

**SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION, GENERAL EQUITY  
ATLANTIC COUNTY, NEW JERSEY  
DOCKET NO. ATL-C-43-13**

**RATIONAL GROUP US HOLDINGS, )  
INC. and OLDFORD GROUP LTD., )  
 )  
 ) Plaintiffs, )  
 ) v. )  
 ) )  
**RESORTS INTERNATIONAL )  
HOLDINGS, LLC, *et als*, )  
 )  
 ) Defendants. )****

**Transcript  
of  
Hearing On Order To Show Cause  
Seeking Preliminary Injunction**

**Place: Atlantic County Criminal Courthouse  
4997 Unami Boulevard  
Mays Landing, NJ 08330**

**Date: May 17, 2013**

**BEFORE:**

THE HONORABLE RAYMOND A. BATTEN, P.J. Ch.

**TRANSCRIPT ORDERED BY:**

NOAH J. GOLD, ESQ., (Lum Drasco & Positan, LLC)

**APPEARANCES:**

WAYNE J. POSITAN, ESQ.; STEVEN J. EISENSTEIN, ESQ.;  
and SCOTT REISER, ESQ.  
(Lum Drasco & Positan, LLC)  
Attorneys for Plaintiffs

THOMAS R. CURTIN, ESQ., (Graham Curtin)  
GILBERT L. BROOKS, ESQ. (Duane Morris - Cherry Hill)  
TARIQ MUNDIYA, ESQ. and DAN C. KOZUSKO, ESQ. (Willkie Farr & Gallagher)  
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I N D E X

Witnesses:

Direct   Cross   Redir   Recross

(None this date)

Evidence:

(None this date)

Argument/Summation:

Mr. Curtin	11/50
Mr. Mundiya	31/40/76
Mr. Brooks	35/48
Mr. Positan	54/79

Ruling/Decision:

The Court	79
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1 (May 17, 2013. Digital recording at Time Index  
2 1:33:01 as follows:)

3 THE COURT: Please be seated, everyone.  
4 Good afternoon and welcome.

5 MR. CURTIN: Good afternoon, Your Honor.

6 MR. POSITAN: Good afternoon.

7 THE COURT: We're on the record?

8 THE CLERK: Yes.

9 THE COURT: Okay. Bear with — Let me get  
10 organized here for just a moment.

11 We convene in the matter of Rational Group  
12 US Holdings, Incorporated and Oldford Group Limited v.  
13 Resorts International Holdings, LLC; Eric Matejevich —  
14 Am I pronouncing that correctly?

15 MR. CURTIN: Matich (sic) — Matejevich, Your  
16 Honor.

17 THE COURT: Matejevich? Thank you. Irwin  
18 Apartment Trust, *et al*, and it is docket ATL-C-43-13.  
19 Counsel, your appearances, please.

20 MR. POSITAN: For the plaintiffs Rational  
21 Group Holdings and Oldford Group Limited, Wayne J.  
22 Positan, Steven Eisenstein, and Scott Reiser of the  
23 firm of Lum Drasco & Positan.

24 MR. CURTIN: Good afternoon, Your Honor. My  
25 name is Tom Curtin. I'm from Graham Curtin of

1 Morrystown, and I represent the defendants together  
2 with my colleagues who I will introduce to you, who  
3 have been admitted *pro hac vice*. At least their  
4 application is pending.

5 THE COURT: I have it right here, and we'll  
6 do that in first order.

7 MR. CURTIN: And my adversary graciously has  
8 consented to their admission from Wilkie Farr &  
9 Gallagher, Tariq Mundiya and Dan Kozusko.

10 THE COURT: Welcome.

11 MR. MUNDIYA: Thank you, Your Honor.

12 MR. BROOKS: Good afternoon, Your Honor.  
13 Gil Brooks of the firm of Duane Morris appearing on  
14 behalf of the defendants.

15 THE COURT: The Gil Brooks of the  
16 certification, I gather?

17 MR. BROOKS: Correct, Your Honor.

18 THE COURT: Okay.

19 MR. POSITAN: Your Honor, if I may please,  
20 if Mr. Brooks is going to speak I'm going to have an  
21 objection to that given his factual affidavit filed.  
22 I think he's made himself a fact witness in the case.

23 THE COURT: Was there any inclination to  
24 have Mr. Brooks speaking, Mr. Curtin?

25 MR. CURTIN: My inclination, Judge, is that

1 given this is the first opportunity we've had to  
2 respond to the allegations made by the plaintiffs in  
3 this case that the Court – there are others, there are  
4 people other than me that might have information that  
5 the Court might inquire, and if there are issues that  
6 are a concern to the Court of Mr. Positan and his  
7 client, he is – Mr. – he is available to speak. I  
8 don't anticipate him making a presentation.

9 THE COURT: So noted. Mr. Positan, your  
10 objection is noted and we'll see where we go.

11 Let us first address that, that motion. I  
12 have the motion. I have it with me here at the bench.

13 Mr. Positan, there is no objection to the  
14 motion for admission of Mr. Mundiya and Mr. Kozusko  
15 *pro hac vice*?

16 MR. POSITAN: No, Your Honor.

17 THE COURT: I sign the order, and we'll get  
18 that filed, counsel, in due course and get everyone  
19 copies. The order is filed – signed.

20 Counsel, a few other preliminary matters  
21 that won't take long. First, I want to share with all  
22 of you that on May 13th when I entered the initial  
23 restraints and scheduled the return for today at 1:30  
24 it was certainly not my intention then, nor is it now,  
25 to pull or have pulled two past presidents of the New

1 Jersey State Bar Association from the last afternoon  
2 of the New Jersey State Bar Association convention.  
3 That is extremely fortuitous. I acknowledge that  
4 you're here. I also want to acknowledge to you that I  
5 know what you just left, I assume.

6 MR. POSITAN: Yes, Your Honor. In fact, Tom  
7 Curtin and I spent lunch yesterday at the past  
8 presidents lunch and dinner last night at the  
9 installation dinner, and we were both together at the  
10 cocktail party the night before; and also I succeeded  
11 Tom as the New Jersey delegate to the ABA, and he  
12 succeeded me as the Board of Governors representative  
13 from the Third Circuit. So we've worked very closely  
14 together on things that are good for the profession.

15 THE COURT: May I ask -

16 MR. POSITAN: But that's the greatness of  
17 the adversarial system.

18 THE COURT: May I ask whether, as a result  
19 of those discussions, any matters have been resolved?

20 (Laughter)

21 MR. POSITAN: Well, we can't bring  
22 settlement discussions before the Court, Your Honor.

23 MR. CURTAIN: Well, I did agree to pay the  
24 bar tab, Your Honor.

25 MR. POSITAN: That's because they gave us

1 free tokens though, Tom.

2 THE COURT: In any event, I acknowledge that  
3 you are here under that circumstance.

4 First, I also want to acknowledge Mr.  
5 Positan's objection to what he characterized as late  
6 submissions by the defendants, and I believe they took  
7 the form of certifications if I'm not mistaken, and  
8 I've not had the opportunity -

9 MR. POSITAN: Contracts actually, Your  
10 Honor, that were referred to -

11 THE COURT: Two other -

12 MR. POSITAN: - in their other papers, which  
13 I have also objected to as being irrelevant and  
14 extraneous. So that's part of my argument.

15 THE COURT: I understand. As is typically  
16 my habit, I read everything. So I've read them. I  
17 will also share with counsel that it is my view, at  
18 least at the moment, that the content of those  
19 contracts is not dispositive here today, and I'm  
20 satisfied that as the oral argument goes forward and I  
21 make my findings you'll be satisfied to that effect.

22 I also note that there are objections to the  
23 four certifications provided by Messrs. Perskie,  
24 Hurley, Auriemma, and Catania and, again, I've read  
25 those as well. Counsel can be free to comment upon

1 those as you choose, but I'm also relatively certain –  
2 my mind may change, but I don't envision any such  
3 change – I'm relatively certain that while those  
4 affidavits or certifications are certainly interesting  
5 to read and they are arguably relevant, they are also  
6 not dispositive as relates to the decision that I  
7 perceive needs to be made here today.

8 So to the extent of those objections I don't  
9 perceive prejudice visiting, visiting anyone. I don't  
10 know that – Well, I'll probably hear from Mr. Curtin  
11 in that regard, but I don't know that this Court is  
12 necessarily bound by the content of those  
13 certifications.

14 And we've already addressed the contracts.  
15 Counsel, I believe that covers at least the  
16 preliminary matters that I wanted to address. Before  
17 we actually get into the oral argument, do any of you  
18 have anything else preliminarily?

19 MR. CURTIN: I don't, Your Honor.

20 MR. POSITAN: No, Your Honor.

21 THE COURT: I have one more matter, and it  
22 actually relates to the contract and pertains to two  
23 matters that neither of you have raised in your  
24 pleadings. And if you'll indulge me, I'd like to  
25 direct your attention to the contract and specifically

1 page 47, and it pertains to Article 7, specifically  
2 section 7.1, termination – and I gather we'll be  
3 discussing that section quite a bit this afternoon –  
4 and specifically 7.1, its introductory sentence and  
5 then down to section (c). And reading the  
6 introductory language of 7.1 with section (c) it  
7 reads, and I'll quote, (reading:)

8 "This agreement may be terminated at any time  
9 prior to closing."

10 And then down to (c),

11 "By seller's representative or buyer. If any  
12 gaming authority has made a final determination  
13 that such gaming authority will not issue to  
14 buyer all gaming approvals or if buyer withdraws  
15 unless subsequent to the termination of this  
16 agreement pursuant to section," – this section –  
17 "7.1, its application for gaming approval;"

18 Is there a clause or a phrase missing there? Do you  
19 perceive?

20 MR. CURTIN: I think we'll get you at least  
21 a response, Your Honor. I'm not sure an answer, but a  
22 response at least. We'll have the lawyer who did the  
23 contract itself –

24 THE COURT: In any event, let me share with  
25 counsel as I read that, and I have read it and reread

1 it, I am consistently left with the sense that there  
2 was likely at some point in time a clause that  
3 followed, and I'm wondering what that may have been,  
4 and I would appreciate your thoughts in that regard.

5 Next, if we turn the page to page 48,  
6 section 7.1(f), same introductory language as begins  
7 section 7.1 on page 47, but after the colon we flip to  
8 page 48 under (f), (reading:)

9 "By the seller's representative if buyer has  
10 breached any representation, warranty, covenant,  
11 or agreement on the part of the buyer set forth  
12 in the agreement which, one, would result in the  
13 failure of a condition set forth in section  
14 6.3(a), (b), or (c) hereof,"

15 and if you flip back to section 6.3(a), (b), or (c),  
16 my copy at least, and I would trust that your copy,  
17 does not contain a section 6.3(c). I'll say it again  
18 if you'd like.

19 MR. MUNDIYA: No, I — Your Honor, I think  
20 that probably should read 6.1(c). It may be a  
21 typographical error. We'll confirm that. That's  
22 probably a typo.

23 THE COURT: In any event, I'll appreciate  
24 your thoughts. And it may be of no moment, but —

25 MR. MUNDIYA: Right. But we, we will get

1 back to you on that.

2 THE COURT: That's fine.

3 With that, this is the return on the order  
4 to show cause. Mr. Curtin, I'm happy to hear from you  
5 first.

6 MR. CURTIN: Judge, thank you for this  
7 opportunity to present information to you on behalf of  
8 my clients. With your permission what I'd like to do  
9 is to be able to address, have me the address the  
10 issues that relate to the issuance of the temporary  
11 restraining order and the return of the order to show  
12 cause for today, and to the extent that there are  
13 other issues my colleagues will either respond to them  
14 or present with regard to any issue that may arise  
15 either raised by the Court or in response to Mr.  
16 Positan's argument if that's okay.

17 THE COURT: That's fine.

18 MR. CURTIN: So let me start first by  
19 hopefully – although Your Honor has just corrected  
20 what may be an error or mistake unnoticed by both  
21 sides – that before you you have a series – you have a  
22 complaint, a verified complaint on an order to show  
23 cause, briefs, exhibits, and a variety of documents  
24 including the certifications to which you earlier  
25 referred, which we filed, those of Steven P. Perskie,

1 Thomas N. Auriemma, Frank Catania, Sr., Louis R.  
2 Hurley, Eric Matejevich, and Gilbert Brooks.

3 I want to begin where I think we should.  
4 That is I understand that it's not my responsibility  
5 today, I don't have the burden today to show that the  
6 plaintiffs have satisfied their obligations under the  
7 four-prong test, but that I do have the obligation to  
8 come forward and to present information to you that  
9 would permit you to make a decision with regard to  
10 whether or not the plaintiffs have satisfied the  
11 obligations of Crowe v. DeGioia. And I thought while  
12 we're caught up to a large degree in a big world  
13 picture, a big argument between casino stars – excuse  
14 me, PokerStars and our client, that maybe we ought to  
15 see what others perhaps more informed would say about  
16 what we see are issues that the Court should look at  
17 today with regard to all of the issues on the order to  
18 show cause and temporary restraints. And I point the  
19 Court – aware of the fact that there's been an  
20 objection to the Perskie and other certifications – to  
21 paragraph 12 of the Mr. Perskie's certification.

22 THE COURT: So the record is complete, a  
23 former colleague of mine here in Vicinage I.

24 MR. CURTIN: I'm aware of that, Your Honor.

25 MR. POSITAN: Well, Your Honor, I – and I do

1 object to that. I think for a retired judge of this  
2 vicinage to introduce the kind of affidavit he did,  
3 telling you how you should rule on statutory  
4 construction, raises some serious questions. And, you  
5 know, we have had no opportunity to get into his  
6 affidavit or any other affidavits about conflicts of  
7 interest. Mr. Catania, for example, I am told this  
8 morning, represented my client PokerStars at one time,  
9 provided legal advice to them. So we have two  
10 questionable affidavits. Where we go from there and  
11 what these respective interests are, but to have a  
12 retired judge – and he has his retired judge  
13 information prominently displayed here from his web  
14 site – to offer that in this vicinage –

15 THE COURT: Even, even with that –

16 MR. POSITAN: – raises some serious  
17 questions.

18 THE COURT: But even without that, in this  
19 region that name is not unknown to very many people.  
20 I wanted to offer the comment so that the record is  
21 complete.

