No. 08-984

IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERSTEIN, DENNIS VACCO, and PAUL DEBARY,

Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC. and PARK PLACE ENTERTAINMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where an Indian tribe is induced to enter into contracts relating to the management of a proposed casino that will operate on trust land, are those contracts valid and enforceable, even if not approved by the NIGC, simply because the land on which the casinos are intended to operate is not yet "Indian land"?

2. Are so-called "precursory obligations" contained in casino management contracts with Indian tribes enforceable if the NIGC has not approved the contracts?

3. Is the Land Purchase Agreement at issue in this case a collateral agreement relating to the management of an Indian casino?

PARTIES TO THE PROCEEDINGS

Respondents agree with the statement contained in the Petition for a Writ of Certiorari that the real parties in interest are Petitioner Catskill Litigation Trust and Respondent Harrah's Operating Company, Inc. Respondents also agree that the Trust is currently represented by trustee Dennis C. Vacco and Joseph E. Bernstein.

The Respondents do not agree that the Trust represents either the interests of 13,000 members of the St. Regis Mohawk Tribe or the Tribe as a juridical entity. The purported assignment of any claims held by any members of the Tribe or the St. Regis Tribe itself is currently the subject of separate litigation pending in the Northern District of New York, *Dennis C. Vacco and Joseph E. Bernstein, et al. v. Harrah's Operating Company, Inc. and Clive Cummis*, Case No. 07-CV-0663 (TSM/DEP).

CORPORATE DISCLOSURE STATEMENT

Respondent Park Place Entertainment Corporation ("Park Place"), changed its name to Caesers Entertainment Inc. and, on or about June 28, 2005, Caesars Entertainment, Inc. was merged into Harrah's Operating Company, Inc. Harrah's Entertainment, Inc. is the parent company of Respondent Harrah's Operating Company, Inc. There are no other parent and no publicly held company owning 10% or more of the stock of the Respondents.

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STATEMENT OF THE CASE

The Mohawk Tribe entered into a series of contracts with the Catskill Group[1] for (1) the sale of certain land in Monticello, New York for use by the Tribe as an Indian gaming facility, (2) the construction of the facility and (3) the management of the facility by the Catskill Group. Because an Indian gaming facility could only legally operate in New York on "Indian land", the parties asked the Bureau of Indian Affairs ("BIA") to take the proposed site (the "Monticello Site") into trust for the benefit of the Tribe.

In April 2000, after years of frustration with the Catskill Group, the Mohawk Tribe agreed to enter into an agreement with Park Place giving Park Place the exclusive right to develop casinos in the State of New York with certain exceptions not applicable here. Park Place proposed an alternative site for a Mohawk gaming facility also in the Catskill region (the "Kutsher's Site"). The Catskill Group claimed that Park Place had tortiously interfered with its agreement with the Mohawk Tribe. Park Place argued that there could be no tortious interference because the contracts were void because they had not yet been approved by the National Indian Gaming Commission ("NIGC") under the Indian Gaming Regulatory Act, 25 U.S.C. §2710(d)(7) ("IGRA").

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1. All the terms and abbreviations used herein are the same as those used by the Second Circuit Court of Appeals in its decision in *Catskill Development L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Circuit 2008) which appears at pages 1a-40a of the Appendix to the Petition for Certiorari herein ("Petitioner's App.").

The intent of IGRA and the accompanying regulations is clear: No management contract and no collateral agreement that relates to the management of the gaming operation is valid unless it is approved by the NIGC. The legislative history of IGRA confirms that the purpose of this statutory scheme is to shield tribes from organized crime and other corrupting influences and to insure that Indian tribes are the primary beneficiaries of gaming operations. 25 U.S.C. § 2702 quoted in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 547 F.3d 115, 119 (2008) (hereinafter "Catskill") (Petitioner's App. at 3a). That legislative purpose would be defeated if casino management companies could impose binding contractual commitments on tribes merely by signing the management contract before the land on which the casino would sit was taken into trust.

The Petitioners ask this Court to accept certiorari in this case because of the filing of a petition by Respondent in case No. 08-665 seeking review of *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.* 531 F.3d 767 (9th Cir. 2008) ("Guidiville")(Petitioners' App. at 197a). In *Guidiville*, the Ninth Circuit held that the subject contracts (which were not casino management contracts) did not require approval by the Secretary of Interior pursuant to 25 U.S.C. § 81 because the contracts related to land that was not yet "Indian land." It was not Indian land because it had not yet been taken into trust by the United States on behalf of the Indian tribe. The petition in *Guidiville* was based on the disagreement between the Second and Ninth Circuits with regard to the application of the Dictionary Act, 1 U.S.C. §§ 1-8 as it applied to the definition of "Indian land" and the relevant statutes in those two

cases. However, this Court denied certiorari in *Guidiville* on January 26, 2009, evidencing this Court's lack of interest in addressing that issue at this time.

