employed include criminal or fraudulent conduct”) (quoting *PPX Enters., Inc. v. Audiofidelity Enters.*, 818 F.2d 266, 269 (2d Cir. 1987)).

4. Reasonable Jurors Could Find That PPE Exerted Improper Economic Pressure Upon The Mohawks.

This Court established in *Scutti* that the economic pressure employed by PPE here—offering money to the cash-strapped Mohawks but attaching a condition that functions to destroy another's business relationship with them—qualifies as wrongful means. In *Scutti*, PPE promised to lend the Mohawks \$6 million provided that they severely limit the number of VLTs at their Bingo Palace facility, which plaintiff Scutti, the Bingo Palace manager, claimed made profitable operations impossible and thus destroyed his business relationship with the Mohawks. 322 F.3d at 214. This Court held these allegations sufficient to constitute wrongful means, explaining that “[PPE's]

loan offer, which induced the Mohawk's agreement to the limitation, was economic pressure unrelated to [the casino business in which PPE and Scutti compete], and was wrongfully aimed at extinguishing Scutti's relationship with the Mohawks." *Id.* at 217.

This case is no different. PPE knew of plaintiffs' relationship with the Mohawks, knew that an exclusive contract between PPE and the Mohawks would destroy that relationship, and used its financial power (the \$3 million) to accomplish it. See Smoke dep. 306 (Ex. O to Frey WM Decl.) (testifying that Mohawks would not have signed the exclusive "if it weren't for that \$3 million"); Ransom dep. 348 (Ex. P to Frey WM Decl.) (similar). Moreover, a reasonable juror could easily conclude that the pressure was exerted in an "unrelated" (322 F.3d at 217) area to the Catskills region where plaintiffs and PPE were competing. Cummis described the Akwesasne casino as "having nothing to do with the base casino" in the Catskills region. Ex. R to Frey WM Decl.

We note that PPE has expressly conceded that *Scutti* and this case involve "identical" economic-pressure-as-wrongful-means theories. See PPE Br. in *Scutti*, No. 02-7371, at 29 (SPA-___) ("the identical argument was expressly rejected [by the district court] in *Catskill III*"). Just as this Court sustained the theory in *Scutti*, it should do so here.

B. Causation

1. Plaintiffs Were Not Required To Prove That The Project Would Have Been Consummated.

The district court alternatively held that, in order to prevail on the business-relations-interference claim, it was not enough for plaintiffs to show that PPE had destroyed their valuable business relationship with the Mohawks. Rather, plaintiffs had to show that their relationship *would have coalesced into a contract*—here, according to the court, one that received all regulatory approvals and could actually be implemented.

As an initial matter, the court erred in reflexively importing into this unique situation a rule whose evident purpose is to ensure that the relationship allegedly interfered with was real and substantial, not merely a speculative hope that the plaintiff entertained. Proof that there would have been a contract but for the interference is one way of accomplishing the goal of confirming the substantiality of the claimed relationship. But that concern is inapposite here, where there *actually was* an existing contractual relationship between plaintiffs and the Mohawks. While these contracts were found technically “void” when interfered with, they nevertheless demonstrate the existence of a real, substantial, and valuable relationship between plaintiffs and the Tribe. We are aware of no other case applying the would-have-received-a-contract rule in such a context.

Even in the typical context of a pre-contractual relationship not yet crystallized into an actual contract, New York law does not require the plaintiff to show that, but for the interference, a contract would definitely have been executed. This issue is controlled by this Court's holding in *Hannex*:

To state a claim for tortious interference with prospective business relations, a valid contract is not necessary. ***Further, it is not necessary for Hannex to prove that it would have been a party to any future contract with S & S Japan.*** Rather, it is well-settled that a plaintiff can recover if that plaintiff can prove that the defendant tortiously interfered with 'a continuing business or other customary relationship not amounting to a formal contract.' *** Accordingly, the tort encompasses the kind of conduct alleged here, including 'interferences with *** the opportunity of selling or buying *** chattels or services, and any other relations leading to potentially profitable contracts.' *** ***Regardless of whether or not [the plaintiff] would have been a party to any future contract, [it] lost a valuable business relationship*** when S & S Japan signed the exclusive distribution agreement with [the defendant].

