SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.:

RATIONAL GROUP US HOLDINGS INC. and OLDFORD GROUP LIMITED,

Plaintiffs,

-vs-

RESORTS INTERNATIONAL HOLDINGS, LLC, RIH ACQUISITIONS NJ, LLC, RIH PROPCO NJ, LLC, ERIC MATEJEVICH, IRWIN APARTMENT TRUST, and MICHAEL FRAWLEY,

Defendants.

ON MOTION FOR LEAVE TO APPEAL
FROM:
SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:ATLANTIC COUNTY
GENERAL EQUITY PART
DOCKET NO. ATL-C-43-13

SAT BELOW:
HON. RAYMOND A. BATTEN, P.J.CH.

Civil Action

BRIEF OF PLAINTIFFS, RATIONAL GROUP US HOLDINGS INC. AND OLDFORD GROUP LIMITED, IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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Plaintiffs, Rational Group US Holdings Inc. ("Rational") and Oldford Group Limited ("Oldford") (collectively "Plaintiffs") submit this brief in support of their motion for leave to appeal from the Chancery Division's Order dated May 19, 2013, dissolving temporary restraints and denying Plaintiffs' application for preliminary injunctive relief against Defendants, Resorts International Holdings, LLC, RIH Acquisitions NJ, LLC, RIH Propco NJ, LLC, Eric Matejevich, Irwin Apartment Trust, and Michael Frawley (collectively "Defendants" or "Sellers").

PRELIMINARY STATEMENT

The Casino Control Act ("CCA") requires parties to a casino purchase contract to provide the New Jersey Division of Gaming Enforcement ("DGE") and Casino Control Commission ("CCC") a full 121-day period to review a license application when an unlicensed person contracts to purchase a casino. In this matter of first impression, the trial court misinterpreted an unambiguous statute, failing to apply it to the casino purchase agreement at issue. In doing so, the trial court incorrectly vacated properly-entered temporary restraints, and denied preliminary injunctive relief. Plaintiffs now seek interlocutory review.

Plaintiffs agreed to buy the financially-distressed Atlantic Club Casino Hotel ("Atlantic Club"), located in Atlantic City, from Defendants by way of a Membership Interest Purchase Agreement (the "Purchase Agreement"). Plaintiffs immediately applied for an Interim Casino Authorization ("ICA"). The application, however, was not deemed "complete" until sixteen days prior to the Purchase Agreement's projected "Outside Date",

which, in violation of the CCA, purportedly allowed cancellation unless the transaction closed by April 26, 2013. Defendants improperly attempted to terminate the Purchase Agreement on April 27, 2013, barely three weeks into the mandatory 121-day review period.

Plaintiffs filed a Verified Complaint and Order to Show Cause seeking Temporary Restraints (the "TRO"), which the trial court granted on May 6, 2013, restraining Defendants, *inter alia*, from trying to sell the Atlantic Club to other parties during this action. Nevertheless, on the return date of the Order to Show Cause, the trial court vacated the TRO and refused to enter a preliminary injunction, based on a misapplication of the CCA and a misreading of the same contract which it had reviewed in detail before entering the TRO.

Although the trial court found that Plaintiffs had strong equitable arguments for maintaining the *status quo*, that the harm to Plaintiffs in the absence of an injunction would be irreparable, that there was a significant public interest in terms of more than 1,800 casino jobs and a $32 million dollar pension obligation which could go unfunded without Plaintiffs' purchase, it concluded that DGE and CCC were not entitled to the mandatory 121 days of review and refused to apply the CCA to this casino purchase agreement.

The interest of justice will be violated without interlocutory review of this decision. As the trial court indicated, this is a matter of great public importance, to the Atlantic Club's employees, to the highly-regulated casino

industry, to DGE and CCC, and to Plaintiffs, who invested more than $11 million in the Atlantic Club in connection with the Purchase Agreement. The trial court's interpretation of the CCA contradicts its express language, and there is no existing case law interpreting this provision.

In addition, the trial court's decision on the return date of the Order to Show Cause was unequivocally prejudiced by Defendants' improper opposition papers and oral argument. First, over Plaintiffs' objection, Defendants relied in part upon a signed affidavit of a retired Atlantic County Superior Court judge to provide expert opinion as to the licensing process and to the application of the CCA to the Purchase Agreement. Next, the trial court allowed an attorney for Defendants to argue critical facts not in the record, also over Plaintiffs' objection. Finally, the trial court considered three other "expert" certifications and Defendants' uncertified summaries of other casino contracts which were not produced, not certified, and not in evidence. For these reasons alone, the trial court's decision is erroneous.