The Dictionary Act issue is even less relevant to this petition since, as is more fully set forth below, the Second Circuit found that it did not have to address the question of whether the land at issue here was Indian land, because there is no requirement in IGRA, as opposed to § 81, that contracts subject to NIGC review must relate to "Indian land." *Catskill*, 547 F.3d at125-26 (Petitioners' App. at 15a-19a).

Moreover, the *Guidiville* decision does not support Petitioner's position. In *Guidiville*, the Ninth Circuit specifically noted that the casino management contracts at issue in that case were *not* valid because they had not yet been approved by the NIGC, even though the casino was to be placed on land that was not yet "Indian land." *Guidiville*, 531 F.3d at 126 (Petitioners' App. at 206a and n. 6).[2]

Finally, this is not an appropriate case to decide the "Indian land" issue because there are separate and

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2. Specifically, the *Guidiville* court stated that "the Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under § 2705(a)(4) due to the Tribe's failure to have obtained approval of that contract by the chairman of the Gaming Commission." Section 2705(a)(4) is the provision in IGRA that specifically gives the NIGC authority to approve management contracts for Indian gaming casinos. *See* Petitioners' App. at 432a.

independent grounds for the granting of summary judgment in favor of Respondents. The District Court found that, even if Petitioners could establish that they had a valid contract or that Respondents had engaged in wrongful conduct sufficient to state a claim for tortious interference with prospective business relations, Respondents would still be entitled to summary judgment because Petitioners could not establish, under New York law, that "but for" Respondents' actions, Petitioners would have consummated their contractual arrangement and built a casino at the Monticello site. The District Court found that there were numerous economic and regulatory hurdles that Petitioners still faced in bringing the casino to fruition and therefore they could not establish causation. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423, 440 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App.79a, 114a-115a). Events have proven the District Court correct because, even to this day, there are no Indian gaming facilities in the Catskill region.

PROCEDURAL HISTORY

This action was commenced by the Catskill Group in the United States District Court for the Southern District of New York on November 13, 2000 alleging claims against Park Place for tortious interference with contract, tortious interference with business relations, unfair competition and violations of New York's Donnelly Act. In its first decision, the District Court dismissed the tortious interference with contract claim because the Court found that none of the contracts that Park Place had allegedly interfered with had been approved by the NIGC as required by IGRA. The Court also dismissed the unfair competition and Donnelly Act

claims; Petitioners did not appeal those dismissals. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) ("Catskill I")[3] (Petitioner's App. at 143a).

The Catskill Group moved for reconsideration of *Catskill I* with regard to one of the contracts, the Land Purchase Agreement ("LPA"), arguing that that contract did not need NIGC approval. The Court granted reconsideration and reinstated the claim as to the LPA only. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 154 F. Supp. 2d 696 (S.D.N.Y. 2001)(Petitioner's App. at 125a). Park Place then moved the District Court to reconsider that decision and, while that motion was pending, moved for summary judgment on all the remaining claims. The District Court granted summary judgment dismissing the entire case, finding, after approximately forty (40) depositions, and thousands of pages of discovery, that the Catskill Group had failed to show that Park Place had engaged in any wrongful conduct. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App. at 79a). The Court also reinstated its decision in *Catskill I* holding that the LPA, like the other contracts entered into between the Catskill Group and the Mohawk Tribe, required NIGC approval.

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3. Respondents adopt the abbreviations used by the Second Circuit to identify the District Court's opinions. Petitioners have used abbreviations different from those used by the Second Circuit, causing unnecessary confusion.