140 F.3d at 205 (citations omitted; emphases added). Accord, *State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 171-72 (2d Cir. 2004) (focus is on interference with "proposed contractual relations"). Like *Hannex*, plaintiffs lost a valuable business relationship when the Mohawks signed an exclusive agreement with PPE. That loss was a cognizable injury, caused by PPE's interference.

Although the district court cited older New York cases employing a different standard, e.g., *Fine v. Dudley D. Doernberg & Co.*, 610 N.Y.S.2d 566 (2d Dep't 1994) (but for interference, plaintiff "'would have received a contract'" with third

party) (quoting *Union Car Adver. Co. v. Collier*, 189 N.E. 463, 469-70 (N.Y. 1934)); *Williams & Co. v. Collins, Tuttle & Co.*, 176 N.Y.S.2d 99 (1st Dep't 1958) (same),³³ they precede *Hannex* and therefore furnish no cause to depart from it. See *Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987) (“A ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel absent a subsequent decision of a state court or this Circuit tending to cast doubt on that ruling.”).

The district court did cite one post-*Hannex* case, but it does not support the would-have-consummated-a-contract rule. SPA-79 (citing *American Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 678 N.Y.S.2d 1 (1st Dep't 1998)). That case involved at-will employment contracts, which under New York law fail to satisfy the “valid contract” element of contract-interference but can support a business-relations-interference claim. By definition, the parties already have a “contract”; the only possible causation question, and the one asked by that state court, is whether “the

^{33/} These state-court decisions, unlike this Court’s *Hannex* decision, do not focus upon or discuss the causation requirement, but simply state in somewhat offhand fashion one formulation or another. Not surprisingly, this has spawned divergent standards. See *Union Carbide Corp. v. Montell N.V.*, 944 F.Supp. 1119, 1142 (S.D.N.Y. 1996) (collecting cases) (“[C]ase law is in conflict regarding the precise nature of the test. Some courts have held that a plaintiff’s allegations must reflect a greater likelihood than ‘being reasonably certain’ or ‘having a reasonable expectation’ of receiving a contract. By contrast, other courts have stated that claims * * * may be sustained where ‘the plaintiff had a “reasonable expectancy” of a contract with the third party’”) (citations omitted).

agreements would * * * would have continued ‘but for’ defendants’ actions.” 678 N.Y.S.2d at 4. A second post-*Hannex* case, *Scalise v. Adler*, 700 N.Y.S.2d 49, 51 (2d Dep’t 1999), is to the same effect.³⁴ These cases obviously do not require the plaintiff to show that a binding contract would have been entered; it is enough that the relationship probably would have continued, to the plaintiff’s economic benefit. Moreover, they focus directly on the plaintiff and its relationship partner and do not, in contrast to the ruling below, engage in additional speculation into likely third-party actions. Finally, these cases precede this Court’s 2004 decision in *State Street*, which essentially echoes *Hannex*.

Moreover, only the *Hannex* rule makes sense. The wrong is interference with a business relationship; there is no reason to elevate business relationships that will surely culminate in a contract over other valuable business relationships for purposes of the tort. So long as the relationship is a substantial, existing, non-speculative one, whether it ultimately would produce a valid agreement should go to *damages*, not liability. *Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000), is instructive. The plaintiff brought suit for the defendants’ breach of their promise to fund plaintiff’s television channel. This Court held that the speculative nature of the television

^{34/} A third post-*Hannex* case that we have found equivocates between the two standards without discussion and thus furnishes no basis for this Court to abandon *Hannex*. *Chemfab Corp. v. Integrated Liner Techs. Inc.*, 693 N.Y.S.2d 752, 755 (3d Dep’t 1999).

channel's prospects bore only upon plaintiff's ability to recover lost-profit damages, and did not impair recovery of *lost-asset damages*, much less preclude *liability*: That "Schonfeld cannot recover * * * lost profits * * * in no way impairs his ability to establish his claim for 'hybrid' damages seeking the market value of the lost supply agreements." *Id.* at 176.

