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**United States District Court**  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NGV GAMING, LTD.,	)	Case No. 04-3955 SC
	)	
Plaintiff,	)	
	)	ORDER DENYING
v.	)	PLAINTIFF'S MOTION
	)	FOR PARTIAL SUMMARY
HARRAH'S OPERATING COMPANY, INC., a	)	JUDGMENT AND DENYING
Delaware Corporation,	)	DEFENDANT'S MOTION
	)	<u>FOR SUMMARY JUDGMENT</u>
Defendant.	)	
	)	
_____	)	

**I. INTRODUCTION**

On May 8, 2009, Plaintiff NGV Gaming, Ltd. ("NGV" or "Plaintiff") filed a Motion for Partial Summary Judgment ("Pl.'s MPSJ"). Docket No. 189. Defendant Harrah's Operating Company, Inc. ("Harrah's" or "Defendant") filed an Opposition and NGV submitted a Reply. Docket Nos. 202 ("Def.'s Opp'n"), 215 ("Pl.'s Reply").

On June 12, 2009, Harrah's filed a Motion for Summary Judgment ("Def.'s MSJ"). Docket No. 203. Plaintiff NGV filed an Opposition and Harrah's submitted a Reply. Docket Nos. 226 ("Pl.'s Opp'n"), 237 ("Def.'s Reply"). For the reasons set forth below, the Court DENIES Plaintiff's Motion for Partial Summary Judgment and DENIES Defendant's Motion for Summary Judgment.

Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment includes a request for a Rule 56(f) continuance,

1 and Defendant also filed a Rule 56(f) affidavit. Def.'s Opp'n at  
2 2 n.1; Docket No. 208 ("Rule 56(f) Aff."); Docket No. 245  
3 ("Supplemental Rule 56(f) Aff."). Defendant's request for a  
4 continuance is moot because the Court denies Plaintiff's Motion  
5 for Partial Summary Judgment.  
6

7 **II. BACKGROUND**

8 **A. Factual Background**

9 On July 3, 2002, the Guidiville Band of Pomo Indians (the  
10 "Tribe") contracted with F.E.G.V. Corporation ("FEGV") for the  
11 latter to develop and construct a gaming facility on a  
12 to-be-acquired parcel of land in Northern California. Pl.'s MPSJ  
13 at 3-4. The Agreements comprised two separate documents: (1) a  
14 Development Agreement and Personal Property Lease (the "Lease"),  
15 and (2) a Cash Management Agreement. Id.; Siegel Decl. Ex. L (the  
16 "Agreements").<sup>1</sup> NGV was obligated under the Agreements to assist  
17 the Tribe in identifying and purchasing land to establish the  
18 trust land base on which the gaming facility would be built.  
19 Pl.'s MPSJ at 4. In exchange, NGV would be compensated through a  
20 combination of fixed payments and a percentage of gross and net  
21 revenues earned by the newly constructed gaming facility. Id.  
22 The Tribe was obligated to pay FEGV "Base Rent" equal to "the  
23 final total Pre-Development Costs, Construction Costs and Start-Up  
24 Expenses," "Additional Base Rent" equal to seventy-five percent  
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26 <sup>1</sup> Stanley E. Siegel, Jr., counsel for Defendant Harrah's,  
27 submitted a declaration in support of (1) Defendant's Opposition to  
28 Plaintiff's Motion for Partial Summary Judgment; and (2)  
Defendant's Motion for Summary Judgment. Docket No. 204.

1 (75%) of net revenue per month, and "Incentive Rent" equal to  
2 sixteen percent (16%) of gross revenues per month. Agreements  
3 §§ 6.1, 6.3. The term of the Lease was to continue until the  
4 tenth anniversary of the date upon which the total Base Rent was  
5 paid in full. Id. § 5. In December 2003, FEGV assigned to NGV  
6 its rights and duties under the Agreements. Pl.'s MPSJ at 3-4.

7 In January of 2004, Upstream Point Molate, LLC ("Upstream")  
8 was awarded the right to negotiate by the City of Richmond ("the  
9 City") in connection with a potential sale by the City of  
10 approximately 400 acres of land at Point Molate for the purpose of  
11 constructing an Indian casino.<sup>2</sup> Id. at 4. Harrah's began  
12 pursuing the Tribe in April 2004 to become its Indian gaming  
13 partner at Point Molate. Id. On August 2, 2004, the Tribe sent a  
14 letter to NGV rescinding the Agreements. Id. at 6; Siegel Decl.  
15 Ex. K ("August 2, 2004 Letter"). The Tribe entered into a  
16 contract with Harrah's on or about September 22, 2004. Siegel  
17 Decl. Ex. G ("Dep. of Clayton Rice") at 102:12-15. Plaintiff NGV  
18 maintains that the Tribe was induced to terminate the Agreements  
19 as a result of Defendant's interference. Pl.'s MPSJ at 6.