22 MR. CURTIN: Judge, with regard to that let  
23 me proceed. I understand Mr. Positan has made his  
24 objection.

25 Mr. Perskie has outlined, I think, for us on

1 our behalf and for the Court's information and  
2 persuasion, I hope, several provisions, but I want to  
3 point specifically for what we're doing today that Mr.  
4 Perskie says, beginning with paragraph 12, and I'm  
5 reading, (reading:)

6 "In my experience it is common and, in fact, the  
7 norm for an agreement involving the purchase and  
8 sale of interests in Atlantic City casinos to  
9 include a closing date that provides for closing  
10 to occur after the issuance of an Interim Casino  
11 Authorization by the Commission such as the  
12 provision in the agreement that is currently  
13 before the Court. In my experience such a  
14 closing date provision has always been considered  
15 consistent with the waiting period requirements  
16 of N.J.S.A. 5:12-95.1(2)(a)."

17 And in paragraph 13 he says, (reading:)

18 "In my experience it is also common for an  
19 agreement involving the purchase and sale of an  
20 interest in an Atlantic City casino to include a  
21 separate termination provision such as is  
22 included in the agreement before the Court that  
23 would limit the time period during which the  
24 proposed buyer must complete the regulatory  
25 process and thus providing for a termination of

1 the agreement within a specified time or a  
2 specified date. As long as such provision would  
3 not purport to afford any buyer the opportunity  
4 to 'close' or 'settle' on the purchase before the  
5 121-day regulatory review period had expired,  
6 such a termination provision is neither  
7 inconsistent with any of the interests of the  
8 regulatory agencies nor violative of the  
9 provisions of the ICA statute. Rather, such a  
10 provision merely reflects the negotiated  
11 positions of the buyer and seller, a mutually  
12 acceptable determination that is beyond the  
13 interests of the regulatory process."

14 And finally in paragraph 14, (reading:)

15 "While I have no information and would not  
16 speculate with regard to the perceived interests  
17 of the respective parties in the instant  
18 transaction, including a termination date in  
19 their agreement, I would observe for the Court's  
20 attention that the economics of the casino  
21 industry in New Jersey have definite 'calendar  
22 rhythm' in the sense that the summer season,  
23 which is, of course, the busiest time of year,  
24 frequently mandates the schedule for transfers of  
25 interests in casino licenses and other

1 transactions in order to preserve for all  
2 concerned the advantages and summer businesses  
3 and full attention of the operator during that  
4 period."

5 So says the author of the Casino Control statute that  
6 has been working quite well for a number of years.

7 Finally, -

8 MR. POSITAN: May I address that, Your  
9 Honor?

10 THE COURT: I'm sorry?

11 MR. POSITAN: Could I address the  
12 qualifications of this testimony on somebody who is  
13 not a fact witness, who is not - What is he? An  
14 expert witness? Has he been paid for this testimony?  
15 And what are we doing here? We don't have an  
16 Appellate Division ruling here. Is he speaking as a  
17 retired judge? Is he speaking - What is he speaking  
18 as? He's not involved in this case.

19 THE COURT: I think those questions, Mr.  
20 Curtin, are directed to you more than the Court.

21 MR. CURTIN: We - This is our first  
22 opportunity to respond to an *ex parte* application made  
23 to you last week when we had no opportunity to respond  
24 to the allegations made by the plaintiff. We were not  
25 given notice. We had to present to you as much

1 factual information that we possibly could in a  
2 relatively short period of time in which we sought to  
3 inform the Court with as much information as we could  
4 find. We went, selected a number of experts who have  
5 more knowledge on the subject than I do and,  
6 respectfully, probably more knowledge on the subject  
7 than the Court has or Mr. Positan or his colleagues  
8 have.

9 THE COURT: No doubt.

10 MR. CURTIN: So we are, we are at this  
11 stage, on the return of an order to show cause seeking  
12 to restrain us from operating our business, pulling  
13 out all the stops, and I think that -

14 THE COURT: I don't know that the restraint  
15 seeks to prevent you from operating the business.

16 MR. POSITAN: It does not.

17 THE COURT: In any event -

18 MR. CURTIN: In any event, put that in the  
19 column of an exercised Irishman trying to make a  
20 point.

21 The selection of the experts that we  
22 selected - and this is the first, the first - I  
23 shouldn't say that. This is an unexpected objection  
24 to the qualifications of somebody. I know that there  
25 was an objection written by Mr. Positan to the use of

1 these, but I think you need information that's  
2 sensible, that's reliable, that's dependable that the  
3 Court can rely on in terms of hearing my argument.  
4 Whether or not you choose to regard or disregard that  
5 argument, the qualifications of the individual, you  
6 know who it is, you know what his reputation is, and  
7 you can use that, ignore it, or use it or otherwise.  
8 But I think it's important for you to know that at  
9 least the expert in this area has said that what we  
10 have done, what this contract says is the typical  
11 standard agreement that is utilized in the casino  
12 industry and has been for some time in his experience.

13 THE COURT: You would acknowledge, I gather  
14 – and I think this goes more to Mr. Positan's  
15 objection – that whatever the practice of the Casino  
16 Control Commission with regard to the substantive  
17 content of agreements to purchase casino interests is  
18 or may be, it's not binding upon this court here.

19 MR. CURTIN: I wasn't suggesting it was  
20 binding, but it certainly is informative, and I would  
21 hope that the Court would utilize that in other  
22 arguments and other evidence to come to a  
23 determination that today you are not – you're going to  
24 dissolve these restraints and permit us to move  
25 forward.

1           THE COURT: Again, I understand that this is  
2 your client's first opportunity to be here, and I am  
3 going to extend to both sides, but certainly you and  
4 your client, Mr. Curtin, the time that you want and  
5 I'll hear your arguments. I will not cramp your  
6 style, so to speak, in developing a record. I did  
7 indicate a little bit earlier, and it remains my  
8 sense, that the four certifications to which the  
9 objection was made, I've read them. They are  
10 interesting. They are arguably relevant. To this  
11 point they're not dispositive and should that change  
12 I'm certainly going to share the point at which I  
13 sense that may be the case with Mr. Positan so that he  
14 can build his record.

15           MR. POSITAN: Your Honor, if I also can  
16 correct the record here? This is not an *ex parte*  
17 proceeding. There was an original *ex parte* order, and  
18 that was - Then they were immediately notified. We  
19 had a second telephonic conference hearing, which is a  
20 matter of record, -

21           THE COURT: One day later.

22           MR. POSITAN: - and in the papers. So this  
23 not *ex parte* anymore, and then he wanted it moved it  
24 up until Tuesday, and we consented. Then he wanted it  
25 moved back to Friday, and we consented. So to say

1 this is *ex parte* today is incorrect.

2 THE COURT: But in fairness it is first  
3 opportunity for Mr. Curtin and his colleagues to  
4 appear here, stand on their feet and represent their  
5 client, and I recognize that.

6 MR. CURTIN: Thank you, Judge.

7 The second thing to see if I can get us back  
8 to where, the real world discussion that I think is  
9 important to my clients today, if I could point Your  
10 Honor's attention and counsels' attention to Mr.  
11 Matejevich's certification dated May 13th of 2013 and  
12 in particular paragraph 17.

13 THE COURT: Seven?

14 MR. CURTIN: Paragraph 17. And I, the  
15 reason I want you to consider this and to focus your,  
16 the Court's attention to this is there is a  
17 significant impact on the imposition of the temporary  
18 restraining order and any restraint that may follow.  
19 And the words that Mr. Makovitch – Matejevich, excuse  
20 me – utilizes here I think are helpful and will help  
21 shape my argument, and if you will permit me I will  
22 read, briefly read paragraph 17 because it depicts  
23 the climate in which this, these circumstances are  
24 occurring. He says, (reading:)

25 "At present the temporary restraining order is

1 preventing RIH from fulfilling its  
2 responsibilities to its constituents, including  
3 owners, management, 1,743 employees, vendors and  
4 patrons of The Atlantic Club. Seller's  
5 responsibilities to its stakeholders is to review  
6 all options available and seek the best  
7 alternative. Seeking alternative buyers or  
8 partners will not cause chaos. It will be an  
9 orderly process with full disclosure of  
10 Rational's asserted claims. The sellers are  
11 prevented from taking steps to prepare The  
12 Atlantic Club for the advent of on-line gaming.  
13 RIH and The Atlantic Club are at a standstill  
14 while its competition is busy pursuing the  
15 economic opportunity that RHI (sic) helped to  
16 bring to Atlantic City by being the primary  
17 casino advocate for legalized on-line gaming in  
18 New Jersey. Time is short, and every day of  
19 delay is harmful. Rational is also waging a  
20 public relations campaign by filing its lawsuit  
21 and trumpeting the *ex parte* TRO secured last  
22 week. The press has caused significant employee,  
23 vendor, and customer uncertainty. Such  
24 uncertainty is the last thing The Atlantic Club  
25 needs as we head into the summer season."

1 And he asks in the concluding paragraph that you  
2 eliminate or vacate the order which you previously  
3 entered.

4 So that's sort of where we are today, Your  
5 Honor, and we are – it's really a very critical time  
6 for Atlantic City. It's really a very critical time  
7 for our client, and it wants to be in a position where  
8 it remains viable and can compete.

9 What's happening in my view, Your Honor, and  
10 the view of my clients is what the plaintiffs are  
11 asking you to do is to require us to comply with – or  
12 requiring you or asking you to enforce a contract that  
13 we did not sign. We want to enforce the contract  
14 which we did sign, and it contains provisions that  
15 authorize us to do what we have done.

16 More particularly with regard to the events  
17 that have occurred over the last several days, they've  
18 asked you for an extraordinary remedy which arises out  
19 of an ordinary standard contract that was negotiated  
20 by sophisticated parties with powerhouse lawyers  
21 knowing the full import of the contents of those  
22 agreements, knowing what the provisions they wanted,  
23 what the provisions that they did not want. You're  
24 being asked in my view, Your Honor, and in the view of  
25 my clients to rewrite a contract that these parties

1 negotiated, the terms that they negotiated, the give-  
2 and-takes that they negotiated because the plaintiffs  
3 are unhappy with the contract that they have; and  
4 that's not your job, to reform or to rewrite  
5 agreements that sophisticated parties with  
6 sophisticated counsel experienced in this field are,  
7 are involved with.

8           The pleadings that we are dealing with here,  
9 Judge, as I read them at least, don't claim that there  
10 was a breach of the agreement. They don't claim that  
11 there's an ambiguity. They don't claim that there's  
12 fraud. They don't claim that - they don't actually  
13 claim that there's any dispute with the terms of the  
14 contract. There's a bunch of subjective arguments  
15 about how they, what they feel and how they feel  
16 they've been treated, but there are no allegations in  
17 my view, at least in my reading, that claim that we  
18 have breached this agreement, and without a breach  
19 there's no basis, despite their argument, for the -  
20 for an injunction to occur without a breach of the  
21 agreement. We think the injunction provision limits -  
22 is limited to that argument by agreement of the  
23 parties, not by a substituted agreement or judgment of  
24 the Court. In fact, -

25           THE COURT: If I may, if I may interrupt?

1 MR. CURTIN: Sure.

2 THE COURT: Just my sense is you and I are  
3 about to hear from Mr. Positan with regard to the  
4 events of March 26th and the letter by Mr. Matejevich  
5 or an email by Matejevich and the language contained  
6 in the email and what that means. You don't have to  
7 address that now, but you raised the issue of breach,  
8 and I'm listening. So go ahead.

9 MR. CURTIN: Essentially what you're being  
10 asked to do is to rewrite this agreement to give the  
11 plaintiffs an exclusive option to purchase The  
12 Atlantic Club and asking The Atlantic Club to bear the  
13 risk and the uncertainty of the issuance of an ICA,  
14 the risk that we didn't bargain for. They bargained  
15 for, that PokerStars agreed, not Atlantic Club, to get  
16 their license in the required period of time. There  
17 is in our view, Judge, based upon what we've seen,  
18 particularly the certifications and the information  
19 that's, that is put forth in our pleadings, there is  
20 little or no likelihood of success here.

21 One of the questions we think you - we would  
22 hope that you will address today is whether or not the  
23 contract sets forth and specifies a date earlier than  
24 the 121st day after a completed application. It does  
25 not. That issue, I think the Court must look at in

1 connection with the request that's being made by the  
2 plaintiffs.

3 The closing date as defined in the agreement  
4 is specific and says that the closing date will be set  
5 after all approvals, not just the regulatory approvals  
6 but all approvals are made, and it sets forth a method  
7 for – a process for those approvals.

8 THE COURT: Three days.

9 MR. CURTIN: The closing –

10 THE COURT: Three business days.

11 MR. CURTIN: Excuse me.

12 THE COURT: Three business days.

13 MR. CURTIN: Yes, three business days.

14 And, Judge, some of this is responsive to  
15 things that we have read. So if – I'm not making them  
16 up, but there's some suggestion that this, there's a  
17 fixed closing date. This closing date floats. It's  
18 not a fixed day. It wasn't set in the contract. It  
19 now – it's now set – There's a format, and you've just  
20 seized on it, that is three days after their  
21 regulatory approval is met.

22 So the plaintiff claims in addition to this  
23 that the inclusion of a termination date establishes a  
24 closing date in violation of statute. It doesn't.  
25 I've indicated to you from the certifications of Mr.

1       Perskie and others our view that in fact there is no  
2       violation of any statute in connection with the  
3       inclusion of a termination date. The statute is there  
4       to protect the public, to give the regulatory  
5       authorities sufficient time to be able to do their  
6       inquiry to determine whether or not the candidate, the  
7       applicant is, is a suitable applicant for licensing in  
8       New Jersey.