Given the above, and for reasons set forth more fully herein, Plaintiffs respectfully request that this Court, in the interest of justice, grant their motion for leave to file an interlocutory appeal.

PROCEDURAL HISTORY

On May 6, 2013, Plaintiffs filed a Verified Complaint and Order to Show Cause seeking Temporary Restraints. Pa1. The Court entered the Order the same day. Pa129. On May 7, 2013, the Court

convened a phone conference, on the record, to address entry of the TRO. Pa657. The Court entered an Order continuing those restraints, dated May 9, 2013. Pa134.

On May 13, 2013, Defendants filed opposition to the Order to Show Cause and a request to vacate the TRO. Plaintiffs filed a reply brief and certifications on May 15, 2013. The Court heard oral argument on Plaintiffs' application for preliminary restraints on May 17, 2013. On May 21, 2013, the Court entered an Order regarding vacating the TRO and denying Plaintiffs' application for a preliminary injunction, as stated in its decision on the record on May 17, 2013. Pa704. The May 21, 2013 Order was served via electronic mail on the same date.

Defendants filed and Answer and Counterclaims on May 30, 2013. On June 4, 2013, Plaintiffs filed a motion for leave to file a First Amended Verified Complaint, to which Defendants consented.[1]

STATEMENT OF FACTS

In October 2012, Rational and Defendants began to negotiate a sale of the financially distressed Atlantic Club. Pa4-5, ¶ 18. The Atlantic Club had more than $32 million in unfunded pension liabilities, ibid. and if an agreement could not be reached quickly, with Rational funding the Atlantic Club's operational shortfalls, Defendants would file for bankruptcy, resulting in, *inter alia*, the loss of over 1,800 jobs. Pa5, ¶ 19. The parties could not immediately close because the CCA requires Rational to

[1] Certain dates and other minor items have been corrected with the filing of the Amended Complaint. Those corrections, however, are not material to the analysis here.

obtain an ICA prior to purchasing a casino. Id., ¶ 20. Defendants demanded that Rational commit to fund their operational shortfalls from execution of a binding term sheet (the "Term Sheet"), ibid., which Rational did, even agreeing to provide for additional advances to the Atlantic Club during negotiation of the Purchase Agreement. Ibid. On December 21, 2012, Rational and Defendants executed the Purchase Agreement. Pa5, ¶ 22; Pa34-115. Rational agreed to pay the Atlantic Club's weekly operating shortfalls, up to $750,000 per week, as additional advances against the purchase price. Pa5, ¶ 23; Pa39-40 (Sec. 1.3).

Pursuant to the Purchase Agreement, on December 24, 2012, Rational submitted its ICA application. Pa6, ¶ 24. On March 26, 2013, as the Purchase Agreement contemplated (Pa76, Sec. 5.5(b)), DGE requested additional information and documents from Rational Pa7, ¶ 29. DGE advised Rational that this would delay the issuance of an ICA for a few months. Ibid. This was the first time that Rational learned of the delay. Ibid. This delay was for reasons beyond Rational's control. Pa7, ¶ 29.

On March 26, 2013, Matejevich, CFO of RIH, wrote to Rational, advising that DGE informed Defendants that Rational's ICA application was not yet deemed "complete" due to the need for further information and documents requested by DGE, and that DGE would not be able to act on the ICA application for at least 90 days. Id., ¶ 30; Pa116-117. Matejevich also acknowledged that he knew that Rational would not obtain its ICA by the Outside Date, but, nevertheless, Sellers remained committed to assist Rational in obtaining the ICA. He wrote that Sellers remained committed to

"using their best efforts to obtain . . . the interim casino authorization from [DGE and CCC] as promptly as practicable." Pa7-8, ¶ 31; Pa117 (emphasis added). No change in circumstances occurred between March 26, 2013 and April 26, 2013 to justify Defendants' withdrawal of the implied waiver of their purported right to terminate and their commitment to complete the transaction.

Matejevich also advised Guy Templer ("Templer"), Rational's Group Strategy and Business Development Director, that DGE informed him that its report to the CCC may be delayed until June 2013. Pa8, ¶ 32. Nevertheless, Matejevich did not suggest either in his March 26, 2013 letter or in any subsequent conversation with Templer that Sellers intended to terminate the Purchase Agreement. Id., ¶ 33. On March 27, 2013, Rational's counsel further advised Defendants' counsel that Rational expected to receive a new DGE information request shortly. Id., ¶ 34.