While the appeal was pending from *Catskill II*, the Catskill Group moved pursuant to Federal Rule of Civil Procedure 60(b) to vacate the judgment based upon the discovery of six audio tapes which had not been produced to the Catskill Group in discovery. Finding that the failure to produce the tapes was a result of a mistake or misunderstanding, the District Court nonetheless held that the Catskill Group was entitled to further limited discovery based upon the evidence contained in the tapes. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 286 F. Supp. 2d 309 (S.D.N.Y. 2003) ("Catskill IV"). After granting such additional discovery, the District Court reaffirmed its grant of summary judgment in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 345 F. Supp. 2d 360 (S.D.N.Y. 2004) ("Catskill V") (omitted from Petitioners' papers and attached hereto as Respondent's App. at 1 A). Subsequently, while the second appeal was pending, the Catskill Group disclosed that complete diversity of jurisdiction was lacking because of the citizenship of one of its parties and, after remand and further proceedings below, that jurisdictional defect was cured. *See Debary v. Harrah's Operating Co. Inc.*, 465 F. Supp. 2d 250 (S.D.N.Y. 2006) ("Catskill VI")(Petitioners' App. at 41a). On October 21, 2008, the Second Circuit Court of Appeals affirmed the dismissal of the claim for tortious interference with contract and affirmed the grant of summary judgment on the claim for tortious interference with prospective business relations. *Catskill*, 547 F.3d at 136-37. (Petitioners' App. at 1a).

STATEMENT OF FACTS

In 1995, the Catskill Group acquired the 230-acre Monticello site for $10 million and, after unsuccessful negotiations with other tribes, eventually entered into agreements with the St. Regis Mohawk Tribe. The Catskill Group executed three (3) primary agreements with the Tribe: (1) a Management Agreement ("MA"), that would govern the actual management of the casino and provide the Catskill Group with a portion of the profits therefrom (R 508)[4]; (2) the Development and Construction Agreement ("DCA") that would govern the actual development and construction of the casino (R 596); and (3) the LPA by which the Tribe would acquire a 29-acre parcel out of the 230-acre site. All three agreements, by their very terms, were subject to federal approval (R 436).

In order to bring the project to fruition, the Catskill Group needed to overcome a number of regulatory hurdles. First, in order to operate a Native American casino that was not on an Indian reservation (which the Monticello site was not), the Catskill Group needed to convince the Bureau of Indian Affairs ("BIA") to take the land into trust on behalf of the Mohawk Tribe. *See* 25 U.S.C. § 2719(b)(1)(a). Once the BIA approved taking the land into trust, it was then necessary for the Governor to approve that transfer. On April 6, 2000, the BIA agreed to take the land in trust (R 921-38), but final approval was never given because the Governor had not yet consented to such transfer ((R 1567 at ¶ 8);

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4. Record citations appearing at "R ___" are references to the Record before the Court of Appeals.

217 F. Supp. 2d at 443-44), and the BIA had not made a final determination that the price to be paid by the Tribe did not exceed fair market value. *See* 25 C.F.R. Part 151; 217 F. Supp. 2d at 444 (R 874).

Moreover, no Class III casino can operate without a compact between the Tribe and the State of New York. 217 F. Supp. 2d at 444-45. Then-Governor Pataki had made it clear in numerous public announcements that no compact would be entered into with the Mohawks unless the Mohawks had settled their longstanding land claims dispute with the State. (R 1567 at ¶ 8).

In addition, any management contract and any related agreements that affected the management of the casino would have to be approved by the NIGC. Although the Catskill Group submitted their application to the NIGC in August 1996 (Appellants' Br. in the Court of Appeals at 16), it never received approval, and was formally rejected five (5) times. (*See* R 715-22; 865-66; 870-72; 873-74; 875-76). The NIGC questioned the suitability of the Catskill Group as manager of a casino in light of numerous regulatory problems encountered by one of the Group's principal investors with regard to its operation of casinos in the State of Mississippi. (*See* R 1225-95; 45-53). In addition, three principals of the Catskill Group were under criminal investigation, two have since been convicted, and one is a fugitive from justice. (R 1356-1432; 1631-36; 1433-36). Moreover, the Catskill Group demanded from the Mohawks a compensation scheme which was in excess of the established NIGC Guidelines (*See* R 717 at ¶ 1; 1653-66; 299-300; 301; 385) and had induced the Mohawks to pay $10 million for only 29 acres of land that the Catskill

Group has since admitted is worth only $150,000. (R 230; 248-49; 343; 356-57; 874 at ¶ 7).

The Catskill Group's problems before the NIGC were so numerous that, at a meeting held in February, 2000, NIGC staff advised the Mohawk Chiefs that their application for the Monticello casino was in serious trouble and that, in the NIGC's view, the Tribe was likely to encounter the same problems with the Catskill Group that it had encountered with the operation of the Mohawk's then-existing casino at the Akwesasne Reservation. (*See* R 740-51; 357; 359; 372; 243-44; 330; 363-65).