A breached business relationship such as that between the plaintiffs and the Mohawks is fully susceptible to market-value damages analysis. Suppose, for example, that the proposed Monticello casino had a 40% chance of coming to fruition and would have had a value to plaintiffs of \$500 million had that happened. The value of the relationship at the time of the interference would be \$200,000,000. Cf. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002) (Posner, J.) (emphasizing need to value claims as likely recovery multiplied by probability of occurrence). But there is no basis for saying (as the district court's formulation would) that the relationship has no value, or is not protected, merely because it had only a 40%, rather than a greater-than-50%, likelihood of culminating in a \$500 million profit.

Here, there can be little doubt that, with BIA approval of the land-into-trust proposal and with contracts in hand that would lead to creation of an enormously valuable asset if the remaining approvals were forthcoming, plaintiffs had an asset that could be sold to investors for a very substantial sum. True, those investors would take

a risk that the government approvals would not in fact materialize. But that goes merely to the discount factor by which an investor would have reduced the value from that of a fully approved casino. It does not mean that no value existed that was entitled to legal protection.

Under *Hannex*, the district court’s “causation” ruling was based on a legally incorrect standard. This Court should therefore reverse and remand.

2. There Was Sufficient Evidence Of Causation To Go To The Jury.

Even if plaintiffs had to establish that they would more probably than not have received all necessary approvals, there was sufficient evidence to submit that issue to a jury.

The district court identified seven hurdles: (a) Governor Pataki’s concurrence; (b) final BIA approval of land-into-trust; (c) a Tribal-State compact covering the casino proposal; (d) NIGC approval of the management contract; (e) pending constitutional challenges to the gaming compact law; (f) New York State Racing & Wagering Board (“Racing Board”) approval; and (g) financing. In concluding that the evidence did not support a finding that these hurdles would have been overcome, the district court frequently invaded the province of the jury.

As a threshold matter, even if the court’s flawed proof-of-causation theory were correct, only the first four of the seven requirements have any bearing on compliance

with IGRA. Satisfaction of them would comply with all IGRA requirements, thereby producing, even on the district court's terms, a valid contract. The remaining three criteria go only to damages, if anything.³⁵ We therefore first consider the four hurdles to federal approval, then turn to the damages-related issues.

A second threshold point is that PPE bears the burden of proof on causation because its interference halted the approval process, triggering the general equitable principle that a wrongdoer should not profit by his or her wrongdoing at the victim's expense. The Supreme Court has explained:

In such circumstances 'juries are allowed to act on probable and inferential as well as (upon) direct and positive proof.' Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

^{35/} The cases cited by the district court for its proposition that plaintiffs had to show that their relations would have coalesced into a contract stop right there; they do not require proof that the parties would have begun, *let alone completed*, performance. *E.g.*, *Union Car*, 189 N.E. at 469 ("A cause of action has also been recognized where a party *would have received* a contract but for the * * * [wrongful acts].") (emphasis added); *M.J.&K. Co. v. Matthew Bender & Co.*, 631 N.Y.S.2d 938, 940 (2d Dep't 1995) ("Tortious interference with business relations 'applies to those situations where the third party *would have entered into or extended* a contractual relationship with plaintiff but for the intentional and wrongful acts of defendant'") (citation omitted; emphasis added). Therefore, all plaintiffs need show to satisfy the rule of these cases is that they would have obtained the *federally required* approvals.

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946) (citations omitted). See also *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir. 1995) (“The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages.”).

a. Governor’s concurrence.

The district court held that plaintiffs could not “establish that the Governor ever would have concurred with the BIA’s recommendation,” as required by 25 U.S.C. § 2719(b)(1)(A). SPA-81. But there was ample evidence of likely gubernatorial approval. See 3/14/00 Letter from John O’Mara (Governor Pataki’s negotiator on Indian land claims and adviser on Indian gaming) to Robert Berman (JA 434) (“The Governor has expressed his strong support for a casino in the Catskills and I am confident that when the [Mohawks] have obtained federal permission the Governor will respond expeditiously.”); 6/15/99 Letter from Gov. Pataki to Anthony P. Cellini, Supervisor, Town of Thompson (JA 435) (“Naturally, it has always been my goal to encourage all economic development strategies * * *. One project that shows tremendous potential is the [Mohawks’] proposal to establish an off-reservation casino at the Monticello Raceway. *** Assuming the BIA’s final determination is favorable, I am prepared to attempt to negotiate in good faith an amendment to the St. Regis Mohawk Tribe’s gaming compact for an off-reservation casino at the Monticello

Raceway in Sullivan County.”). From this evidence, reasonable jurors could find it probable that the Governor would concur in BIA’s recommendation.