On March 29, 2013, fully aware of this delay, Matejevich requested that Rational advance payment for past and future work on designing and building a planned new poker room within the Atlantic Club. Id., ¶ 35. This request provided Rational with another strong indication that Defendants intended to proceed with the transaction despite the delay. Ibid. On March 28, 2013, Templer spoke to Richard Welch ("Welch"), a principal of Colony Capital, LLC,[2] who appeared to remain committed to the deal, but sought reassurance that nothing significant had changed. Id., ¶

[2] RIH is an affiliate of Colony Capital. Pa3, ¶ 7.

36. Defendants advised Rational that they would approach DGE independently to discuss Rational's ICA application. Ibid.

On April 1, 2013, Rational received an information request from DGE, requiring Rational to respond by April 22, 2013 ("the Information Request"). Id., ¶ 37. On April 2, 2013, the parties' counsel held a conference call regarding the ICA application's status, including the Information Request. Pa8-9, ¶ 38. Counsel for Sellers did not indicate that Sellers believed that Rational had breached the Purchase Agreement, or that Sellers intended to terminate the Purchase Agreement. Ibid.

On April 8, 2013, counsel for Rational met with the members of DGE, including DGE's Director, David L. Rebuck. Pa9, ¶ 41. Counsel updated Sellers regarding the meeting and assured them that Rational continued to believe that it would obtain the ICA within DGE's new timeframe. Ibid. On April 11, 2013, DGE confirmed that DGE deemed Rational's ICA application to be "complete" as of April 10, 2013. Id., ¶ 42. This confirmation triggered the start of the 121-day period as required by the CCA, meaning a decision by DGE and CCC on the ICA application no later than August 9, 2013, if not sooner. Ibid.

On April 12, 2013, Templer and Welch discussed the status of the ICA application and the Purchase Agreement. Pa10, ¶ 43. Welch advised Templer that Defendants would not engage in further discussions on these topics without first receiving a copy of the April 2 Information Request. Ibid. Rational agreed to provide the Information Request, together with a sensitive and confidential document regarding Rational's business, upon Sellers signing a

non-disclosure agreement. Id., ¶ 44. On April 17, 2013, Defendants signed the non-disclosure agreement. Id., ¶ 45. On April 18, 2013, Defendants received a copy of the Information Request and two other of Rational's sensitive documents. Ibid. Rational would not have provided those highly sensitive documents to Defendants if Rational had not been led to believe that the Purchase Agreement was subject to termination prior to the completion of the ICA process. Ibid.

On April 23, 2013, Templer spoke with Welch and proposed that the parties formally extend the Outside Date of the Purchase Agreement. Id., ¶ 47; Pa118-119. On April 24, 2013, despite not being obligated to, Templer provided a written proposal for an extension, including the significant concession that Rational would assume *all* of the Atlantic Club's past and current workers' compensation claims, which would require Rational, outside of the Purchase Agreement, to replace over $7 million held on deposit under an RIH insurance policy. Pa10-11, ¶ 47.

On April 25, 2013, Rational's counsel met with DGE to further discuss matters relating to the ICA process. Pa11, ¶ 49. Immediately after this meeting, Rational's counsel provided Frawley, COO of the Atlantic Club, with a detailed update on the status of the ICA process. Ibid. By email dated April 25, 2013, Welch advised Templer that Sellers rejected Rational's proposal for a formal extension of the Outside Date. Id., ¶ 50; Pa118-119.

After further telephone calls from Rational to Sellers, on April 26, 2013, Welch proposed that Rational "offer" to pay $6 million to Defendants in consideration for Defendants' agreeing

to extend the Outside Date on the Purchase Agreement for ten days. Pa11, ¶ 52; Pa120-121. Under Welch's proposal, Defendants would be "released from [their] obligations [under the Purchase Agreement] related to soliciting other interested buyers" - that is, Defendants would be permitted to entertain offers from other potential buyers during the ten-day extension, in exchange for payment from Rational of $6 million. Pa11, ¶ 53; Pa120-121.

On April 27, 2013, Defendants, despite waiving their purported right to do so, sent Rational notice that they had purportedly terminated the Purchase Agreement as of the Outside Date of April 26, 2013 (the "Termination Letter") pursuant to Section 7.1(b)[3] of the Purchase Agreement, also alleging that Rational failed to advance certain fees for construction of a poker room at the Atlantic Club. Pa12, ¶ 55; Pa122-124. Defendants first requested payment of these fees four days earlier, on April 22, 2013. Pa12, ¶ 55.