9                 The termination date, which seems to have  
10       created a significant dust-up in this case, was a  
11       right that we had. It was an outside date. It wasn't  
12       a date pulled from a hat. The parties negotiated that  
13       date. April 26th was not a date – it's not my  
14       birthday, it's not somebody else's birthday, it was a  
15       negotiated date. It was negotiated because it – the  
16       belief, as I would suggest to the Court, was that it  
17       provided a sufficient amount of time for the  
18       regulation process to begin. It gave the buyer an  
19       opportunity to be able to make its application, to  
20       pursue its application, and it gave either side the  
21       right to terminate after April 26th, an agreed upon  
22       date. For I – for any reason, any or no reason either  
23       side could have, after that date, separated themselves  
24       from one another. Didn't like us, didn't like what  
25       they saw, wasn't moving well enough in New Jersey,

1 weren't getting a good feeling. It wasn't an  
2 automatic termination.

3 THE COURT: Didn't get iGaming.

4 MR. CURTIN: Pardon me?

5 THE COURT: Did not get iGaming.

6 MR. CURTIN: Right. Did not get it. It was  
7 not an automatic. It was, it had – there had to be an  
8 action on our part if we were going to take, take that  
9 step and we, in fact, do that. And it didn't in any  
10 way – there's no suggestion that it's limited the  
11 inquiry of the DEG (sic). The process continues even  
12 as we speak. And these, as I've suggested to you and  
13 the certifications have pointed up, that those  
14 termination provisions are common. You can see from  
15 the certification of Mr. Perskie and others how, how  
16 those provisions are standard provisions in operating  
17 agreements involving casinos regularly in New Jersey  
18 and certainly in Atlantic City. It doesn't – the  
19 inclusion of the termination provision doesn't limit  
20 or doesn't require the regulators to act prematurely.  
21 If it did why would sophisticated powerhouse lawyers  
22 permit – representing the plaintiffs permit that  
23 provision to be in the agreement? Their argument is  
24 that for some – on some basis that that provision is  
25 inappropriate, unlawful, illegal, immoral, and not

1 really very good. Well, why put it in if you didn't  
2 want that provision in there? They negotiated for  
3 that provision, for it, and they did so because both  
4 sides wanted to allocate the risk. It gave the  
5 plaintiff and defendant the walk-away right, excuse  
6 me, if they wanted it. It gave them time to get  
7 approval, and it gave us – importantly, when you're  
8 balancing things, Judge, it gave us an opportunity if  
9 it doesn't work, if it doesn't work out to get another  
10 player involved – excuse me, shouldn't use the word  
11 player – another entity involved in our business.

12 So if, if you accept the argument that's  
13 been made by the plaintiffs that the termination  
14 provision couldn't be included and shouldn't be  
15 included, it would suggest that you could never  
16 terminate one of these agreements no matter what  
17 happened.

18 THE COURT: Which is the point that you make  
19 at page 17 of your brief.

20 MR. CURTIN: Yes, sir. So I'm getting  
21 there.

22 I'm asking you please on my clients' behalf,  
23 let's try to look at the balance of the equities here.  
24 You don't have a contract with an ambiguity in it.  
25 You don't have a breach. There are no surprises here.

1 There's no unfair conduct. There's no, no issue that  
2 suggests that the relief that they've requested is in  
3 fact warranted. These were, again, sophisticated  
4 folks, as were we, and negotiated a contract that they  
5 could live with, and now they don't like the contract  
6 they've negotiated and they've asked you to rewrite it  
7 and to revise it.

8 Now I read a certification earlier about  
9 why. Why is this important to us currently? You know  
10 from that certification and from the, from the earlier  
11 argument that we need to take steps to protect our  
12 employees, our vendors, our contracts during this  
13 period of time in the summer. We can't wait until  
14 August. We can't wait to find out when and if there  
15 is approval. We can't do that. We, the board has  
16 fiduciary responsibilities to protect its  
17 shareholders, protect business, the business  
18 interests, and we have a responsibility as well to  
19 protect the community interest here. On-line gaming  
20 is coming. Everybody knows it's coming. We need to  
21 be geared up and get ready to go for that on-line  
22 gaming. We're at a standstill, as you've been told,  
23 and we need to move on if we're unable to - if we're  
24 not able to move forward from this day and - because  
25 we will never get our on-line gaming planning

1 completed. There is an uncertainty. There's an  
2 uncertainty in the community. There's an uncertainty  
3 with our employees. There's an uncertainty with our  
4 vendors. There's an uncertainty with our landlords as  
5 to whether or not we – they should continue in  
6 business with us.

7           If you do what you're being asked to do,  
8 Your Honor, by the plaintiffs in this case your ruling  
9 will be unique. To our knowledge there is no  
10 precedent for asking for what you've been asked here.  
11 There is a – You are dealing with a principle here  
12 that this is a – there are settled contract rights.  
13 These contract rights are enforceable. We're seeking  
14 to enforce the contract that we entered into, not –  
15 and not enforce a contract that we didn't enter into  
16 and we're now being asked to by asking you to revise  
17 the provisions of the agreement to eliminate critical  
18 provisions that were bargained for and significant to  
19 us.

20           Thank you for permitting me to address the  
21 issues on the TRO, and obviously my ask here is that  
22 you dissolve the temporary restraining order which you  
23 entered and not enter an injunction on a going-forward  
24 basis and permit us to do what we contracted to do and  
25 what we're expected to do as good citizens of this

1 community.

2 THE COURT: I have many questions of both  
3 sides. I don't know whether you would have me pose  
4 them to you or to -

5 MR. CURTIN: I think if you pose them,  
6 Judge, we're -

7 THE COURT: - or to the bank of attorneys  
8 seated at the defense table.

9 First question. Do you take the position  
10 that this contract is clear and unambiguous?

11 MR. MUNDIYA: Yes, Your Honor, we do. We  
12 take that position. We think it's clear and  
13 unambiguous with respect to the termination  
14 provisions.

15 THE COURT: And the math is straightforward  
16 and undeniable?

17 MR. MUNDIYA: That's right, Your Honor.

18 THE COURT: Okay. Executed December 21.

19 MR. MUNDIYA: That's right.

20 THE COURT: The day after the Senate passes  
21 iGaming.

22 MR. MUNDIYA: That's right.

23 THE COURT: Requires the plaintiff to file  
24 with DGE within three days.

25 MR. MUNDIYA: Within three business days I

1 thought it was, Your Honor.

2 THE COURT: I stand corrected.

3 MR. MUNDIYA: Right, yes.

4 THE COURT: Three business days.

5 MR. MUNDIYA: Yes.

6 THE COURT: But the filing actually occurs  
7 within three days, on -

8 MR. MUNDIYA: Right.

9 THE COURT: - the 24th.

10 MR. MUNDIYA: That's correct, I understand.  
11 Yes.

12 THE COURT: The 120th day subsequent to  
13 December 24 is?

14 MR. MUNDIYA: It's close enough to -

15 THE COURT: It's April 23rd.

16 MR. MUNDIYA: Right. Right.

17 THE COURT: And three days later, which is  
18 the three-day closing date calculus, is April 26th?

19 MR. MUNDIYA: Well, the three days is three  
20 business days. But - I don't have a calendar. But  
21 you're right, Your Honor. It is three days from  
22 April 23rd. That's correct, Your Honor.

23 THE COURT: April 23rd was Tuesday.

24 MR. MUNDIYA: Right. So -

25 THE COURT: The 26th was Friday.

1 MR. MUNDIYA: That's right.

2 THE COURT: Okay.

3 MR. MUNDIYA: So April 26th is three days  
4 thereafter.

5 THE COURT: So in terms of drafting that  
6 contract, if those dates were the dates intentionally  
7 negotiated there is virtually no room for plaintiff to  
8 secure an ICA absent DGE deeming the filing, the first  
9 filing complete on Christmas Eve.

10 MR. MUNDIYA: Well, you know, that was the,  
11 that was the date that was negotiated by both sides.  
12 That was a date that was negotiated -

13 THE COURT: No. I understand.

14 MR. MUNDIYA: Yes.

15 THE COURT: I'm accepting your argument that  
16 these are the negotiated dates.

17 MR. MUNDIYA: That's right.

18 THE COURT: I'm just -

19 MR. MUNDIYA: Yes.

20 THE COURT: - filling the math in between  
21 the dates.

22 MR. MUNDIYA: That's right.

23 THE COURT: This was an agreement, if you're  
24 correct, that the parties negotiated allowing zero  
25 room for DGE taking anything more than the date of

1 filing, if they chose. They could have accelerated  
2 the 90-day turnaround if they wanted.

3 MR. MUNDIYA: They could, and – but there is  
4 precedent, Your Honor, for ICA approval being done in  
5 less than that time, and the parties knew that. They  
6 knew it, and we knew it, and we came to a  
7 determination that April 26 was the date that would  
8 allow them time to get their approval, and if they  
9 didn't get that approval would give us enough time to  
10 go out and find somebody else to be in a position to  
11 give on-line – provide on-line gaming in November.

12 THE COURT: I understand the argument. And  
13 then I read section 5.5 of the agreement, and I  
14 believe I cited this when we spoke on the 14th.

15 MR. POSITAN: 5.5(b), I believe it is, Your  
16 Honor.

17 THE COURT: It is. And it states in  
18 pertinent part, and I'll quote, (reading:)

19 "Notwithstanding any determination from the  
20 Division that an application is incomplete or a  
21 failure by the Division to deem an application  
22 complete, any application referenced herein,  
23 including the application for an ICA  
24 determination, will be considered complete for  
25 purposes of compliance with this agreement even

1           though there may be supplemental or revised  
2           information and filings including but not limited  
3           to," -

4           and then it goes on. (Reading:)

5           "... unless, after requested, the buyer fails to  
6           make the additional or revised filings within the  
7           time frame required by statute or applicable  
8           regulation otherwise imposed by NJ CCC and/or NJ  
9           DGE."

10           That section of 5.5(b) suggests to me that  
11           the prospect of DGE deeming an initial filing  
12           incomplete was well within the contemplations of the  
13           party, and if that's the case how consistent is that  
14           contemplation with the tightest conceivable time line  
15           between filing and outside date absent report by DGE  
16           prior to the 90-day deadline or relaxation either  
17           through a negotiated modification or waiver of the  
18           outside date? And I ask that question because it's my  
19           sense that's the plaintiff's point.

20           MR. BROOKS: Your Honor, if I may -

21           THE COURT: And if that's wrong I want to  
22           hear it.

23           MR. BROOKS: No. I think you're right. I  
24           think you're right, Your Honor. I want to acknowledge  
25           that. If you look at just the plain time frames that

1 are applicable -

2 MR. POSITAN: This is where I have a problem  
3 with Mr. Brooks. He said he wasn't going to speak  
4 before.

5 THE COURT: Well, I note the objection. I'm  
6 going to overrule the objection. I'm going to allow  
7 him to speak. Again, this is defendant's first  
8 opportunity to be in this court physically and present  
9 their, their position.

10 MR. BROOKS: I would -

11 THE COURT: So I'm inclined to be somewhat  
12 less formal than otherwise might be the case. Go  
13 ahead.

14 MR. BROOKS: Your Honor, thank you. The  
15 outside time frames, if you're looking at strictly the  
16 outside time frames then the time - then it is a very  
17 tight time frame as you described. The application,  
18 initial application on the 24th, and then about a 120-  
19 day block of time for a ruling by the Division. But  
20 the statute provides that the Commission - the  
21 Division can report sooner. They can report sooner  
22 than a full 90 days after they deem an application  
23 complete.

24 THE COURT: Mmhmm.

25 MR. BROOKS: In fact, in practice, in

1 practice there has never been an ICA that I'm aware of  
2 where they ruled the full 90 days after they deem an  
3 application complete. Typically there's a back-and-  
4 forth. There's a point in time when they deem an  
5 application complete and, per the rule, if they deem  
6 the application – if their report issues sooner, they  
7 can issue a report sooner. They're allowed, per the  
8 rule, to issue a report sooner, and as soon as they  
9 issue the report the Commission can conduct a hearing.

10 So the – Yes, the time frame in the  
11 contract, if you look at just the outside possible  
12 dates if they took the full time and that 24th was  
13 initial – you know, was initially a filing that would  
14 be complete, yes, it would fit in that time frame.  
15 But that's not what the parties were contemplating.  
16 They, the parties were not contemplating that and, in  
17 fact, the law provides that there could be a much  
18 sooner date. The law itself –

19 THE COURT: Right.

20 MR. BROOKS: – provides that the Division  
21 can issue a report. It doesn't need the full 90 days.

22 THE COURT: Right.

23 MR. BROOKS: It doesn't even have to deem  
24 the application complete to issue its report, and  
25 after the report is issued the Commission can conduct

1 a hearing, which, as we pointed out in a lot of the  
2 submissions we made to the Court, has been the  
3 practice.

4 The intent of section 5.5(b) was not, it  
5 wasn't contemplated that there would be an elongated  
6 ICA determination process. The intent of 5.5(b) was  
7 to address the situation dealing with when the  
8 plaintiff had an obligation to complete its  
9 application. The contract says you have three  
10 business days basically to complete your application -  
11 to file a completed application, recognizing that  
12 often the Division will want more information and that  
13 that was a possibility. It also provided that if the  
14 Division did request more information it wouldn't be a  
15 breach of the contract - a breach of the requirement  
16 to file a completed application. That's what 5.5(b)  
17 was meant to intend - to address rather. It wasn't  
18 meant to be a situation, Your Honor, where the parties  
19 were contemplating some elongated ICA determination  
20 process. Just as you noted by the dates, they  
21 weren't. They were contemplating at that time an ICA  
22 process that would not be that long, that would be  
23 done in a fairly prompt time frame.

24 THE COURT: Then my next question becomes  
25 who would reasonably anticipate even a 90-day report

1 by DGE given the history of some of the principals of  
2 the plaintiff entities, depending upon whose brief I  
3 read and find the more credible, as to which everyone  
4 knew something.

5 MR. BROOKS: Your Honor, can I – if I could  
6 answer? Counsel – counsel for the plaintiffs, Your  
7 Honor. Counsel for the plaintiffs. They didn't – It  
8 wasn't like we were surprising them. Counsel for the  
9 plaintiffs, who are experienced gaming attorneys,  
10 experienced large law firms with very sophisticated  
11 attorneys, agreed to that date, agreed to that outside  
12 date. They were the ones handling the process. They  
13 are the ones that made a determination that that was  
14 an acceptable outside date. So the answer to that is,  
15 Your Honor, they did, counsel for the plaintiffs.