The district court ignored this evidence, however, because it found that “the evidence strongly indicates that no such concurrence would have been forthcoming absent (1) agreement on a new gaming compact and (2) settlement of all land claims with the State of New York.” SPA-81. The court was mistaken on both grounds. As to the first, the district court simply mistook the facts about the Tribal-State gaming compact: a compact was already in place. See Point II.B.2.c, *infra*. As to the second, PPE pointed to no admissible evidence that the Governor would have withheld his concurrence until the land claims were settled, citing only: inadmissible hearsay statements;³⁶ a letter from O’Mara to the tribal council expressing concern about the state of land claims negotiations but making no mention of any tie to the Governor’s concurrence in BIA’s recommendation; and a newspaper article saying that a different tribe, the Wisconsin Oneidas, was willing to forfeit its land claims in New York in

^{36/} These were equivocal and internally inconsistent statements by the Chiefs that they had been told that the Governor would tie his concurrence to land claims settlement. Since PPE proffers the statements for the truth of what the Chiefs say they were told, this testimony would be inadmissible hearsay. Inadmissible hearsay may not be considered on summary judgment. *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 236 (2d Cir. 1999).

order to improve its relationship with Governor Pataki and make his concurrence in the Oneidas' land-to-trust application more likely.³⁷

b. BIA final approval of the land transfer.

After initial approval of the land-to-trust proposal, one formality remained for BIA: publication of a Federal Register notice of that determination stating that “a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.” 25 CFR § 151.12. There is no reason to believe that this essentially ministerial requirement would not have been complied with; the agency determination had been made, and BIA was therefore required to publish the notice.³⁸

PPE speculated that during the 30-day period, opponents of Indian gaming “could have commenced legal actions challenging [BIA’s] determination.” There is no basis to suppose that such hypothetical litigation by hypothetical “opponents” of Indian gaming would have blocked the land-to-trust transaction.

^{37/} JA 1983-84 (Mem. in Support of PPE’s Motion for Summary Judgment 28-29). Even were there admissible evidence that the Governor would not move forward without a land claims settlement, by April 2000 the claims were virtually settled. JA 71-72, 88, 89 (Berman dep. 119-20, 489-92, 551-52). Moreover, a juror could reasonably infer that the intensity of the Mohawks’ interest in a Catskills casino made it more likely that they would, if necessary, have compromised on their land claims in order to get approval, just as the newspaper article cited by PPE described. JA 758.

^{38/} § 151.12 does not prescribe a notice-and-comment period; it simply requires that notice of the already-final decision be published.

The district court also found BIA approval to “depen[d] upon the BIA’s certifying the accuracy of plaintiffs’ appraisal of the value of the land.” SPA-82. This misreads the record. The passage relied upon appeared in the attachments to the letter from the Assistant Secretary to Governor Pataki requesting his concurrence in BIA’s determination in favor of the Mohawks; those attachments were identified in the letter as findings of fact supporting that determination. This would be an extraordinary way for BIA to announce a condition of approval (one not tied to any regulatory or statutory requirement).

Moreover, the passage cited by the district court merely described the appraised value of the Monticello Property (over \$95,000,000) and the purchase price in the LPA (\$10,000,000), with no criticism whatsoever of those valuations, and then stated: “The Bureau of Indian Affairs *will certify* the accuracy of this appraisal before the land can be taken into trust” (JA 930 (emphasis added))—not “will determine” or “will evaluate” or “will have to certify.” A factfinder could certainly conclude from this that BIA had already accepted the independent appraisal.³⁹ In sum, the remaining BIA formalities posed no obstacle.

^{39/} There was in any event little doubt that a jury would find the land value sufficient to allow consummation of the sale. Whatever its value as unimproved land, the relevant question was its value as an approved casino site—approval obtained through four years of hard work and substantial financial investment.

c. Tribal-State compact.