On April 30, 2013, in a good faith effort to salvage the transaction, Rational offered (without prejudice) to pay $4 million to Defendants to extend the Purchase Agreement until Rational received the ICA. Ibid. Rational also offered to continue paying the Atlantic Club's operating losses through the extended period. Ibid. Despite these good faith efforts, on May 1, 2013, Sellers sent a letter reiterating that the Purchase Agreement was terminated. Pa12, ¶ 56; Pa125-128.

[3] This section allows a party to terminate the Purchase Agreement "if the transactions contemplated hereby shall not have been consummated on or prior to the Outside Date." Pa84.

From November 2012 to April 27, 2013, Rational paid Defendants more than $11 million to cover the Atlantic Club's operating shortfalls pursuant to the Term Sheet and Purchase Agreement. Pa12, ¶ 57, and also paid approximately $319,486 toward the establishment of a poker room at the Atlantic Club and to cover initial plan and design costs for refurbishing and upgrading other parts of the Atlantic Club. Ibid. Rational also incurred more than $1 million in connection with the transaction, including the fees and expenses of various third party providers. Ibid. Defendants believe that they can now sell the Atlantic Club to another buyer and wish to keep the $11 million paid to them by Rational. Pa671 (Tr. 15:24-25).

LEGAL ARGUMENT

POINT I

THE INTEREST OF JUSTICE REQUIRES INTERLOCUTORY REVIEW OF A MATTER WHICH PRESENTS ISSUES OF FIRST IMPRESSION AND OF SUBSTANTIAL PUBLIC INTEREST

This Court may grant leave to appeal from interlocutory orders "in the interest of justice." R. 2:2-4. Interlocutory review is appropriate "where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." M. Sullivan, Interlocutory Appeals, 92 N.J.L.J. 161 (1969); see also State v. Reldon, 100 N.J. 187, 205 (1985). Edwards v. McBreen, 369 N.J. Super. 415, 420 (App. Div. 2004) ("It is the exclusive prerogative of [this Court] to determine whether extraordinary circumstances are present warranting a piecemeal appeal."). Interlocutory review should be granted where the individual injustice resulting from waiting for

a final judgment outweighs the concern against piecemeal review. In re Pennsylvania R.R. Co., 20 N.J. 398, 404 (1956) (holding that one compelling factor in the analysis is the threat of "individual injustices which may result from the denial of any appellate review until after final judgment at the trial level.")

The balancing of the competing factors requires a fact-sensitive analysis. Delbridge v. Jann Holding Co., 164 N.J. Super. 506, 509-10 (App. Div. 1978). The "interest of justice" standard thus "attempts to achieve fairness in individual cases." Robert L. Clifford, Civil Interlocutory Appellate Review in New Jersey, 47 Law & Contemp. Probs. 87, 100 (Summer 1984). The interests of justice are implicated where the questions presented are "substantial and require prompt disposition." Caggiano v. Fontoura, 354 N.J. Super. 111, 124 (App. Div. 2002). From the perspective of judicial economy, "an interlocutory appeal is not appropriate to 'correct minor injustices. . . .' Rather, when leave is granted, it is because there is the possibility of "some grave damage or injustice" resulting from the trial court's order." Brundage v. Est. of Carambio, 195 N.J. 575, 599 (2008) (citations omitted). Further, "Regardless of the specific basis asserted, however, the moving party must establish, at a minimum, that the desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause.'" Ibid.

In this matter, the trial court failed to apply the CCA to the Purchase Agreement. The trial court held that it had "never read anything like [the Purchase Agreement], which really means

nothing in terms of the legal analysis." Tr. 98:18-19. But regardless of this perhaps atypical business arrangement, the trial court had the duty to apply the CCA and afford DGE and CCC sufficient time, as ***required by statute***, to complete their investigation. The fact that the trial court did not do so is reversible legal error. Further, the trial court improperly considered the "expert" testimony of a retired Superior Court judge, and testimony of a lawyer-fact witness in Court at oral argument, as well as other purchase agreements and summaries of purchase agreements, without those agreements being entered into evidence. The trial court also failed to hold Defendants to their duty to act in good faith and did not even consider Defendants' conduct.

These factors led the trial court to reach the wrong conclusion in its analysis of the propriety of injunctive relief. Had the trial court properly applied the CCA to the Purchase Agreement and Defendants' duty to act in good faith, it would have necessarily reached a different conclusion and would have maintained the *status quo*, preserving the parties' interests while this matter is fully litigated. The improper affidavits and testimony would not have been needed, and the trial court would properly have held that the Outside Date in the Purchase Agreement could not be enforced and had to be reformed.