The Akwesasne Casino had opened in April 1999 under the management of President R.C. – The St. Regis Management Company ("President"), whose principal is Ivan Kaufman. The casino lost money from the day it opened, and the Mohawks were very concerned that the casino would fail, causing the loss of hundreds of jobs for tribal members. (*See* R 211-12; 262-64; 326). After an investigation was undertaken, the Tribe learned of numerous financial irregularities arising from President's management of the Casino and ultimately terminated President's management of the Casino in April, 2000. (*See* R 1670-75; 1676-77; 1678-90; 1691-92; 1693; 1713-18; 1720-21; 1722-23).

While the Catskill Group's application was bogged down with the NIGC (to the great displeasure and frustration of the Mohawks), the relationship between the Catskill Group and the Mohawks seriously deteriorated. The principals of the Catskill Group had cultivated a relationship with a faction of the Mohawk

Tribe, the so-called "Constitutionals" which was out of power, and the Three Chiefs' Government, which was then in power (R 67; 98-99), believed that they were being treated disrespectfully and dismissively by the Catskill Group's principals. (R 76; 258-60; 292; 224-25; 226-27; 288; 367; 752-53) (referring to Three Chiefs as the "three amigos.")). The relationship had gotten so bad that Robert Berman, one of the Catskill Group's principals, was ordered by the Chiefs to stay off the Reservation. (R 177; 132-33; 61; 95; 380).

Park Place had become interested in the possibility of developing a Catskill casino in the Fall of 1999 and approached Kaufman, whose firm was still operating at the Akwesasne Casino, to make an introduction to the Tribe.[5] Kaufman proposed, and Park Place agreed, that Park Place would consider some role in salvaging the Akwesasne Casino as a means of convincing the Mohawks to undertake a relationship with Park Place for the development of a casino in the Catskills. (R 1549-50). The principals of President and Park Place

5. Petitioners' statements that Respondents "became prolific interlopers in Indian Country," that they had "developed a strategy to become involved in ventures that had already reached the regulatory approval stage" and that they developed a "legal defense strategy to insulate [themselves] from liability for breaking up contractual relationships with competitors of the tribes" (Petition at 7) are without any citation to the record and have no support in the record. There is also no evidence in the record and no citation to the record to support Petitioners' assertion (Petition at 8, 11-12) that either Park Place or its former executive, Arthur Goldberg, entered into the agreement with the Mohawk Tribe for the purpose of stopping the Monticello project, rather than for the purpose of developing Park Place's own project with the Tribe.

negotiated for several months over the terms of a possible takeover of the management of the Akwesasne Casino, but those negotiations were not successful and ultimately ended when the Tribe terminated its relationship with President. (R 1548; 1551; 1693; 1720-21; 1722-23).[6]

Soon after terminating its relationship with President, the Tribe offered Park Place a proposal whereby the Tribe would give Park Place an exclusive right (with certain exceptions) to develop casinos in the State of New York in return for a $3 million loan to be paid to the Tribe. The Tribe needed these funds to pay past due expenses to the New York State Police and the New York State Racing and Wagering Board for oversight of the Akwesasne Casino. An agreement was entered into on April 14, 2000 between the Mohawks and Park Place and, after this agreement was signed, the Catskill Group terminated all further discussions with the Mohawk Tribe. (R 725-26). Park Place offered terms to the Tribe for the operation of a casino at the Kutsher's site that was, in every respect, far superior to the offer the Catskill Group had made (R 350).[7]

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6. Petitioners' contentions that Park Place conspired with Kaufman or his company to "squeeze" the Tribe to Park Place's advantage was found to be without factual merit by the District Court. *Catskill V*, 345 F. Supp. at 365-68 (Respondent's App. at 11a-17a). That finding was affirmed by the Court of Appeals. *Catskill* at 547 F.3d at 136.

7. For example, the Three Chiefs concluded that there was "no comparison" between what Park Place offered the Tribe and what the Catskill Group was willing to give. (R 350, 357). Park Place offered what the Chiefs described as a "mega resort" (R 328, 342); the Catskill Group offered a land-locked island in the middle of the Catskill Group's racetrack property. (R 342, 349-50). The

(Cont'd)

Within five (5) days of the April 14, 2000 agreement, the Catskill Group's NIGC application was rejected for a fifth time. (R 715-22).

ARGUMENT

I. Petitioners "Indian Lands" Argument was Properly Rejected by the Court of Appeals and is Inconsistent with Long Standing Case Law.