IGRA requires tribes to enter into “a Tribal-State compact governing the conduct of gaming activities.” 25 U.S.C. § 2710(d)(3)(A). The district court mistakenly found that no such compact existed and thus that plaintiffs had to show that a compact would have been negotiated successfully. In fact, the Mohawks entered into a compact with the State in 1993, which remained in effect in April 2000. The compact covered gaming conducted not only on the Mohawks’ reservation, but also on trust land, stating: “The Tribe may conduct, only within the St. Regis Mohawk Tribe Reservation, * * * any and all games of chance” described in an attached appendix. The compact’s Definitions section provided:

For purposes of this Compact: * * * “Reservation” means the Indian lands of the St. Regis Mohawk Tribe within the State of New York as defined by * * * 25 U.S.C. § 2703(4); and all lands within the State of New York title to which is * * * held in trust by the United States for the benefit of the Tribe * * *.”

JA 1017, 1019. There was thus no need to show that negotiations for a Tribal-State compact would have been successful; the required compact already existed.

Even if the existing compact did not already cover casinos on trust lands, reasonable jurors could still conclude that there would have been a compact. IGRA provides procedures to ensure that a tribe can conduct Class III gaming activities on its tribal lands, including lands taken into trust, despite state opposition or lack of

cooperation. In particular, although a State may invoke sovereign immunity to block a suit by a tribe under 25 U.S.C. § 2710(d)(7), see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Secretary herself may issue compromise “gaming procedures” that are the legal equivalent of a compact. See 25 CFR part 291; SPA-23.

By the very terms of the statute and regulations, therefore, the Mohawks would have ended up either with a new compact or federally-imposed “quasi-compact.”

d. NIGC approval.

The district court found that plaintiffs could not show that NIGC would eventually have approved the management agreement. But it is undisputed that NIGC’s review process is a cooperative one, in which proposed terms are passed back and forth until consensus is reached. *E.g.*, letters from NIGC to Tribal Chiefs and/or plaintiffs’ principals of 4/19/00 (JA 715-22); 1/12/00 (JA 875-76); 10/22/99 (JA 870-72); Aug. 31, 1999 (JA 873-74) (all identifying existing impediments to approval and requesting response and resolution). See generally JA 1564 (memorandum from Michael Cox, former NIGC General Counsel, describing NIGC review as “more perfunctory and * * * an ongoing process”); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1418 (8th Cir. 1996) (NIGC review focuses on formal compliance with IGRA and regulatory requirements).

The district court’s skepticism centered on whether NIGC would have found everyone associated with Mohawk Management to be “suitable” managers for the casino, a determination governed by 25 CFR § 533.6(c). NIGC promulgated that rule to satisfy “one of the fundamental policies of the IGRA—‘to shield (tribes) from organized crime and other corrupting influences.’” 58 Fed. Reg. at 5819 (quoting 25 U.S.C. § 2702(2)).

It is doubtful that the evidence pointed to by PPE—infractions relating to Mississippi casino operations run by a corporation (Alpha) with a financial stake in Mohawk Management; misdeeds of individuals who had indirect ownership interests in Alpha; conduct of one of plaintiffs’ principals described by PPE as “potentially” illegal or “questionable”; and the fact that another of plaintiffs’ principals had been involved in a real estate project that ended in a bankruptcy filing—would trigger the level of concern that the conduct (“organized crime and other corrupting influences”) animating NIGC’s rule does. More importantly, when a finding of unsuitability is likely, NIGC does not reject the application, but asks that the involvement of any unsuitable individuals be terminated. JA 143-44, 145-46 (Cox dep. 93-94, 129-130) (speaking from personal experience gained while NIGC General Counsel). Even PPE’s Cummis acknowledged that to be the “usual” NIGC practice. JA 167

(Cummis dep. 600). Plaintiffs' principals would have complied with any such requirement. JA 87 (Berman dep. 469).

Negotiation until agreement is reached is NIGC's *modus operandi*. The district court usurped the jury's function in deciding that the cooperative process between NIGC and plaintiffs would have ended unsuccessfully, when a jury could easily have reached the opposite conclusion.