Finally, this case is one of great public importance. There are 1,800 casino industry jobs at risk, Pa5, ¶ 19, and $32 million in potentially unfunded pensions, Pa4-5, ¶ 18. There has been extensive media coverage of this matter. This matter

provides the Court with an issue of first impression of the controlling statute. See Eisten v. Kostakos, 116 N.J. Super. 358, 366 (App. Div. 1971) (this Court granting leave to appeal on its own motion where "an important question in the [subject] field . . . has not specifically been dealt with in New Jersey by an appellate court."). Further, this case involves a transaction in a highly regulated industry with critical economic impact in this State. Given these factors, this Court should grant interlocutory review in the interest of justice.

POINT II

THE TRIAL COURT ERRED BY PREVENTING DGE AND CCC FROM BEING ABLE TO USE ITS FULL 121 DAYS TO REVIEW THE ICA APPLICATION

This Court should grant leave to appeal because the trial court misconstrued the Purchase Agreement in violation of a clear, unambiguous statute. The CCA expressly requires that if a party enters into a casino purchase contract, such as the subject Purchase Agreement, "the contract shall not specify a closing or settlement date which is earlier than the 121st day after the submission of a completed application for licensure or qualification . . . ***Any contract provision which specifies an earlier closing or settlement date shall be void for all purposes.***" N.J.S.A. 5:12-95.12(a) (emphasis added).

In misconstruing the effect of the CCA on the Purchase Agreement, the trial court adopted the Defendants' position that the CCA was essentially meaningless because "DGE could deem an application to be incomplete for two years, and that would have the effect of essentially extending the termination date for a

corresponding period of time or even longer." Tr. 99:24-100:2. This holding contradicts the express language of the statute, strips DGE and CCC of their statutory authority and discretion, and warrants interlocutory review.

The Purchase Agreement lists April 26, 2013 as the "Outside Date". Pa98. Defendants purportedly terminated the Purchase Agreement on the basis that the "transactions contemplated" were not completed by the Outside Date. Pa125-126. That termination, and Defendants' interpretation of the Purchase Agreement, violates the CCA, because the Outside Date, which here operates as a closing date, is earlier than the 121st day following the submission of Rational's complete application (the ICA was complete as of April 10, 2013, so 121 days falls on August 9, 2013).

Further, Section 5.5(c) of the Purchase Agreement unlawfully requires the closing to occur by the Outside Date. Section 5.5(c) provides that:

> . . . Buyer, its Affiliates and Sellers shall . . . each use its reasonable best efforts to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation Law that may be asserted by any Governmental Entity with respect to the Closing so as ***to enable the Closing to occur as soon as reasonably possible (and in any event no later than the Outside Date)***, . . .
>
> [Pa77 (emphasis added).]

In fact, even if DGE had deemed Rational's ICA application to be complete three business days after the execution of the Purchase Agreement (the agreed time for submission), the Purchase Agreement created a schedule which forced the parties to close before the 121-day statutory period was completed. Therefore, the

trial court erred in failing to apply the CCA and reform the Purchase Agreement.

The CCA's 121-day requirement must have broader meaning other than a simple statutory prohibition preventing parties from closing a deal before grant of an ICA. If that was its only purpose the Legislature would have simply stated that intent with express language. Rather, the plain meaning of the statute indicates that the Legislature wanted to provide a broader protection of the integrity of the ICA process and specifically provide DGE with sufficient time to thoroughly review each applicant, without being subject to any potential pressure from a seller wishing to terminate an applicant's purchase agreement during the review process.

The Court's interpretation of the CCA will lead to absurd results, whereby parties to casino purchase agreements may deliberately agree to termination dates falling just a few days after execution of a purchase agreement (or even agree on automatic termination of the contract if the ICA is not granted within a very short period of time), thereby causing DGE to expend its resources needlessly when an agreement is terminated by a party during DGE's investigation. Such interpretation would undermine any investigation process conducted by DGE, which happened in this matter, with Defendants purportedly terminating the Purchase Agreement at the beginning of the "121-day period" merely sixteen days following DGE's deeming Rational's ICA application to be complete. This meant that the termination occurred after DGE had invested substantial resources in the ICA

process for several months. This graphically illustrates how Defendants' termination of the Purchase Agreement undermines the statutory goals of the CCA and DGE's control of the ICA process.

Furthermore, under the Purchase Agreement, Rational was obligated to file its extensive and detailed ICA application within three business days following the signing of the Purchase Agreement and to make "additional or revised filings within the timeframe required by statute or applicable rule and regulation or otherwise imposed by the CCC and/or DGE and, in the absence of any such timeframe, within a reasonable period of time" Pa76-77 (Sec. 5.5(b)). Hence, the ICA process could not have continued for an indefinite period of time as feared by the trial court without Rational eventually being in breach of the Purchase Agreement. At best, the Outside Date in the Purchase Agreement should be viewed as a target date rather than a concrete deadline, given that the CCA requires a closing date outside of 121 days following submission of the completed application, and not from the initial application.