The District Court held, and the Court of Appeals agreed, that Park Place could not have tortiously interfered with any contract between the Mohawk Tribe and the Catskill Group because none of the contracts entered into were valid unless and until they had been approved by the NIGC. *Catskill*, at 547 F.3d at 124-25. That holding is consistent with longstanding case law.

(Cont'd)

Catskill Group proposed to sell the Tribe 29 acres for $10 million, despite the fact that it paid only $10 million for the *entire* 230-acre parcel. (R 230, 248-49); (343, 356-57). Park Place, in contrast, offered to *give* the Tribe 66 acres. (R 343). The Catskill Group also demanded 35% of the earnings of the casino, five percent greater than that allowed by NIGC guidelines. (R 521, 356). Further, the Catskill Group demanded a 5% "developer's fee." (R 612, 329-30, 246). In contrast, Park Place sought only 30% of the earnings of the casino and did not demand any developer's fee. (R 356). The Catskill Group also cut the Tribe out of all the ancillary developments that the Catskill Group planned to build on the land surrounding the casino, including retail amenities, entertainment facilities and a hotel. (R91-92, 292-93; 294-95, 343, 349-50, 357). Park Place's deal included a hotel and all retail, sports and entertainment amenities from which the Tribe would receive 70% of the profits. (R349-50, 357). Finally, the Catskill Group intended to charge the Tribe for 90% of the cost for all the access roads in the entire project. (R66).

A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 788-89 (9th Cir. 1986); *Scutti Enterprises, LLC v. Park Place Entertainment Corp.*, 322 F.3d 211, 215-16 (2d Cir. 2003); *Native American Servs., Inc. v. Givens*, 213 F.3d 642, 2000 WL 328137, at *1 (9th Cir. March 23, 2000) (gaming management contract not approved by NIGC is void); see also *The Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 889-90 (10th Cir. 1989) (bingo management contract not approved pursuant to 25 U.S.C. § 81 is void).

In an attempt to evade this longstanding case law, Petitioners argued, *for the first time on appeal*[8], that, even though casino management contracts must be ratified by the NIGC, the contracts with the Mohawk Tribe did not have to be ratified because the land on which the casino was to be built was *not yet* Indian land. The Second Circuit properly held that this argument carried no weight because, by the clear terms of IGRA, NIGC approval of Indian management contracts is not

8. This argument was never made below to the District Court. Thus Petitioners' statement on page 19 of their Petition that this argument had been repeatedly ignored by the District Court, "*without explanation*" is wrong and disingenuous. Indeed, the only reference to this issue below was one sentence in the Catskill Group's Motion for Reconsideration of the initial order dismissing the tortious interference with contract claim, referencing that it was allegedly the Bureau of Indian Affairs's position that none of the agreements required approval because the land was owned by Catskill, and therefore the contracts did not involve "Indian lands." See May 30, 2001 Catskill Br. in Support of its Motion for Reconsideration, at 17. This argument was not made in the Catskill Group's opposition to the Park Place motion for summary judgment.

dependent upon whether the casino was on Indian land *Catskill* at 547 F.3d at 125-26. Moreover, the Second Circuit properly held that reading an Indian land requirement into the statute and requiring that the land be in Indian hands before NIGC review would apply, would eviscerate Congress's intent to promote and protect the best interest of Indian tribes. *Id.* The fact that the land on which the casino is intended to operate is not yet in trust does not eliminate the need for the NIGC oversight that Congress believed was necessary to protect Indian tribes from improvident gaming contracts. *Id.* at 126.

This case presents the perfect example of the Second Circuit's reasoning. Under Petitioners' argument, once the Mohawk Tribe had signed a contract with the Catskill Group, it would be forever wedded to the Catskill Group, even if other suitors presented more favorable proposals to the Indian tribe (which Park Place did) and even if the NIGC found the Catskill Group contracts not to be in the Tribe's best interest (which it did) and even if the NIGC refused to approve those contracts (which it did). In rejecting Petitioners' argument, the Second Circuit held that the Mohawk Tribe was free to solicit new offers and to enter into new agreements unless and until a contract with any particular management group was approved by the NIGC.[9]

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9. Ironically, the Catskill Group itself took advantage of this principle. Ultimately, the Mohawk Tribe became dissatisfied with its arrangement with Respondent Harrah's because the Tribe could not obtain BIA approval to take the Kutsher's site

(Cont'd)

Moreover, Petitioners' argument simply makes no sense. Under Petitioners' reading of IGRA, a management contract with an Indian tribe would be valid so long as the BIA did not approve the land into trust. Once the BIA approved the land transfer into trust, however, the contracts would then become *invalid* because the land would then be Indian land, and the contracts would require NIGC approval. The contracts would then remain invalid unless and until the NIGC subsequently approved the contracts.