* * * * *

In sum, reasonable jurors could find that Governor Pataki would have concurred; that BIA would have published notice and taken the land into trust; that there already was or foreseeably would have been a compact; and that NIGC would have approved the management contract. Those were the only impediments to plaintiffs having a federally approved contract with the Mohawks, and thus that is all plaintiffs must show even under the district court's "fully consummated contract" causation rule. The three remaining issues identified by the court thus go solely to damages. There too, however, plaintiffs adduced evidence sufficient to present jury questions.

e. Legality of Indian Gaming in New York.

Observing that two lawsuits had been filed challenging the constitutionality of the legislation empowering the Governor to negotiate compacts for Indian casinos, the district court found it "impossible to say with certainty" (as though "certainty" was the

standard), until those cases are definitively decided by the New York courts, that a casino in New York would “pass legal muster.” SPA-81. Since then, both the trial court and the intermediate appellate court have upheld the legislation. See *Dalton v. Pataki*, 780 N.Y.S.2d 47 (3d Dep’t 2004), appeal argued in N.Y. Court of Appeals (March 21, 2005).

Laws are presumed constitutional until declared otherwise. *McGee v. Korman*, 513 N.E.2d 236, 238 (N.Y. 1987) (“statutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt”); *Trump v. Perlee*, 644 N.Y.S.2d 270 (1st Dep’t 1996) (laws creating lottery game presumed constitutional). Frivolous constitutional challenges to all manner of statutes are hardly uncommon. If PPE wishes to try to prove, beyond a reasonable doubt, that the law empowering the Governor to negotiate gaming compacts is unconstitutional (and thereby destroy its own aspirations to an Indian casino in the Catskills), it could undertake the attempt. But assigning the converse burden to plaintiffs is contrary both to law and common sense, especially in light of the decisions of the trial and intermediate appellate courts upholding the legislation.

f. New York Racing Board approval.

The district court ruled that plaintiffs had to but could not prove that their principals would have been approved to run the casino by the Racing Board. As an

initial matter, neither the district court nor PPE pointed to any specific authority requiring casino managers to obtain such approval. The only requirement of Board review of which we are aware is in the Tribal-State compact—the very document PPE claims does not apply to a Catskills casino.

The compact requires that “enterprise[s] [that] * * * provide gaming service, gaming supplies or gaming equipment to the Tribal Gaming Operation” be licensed by the Board. The standard for the Board to apply is that the “gaming management enterprise” itself and its principals must have no felony or gambling-related convictions (none of plaintiffs’ principals does), and satisfy a suitability standard materially identical to that of NIGC. JA 1032-34. If NIGC would not have rejected Mohawk Management—as reconstituted, if necessary, following negotiations—it is untenable to speculate that the Board would have reached a different conclusion.

In addition, six principals of plaintiffs (Morad Tahbaz, Cliff Ehrlich, Guillermo Montero, Paul deBary, Joseph Bernstein and Ralph Bernstein) had already been found suitable and licensed by the Board to operate the Monticello Raceway. JA 1541 (Berman affidavit 2); <<http://licensing.racing.state.ny.us/license.cfm>>. The standard applied by the Board under the applicable statute, N.Y. Rac. Pari-M. § 307(5)(b), is similar to the standard to be applied by the Board under the compact, and reasonable jurors could readily conclude that the Board would not have withheld approval.

g. Financing.

Finally, the district court stated that it was “far from certain” that plaintiffs would have secured financing for the casino. SPA-84. Of course, plaintiffs needed to show only that reasonable jurors could conclude that plaintiffs would have obtained financing, not that getting financing was “certain.” The record is replete with evidence that plaintiffs would have obtained financing.

Wendell Brooks of Salomon Smith Barney (“SSB”), who was involved in the financial structuring and prospective financing of plaintiffs’ proposed casino throughout its development (JA 108-09 (Brooks dep. 57-58)), was quoted in a newspaper article as saying that Wall Street would have “fallen over itself” to invest in plaintiffs’ casino, and affirmed in deposition his continuing commitment to that basic proposition. JA 118 (Brooks dep. 96-97). In 1996, SSB had advised the NIGC that it was “highly confident” that plaintiffs and the Mohawks could raise up to \$300 million in the debt markets for the proposed casino operation. JA 108 (Brooks dep. 55).⁴⁰ In late 1999, SSB advised NIGC that it was “confident” that plaintiffs and the Tribe could raise the full anticipated construction cost of the casino, \$400 million, in the public debt markets, and that plaintiffs could raise an additional \$50 million secured by the MA and the Monticello Raceway. JA 116-17 (Brooks dep. 89-90). Brooks testified that as of mid-

^{40/} Since under IGRA the tribe must own the casino, financing must be through debt, not equity. JA 107 (Brooks dep. 51).