The trial court's failure to apply the express, plain language of the CCA to the Purchase Agreement violates the statute. Therefore, this Court should grant Plaintiffs' motion for leave to file an interlocutory appeal.

POINT III

THE TRIAL COURT ARBITRARILY REVERSED ITSELF AND DISTURBED THE STATUS QUO, WHICH WILL CAUSE IRREPARABLE HARM

This Court should grant interlocutory review because the trial court arbitrarily reversed itself by vacating the TRO it

entered to maintain the *status quo*. On May 6, 2013, the trial court restrained defendants from, *inter alia*, marketing or selling the assets comprising the Atlantic Club. The trial court vacated those restraints and denied a preliminary injunction, based on a faulty analysis of the CCA and the duty of good faith and fair dealing. This flawed analysis led to an incorrect assessment of Plaintiffs' likelihood of success on the merits. Accordingly, this Court should grant interlocutory review.

The trial court reviewed Plaintiffs' application under Crowe v. DeGioia, 90 N.J. 126 (1982). The trial court erred, however, in vacating the *status quo* restraints, which it initially found were critically important. In a conference conducted on the record on May 7, 2013, the trial court indicated that Plaintiffs had made a *prima facie* showing in satisfaction of Crowe v. DeGioia." Pa690 (Tr. 34:4-8). The trial court stated that under its initial review of the Purchase Agreement, the subject provision could be voided for all purposes if the Outside Date did not comport with the CCA.[4] Pa682 (Tr. 26:11-21).

The trial court initially recognized the likelihood of imminent irreparable harm to Plaintiffs without restraints in place. Further, Defendants admitted that they are trying to sell the Atlantic Club. Pa671 (Tr. 15:24-25) (counsel stated that Defendants "have people who might be interested in purchasing this property"). The trial court appropriately remarked that "the more I read [Plaintiffs' application] the more concerned I became and was left with somewhat of a sense of a fully-stocked freight

[4] See Pa107 (Purchase Agreement, Sec. 10.8) (the Savings Clause).

train headed directly, if not for this Courthouse, certainly for the Atlantic Club." Pa679 (Tr. 23:19-23). The trial court recognized that without a TRO (and the same logic applies to preliminary injunctive relief), that:

> any restraints that the Court might order within the context of a short return date, [would be] far less damaging . . . than the potential chaos that would predictably result given the filing of the litigation by plaintiffs were defendants to negotiate a third-party deal with new buyers. Imagine the procedural consequences were that to occur.
>
> [Pa687 (Tr. 31:2-9).]

Thus, the trial court recognized the importance of maintaining the *status quo* from the inception of the litigation. Pa688-689 (Tr. 33:17-34:2-34) (preservation of the *status quo* "is ultimately warranted and will, if not sooner, certainly later, leave both of these parties in better circumstances than would otherwise be the case were there to be a third-party negotiation and contractual agreement to be consummated. And - And it's avoidable at this juncture.").

A trial court may issue a *status quo* injunction, even if all of the Crowe factors are not met. See Waste Mgmt. of New Jersey, Inc. v. Union Cty. Utilities Auth., 399 N.J. Super. 508 (App. Div. 2008). Even if a trial court finds that a party cannot bear its burden on ***each*** Crowe factor, such "determination does not necessarily preclude the granting of an interlocutory injunction after a full and fair weighing of the other Crowe factors, with particular regard to the impact the injunction would have on the public interest." Id. at 521. Thus, "[a] court may issue an interlocutory injunction on a less than exacting showing if

necessary to prevent the subject matter of the litigation from being "destroyed or substantially impaired." Id. at 534 (quoting General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 237 (App. Div. 1955). The trial court still must evaluate the Crowe factors, but when a party seeks to maintain the *status quo*, the Crowe:

> factors "are not to be looked upon as hard and fast and sharply defined in scope; rather they are but factors, among others, which must be weighed, one with another, all going to the exercise of an exacting judicial discretion as to whether or not to issue a preliminary injunction." General Elec. Co., supra, 36 N.J. Super. at 237.
>
> [Id. at 534-35.]