16 MR. POSITAN: Now we're testifying, Your  
17 Honor.

18 MR. BROOKS: No, we're not, Your Honor.  
19 That's what the contract says.

20 THE COURT: Well, to a degree we are.

21 MR. MUNDIYA: It's –

22 THE COURT: Yes, sir?

23 MR. MUNDIYA: Your Honor, it's simply a  
24 matter of risk allocation. Experienced counsel on one  
25 side, experienced counsel on another side. They took

1 the risk, given all of their history, that they could  
2 get it done; and we agreed to that date because if  
3 they couldn't get it done we would have several months  
4 to go out and find somebody who could get it done.  
5 They couldn't get it done, and now they want to  
6 rewrite the contract. That's our position, Judge.

7 THE COURT: I understand that position.

8 There is reference, counsel, in plaintiffs'  
9 complaint to – Well, section 5.7, further assurances.  
10 I'm about to hear, I gather, that the language of 5.7  
11 contemplates, if not its black-letter language but if  
12 it – in its spirit, a degree of cooperation for lack  
13 of a better term. Is that an incorrect reading of  
14 5.7?

15 MR. MUNDIYA: Your Honor, section –

16 THE COURT: Particularly given plaintiffs'  
17 argument that they make with regard to the March 26,  
18 2013 letter by Matejevich in which he pledges, "best  
19 efforts as promptly as practicable." Does that  
20 section correlate to that quoted section of that  
21 letter or email?

22 MR. MUNDIYA: Section 5.7 is – as it says,  
23 is, (reading:)

24 "Subject to the terms and conditions hereof each  
25 of the parties hereto agree to use reasonable

1 best efforts to take or cause to be taken all  
2 appropriate action and to do or cause to be done  
3 all things reasonably necessary, proper, and  
4 advisable under applicable laws."

5 That was the obligation of both sides, and  
6 all the March 26th letter was doing was suggesting  
7 that. But the important thing, Your Honor, is – is  
8 the lead-in to that, "Subject to the terms and  
9 conditions herein." So there's nothing in 5.7(a) that  
10 would suggest that the termination provision is not  
11 applicable or that the outside date is not applicable.  
12 The outside date was fixed. It was clear. And so  
13 regardless of what the obligation was in 5.7(a), as  
14 soon as April 26th came and went that event triggered  
15 an obligation – or a right rather under 7.1(b). So  
16 all 5.7(a) does is simply oblige the parties to  
17 negotiate – to do all things necessary and reasonable  
18 up and through April 26th. But once that date came  
19 and went, Your Honor, all bets were off.

20 THE COURT: You argue in your brief at pages  
21 4 through 5 that post filing "significant information  
22 emerged publicly." And I gather that's a reference to  
23 the March 4, 2013 AGA "unprecedented objection."  
24 While it's interesting reading, do you take the  
25 position that that filing constitutes any basis for

1 any action or inaction, decision or indecision  
2 undertaken by the defendants here?

3 MR. MUNDIYA: No, Your Honor. It was just  
4 part of the mix. March came along. We got that  
5 information. It caused concern. March 26th came  
6 along, and we had a conversation with the DGE. It's  
7 in the record. That caused concern. April 1 came  
8 along, and we asked for information which they refused  
9 to provide unless we signed an NDA. That caused  
10 concern. When we got the information without  
11 disclosing anything in the information, that caused  
12 concern. It was a continued development of events,  
13 which by the time we got to the end, caused us real  
14 concern about their prospects of licensing. So it was  
15 really a gradual process up until and through, through  
16 April 26th.

17 THE COURT: I expect to hear soon that upon  
18 your client being advised – I believe on April 11 –  
19 that the filing, the application for the ICA had been  
20 deemed complete as of April 10, that the new outside  
21 date, at least in terms of the 120-day – 90-day  
22 reporting by DGE and 30-day decision by the Casino  
23 Control Commission, would have brought you to  
24 August 9th and that the interceding marginal delay of  
25 three months was a relatively minor consideration.

1 Before you hear that from Mr. Positan, as long as  
2 you're on your feet what's your response to that?

3 MR. MUNDIYA: The response is in Mr.  
4 Matejevich's affidavit. If we cannot between the time  
5 – between today and August 10th get out ahead and get  
6 this iGaming show on the road there's going to be  
7 untold harm to the defendants. In order to have  
8 iGaming ready in November we have to get a partner  
9 who, unlike them, has a shot at getting licensed. We  
10 need to get the software ready for on-line gaming, and  
11 that's technical and it takes a lot of time. We need  
12 to do the marketing for on-line gaming. So the months  
13 between now and August are, in some ways, the most  
14 critical, and when we have potential partners in there  
15 it's important to have the summer season be with us.  
16 You don't sell your house in the middle of winter.  
17 You sell your house when the flowers are blooming and  
18 the sun is shining. It's very, very important for us  
19 to be able to move on, to terminate this disagreement,  
20 be done, and get somebody who can help us be in line  
21 for on-line gaming in November; and that's not going  
22 to start in August because if we start in August, Your  
23 Honor, it's way too late, way too late. We have to  
24 start today.

25 THE COURT: Page 5 of your brief. Top of

1 the page, first full sentence, "The delays plaintiffs  
2 have encountered in the regulatory process were  
3 inevitable." Were they?

4 MR. MUNDIYA: There were some things we  
5 thought might be inevitable given the history, but  
6 they assured us – as you see in the certifications,  
7 they assured us that they could get it done. There  
8 was, there was a lot of negotiation on this provision.  
9 We thought that there would be, there would be delays.  
10 They told us we're done – we think we can get it done.  
11 In fact, we were hearing that from Mr. Isai Scheinberg  
12 calling in from wherever. He had a – he says he has a  
13 90 percent chance of getting approval.

14 Your Honor, at this point we shouldn't have  
15 to take the risk. That's the point. Whether we  
16 thought it was inevitable or not inevitable, the point  
17 is that we are now here on May 17th and they don't  
18 have it, and the clock is running.

19 THE COURT: Given the tight time line on the  
20 agreement, the recent history by some principals  
21 affiliated with plaintiffs and some degree of  
22 familiarity with that history, I'm about to hear, I  
23 gather, that the structure of this contract, not just  
24 as relates to the time line, but the advance payment  
25 against operating loss up to the 11 million, which was

1 reached by February 1, constitutes a self-fulfilling  
2 prophecy of non-compliance with the ICA. Do you  
3 follow me?

4 MR. MUNDIYA: Not really, Your Honor.

5 THE COURT: That the deal was structured to  
6 get their money, apply it against operating losses  
7 under the prospect of credits against the purchase  
8 price all within a time frame that, given the history  
9 of some of those principals with plaintiffs, was  
10 unrealistic.

11 MR. MUNDIYA: Okay.

12 THE COURT: Your response would be they're  
13 big boys and girls, -

14 MR. MUNDIYA: Risk allocation.

15 THE COURT: - sophisticated counsel, -

16 MR. MUNDIYA: It's more than that, Your  
17 Honor.

18 THE COURT: - buy a casino for 15 million  
19 although there's the two million in conditional  
20 payments to your two principals. There's the 32  
21 million to reconstitute the unfunded pension  
22 obligations, the four million dollar - Well, that's  
23 part of the 15. Ultimately, had this agreement been  
24 fully completed or should it at some point, the  
25 purchase price really is more than 15 million dollars.

1           MR. MUNDIYA: You know, the purchase price  
2           is, is what it is in the contract. The important  
3           point for this Court, I think, is not only are they  
4           big boys and girls, the fact is that there is a  
5           provision in this agreement that says that all of the  
6           advances that they provide which went to operation,  
7           operating costs, that if this agreement is terminated  
8           those payments, those – that money shall not be  
9           refunded, and the reason for that is that in December  
10          we wanted this transaction to be as economically  
11          neutral as possible. We did not want to be in a worse  
12          position in April than we were in, in December. So we  
13          and they agreed that they would fund the casino that  
14          went not to the, not to the sellers but to the  
15          operations, to pay payroll, to pay expenses, and that  
16          come April, if there was no, no agreement, that that  
17          money, expressly in section 7.2(c), would stay with  
18          the company. That was the deal, Your Honor. And if  
19          we terminated pursuant to the lack of an outside date  
20          – or closing by the outside date, they agreed that  
21          they would pay a termination payment. Plain and  
22          simple.

23                 Your Honor, on the contract Your Honor had  
24                 two, two questions on the – at the beginning. Could I  
25                 – May I address those?

1 THE COURT: Sure.

2 MR. MUNDIYA: The typographical error, I  
3 think is -

4 THE COURT: Does there appear to be a phrase  
5 or a clause missing in that paragraph?

6 MR. MUNDIYA: Oh, on that one? Yes. I  
7 think the phrase is "unless subsequently approved" or  
8 words along those lines. I mean I'd have to go back  
9 and -

10 THE COURT: Would that be rather significant  
11 in this case?

12 MR. MUNDIYA: Well, Your Honor, we have to -  
13 I have to sit with my corporate counsel. Maybe we can  
14 go through this at a break or something because I need  
15 to figure out exactly what it is, but we're - we're  
16 still working with that.

17 THE COURT: All right.

18 MR. MUNDIYA: But it may be words, may be  
19 something along those lines, but we just need to sit  
20 down and go through that. And in terms of 6.3 -

21 THE COURT: Well, if that's the missing  
22 phrase -

23 MR. MUNDIYA: Yeah. Well, it's not, it's  
24 not sig - Maybe we'll take a break and we'll try to  
25 figure out what that's supposed to say. But in terms

1 of 7. - or 6.3, I think it was 6.3(c) was missing.  
2 6.3 - there's no, there should be no, no (c). So  
3 that, I think, is the, the typo. But we will, we'll  
4 get back to you on 7.1(c), Your Honor.

5 THE COURT: For now that's all I have. For  
6 now.

7 MR. MUNDIYA: Thank you.

8 THE COURT: Anything else from the defense?

9 MR. CURTIN: No, Your Honor.

10 THE COURT: Mr. Positan, would counsel  
11 prefer maybe a ten-minute break before we continue?

12 MR. CURTIN: We'll give you - maybe we'll  
13 get a response on that, Judge.

14 THE COURT: We've been under way a little  
15 bit over an hour, and it is mid-afternoon. Let's,  
16 let's stand in recess for ten minutes.

17 COURT ATTENDANT: All rise.

18 (Off the record at 2:33:08. Back on the record  
19 at 2:44:25 as follows:)

20 THE COURT: Thank you, everyone. Again,  
21 please be seated and make yourselves comfortable.

22 MR. BROOKS: We have - Are we good?

23 THE COURT: We're on the record?

24 THE CLERK: We're on the record.

25 THE COURT: Good. Okay.

1 MR. CURTIN: We have an answer to your  
2 question, Judge.

3 THE COURT: Go ahead.

4 MR. BROOKS: Your Honor, if I may, there is  
5 no missing language in 7.1(c). The provision that  
6 you're looking at, that clause, "its application for  
7 gaming approval" is meant to modify withdrawals above  
8 or meant to relate to withdrawals above, and it deals  
9 with -

10 THE COURT: Say, say that again. I'm there  
11 now.

12 MR. BROOKS: "Its application for gaming  
13 approval," the clause that you were focusing on, Your  
14 Honor, you thought there was language missing after  
15 that. There's no language missing, Your Honor. That  
16 clause relates to the withdrawals above it. What was  
17 contemplated there, Your Honor, is that after a  
18 termination they may - we don't know what they're  
19 going to do with their application. They had a right  
20 to withdraw it, continue with it, and that's really  
21 what it addresses. But the clause itself, there's no  
22 missing language. That clause relates to withdrawals.  
23 So if you took out "unless subsequent to the  
24 termination of the agreement pursuant to section 7.1,"  
25 it would simply say "or if buyer withdraws its

1 application for gaming approval."

2 THE COURT: I follow your interpretation.  
3 I'll share with you that I probably read and re-read  
4 that provision more times than I want to share. I  
5 didn't see that.

6 MR. BROOKS: But that's what it was intended  
7 to be, Your Honor.

8 MR. CURTIN: Judge, you were nice enough to  
9 ask me if I had anything else. I do have one more  
10 thing. We have a demonstrative put together by us. I  
11 gave Mr. Positan a copy of it in advance of the  
12 argument today. It's on the board, and I have a hand-  
13 up copy that addresses one of the questions. During  
14 our break we thought it wise in response to the  
15 Court's question when you asked about how long things  
16 took, we've compiled public information the length of  
17 time to the granting of the ICA from the execution  
18 date, and we have a demonstrative that we could use to  
19 talk to you about that subject if you would like to  
20 see it.

21 THE COURT: Mr. Positan, any -

22 MR. CURTIN: I've reversed it because I  
23 didn't want to have it - you look at it -

24 THE COURT: Does it, does it visualize my  
25 math?

1 MR. CURTIN: It visualizes your math.

2 MR. POSITAN: Well, Your Honor, I didn't get  
3 it in advance. It was as I walked through the door  
4 there actually.

5 MR. CURTIN: It was after he sat down.

6 MR. POSITAN: Yeah. After we sat down. So  
7 I haven't even had a chance to look at it. We don't  
8 need demonstrative evidence.

9 First of all, and I - We were told there are  
10 25 contracts. Nobody filed a certification. Nobody  
11 gave them to us. We can't even look at them. We just  
12 got their little chart. I don't know if it's accurate  
13 or not. I don't even, I can't even compare their  
14 demonstrative evidence to what would be the evidence  
15 except it's not in evidence. So we don't have them.  
16 I don't know what they're talking about. What we're  
17 able to glean from their chart, it has a glaring bunch  
18 of inconsistencies. Like Colony Capital themselves,  
19 which closed and got their license outside, after the  
20 outside closing date. I don't know if that one's on  
21 the chart or not, but that's what they did. They did  
22 exactly what they said we shouldn't do in this case.  
23 But that's, you know, how much testimony are we going  
24 to have from the sophisticated bunch of lawyers who  
25 have all the mistakes in their contract that took them

1 five to figure out whether it should have been in  
2 there or not? That's what happens, I guess, when you  
3 have all these sophisticated lawyers from all over the  
4 place doing contracts.