1999, with a seasoned management team in place, plaintiffs were positioned to raise \$470 million in the debt markets. JA 121 (Brooks dep. 112-13).

Plaintiffs' principals were willing to accept and were actively seeking a seasoned casino operator as a partner. JA 1542 (Berman affidavit 3); JA 73 (Berman dep. 241); JA 179-80 (Fields dep. 47-49); JA 104-05 (Brooks dep. 38-42). The attractiveness of plaintiffs' proposal to other operators would have increased exponentially once BIA approved plaintiffs' application. Brooks testified that he believed that in April 2000, plaintiffs could have found the operator they needed to guarantee that their casino would be financed. JA 120 (Brooks dep. 106).

Investing in what would be the closest casino to New York City, a 90-minute drive away and an hour closer than the hugely profitable Foxwoods and Mohegan Sun, is not much of a gamble. A reasonable juror could conclude from the evidence described above that plaintiffs would have succeeded in obtaining financing.

III. THE DISTRICT COURT ERRED IN SUMMARILY REJECTING SANCTIONS FOR PPE'S DISCOVERY MISCONDUCT.

As noted in the Statement, *supra*, at 21-22, PPE's failure to produce several audiotapes prompted the district court to grant plaintiffs temporary relief under FRCP 60(b)(3). During the renewed discovery allowed pursuant to the 60(b) motion, plaintiffs learned that the tapes episode was only one in a series of flagrant discovery abuses by PPE. Plaintiffs moved for sanctions against PPE, but the court summarily

rejected the motion. See endorsement of 12/29/03; letters of 4/26/04 and 12/3/04. This was an abuse of discretion. PPE's violations call for a substantial sanction, and at the very least warranted plenary consideration by the district court.

We acknowledge that this Court typically reviews a district court's grant or denial of discovery sanctions for abuse of discretion. *E.g.*, *Residential Funding Corp v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). However, there is really nothing to review here; the sum total of the district court's "decision" denying sanctions was its scribbled directive that "PPE NOT respond to that motion." Endorsement of 12/29/03. Although this Court does not appear to have addressed the standard of review applicable to such a summary denial, several other circuits have held that the abuse of discretion standard does not apply when a district court denies sanctions without explanation—indeed, that summary denial of a non-frivolous sanctions motion itself constitutes an abuse of discretion. *E.g.*, *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 408 (7th Cir. 1998) ("we have said more than once that the summary grant or denial of a sanctions request may constitute an abuse of discretion"); *Griffen v. City of Oklahoma City*, 3 F.3d 336, 340 (10th Cir. 1993) (similar).

Summary denial was especially inappropriate here. Plaintiffs demonstrated that sanctions were warranted under both FRCP 37 and the district court's "inherent power to manage its own affairs." *Residential Funding*, 306 F.3d at 107.

This case resembles *Metropolitan Opera Association v. Local 100*, 212 F.R.D. 178, 219 (S.D.N.Y. 2003) (Preska, J.). There, the defendant was a union that had allegedly defamed the Met. *Id.* at 184. The Met sued, and the union embarked on a pattern of non-production of documents responsive to the Met's discovery requests. *Id.* at 181-82. Judge Preska granted sanctions, entering default judgment against the union on liability, relying, *inter alia*, on FRCP 37 and the court's inherent authority. *Id.* at 231. The court rejected "[t]he Union's assertion that the Met must show prejudice before a sanction may be ordered," but it proceeded nonetheless to find that the Met had suffered prejudice, such as by being "forced to proceed with depositions before relevant documents were produced * * * [and] no doubt hampered in opposing summary judgment[.]" *Id.* at 229.