Thus, "it is important to consider the nature of the undertaking and the status of the suit when a litigant seeks an interlocutory injunction." Id. at 535. Even:

> a claim with only "some" factual merit or based on uncertain or novel legal principles may nevertheless support an interlocutory injunction, limited to preserving the status quo, so long as the harm confronting the movant is great and irreparable, and the hardship imposed on the opponent is not terribly significant, ...
>
> [Id. at 536.]

The trial court found that Plaintiffs would suffer irreparable harm without an injunction. (Tr. 92:17-94:18). Defendants' only assertion as to harm from continuation of the TRO was set forth in a single conclusory paragraph in one of its six affidavits. There, Matejevich only claimed that the TRO prevented "RIH from fulfilling its responsibilities to its constituents, including the owners, management, 1,743 employees, vendors and patrons of the Atlantic Club." Pa604, ¶ 17. Matejevich, however, did not specify those responsibilities or

how the TRO prevented the Atlantic Club from fulfilling them. This statement ignored Plaintiffs' offer to fund any operating shortfall. Matejevich further concluded that "Seller's responsibility to its stakeholders is to review all options available and seek the best alternative. Seeking alternative buyers or partners will not cause chaos; it will be an orderly process with full disclosure of Rational's asserted claims." Ibid. This admission vividly illustrates Plaintiffs' entitlement to *status quo* restraints.

Furthermore, the Purchase Agreement contemplates a situation in which Plaintiffs were obligated to support the Atlantic Club if its business suffered during this period. Section 1.3 of the Purchase Agreement requires Plaintiffs to provide Defendants payment of $750,000 on a weekly basis to cover the contractually defined weekly "Projected Shortfall" of Defendants. Pa39-40. Those amounts are required up to $11 million, and are credited as advances against the purchase price (separate from Plaintiffs' obligation with respect to the $32 million pension funding shortfall once the deal is closed).

The fact that Plaintiffs have covered shortfalls in an amount up to the $11 million cap by no means leaves Defendants without a further form of assistance from Plaintiffs in the event of financial difficulties. Section 5.20 of the Purchase Agreement ("Bankruptcy Matters"), provides Defendants with ***further*** protection. Specifically, the Purchase Agreement provides that during its pendency, if Defendants were contemplating bankruptcy, Rational could either terminate the agreement or make advances to

prevent bankruptcy. Pa81.

Thus, Defendants were virtually indemnified against a loss of business during the pendency of the licensure process. Since Plaintiffs demonstrated their utmost commitment to this purchase by providing $11 million in advances in anticipation of closing. They have a significant interest in ***continuing*** to fund the Atlantic Club until closing pursuant to the Purchase Agreement, as long as it remains in force. Plaintiffs made a written offer to continue to fund operating shortfalls until receipt of the ICA, leaving no doubt that Defendants would not be financially exposed during this period.

The trial court abandoned the equities and ignored Defendants' bad faith termination. Defendants attempted to skirt the collective awareness of the likely delay in the ICA process, and in fact memorialized their understanding in Section 5.5(b) of the Purchase Agreement, Pa76. Defendants' bad faith termination breached the implied covenant of good faith and fair dealing. In Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 422 (1997), the Supreme Court held that "a party to a contract may breach the implied covenant of good faith and fair dealing in performing its obligations even when it exercises an express and unconditional right to terminate." Id. at 422; see also Bak-A-Lum Corp., supra, 69 N.J. at 129-30 (holding that the defendant acted in bad faith in terminating contract even though the conduct not violate the express terms of the contract at issue).

Defendants breached the Purchase Agreement by wrongfully terminating it, and then misrepresenting that they had only

recently discovered irrelevant information about Plaintiffs. Defendants knew of this alleged conduct well in advance of their purportedly recent discovery of same. On March 21, 2013, Frawley, interviewed on an industry website, www.pokernews.com, had the following colloquy:

> [POKER NEWS]: There are those who have said there has been tremendous resistance from various elements within the gaming community and the gaming industry and we've heard conversations and accusations lately that Caesars is behind a good deal of that. Do you believe that to be the case?
>
> [FRAWLEY]: I believe the A[merican] G[aming] A[ssociation], which certainly Caesar's is a part of, probably has a little bit more of an agenda. PokerStars is the largest Internet gaming company in the world, they're a great company, their customers are absolutely loyal to them. I think it's an issue before anybody makes a judgment they should look at what ulterior motive could be behind it.

[Pa700 (Tr. 5:16-6:4).]

The AGA filed a vitriolic brief in opposition to Plaintiffs' ICA application. Pa144, ¶¶ 24-25, Pa427-454. Defendants' counsel, who made himself a witness with his lengthy factual Certification (see infra, Point IV), knew of these allegations as of July 31, 2002, in advance of the contract. Pa647-653.