5 THE COURT: Are you testifying now?

6 MR. POSITAN: Well, I figure if everybody  
7 else can I might as well.

8 MR. CURTIN: Well, I haven't had my, I  
9 haven't had my turn yet though.

10 MR. POSITAN: I'm just one of these country  
11 lawyers from up in Roseland, New Jersey, Your Honor.  
12 I'm not one of these 700 firm guys, you know?

13 THE COURT: Mr. Curtin, go ahead.

14 MR. CURTIN: Neither am I.

15 MR. POSITAN: We're just a rose among  
16 thorns, I guess, Tom.

17 THE COURT: Put it this way. To the extent  
18 that you've brought visual aids, while I appreciate  
19 it, I don't know that I need it. I've read — I hope —  
20 if nothing else, I hope it's apparent that I've read  
21 your submissions.

22 MR. CURTIN: Very much so, Judge.

23 THE COURT: And I'm familiar. I'm satisfied  
24 with your arguments. Mr. — Go ahead.

25 MR. CURTIN: The reason that — what prompted

1       it, Judge, I mean we brought it obviously to use as  
2       part of the presentation, but what prompted it was the  
3       Court seemed to be focused on dates and whether these  
4       were tight time frames or not such tight time frames,  
5       and we could – these are illustrative of the fact that  
6       the times are all over the map.

7               THE COURT: Well, but –

8               MR. CURTIN: And if the Court will draw that  
9       conclusion from our argument, then we need not show  
10      you the billboards.

11              MR. POSITAN: And here's another problem,  
12      Your Honor. We don't know what the terms of those  
13      contracts were. That's the real problem.

14              THE COURT: But here's what I'm satisfied in  
15      a general sense, and perhaps these are suppositions.  
16      That each contract to purchase a casino interest is  
17      unique. It stands on its own. The parties are  
18      different, their resources are different, their  
19      priorities are different, and as a result the time  
20      period within which DGE deems itself comfortable to  
21      submit its final report to the Commission, they  
22      probably vary. They probably run within a range.  
23      There may be a so-called beaten path of an average,  
24      but I don't know that that helps me from a standpoint  
25      of this return on the order to show cause. I am

1 satisfied that I have a handle on the outside dates,  
2 90 plus 30; that this agreement from the date of the  
3 filing ran 120 plus 3 to the 26th.

4 MR. POSITAN: Actually you have to correct  
5 that as well, Your Honor, because it didn't take into  
6 account the Christmas holiday. Mr. Eisenstein can  
7 give you the actual count on that.

8 THE COURT: Well, if I'm within a day. I'm  
9 a lawyer, not a mathematician. If I'm within a day  
10 I'm happy. I'm satisfied I have the tight time line.  
11 And that raises many questions. We're discussing  
12 those questions or counsel are offering your sense of  
13 the appropriate answer, and I'm about to hear from Mr.  
14 Positan. So go ahead.

15 MR. POSITAN: Your Honor, the time line  
16 actually runs from December 27th and it goes past the  
17 date. Right?

18 MR. EISENSTEIN: That's correct, Your Honor.  
19 We in good faith filed our license application  
20 immediately -

21 THE COURT: On the 24th.

22 MR. EISENSTEIN: - on the 24th, but it was  
23 the third business day after that we were obligated  
24 to. The 21st was a Friday, 21st of December, and we  
25 had the Christmas holiday on the 25th. So our

1 obligation was the 27th, and if you carried that out  
2 it brings the third business day after the 120-day  
3 period -

4 THE COURT: Which was the outside date.

5 MR. EISENSTEIN: - beyond the outside date.

6 MR. POSITAN: That goes to the question of  
7 the validity of the contract obviously.

8 THE COURT: The floor is yours.

9 MR. POSITAN: Your Honor, I heard the words  
10 from my good friend Tom Curtin, who said this is all  
11 about the balancing of the equities; and I heard his  
12 counsel from New York, from Wilkie Farr say, you know,  
13 an impassioned plea about how summer is upon us and  
14 this is the time, because otherwise winter is coming.  
15 I don't know if you watch the game like me, winter is  
16 coming. Well, winter came last December. And does  
17 everybody remember what was going on last December at  
18 that casino? They were on the verge of filing  
19 bankruptcy, 1,800 jobs lost, and the only thing that  
20 stopped that was my client. My client agreed to that  
21 deal. It infused weekly pay. All those people,  
22 that's how those people kept working. And through the  
23 winter when the times were bad, through Hurricane  
24 Sandy and the recovery, would that hotel have even  
25 opened up again after Hurricane Sandy without my

1 client? You want to talk about equities? So they lay  
2 out \$11,000,000. \$750,000 a week. There's a clause  
3 in there that we furnished in our brief.

4 THE COURT: By February 1.

5 MR. POSITAN: Pardon me?

6 THE COURT: By February 1.

7 MR. POSITAN: By February 1. But there's a  
8 clause right after that that says if further funds are  
9 needed and they're going to go into bankruptcy they  
10 give us notice first, and we pony up as an advance.  
11 They didn't have to do that, did they? That's because  
12 their COO is releasing things saying, oh, now we're,  
13 now we're okay. This is the same COO who, on  
14 March 13th, Mr. Frawley - you know, we read all about  
15 this, this smear campaign on my, on my client - who  
16 talks about the AGA, and it says - and he - this is on  
17 March 13th.

18 MR. CURTIN: What is this?

19 MR. POSITAN: This is Mr. Frawley's  
20 transcription from his interview, which was attached  
21 to the papers and transcribed by Schulman Wiegmann  
22 Court Reporters, and he talks about he'd like to see  
23 it happen as soon as possible. (Reading:)

24 "Q. There have been those who say that The  
25 Atlantic Club would be in very serious

1 trouble, that its future would be imperiled  
2 were it not for internet gaming, were it not  
3 for the possibility as well of sports  
4 betting being actually implemented. Is that  
5 true?

6 A. Yes. It is certainly a possibility. Our  
7 possibility and our future has been  
8 brightened by the foresight of the lawmakers  
9 in New Jersey. Internet gaming has been a  
10 great help to us, and it helped bring us  
11 together with PokerStars.

12 Q. What would that mean to your bottom line?

13 A. Right now we are not a profitable casino.  
14 With PokerStars and with internet gaming and  
15 the capital investment they're prepared to  
16 make in the property we expect to be more  
17 than profitable.

18 Q. How much is that capital investment that  
19 they expect to make?

20 A. Right now it's about 20 million the first  
21 year and will probably approach over 40  
22 million over the next five years, and that  
23 only includes our property. I know there  
24 are plans to invest in other places in the  
25 state. We are also going to have to build a

1 data center on the property, which is a very  
2 significant capital investment.

3 Q. There are those who have said that there  
4 have been tremendous resistance from various  
5 elements within the gaming community and the  
6 gaming industry, and we've heard  
7 conversations and accusations lately that  
8 Caesar's is behind a good deal of that. Do  
9 you believe that to be the case?

10 A. I believe the AGA, which certainly Caesar's  
11 is a part of, probably has a little bit more  
12 of an agenda. PokerStars is the largest  
13 internet gaming company in the world.  
14 They're a great company. Their customers  
15 are absolutely loyal to them. I think it's  
16 an issue before anybody makes a judgment  
17 they should look at what ulterior motive  
18 could be behind it.

19 Q. The poll we referred to just before we did  
20 this interview, even though there's  
21 obviously a smaller and smaller number of  
22 New Jerseyans who are opposed to internet  
23 gaming, there are still more than that  
24 opposed that are in favor of it, and many of  
25 them say they're just worried about it being

1 too easy for people to either gamble when  
2 they shouldn't perhaps or for people to  
3 develop gambling problems. What do you say  
4 to that?

5 A. I think one of the things the governor  
6 addressed, and rightfully so, is the problem  
7 gaming issue. The other issue would be  
8 security. If you look at some of the  
9 security measures that I've been privy to  
10 I'm amazed at how they're able to keep  
11 under-aged gamers, people – there is an  
12 exclusion list, a sizeable – PokerStars is  
13 prepared to put a sizeable amount of funding  
14 into the problem gaming fund. I think there  
15 needs to be a little bit more education on  
16 it in a lot of ways before people make a  
17 snap judgment."

18 It talks then about – Oh, and it says, (reading:)

19 "Q. And last question for you, there's been much  
20 talk about trying to transform Atlantic City  
21 once again to turn it more into a family  
22 destination than a gambling destination. Do  
23 you believe that would be an advisable move?

24 A. I think that it needs to have a broader  
25 appeal beyond gaming. I think gaming will

1 be our core business. I think we're a  
2 little ways from making it the family  
3 destination that it should be, but we're  
4 making progress. I am very pleased with the  
5 things I'm hearing from the governor's  
6 office. I'm very pleased with the things  
7 I'm hearing from PokerStars. I think that  
8 if you look at more capital investment, the  
9 more the casinos are profitable the more  
10 capital investment they make, the more  
11 people are apt to come, the more we're able  
12 to build our properties up to where we want  
13 them to be.

14 Q. Thank you, Mr. Frawley."

15 So PokerStars is pretty good, Mr. Frawley's  
16 view on March 13th, wasn't it? And then they put all  
17 this stuff in about PokerStars. We've brought all  
18 their blogs in, like Mr. Brooks' blog on his firm's -  
19 not his blog, his firm's blog talking about PokerStars  
20 and the problems that they're going to encounter.  
21 This in July of 2012, six months before. But  
22 PokerStars was okay then. And, and you look at some  
23 of the other things they've put out with the papers in  
24 this suit, and everything they say, you look at their  
25 blog and you get a different story. They clearly knew

1 about the legal problems that PokerStars have had.  
2 Everybody knew that going into there, and everybody  
3 knew it was going to be the province of the people who  
4 were charged to make that determination whether or not  
5 an ICA should issue, and that is what should happen  
6 here.

7           The State of New Jersey in addition to my  
8 client has put a lot of effort, funding, and  
9 absolutely proceeding to this day with this  
10 application despite all of this stuff that's before  
11 you and is put out in the paper. Who started the  
12 public relations? They did. The fact of the matter  
13 is the DGA (sic) is proceeding. There's a bunch of  
14 interviews still set up, as we set forth in our  
15 papers. It hasn't stopped. That licensing approval  
16 is proceeding. They will be finished with it in about  
17 less than two months.

18           We made this deal. This contract, the way  
19 it's stated and the way they're trying to say it now,  
20 they have one hand behind their back to say we're  
21 going to fail, but you give us the money. You keep us  
22 going through the dog days of winter, and then when  
23 the blossoms of spring come, hey, forget about it.  
24 We're done. Ha-ha, we cancel. You guys are a bunch  
25 of bad guys. We don't think you're ever going to get

1 a license. Well, guess what? That's what the DGA  
2 (sic) decides, the DGE, not them.

3 Sophisticated buyers? Yeah. We saved their  
4 butts. That's what sophisticated buyers are doing  
5 here. And what do we get? We're getting the end of  
6 the stick. So give us the 11 million. Oh, by the  
7 way, you - we terminate. Give us another four  
8 million. The equities? How about the pension  
9 funding? How about that 32 million dollars? All his  
10 employees are going to get that? How about the  
11 resources that the State of New Jersey has put into  
12 this to go through this license application? Daily  
13 basis five, six people. How come the State of New  
14 Jersey hasn't listened to, you know, the former judge  
15 here that, oh, forget about it? What's the point?  
16 They didn't do that. They're going on it today. That  
17 process goes on. Let them do their job.

18 A couple things happened in this case. We  
19 put up the investment. As you heard from their COO,  
20 we're going to put up another twenty-, forty million  
21 dollars to turn that property around, but now they  
22 just want to say, you know what, let's take that 15  
23 million, and the heck with those guys. Ha-ha-ha.  
24 We're very sophisticated. They're - you know, they're  
25 bad guys anyway, even though we thought they were

1 great guys before. But now, you know what, how about  
2 if we put all this stuff out, and maybe we'll, we'll  
3 mess up the whole process. Maybe we'll convince the  
4 DGE that they really are bad guys. So we'll take the  
5 money, and you're good guys. Once you give them the  
6 money, well, now they're bad guys. And now let's make  
7 sure that we do everything we can to make this go down  
8 the tubes because we get to keep the money and now,  
9 hey, summer's here again. Time to make some money.  
10 That's what's going on here.

11 Bad faith. Really insidious terrible  
12 conduct. This deal was structured to go through with  
13 that license approval. We don't get the approval, we  
14 lose. We get the approval, close. That's this deal.

15 THE COURT: Where does the contract language  
16 say that?

17 MR. POSITAN: The contract, that can only be  
18 read in one way, Your Honor. Those two clauses have  
19 to be read together because, again, I don't know what  
20 those other 25 contracts say. And, once again, we  
21 have these so-called experts opining here. I don't  
22 know how much they got paid to opine, but we'll find  
23 that out someday, I guess. But the Superior Court, it  
24 is unique. It hasn't ruled on it. Nobody's ruled on  
25 this issue before. You know, it's kind of like a

1 house closing. Everybody's got the form contract.  
2 They say, "Okay, we're going to sign the contract.  
3 This is going to close on April 30th." "Oh, wait a  
4 minute, can't close on April 20th. The plumber  
5 couldn't get there to check wires," and we all know  
6 that sometimes the house contract doesn't close on the  
7 date in the original contract, does it? And you say,  
8 "Oh, okay. Let's close on another date." And then  
9 about five times later you say, "Okay. The contract's  
10 got to close by that date," and the house closes.