While PPE's conduct may differ from the union's conduct in certain respects, it is nevertheless strikingly analogous in many others, sufficiently so to justify imposing the same sanction or some other suitably severe sanction on PPE. PPE's willfulness and bad faith is evident. PPE had possession of the tapes on or about June 15, 2001⁴¹—before PPE responded to plaintiffs' first document request on June 29, 2001, before it began producing documents about a month later, and well before it certified

^{41/} As Jason Gross, former PPE in-house attorney in charge of coordinating discovery, acknowledged, a memorandum of that date transmitted the transcripts to Steve Radin, then a partner in Sills, Cummis—a firm that represented PPE in this case and in which PPE's Cummis was a partner. Ex. D to Frey Sanctions Decl.

on November 5, 2001 that it had “fully complied with all of plaintiffs’ document requests, with the exception of producing certain e-mails * * *.” Ex. Z to Frey Sanctions Decl. As stated above (pp. 21-22, *supra*), the tapes and transcripts thereof had been produced by PPE to Presidents in Presidents’ earlier state-court action against PPE. There can be no justifiable reason for the tapes’ non-production in this action by PPE (or by Presidents, Kaufman, and Horn (Presidents’ counsel) under third-party subpoenas). PPE went a step further, however, intentionally omitting *from its privilege logs* any reference to the tapes or transcripts or the attorneys’ letters transmitting them.⁴²

Nor can it be doubted that there was substantial prejudice. Had the tapes been timely produced, crucial witnesses, a number of whom would not even have known of the recordings, could have been confronted with them during their depositions, producing more spontaneous, unrehearsed answers.

Even if default judgment is not warranted, some substantial sanction is surely in order. In view of the correlation between the non-produced evidence and plaintiffs’ ability to demonstrate that PPE employed wrongful means, it would clearly be appropriate to deem wrongful means established or to instruct the jury that an adverse

^{42/} As Kaufman/Presidents similarly did not produce these items, and as they reveal PPE’s and Kaufman/Presidents’ joint deliberations to derail plaintiffs’ relationship with the Mohawks, one can infer that the concerted omission was not coincidental.

inference should be drawn against PPE. At the very least, PPE should be ordered to pay plaintiffs' reasonable expenses in connection with the FRCP 60(b) motion and the post-remand discovery and briefing.

Even worse than PPE's non-production of documents was its tactic of encouraging Melius to mount a dubious objection to plaintiffs' subpoena, see Ex. CC to Frey Sanctions Decl. (1/23/02 fax from Melius's attorney describing agreement with PPE that Melius would "continue to object to the subpoena and force Catskill's attorneys to make a motion to the Magistrate Judge"), and exploiting the resulting delay to buy Melius's cooperation through an agreement settling Melius's action against PPE. Ex. O to Frey Sanctions Decl. (filed under seal) ([REDACTED]); Ex. R to Frey Sanctions Decl. (contemporaneous recorded phone conversation between Melius and Cummis wherein Melius promised to "try to make you look good"). Melius fulfilled his promise by, for example, producing a mere two documents in response to Plaintiffs' subpoena despite producing literally boxes to PPE in Melius's suit against PPE.

Although a witness can lawfully try to help a party to whom he is well disposed, the [REDACTED] cannot be justified by anything legitimate Melius might do by way of cooperation. [REDACTED] (N.Y. Disciplinary Rule 7-109(c)(2)), and the Melius–Cummis conversation further shows that these parties had [REDACTED]

N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 547, 1982 WL 31701, at *1 (quoting DR 7-109(c)) (emphasis added). Based on this episode alone, some severe sanction is warranted.

CONCLUSION

The judgment of the District Court should be reversed.

Dated: April 1, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's Order of March 2, 2005 granting an extension of the word limit to 24,000 words, I hereby certify that this brief was produced in Times New Roman (a proportionally spaced typeface), 14-point type and contains _____ words (based on the Corel WordPerfect word processing system word count function).

Andrew L. Frey

CERTIFICATE OF SERVICE

I, Andrew L. Frey, a member of the Bar of this Court, hereby certify that, on April 1, 2005, I caused to be served two copies of the foregoing Brief For Plaintiffs-Appellants by causing the same to be deposited with third-party commercial carrier United Parcel Service for overnight delivery to counsel for Defendant-Appellee Park Place Entertainment Corporation at the following address:

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