The more logical and common sense approach is to simply hold that management contracts with Indian tribes must, at all times, be approved by the NIGC and that is exactly the way the NIGC interpreted its obligations in this case. As both the District Court and the Court of Appeals found, the NIGC rejected the Catskill Group's contracts five times, even though the land had not yet been (and never was) taken into trust. *Catskill* at 547 F.3d at 125-26 (Petitioners' App. 14a-18a), *Catskill II*, 217 F. Supp. 2d at 442 (Petitioners' App. 114a-115a).

(Cont'd)

into trust. The Mohawk Tribe, believing that the original Monticello site would be approved by the BIA, went back to the Catskill Group and entered into new contracts, walking away from its agreement with Harrah's. In the ultimate irony, the successor to the Catskill Group ultimately walked away from its agreement with the Mohawk Tribe when neither it nor the Mohawk Tribe could obtain BIA approval for the Monticello Site.

II. Petitioners' "Precursory Obligation" Theory Does Not Merit Review Because it is Flatly Inconsistent with Established Case Law and the Purpose of IGRA.

Petitioners also argue that, even if the "operative terms" of the management contracts needed to be approved by the NIGC before they became effective, certain provisions of those contracts, the "precursory obligations", should be held valid insofar as they require the tribe to act in good faith to seek agency approval. As the Second Circuit held, this argument was flatly rejected in *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788-89 (9th Cir. 1986). Further, the Second Circuit, in its extensive analysis, properly rejected Petitioners' reliance on other cases which clearly do not support Petitioners' precursory obligation theory.

Moreover, like their Indian lands argument, Petitioners' precursory obligation argument is flatly inconsistent with the purpose of IGRA. If the Tribe were required to honor its so-called precursory obligations without NIGC approval, then it would be prevented from soliciting or receiving offers from other management firms even if, as happened here, the NIGC advised the Tribe that the contracts were not in the Tribe's best interest. The clear intent of IGRA was to protect Indian tribes from undue influence and corruption by insuring that no management contract and no portion of any management contract would become effective unless or until it was approved by NIGC. Requiring the Mohawk Tribe to stick with the Catskill Group's contract and to take all steps necessary

to obtain approval of that contract, even if the Tribe changed its mind or concluded that the contract was not in its best interest, is clearly inconsistent with that Congressional purpose.

III. Petitioners' "Collateral Agreements" Argument is Without Merit and is Fact-Specific to this Case.

Petitioners argue that the LPA is merely a "collateral agreement," not a "management agreement," and therefore does not need to be approved by the NIGC. The law with regard to whether a collateral agreement is subject to NIGC review is not in dispute. As the Court of Appeals properly held and as Petitioners concede (Petition at 34), the NIGC's approval is required, not only for management contracts, but also for collateral agreements that provide "for the management of all or part of a gaming operation." *Catskill*, 547 F.3d at 130-31. (Petitioners' App. at 25a-26a) (quoting 25 C.F.R. § 502.15).

The issue here is a factual one which does not merit this Court's review: i.e., does the LPA relate to the management of the proposed Monticello casino? As the Court of Appeals found, the NIGC in this case specifically treated the LPA as a collateral agreement relating to management because the NIGC questioned whether the LPA contained a hidden management fee and was therefore related to the management of an Indian gaming operation. *Id.* at 131 (Petitioners' App. at 28a). In addition, the Court of Appeals noted that the parties contemplated that the NIGC would have to approve the LPA; they submitted the LPA to the NIGC for approval; and never argued to the NIGC that the LPA did not need NIGC approval. *Id.* Finally, the Court of Appeals

noted that the LPA, by its terms, was contingent upon BIA approval of the transfer of land into trust for the Tribe. *Id.* Thus, without NIGC or BIA approval, the LPA was not an enforceable contract and Petitioners' tortious interference with contract claim must fail as to the LPA, as it fails with respect to the MA and the DCA. *Id.* 131(Petitioners' App. at 28a-29a)[10].

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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10. Petitioners do not dispute that the MA, being a management agreement was subject to NIGC approval. Further, as the Second Circuit expressly noted, *Catskill*, 547 F.3d at 130(Petitioners' App. at 28a), the NIGC held that the MA and the DCA together were in fact management contracts subject to NIGC approval.