11 Well, you know, it's hard to apply that  
12 logic to all these sophisticated casino contracts  
13 because that's the way it's been going on in Atlantic  
14 City. But maybe if some time somebody said to  
15 everybody, "You know what, why don't you guys comply  
16 with the law? Why don't you comply with 5:12-  
17 95.1(2)(a) because that really is a part of the  
18 contract by a matter of law?" You know, and this  
19 references in the agreement when you read 7.1(b),  
20 which permits the parties to terminate, quote,  
21 (reading:)

22 "If the transactions contemplated hereby shall  
23 not have been consummated on or prior to the  
24 outside date."

25 What's that mean? Same thing as the definition back

1 in 1.4(a). The transactions are all tied together  
2 here. The contemplation in order to comply with that  
3 statute is that it's the statutory date from the  
4 completion of that license, and we all know in this  
5 room that that's July 9th for the DGE and August 9th  
6 for the CCC.

7 THE COURT: Where in the contract is there  
8 language that precludes the closing date from  
9 occurring subsequent in time, or from maturing  
10 subsequent in time to the outside date?

11 MR. POSITAN: As a matter of law it's part  
12 of the, part of the same structure. When you, when it  
13 refers to transactions, the actual clause in this case  
14 I'm talking about referring to the transactions  
15 contemplated hereby. It doesn't say herein, hereby.

16 THE COURT: I'm referring now to page 17 of  
17 the defendants' brief, and I believe I made the point  
18 in our teleconference on May 14th, but I'll quote from  
19 the defendants' brief. (Reading:)

20 "If the plaintiffs are correct, then the contract  
21 could never be terminated, and the parties forced  
22 to continue in a relationship forever depending  
23 on when the regulators deemed the application to  
24 be complete."

25 If you're correct, that extension of that

1 premise is accurate.

2 MR. POSITAN: If we didn't complete by  
3 April 26th they had a right to cancel. Once we  
4 completed the statute goes in effect. We close per  
5 the statute. We have three days after that double  
6 level of regulatory approval is made. If we don't get  
7 approved we're done.

8 THE COURT: Let me ask this, and I hope I'm  
9 not -

10 MR. POSITAN: They, they get the money.

11 THE COURT: And I hope I'm not -

12 MR. POSITAN: That was the risk we took.

13 THE COURT: Let me ask this question, and I  
14 hope I'm not turning any, any counsel at the table  
15 into potential fact witnesses, and you're talking to a  
16 judge who is a former South Jersey, Cape May County  
17 real estate lawyer who used to stay up all night  
18 worrying about the results in termite certifications.

19 Who - and there may well be reasons with  
20 which I'm just not familiar, but who would undertake,  
21 not a 15-million-dollar transaction, the contingent to  
22 at 17, the 32 million to fund the pension fund. Now  
23 you're up close to 40 - 50.

24 MR. POSITAN: 48.

25 THE COURT: A 40-million-dollar transaction

1 in the most highly regulated industry in New Jersey, I  
2 gather, and box yourself in to these time constraints  
3 given what I'll characterize – and not to be  
4 disrespectful; I think I'm actually cleaning it up a  
5 little bit – the history of some of the principals  
6 affiliated with plaintiffs? Who, who would do that as  
7 a business person? What lawyer would allow a client  
8 to do that and go home and be able to sleep that night  
9 knowing that each weekly advance to cover operating  
10 losses is gone whether you ultimately close or not? I  
11 mean I absolutely follow your argument –

12 MR. POSITAN: My client is not stupid, Your  
13 Honor.

14 THE COURT: Oh, I'm – Well, –

15 MR. POSITAN: Nobody ever accused him of  
16 being that.

17 THE COURT: I'm not suggesting that. But  
18 that is part of the response.

19 MR. POSITAN: And the answer is no. You  
20 know why? Because it's convenience. It's an argument  
21 of convenience, it's an argument of greed, and it's an  
22 argument of disingenuous conduct because somebody at  
23 one point in time decided that last week of April  
24 that, you know what, I think we could read that this  
25 way and let's keep the money. Oh, we'll get another

1 buyer. Hey, the statute passed now, and then we'll go  
2 on a campaign to try to make it as bad as possible and  
3 make sure these guys don't get their license.

4 THE COURT: And you may be right, yet  
5 plaintiff didn't execute the agreement until the day  
6 after the state senate passed the bill out of the  
7 senate. So to that extent plaintiff -

8 MR. POSITAN: Governor vetoed it once  
9 before.

10 THE COURT: Well, businessmen are  
11 opportunists. Businessmen and women are opportunists.  
12 They all follow the money.

13 MR. POSITAN: Meet me tonight in Atlantic  
14 City, right?

15 THE COURT: Not, not lost on the Court that  
16 this contract was executed after the months of  
17 negotiation, the term sheet, the amended term sheet,  
18 December 20 the legislation passes out of the senate.  
19 December 21 the agreement is signed. Tight time  
20 constraints. Buyers with, again, a history, and while  
21 I don't pretend to know all things with regard to the  
22 process, it's just my general knee-jerk reaction if I  
23 were advising a client for the first time who was  
24 considering applying even for a casino license to be a  
25 waiter/waitress, anything, bartender, if they had an

1 expunged disorderly persons conviction my instinct  
2 would be, "You've got a problem. It's going to delay  
3 the process. Build it into the contract. Protect  
4 yourself, protect your investment."

5 This is far different from that on a far  
6 greater magnitude, and as I read and re-read all  
7 that's before me, it's fascinating reading I'll share  
8 with you. Unfortunately it's reality, and there's  
9 appeal to your argument. The difficulty that I have  
10 is I then go back to the contract, and it may well be  
11 that the only explanation for why plaintiff agreed to  
12 these terms is that as attributed by the defendants.

13 MR. POSITAN: Then why 5.5(b)? Why the  
14 other provisions about -

15 THE COURT: Well, I've, I've -

16 MR. POSITAN: - cooperating?

17 THE COURT: I've - I've, I've -

18 MR. POSITAN: Because it was contemplated.  
19 It was contemplated that there would be those  
20 problems. And why on March 26th the letter from them  
21 saying we're with you, we're going to get this done?  
22 What changed between -

23 THE COURT: As, as -

24 MR. POSITAN: - March 26th and April 26th?

25 THE COURT: As, as promptly as practicable

1 and depending upon which dictionary you read –

2 MR. POSITAN: If that's not a waiver I don't  
3 know what is after you took all our money.

4 THE COURT: Depending upon which dictionary  
5 you read, Random House, Kennerman, Webster's College  
6 Dictionary defines practicable as "capable of being  
7 done or put into practice with available means." The  
8 thesaurus printed by my alma mater, Princeton  
9 University, "Practicable: capable of being done with  
10 means at hand and circumstances as they are."

11 Practicable. Could have real significant  
12 meaning.

13 MR. POSITAN: Like the legal theory of  
14 practicability for example. That's after all the  
15 money is taken. Everything is fine on March 26th, and  
16 everybody knew on March 26th that the application  
17 wasn't complete and there was no way that a closing  
18 could occur before April 26th. Everybody knew that.  
19 The application got completed on April 10th.

20 THE COURT: Here's my next question. Do you  
21 acknowledge that the disclosure or non-disclosure  
22 agreement – please turn the phone off – sought by your  
23 client as relates to the defendants on April 15th was  
24 not a contractual provision?

25 MR. POSITAN: It was part of cooperating in

1 terms of sharing information. A question came up. My  
2 client believed it was confidential. They asked for a  
3 confidentiality agreement. It was given.

4 THE COURT: Would you acknowledge that the  
5 execution of the confidentiality agreement on April 17  
6 was not a specific affirmative obligation of the  
7 defendants in the contract?

8 MR. POSITAN: No. I think it's part of the  
9 cooperation clause that we've already been talking  
10 about.

11 THE COURT: Okay. Then let me ask this. If  
12 plaintiffs know by, by March 26th, one month prior to  
13 the outside date, that DGE is of the position that it  
14 will likely take another 90 days for its report to get  
15 to the Commission, why wait until April 23rd to  
16 formally propose an extension of the outside date?

17 MR. POSITAN: And ask for six million  
18 dollars in ten days, right?

19 THE COURT: No, that was -

20 MR. POSITAN: That was in good faith.

21 THE COURT: No. That came later.

22 MR. POSITAN: Okay.

23 THE COURT: But why wait - I mean a month  
24 almost passes. From March 26th, DGE needs another 90,  
25 to April 23rd, at which point plaintiffs communicate a

1 proposed formal extension of the outside date. If you  
2 know it's coming that far in advance why continue to  
3 address the fringe issues as opposed to the giant in  
4 the room, the most important term in that contract?

5 MR. POSITAN: At any time point in time  
6 after December 28th everybody knew that that couldn't  
7 be done by April 26th.

8 THE COURT: Well, if that's the case -

9 MR. POSITAN: So everything that happened in  
10 the interim -

11 THE COURT: If, if that -

12 MR. POSITAN: - was done with eyes open.

13 Take the money, don't say a word, and then on  
14 April 23rd you change your mind for the first time?

15 THE COURT: Well, it - 20/20 hindsight is a  
16 wonderful thing, and I confess to engaging in it at  
17 the moment. But if you knew it December 28th, or if I  
18 knew it December 28th, I'm getting something in  
19 writing before I start writing checks for 11 million  
20 dollars by February 1 knowing that it's not, it's not  
21 coming back to me.

22 MR. POSITAN: Because we thought we had a  
23 deal. And on the other side I think their conduct  
24 shows you what they thought, too.

25 THE COURT: But in, but in a contract that

1 is -

2 MR. POSITAN: And here saying today that we  
3 thought it was, it was something different when it was  
4 negotiated. But that, what did they do?

5 THE COURT: But in a con -

6 MR. POSITAN: That's called estoppel.

7 THE COURT: But in a contract that is time  
8 of the essence and which can be either modified or  
9 waived only in a writing signed by both sides. This  
10 contract is, I believe, 70-some pages, relatively  
11 lengthy, but its clarity is apparent, the clarity of  
12 its terms, and I'm just - I'm trying to correspond  
13 your equitable arguments, they enjoy such appeal with,  
14 with the language in the contract.

15 MR. POSITAN: Well, mine match up with the  
16 statute. That's what hap - that's what's supposed to  
17 happen in these applications. Otherwise, why would we  
18 go through that process? Why would the State of New  
19 Jersey DGE go through that process if somebody was  
20 going to say, "Oh, sorry. You're wasting your time.  
21 Ha-ha. We're - you know, we're done." Why would we  
22 put the State through that process?

23 THE COURT: Well, I gather the stat -

24 MR. POSITAN: That's why the statutes are  
25 there, -

1 THE COURT: But I -

2 MR. POSITAN: - is to stop that from  
3 happening.

4 THE COURT: But I gather the statutes were  
5 adopted in their present form because the Legislature  
6 wanted to make sure that it - or that the regulatory  
7 agencies never lost control of the process of  
8 oversight of the purchase and sale of casino  
9 interests, in my sense, because by that statute they,  
10 they - they run that show.

11 MR. POSITAN: Well, if you rule their way  
12 that's exactly what happens, they lost control,  
13 because they're out there still trying to do what's  
14 supposed to happen in this deal. Why would they do  
15 that if they thought this deal was over?

16 THE COURT: Well, that's, that's one of my  
17 questions, but I'm deliberately not asking that  
18 question because what may or may not be happening  
19 administratively is really not binding upon this  
20 court. My sense is that individuals involved in that  
21 process probably have some passing interest at least  
22 in terms of this matter -

23 MR. POSITAN: Well, if you want to talk  
24 about the public interest, how about we get all the  
25 funding that comes from the resource actually going

1 through here? How about, how about my client actually  
2 gets approved and is up and running in November? As  
3 they said, maybe we're the only one who can do that.  
4 And how about the financial effect on the employees of  
5 that casino, getting their pensions funded for 32  
6 million dollars? And how about the revenue it's going  
7 to bring to the state budget? So is there a public  
8 interest involved here? Absolutely. And my client is  
9 in position to make that happen. Nobody else is. And  
10 we were there in the dog days of winter saving all  
11 this. If we thought that that thing was going to get  
12 pulled out for us on April 26th, nah, no way. There's  
13 a statute that says process happens, then closing.  
14 You've got to read those two things together, with all  
15 due respect, with all the cooperation clauses with  
16 their conduct. Accepting the money. March 26th,  
17 we're with you, let's get this done. Right up until  
18 April 23rd and then all of a sudden, oops, sorry guys.  
19 Hey, we got the money. We're done.

20 THE COURT: But if that's the correct  
21 construction then why is the contract silent as to it?  
22 It's the most important term in that contract. How  
23 can the contract be silent if you're correct.

24 MR. POSITAN: Statute applies.

25 THE COURT: Statute's not even -

1 MR. POSITAN: We thought, we thought we had  
2 a deal -

3 THE COURT: Statute's not even cited in  
4 that.

5 MR. POSITAN: - that - If we didn't get, the  
6 risk was if we don't get licensed we lose the money.  
7 So if we're the bad guys that they say we are, then  
8 the DGE will decide that we're not given them a  
9 license, and we lose -

10 THE COURT: Yeah.

11 MR. POSITAN: - and you keep the money.  
12 That was the deal. On the other side, if we get  
13 approval then we're supposed to get the deal and pay  
14 our 48 million dollars, save the pension fund. Put  
15 another 40 million dollars into it, like their COO  
16 says, and then you've got a nice operating piece of  
17 property. You want to improve Atlantic City? There  
18 it is. But no, no, somebody decides on April 26th,  
19 April 27th, nah, you know what? Statute passed now.  
20 We'll throw these guys under the bus. We'll keep the  
21 money. We'll get another buyer. We'll make more  
22 money. Greed. That's what this is all about.

23 THE COURT: Do defendants care to be heard?

24 MR. CURTIN: Yes. Response, please, Judge.

25 THE COURT: By the way, counsel, everybody

1 gets two rounds.

2 MR. MUNDIYA: Okay. Thank you, Your Honor.  
3 This will be very, very brief.

4 This was a termination clause that was  
5 mutual. Not just us. They could have terminated as  
6 well. So I think Your Honor should keep that in mind  
7 as you -

8 THE COURT: But you have their 11 million  
9 dollars, in fairness.

10 MR. MUNDIYA: Yes, we do. Something that  
11 they agreed to do.

12 THE COURT: I understand.

13 MR. MUNDIYA: Right. The next -

14 THE COURT: You're probably less, you're  
15 probably less inclined to walk away from a deal near  
16 the end if you're out eleven of the 15 million.