Defendants cannot seriously claim that they had no knowledge of these ultimately irrelevant allegations, and then turn around and rely upon the purported late discovery of facts in order to justify their bad faith termination of the Purchase Agreement. The trial court improperly vacated the *status quo* restraints based upon improper evidence, which failed to identify any specific harm to Defendants by forcing them to keep to their obligations of the Purchase Agreement. Leave should be granted to reverse this injustice.

POINT IV

THE TRIAL COURT ERRED BY CONSIDERING THE AFFIDAVIT OF A RETIRED JUDGE, PURPORTED EXPERT CERTIFICATIONS, IRRELEVANT PURCHASE AGREEMENTS AND SUMMARIES, AND ALLOWING AN UNSWORN FACT WITNESS TO TESTIFY AT ORAL ARGUMENT

The interest of justice would be served by immediate interlocutory review of the trial court's decision, which was based on a tainted record. Defendants submitted five improper filings in opposition to Plaintiffs' application for a preliminary injunction: (1) the affidavit of the Hon. Steven P. Perskie, J.S.C. (Ret.) (Pa189-201), who previously sat in Atlantic County, in the nature of expert testimony regarding interpretation and application of the CCA; (2) the hybrid fact/expert Certification of Gilbert Brooks, Esq., counsel to Holdings and RIH in the underlying transaction (Pa136-163); and (3) three other "expert" certifications from prior DGE and/or CCC commissioners; and (4) several other casino contracts and summaries thereof (from which the court should not have inferred anything) which were not in certifications and were non-dispositive, but which the trial court reviewed. Over Plaintiffs' objection, counsel for Defendants read significant portions of Judge Perskie's affidavit into the record (Tr. 12:18-19:14); and the trial court allowed Mr. Brooks to address factual issues, without being sworn and without being subject to cross-examination. Tr. 35:20-39:20).

Judge Perskie's affidavit violates the Administrative Office of the Court's Directive #5-08, which states that "[a] retired judge may not sign ***any papers*** filed in court, including

pleadings." Guidelines on the Practice of Law by Retired Judges, Directive #5-08 (hereinafter "Dir. #5-08"), Guideline 1. Guideline 8 states that "[i]t is improper for a retired judge to appear in a New Jersey court as an expert witness . . . ." Id. Judge Perskie is a "retired judge". Pa191, ¶ 4, Pa196-197. His testimony is clearly in the nature of expert, rather than factual, testimony. See Pa192, ¶ 7, *et seq.* (noting that he "was involved in and ruled on several requests for [ICAs] related to casino transactions in Atlantic City" and that because of his experience as a prior Commissioner, he is "very familiar with the provisions and the purposes of [N.J.S.A. 5:12-95.12(a)]". Thus, although the trial court stated that it did not consider Judge Perskie's affidavit as dispositive, nevertheless his testimony addressed the CCA and counsel presented Judge Perskie to the Court as "the expert in this area" whose affidavit addressed "the typical standard agreement that is utilized in the casino industry and has been for some time in his experience." Tr. 18:9-12. Defendants' use of this affidavit is an abuse of his office. See, e.g., Matter of Vasser, 75 N.J. 357, 362 (1978) (As "an attorney he was under a solemn ethical duty to avoid the use of his judicial office to gain in another court any advantage on behalf of his private client. There is no escape from the conclusion that respondent was guilty of ethical misconduct.").

Mr. Brooks' certification and advocacy in open court was troublesome. Unlike a typical counsel certification identifying documents, Mr. Brooks provided a hybrid of potential "expert" testimony (Pa137-141, ¶¶ 5-12) and factual testimony about the

transaction at issue. Pa141-147, ¶¶ 13-35. This combination would be troubling on its own, but then Mr. Brooks addressed the trial court at oral argument, providing further testimony in the guise of argument. Given that he had made himself a fact witness, he should have been disqualified pursuant to R.P.C. 1.7(a). Defendants were represented by two other law firms at the hearing; there was no need for Mr. Brooks to testify (no testimony was allowed on the return date, Pa133 (¶ 10)), and his continuing involvement in this matter is improper; allowing him to testify was plainly erroneous.

The interest of justice is grossly undermined where a retired judge has advocated on behalf of a private client as a purported expert witness, in the same vicinage in which he sat, and where a conflicted attorney was allowed to advocate specific facts, where the attorney-witness was not sworn in or allowed to be cross-examined. This Court should grant interlocutory review.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant leave to appeal from the Chancery Division's May 19, 2013 Order.

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By: _____
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Dated: June 10, 2013