17 MR. MUNDIYA: Understood.

18 THE COURT: And the swing is walking away  
19 with nothing if you terminate or having an Atlantic  
20 City casino. That's a huge swing.

21 MR. MUNDIYA: It is a huge swing. But,  
22 again, they came in with their eyes open. The other  
23 thing that they could have done, and you see this in  
24 other agreements, is they could have negotiated a  
25 right to an extension. That happens all the time,

1 that if – if they had negotiated for that right in  
2 December, then we wouldn't be standing here. But they  
3 didn't do that. And there are other agreements in  
4 which their regulatory counsel has negotiated  
5 extension rights. So they know how to negotiate for  
6 an extension, and they didn't do it. That, Your  
7 Honor, we think speaks volumes about the plain and  
8 unambiguous terms of the contract.

9 The next thing Mr. – my adversary says is  
10 you've got to tie the two things together. New Jersey  
11 law is clear that every provision of a contract has to  
12 be given a meaning, and contracts should be harmonized  
13 to give every clause a meaning. If he's right, you  
14 are writing out the word outside date out of the  
15 contract, you're writing out section 7.1(b). It has  
16 no meaning if he's right. Why would we put it in?  
17 What does it mean? It's there throughout this  
18 contract. Section 5.5(c), a provision he didn't speak  
19 about, talks about having to get to a closing but no  
20 later than the outside date. In the same provision  
21 they talk about a closing and an outside date. So his  
22 argument is completely inconsistent with the plain  
23 unambiguous language of this contract, and every  
24 provision has to be given meaning. And if you accept  
25 that principle of New Jersey law, we win.

1 MR. POSITAN: *In pari materia*.

2 MR. MUNDIYA: I don't know what that means.

3 THE COURT: Equal footing.

4 MR. POSITAN: I think ...

5 THE COURT: Mr. Positan, anything further?  
6 Anything further, sir?

7 MR. POSITAN: Your Honor, we rely upon our  
8 papers, and we thought your initial decision in this  
9 matter was right on line, and you do have to read it  
10 *in pari materia*, this contract, despite some of its  
11 shortcomings and missing - or misnumbered things. We  
12 think it was clear. We think the parties' intentions  
13 were very clear from the beginning, and we think they  
14 should be given their full intent, which, as we all  
15 know, we're not going on a long time frame here. We  
16 have a statutory period which is ongoing as we sit  
17 here today, which will be completed in about six  
18 weeks, seven weeks, and obviously there's been a lot  
19 of resources devoted to this and we just want the  
20 benefit of what we thought we negotiated. The  
21 equities I believe are very clear.

22 THE COURT: Thank you very much.

23 MR. CURTIN: Thank you, Your Honor.

24 THE COURT: I'm going to thank counsel for  
25 your submissions. I also want to acknowledge and

1 thank you for your civility toward one another. It's  
2 appreciated.

3 I noted in reading your pleadings,  
4 specifically the verified complaint and defendants'  
5 responsive brief in support of this application to  
6 vacate restraints, that the, the time line, the dates  
7 do not appear to be factually contested; but in that  
8 regard a brief recital of the time line is appropriate  
9 before I enter my findings.

10 And the Court learns from reading all of the  
11 submissions that in or about September of 2012 a  
12 defendant entity, RIH Management, became interested in  
13 the prospect apparently of on-line gaming presented at  
14 The Atlantic Club in Atlantic City, and apparently  
15 representatives of RIH agreed and RIH Management as  
16 well to retain a lobby hired for the purpose of  
17 seeking passage of legislation in New Jersey that  
18 would permit on-line gaming, that per paragraph 2 of  
19 the Matejevich certification. And at some point  
20 thereafter, meaning thereafter in September of 2012,  
21 RIH Management became aware that PokerStars was an  
22 entity which operated international on-line poker  
23 rooms and tournaments, was interested in entering the  
24 Atlantic City gaming market, and there occurred at  
25 some point in October of 2012 apparently an initial

1 discussion between Mr. Matejevich and one Ira (sic)  
2 Scheinberg, who is certainly referenced in the AGA  
3 brief and in some of the other submissions as well,  
4 apparently Mr. Scheinberg, a founder of PokerStars or  
5 various interests affiliated with it; and in October  
6 of 2012 Mr. Scheinberg expressed an interest in a  
7 potential acquisition of the entity that owned and  
8 operated The Atlantic Club – see the Matejevich  
9 certification, paragraph 3. At the time Matejevich  
10 was seemingly aware that PokerStars had some legal  
11 issue – and I'm referencing the language in the  
12 defense brief – with the United States government,  
13 although it is asserted by the defense that PokerStars  
14 affirmatively represented to Matejevich that it had  
15 paid a large settlement to the United States  
16 government that resolved many of the legal issues that  
17 PokerStars faced.

18 Matejevich claims, at least in his  
19 certification, paragraph 3, that he was not fully  
20 aware of the extent of criminal problems that  
21 Scheinberg and other senior officials at PokerStars  
22 allegedly faced. Matejevich claimed, for example, to  
23 not know that Scheinberg and another officer of  
24 PokerStars, one Paul Tate, were fugitives from the  
25 American courts. Now that's the defendants'

1       assertion. It's contested by the plaintiff. I don't  
2       need to adjudicate the status of Mr. Tate or  
3       Scheinberg for purposes of this proceeding.

4               What is clear is that on or about November 7  
5       of 2012 and after more than a month of negotiations  
6       the sellers - by that I mean the entities owning The  
7       Atlantic Club - and an entity known as Rational  
8       Entertainment Ventures Limited, hereinafter Rational -  
9       excuse me, I heard it pronounced - a company formed by  
10      PokerStars, executed a term sheet providing for the  
11      sale of 100 percent of the membership interests in  
12      RIH, the company that owns and operates The Atlantic  
13      Club, to Rational.

14             The term sheet called for Rational to pay  
15      cash advances to be used to fund operations while due  
16      diligence and negotiations toward a final purchase  
17      agreement continued. Under the term sheet were a  
18      purchase agreement to be executed advances were to be  
19      applied against the purchase price. Sellers were  
20      willing to attempt to complete a sale of the company  
21      to a PokerStars affiliate presumably because, at least  
22      in part, PokerStars represented, claims defense, that  
23      its legal problems were largely resolved and expressed  
24      a willingness not only to commit to cash advances to  
25      fund operating deficits, but also agreed to an

1 expeditious time table for consummating the  
2 transaction, parenthetically a most expeditious time  
3 table.

4           Importantly, claims the defendants, during  
5 negotiations of the term sheet and the membership  
6 purchase agreement both sides were represented by  
7 sophisticated and experienced corporate and regulatory  
8 counsel, that according to Matejevich certification,  
9 paragraph 7, and the Brooks certification, paragraphs  
10 19 through 21.

11           The allocation of risk relating to the  
12 receipt of required regulatory approval was very much  
13 a subject of the negotiation. That per paragraph 6 of  
14 the Matejevich certification, but also per counsels'  
15 arguments here today on behalf of defendants.

16           As a result of the financial condition of  
17 The Atlantic Club at the time, which was not seemingly  
18 sound, and the impending onset of on-line gaming, the  
19 termination provision which set a date after which the  
20 agreement could be terminated by either party were the  
21 transaction to yet be incomplete was critical. Such a  
22 provision would allow the seller sufficient time to  
23 pursue other alternatives if PokerStars was unable to  
24 get licensed in a timely manner per the defense brief.  
25 The same pertains in this Court's view to that clause

1 as related to the plaintiff.

2 The term sheet was executed November 7.  
3 Negotiations toward a definitive purchase agreement  
4 drug into December of 2012 and, as I've earlier  
5 discussed with counsel, the New Jersey Senate passed  
6 the pending bill to legalize on-line gaming on  
7 December 20, and on the very next day sellers executed  
8 the agreement with Rational; and section 1.4(a) of  
9 that agreement defines the closing date, and it has  
10 been noted and quoted by counsel and the Court  
11 throughout this proceeding, but suffice it to say "not  
12 later than the third business day following  
13 satisfaction or waiver of all the conditions set forth  
14 in article 6, which contains a number of conditions,  
15 but the most significant of which is procurement,  
16 timely procurement of - and prior to the outside date  
17 of a valid and then effective ICA, Interim Casino  
18 Authorization, from the Casino Control Commission.

19 It is asserted that as part of the agreement  
20 and consistent with one of the sellers' primary  
21 objectives the parties agreed to that expeditious  
22 transaction, and the time line counsel and I have  
23 reviewed in detail - I'll just incorporate that  
24 discussion by reference - but it is difficult for this  
25 Court to imagine a time line from execution of the

1 agreement to the filing of the first submission three  
2 days thereafter to the expiration of the 120-day  
3 review period for the entire transaction to have been  
4 negotiated to occur more, more quickly. And the  
5 outside date, of course, was April 26 of 2013. The  
6 parties agreed that Rational would not be refunded  
7 advances it had made and would be required to pay a  
8 termination fee in the event the transaction was  
9 terminated for reasons other than a breach of the  
10 agreement by the sellers.

11 Furthermore, an entity related in some  
12 fashion to the plaintiffs, Oldford, unconditionally  
13 and irrevocably guaranteed the obligation, and section  
14 7.2(c) of the agreement provided that, (reading:)

15 "If the agreement is terminated for any reason  
16 pursuant to section 7.1 buyer shall pay the  
17 sellers representative for further distribution  
18 to the sellers within two business days of such  
19 termination an amount in cash equal to  
20 \$4,000,000, and the company shall be entitled to  
21 retain all advances paid by buyer to the company  
22 pursuant to this agreement and the binding term  
23 sheet as of such termination."

24 The agreement incorporated a provision  
25 providing each party the right to walk away if the

1 transaction took longer to complete than the mutually  
2 agreed upon date of April 26, the so-called outside  
3 date.

4 The agreement in a general sense  
5 memorialized the parties' agreement that Rational  
6 would assume all the licensing risk. It's argued here  
7 today, and the contract is fairly construed to that  
8 effect. Rational, plaintiffs, kept their part of the  
9 bargain through certainly May 1, 2013, by which date  
10 they had advanced \$11,000,000. That was the advance  
11 cap per the contract. And plaintiffs also negotiated  
12 the cooperation by defendants to allow plaintiffs to  
13 begin the construction of a new poker facility inside  
14 the casino, and Rational agreed to pre-fund all  
15 related costs and expenses. As of the date of the  
16 notice of termination there apparently was a balance  
17 of \$94,927.91. That, that has been paid as I  
18 understand the pleadings.

19 Rational did satisfy the three-day post-  
20 execution filing requirement as relates to the  
21 application for the ICA, and defendants claim through  
22 the Matejevich certification, paragraph 11, that it,  
23 they, Matejevich were made aware by DEG (sic) that  
24 Rational was not providing information to the DEG  
25 (sic) in a timely manner. That's a contested fact,

1 but that's a position indicated by the parties.

2 In any event, all seemed to concede that in  
3 March of 2013, specifically on March 4, the American  
4 Gaming Association undertook something which  
5 apparently had not earlier been undertaken and that is  
6 that it filed a brief with the DGE seeking to  
7 intervene in the application of Rational for the ICA,  
8 and a copy of that brief has been provided to the  
9 Court. I've read it. It is not dispositive to this  
10 particular application, and actually I'm not entirely  
11 certain that it's relevant and, if relevant, only to a  
12 minimal degree. Assuming for the moment everything  
13 asserted by AGA against Rational in that brief to be  
14 true, nonetheless the parties had an existing and  
15 valid and clearly written contract between the two of  
16 them, and their duties and rights were not adversely  
17 affected in this Court's view as a matter of law to  
18 any extent. Each continued to owe to the other good  
19 faith, due diligence, and fair dealing in their  
20 contractual relations.

21 It is somewhat acknowledged by defendants  
22 that the filing of the intervention petition  
23 nonetheless was unsettling. And then on March 26th  
24 Matejevich claims to have received a phone call from  
25 representatives of DEG (sic) advising that Rational

1 still had not satisfied DEG's (sic) information  
2 request. See the Matejevich certification at  
3 paragraph 13. DGE also specifically stated apparently  
4 that after Rational's application was deemed complete  
5 it would need yet another 90 days to issue its expert  
6 - to issue its report on the application, and  
7 Matejevich conveyed sellers' concerns, defendants'  
8 concerns to Rational in a letter dated March 26, 2013  
9 and during a call to a Mr. Templar, a representative  
10 of the plaintiffs. Matejevich advised Templar that it  
11 was Matejevich's impression that the DGE might not  
12 issue its report until July or August of 2013, not  
13 June as plaintiffs had earlier supposed.

14 There also occurred in the month of March  
15 other events per the pleadings, and they do not appear  
16 to be contested. March 26th the DGE again did contact  
17 plaintiff and requested the additional information in  
18 the form of documents and this, claims plaintiff, its  
19 first instance of information that suggested there  
20 might be additional delay. Matejevich in a letter to  
21 plaintiff, specifically Exhibit B I believe to  
22 plaintiffs' complaint, indicated that he and  
23 defendants remained "fully committed to comply,  
24 including cooperating with buyer and using their best  
25 efforts to obtain all applicable governmental

1       approvals as promptly as practicable." And he also  
2       indicates that the ICA application was "reasonably  
3       likely not to be timely satisfied."

4               On March 27, 2013 plaintiffs' attorney  
5       undertook a telephone conversation with defendants'  
6       counsel regarding new information needed within  
7       several days. On March 29 of 2013 Matejevich  
8       requested payment for past and future work on the  
9       poker room. On March 31 of 2013 Mr. Templar undertook  
10      a telephone conversation with one Richard Welch, a  
11      representative of Colony, a defendant affiliated  
12      entity, and sought assurances from Welch that nothing  
13      significant had changed. Defendants indicated at that  
14      point that they would independently approach DGE to  
15      separately inquire as to the status of the  
16      application.

17             On April 1 of 2013 another request from DGE  
18      for additional information was received, and the  
19      response deadline was indicated to be April 22 of  
20      2013. The next day, April 2 of '13, the parties'  
21      attorneys spoke with one another in a conference call.  
22      In that call there was no indication of a claim of  
23      breach, no intention to - no indication of any  
24      intention to terminate, at least asserts plaintiff.  
25      On the same day Mr. Templar and Mr. Matejevich spoke

1 telephonically with regard to various projects.  
2 Plaintiffs assert there was therein no indication of  
3 termination.

4 On April 8 of 2013 plaintiffs' counsel met  
5 with DGE Director Rebuck, who updated defendants with  
6 regard to the meeting, the status of the ICA  
7 application, and assured defendants of continuing  
8 belief of ICA by June 24. Three days later, on  
9 April 11, the DGE apparently confirmed to plaintiffs'  
10 counsel that the ICA application was deemed "complete"  
11 as of the prior day, April 10, and the new outside  
12 date, at least as far plaintiffs were concerned, April  
13 – excuse me – August 9th, 2013.

14 On the very next day, a Friday, April 12,  
15 Mr. Templar undertook a telephone call with Mr. Welch  
16 regarding the application status. Welch indicated no  
17 discussion or offered no discussion about – absent the  
18 information request copy. On April 15 of 2000 (sic),  
19 a Monday night – this was the next business day –  
20 plaintiffs agreed to provide the requested information  
21 or copies of it to defendants but only upon defendants  
22 execution of a non-disclosure agreement, not  
23 specifically required per the agreement, arguably  
24 required within the more general language as pertains  
25 to assurances and good faith participation.

1           Two days later, on April 17, the defendants  
2 signed the non-disclosure agreement, again, not  
3 specifically required by the contract but arguably  
4 impliedly part of the assurances language and good  
5 faith obligation to participate. On April 18th the  
6 defendants did receive the non-disclosure agreement.  
7 On April 22nd plaintiffs had fully responded - by  
8 April 22nd plaintiffs had fully responded to the  
9 defendants' information request.

10           On April 23 of 2013 Mr. Templar emailed Mr.  
11 Welch - that is Exhibit C to the complaint. On  
12 April 24th defense counsel requested confirmation that  
13 plaintiff had responded timely to DGE's April 22  
14 deadline for additional information, and that timely  
15 response was confirmed. On April 25 Mr. Welch emailed  
16 Mr. Templar refusing Mr. Templar's outreach or request  
17 for a written amendment to extend the outside date.

18           On April 25 plaintiffs' counsel met with the  
19 DGE and updated Mr. Frawley with regard to the details  
20 pertaining to that meeting. On the same date Mr.  
21 Templar emailed Mr. Welch stating, "This is what I was  
22 hoping you'd come back with." I found that to be an  
23 interesting component to that communication.

24           On the next day, April 26, plaintiffs'  
25 counsel contacted defense counsel, offered to have a

1 conference call with DGE. On the same date Mr. Welch  
2 emailed Mr. Templar "in an effort to be constructive,  
3 \$6,000,000 for ten days defendant released from  
4 obligation regarding the solicitation of other bids."

5 On April 27 plaintiffs received the notice  
6 to terminate. That's Exhibit E. On May 1 another  
7 letter reiterating termination. That's Exhibit F.

8 And they are ostensibly the facts at least  
9 as substantially agreed upon that bring us here, and  
10 of course the Court now is duty bound to consider that  
11 record; and to the extent that other facts have been  
12 discussed between the Court and counsel, counsel with  
13 each other, today and are not contested the aggregate  
14 record before the Court and apply the four-prong  
15 criteria of Crowe v. DeGioia, and I begin with  
16 immediate and irreparable harm.

17 And of course both counsel have acknowledged  
18 the inclusion in the subject agreement of a provision  
19 which by its terms stipulates that the subject matter  
20 of this agreement involves a casino and the unique  
21 nature of the real estate, the casino licensure, the  
22 real property, the financial interests as so unique  
23 that a violation as to - a material violation as to  
24 provisions of the agreement would entitle the victim  
25 of any such violation to injunctive relief. Counsel

1 have also briefed, correctly, the extent to which that  
2 language to the extent included in a contract is  
3 always interesting, and it tends, at least at first  
4 blush, to make any judge presiding over a related  
5 dispute feel somewhat better in the beginning. It is  
6 not binding upon any court, and the court really has  
7 an affirmative obligation to consider the nature of  
8 the subject matter of the contract and reach an  
9 independent determination.

10 This Court has no difficulty finding  
11 anything other than the interests that are the subject  
12 of this contract are immeasurably unique. It involves  
13 one of limited casino licenses in New Jersey. The  
14 only casino gaming site is in New Jersey. It is  
15 oceanfront property. I am sufficiently familiar with  
16 the oceanfront in Atlantic City to know that. Again,  
17 there are just a limited number of casino licenses  
18 here in New Jersey, and this transaction was  
19 negotiated and consummated mid-sea change in the state  
20 of New Jersey as relates to the advent of eGaming, on-  
21 line poker, and the parties to this transaction  
22 included, as relates to defendants, ownership interest  
23 in a casino that at best was struggling financially at  
24 the time. Also included what the pleadings suggest to  
25 the Court is, if not the leading on-line poker entity

1 in the world, certainly one of the leading on-line  
2 poker entities, successful at that, in the world. And  
3 to the extent that there approaches that sea chain in  
4 lawful casino gaming in New Jersey, iGaming, and to  
5 the extent that that uniquely successful plaintiff  
6 enjoys opportunity to secure an ownership interest  
7 lawfully in one of New Jersey's limited casino  
8 licenses, the prospect of attempting to measure  
9 damages at any point down the road is seemingly  
10 difficult if not impossible. I'm not sure how anyone  
11 with whatever credentials would be able to sit in this  
12 courtroom today, next month, next year and achieve  
13 some economic model to attempt to calculate  
14 compensatory damages that might be sustained by  
15 plaintiffs were they to lose the benefits of their  
16 negotiated bargain in this particular contract. I may  
17 be wrong, but that's my, that's my instinct at the  
18 moment.

19 As a result the defendants claim that the  
20 deal is the deal and consequential damages remain  
21 available. They're probably correct in the first  
22 instance, but in the latter regard I'm not as certain.  
23 In fact, I have severe doubts.

24 So I do find that the plaintiff faces a very  
25 real prospect of immediate and irreparable harm were

1 the concerns which it has articulated, effectively the  
2 sale or attempted sale of this casino interest to a  
3 third party were to occur.

4 Next, are there genuine issues of material  
5 fact? If there are, there are not many. The, again,  
6 time line of the contract is uncontested. The dates  
7 of emails sent and telephonic communications and  
8 teleconferences between counsel, not in dispute, and  
9 somewhat remarkably so in this Court's view, and I  
10 incorporate by reference my factual findings of just a  
11 moment ago and, of course, those factual findings are  
12 limited to this record as is the entirety of my  
13 decision here today.

14 The balancing of the equities. I have not  
15 only heard your arguments today, counsel, but I have  
16 also reviewed on several occasions your pleadings, and  
17 I am satisfied that I understand your particular  
18 positions. The plaintiffs assert that the hardship to  
19 be suffered by it should restraints not be continued,  
20 substantially more severe than any hardship or harm  
21 that would be suffered by defendant consequent to any  
22 continuation of the restraints. Plaintiff cites the  
23 need for their ongoing ability to conclude  
24 administrative review, the survival of the contract if  
25 you will and their predictable ability to perform

1 should the ICA issue. Plaintiffs note that the  
2 contract is silent with regard to any negotiated  
3 extensions absent a writing signed by all. They  
4 express concerns with regard to any uncertainty on the  
5 part of the DGE and the Casino Commission should its  
6 equitable interest in the casino premises not be  
7 preserved by way of restraints.

8 Defendants also assert that should the  
9 restraints continue managerial and financial  
10 instability will threaten the viability of the casino  
11 itself. They assert a need to market the asset. They  
12 note the approach of the summer tourist season. They  
13 note the approaching commencement of legalized iGaming  
14 in Atlantic City. They assert consequent harm to the  
15 public interests. They also raise and articulate the  
16 basis for their concern about any likelihood of  
17 plaintiffs actually receiving an ICA. It has  
18 characterized that prospect as "highly questionable"  
19 in plaintiffs' brief. And they claim that any  
20 assertion by plaintiffs that continuation of temporary  
21 restraints maintains the status quo is "illusory and  
22 misleading." Defendants will continue to seek  
23 reputational harm should the restraints be continued,  
24 and all of the foregoing risk actual destruction to  
25 the very subject of the controversy. Continued

1 restraints would constitute a "devastating blow,  
2 almost certainly miss the opportunity to pursue other  
3 options prior to the November 13 launch of on-line  
4 gaming in New Jersey."

5 Each argument enjoys merit. Each argument -  
6 each of the arguments on each side enjoys appeal. The  
7 issue, however, is whether or not the benefit that  
8 would enure to the plaintiff through continuation of  
9 restraints is sufficiently offset or countermanded by  
10 the detriment that would predictably visit the  
11 defendants, and that is a difficult call for this  
12 Court to make, and I share, as I have reviewed the  
13 relevant portions of the record in this regard,  
14 counsel, it's my sense that whatever the Court's  
15 decision on this particular issue, one party suffers  
16 harm likely immediate, short- and long-term. I am  
17 unable to find any objectively identifiable advantage  
18 that would enure to either party. The Court senses  
19 that the parties really stand in equipoise here.  
20 That's not intended to be a pass on the analysis.  
21 That's just the Court's read of the record.

22 Which then brings us, lastly, to the  
23 likelihood of success on the merits, and I've  
24 indicated on a couple occasions in oral argument today  
25 that I understand the plaintiffs' equitable arguments.

1 This is a court of equity. And I confess that on  
2 May 13th, when I was able to carve a couple hours out  
3 of my day upon receipt of the verified complaint and  
4 moving papers and I began to read the contract and the  
5 terms of the contract, with each page it seemed I had  
6 more questions in my own mind than the pleadings and  
7 the contract were answering, and I still have some.  
8 Please turn the phone off.

9 The difficulty with the plaintiffs' position  
10 at the moment, however, as this Court views it, is  
11 that the equitable arguments which do bear such appeal  
12 do not find corresponding authority in the agreement.  
13 For example, the notion of paying \$11,000,000 on  
14 account of a purchase price on a contract that's  
15 executed December 21 by February 1, and facing the  
16 prospect of not only losing the 11 million, but  
17 potentially having to pay the addition \$4,000,000 as a  
18 termination fee, I've never read anything like it,  
19 which really means nothing in terms of legal analysis.

20 The prospect of missing an outside deadline  
21 by three months due to the unpredictable - lack of any  
22 other adjective - administrative review process, the  
23 Court has its own general sense about that as well.  
24 On the other hand, this is an exhaustive detailed  
25 contract. It is clearly written to this Court, and

1 the provisions to that contract about which plaintiff  
2 now complains, they're just that, they're the  
3 provisions of the contract. The parties negotiated  
4 the most brief period of time from execution to first  
5 filing to closing date to outside date that state law  
6 provides. Does the closing date necessarily  
7 correspond to the outside date such that should the  
8 administrative process not secure the issuance of the  
9 ICA prior to the outside date, that the outside date  
10 as a matter of law must be moved? That notion enjoyed  
11 real appeal here on May 13th. Unrelated to the four  
12 certifications and unrelated to anything other than  
13 the Court reading counsels' briefs and the Court's re-  
14 view of the very statute, I am satisfied that the  
15 construction given that section of our statute, Title  
16 5, by defendant is the legally correct one because  
17 otherwise as - I've cited this portion of defense  
18 counsels' brief probably twice already. (Reading:)

19 "If plaintiffs are correct and the contract could  
20 never be terminated, the parties would be forced  
21 to continue in a relationship forever depending  
22 on when the regulators deemed the application to  
23 be complete."

24 DGE could deem an application to be incomplete for two  
25 years, and that would have the effect of essentially

1 extending the termination date for a corresponding  
2 period of time or even longer.

3           So for all of those reasons I am not able to  
4 find, again, on this record - and I understand it's a  
5 limited record - I am not able to find that the  
6 plaintiffs on that issue face - enjoy a probability or  
7 likelihood of success on the merits; and that analysis  
8 on that fourth and final criterion of Crowe v. DeGioia  
9 is, in this Court's view, the determinative  
10 consideration, and as a result I am compelled to  
11 dissolve the restraints, and I'll ask Mr. Curtin to  
12 submit an order to that effect. And I would like to  
13 have it in language that is mutually agreeable to  
14 opposing counsel on Monday morning. I want to get  
15 counsel a filed copy of that order as quickly as can  
16 be, and it's four minutes before four this afternoon.  
17 So I know that today is not a likelihood.

18           Now there is a complaint that's yet filed,  
19 although I understand that defense counsel have yet to  
20 file either an answer or a dispositive pleading. So  
21 the rules apply in that regard, and I assume we'll  
22 hear from - from everyone in due course and timely  
23 fashion with that.

24           I again want to thank counsel for your  
25 submissions. I again want to acknowledge that I

1 realize I pulled you away from your colleagues for the  
2 last afternoon of the bar convention.

3 I also want to acknowledge the people in the  
4 courtroom, if you will. We're now approaching two and  
5 a half hours on the record in this matter, and you  
6 have been wonderfully patient and quiet, and that  
7 contributes to the quality of a proceeding beyond what  
8 I can tell you.

9 So with that, to whence ever you now go,  
10 travel safely, enjoy the weekend, and I gather we'll  
11 see counsel back here -

12 MR. BROOKS: Thank you, Your Honor.

13 THE COURT: - at some point in the near  
14 future. We stand adjourned.

15 MR. MUNDIYA: Thank you, Your Honor.

16 COURT ATTENDANT: All rise.

17 THE COURT: Thank you, Sheriff. You can  
18 please be at ease if you will. It's going to take me  
19 a moment to gather my thoughts here.

20 (Off the record)

21 \* \* \* \* \*

22

23

24

25

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New Jersey AOC #202

May 23, 2013  
(Date)

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