20 **B. Procedural Background**

21 NGV sued Harrah's and Upstream alleging the tort of  
22 intentional interference with contractual relations. See Docket  
23 No. 10 ("Second Am. Compl.") ¶¶ 38-44. The Court granted the  
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25 <sup>2</sup> NGV originally sued both Harrah's and Upstream. See Docket  
26 No. 6 ("Compl."). While the case was on appeal, the Ninth Circuit  
27 granted NGV's motion for the voluntary dismissal of Upstream from  
28 this action. See Guidiville Band of Pomo Indians v. NGV Gaming,  
Ltd., 531 F.3d 767, 772 (9th Cir. 2008).

1 Tribe's motion to participate as an amicus curiae. Docket No. 58  
2 ("Jan. 31, 2005 Order"). The Tribe filed a separate lawsuit  
3 seeking declaratory and injunctive relief. See Guidiville Band of  
4 Pomo Indians v. NGV Gaming, Ltd., Case No. 05-01605. The Court  
5 consolidated that case with this one for purposes of discovery and  
6 motion practice. See Docket No. 69 ("May 26, 2005 Order"). On  
7 October 19, 2005, the Court granted the Tribe's motion for  
8 declaratory relief, denied NGV's motion for summary judgment, and  
9 dismissed the present case. See Docket No. 132 ("Oct. 19, 2005  
10 Order"). The Court's decision was based on a finding that the  
11 Agreements were invalid for failure to comply with 25 U.S.C. § 81.  
12 Id. at 8.

13 The Ninth Circuit reversed this decision. Guidiville Band of  
14 Pomo Indians, 531 F.3d at 783. The Ninth Circuit held that the  
15 Tribe could not seek declaratory relief, that 25 U.S.C. § 81 and  
16 25 U.S.C. § 2710 do not apply to the Agreements, and that those  
17 statutes do not invalidate the Agreements. Id. at 773-74, 783.  
18 On remand, the parties filed the summary judgment motions that are  
19 presently before the Court.

20  
21 **III. LEGAL STANDARD**

22 Entry of summary judgment is proper "if the pleadings, the  
23 discovery and disclosure materials on file, and any affidavits  
24 show that there is no genuine issue as to any material fact and  
25 that the movant is entitled to judgment as a matter of law." Fed.  
26 R. Civ. P. 56(c). Material facts are those that may affect the  
27 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S.

1 242, 248 (1986). A dispute as to a material fact is "genuine" if  
2 there is sufficient evidence for a reasonable jury to return a  
3 verdict for the nonmoving party. Id. The court must not weigh  
4 the evidence. Id. at 255. Rather, the nonmoving party's evidence  
5 must be believed and "all justifiable inferences are to be drawn  
6 in [the nonmovant's] favor." United Steelworkers of Am. v. Phelps  
7 Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc)  
8 (quoting Anderson, 477 U.S. at 255).

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10 **IV. DISCUSSION**

11 NGV moves for partial summary judgment based on its  
12 contention that it has established, as a matter of law, each of  
13 the elements of tortious interference with contractual relations.  
14 Pl.'s MPSJ at 8. Harrah's contends that it is entitled to summary  
15 judgment on the grounds that the evidence demonstrates that  
16 Harrah's did not proximately cause the Agreements to be  
17 terminated, and because Plaintiff's alleged damages are too  
18 speculative as a matter of law. Def.'s MSJ at 4. NGV also filed  
19 a Motion to Strike Defendant's Exhibit PP. Docket No. 220  
20 ("Motion to Strike"). Defendant filed an Opposition to the Motion  
21 to Strike, NGV filed a Reply, and Defendant filed a Surreply.  
22 Docket Nos. 227, 231, 239.<sup>3</sup>

23 **A. NGV's Motion to Strike**

24 NGV moves to strike Exhibit PP, which is a letter from the  
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26 <sup>3</sup> Defendant moved for leave to file the Surreply. Docket No.  
27 238. NGV opposed the request. Docket No. 242. The Court GRANTS  
28 the request.

1 President of the Tribe's Gaming Agency providing information  
2 concerning the Agency's September 2005 decision that NGV was not  
3 eligible to receive a license from the Tribe. See Mot. to Strike  
4 at 1; Siegel Decl. Ex. PP ("June 12, 2009 Letter"). NGV questions  
5 the trustworthiness of the Gaming Agency's decision to deny NGV a  
6 license. Mot. to Strike at 5-11. The Court finds that the June  
7 12, 2009 Letter is admissible because Terry Springer, the  
8 President of the Gaming Agency and the letter's author, declares  
9 under penalty of perjury that everything stated in the letter is  
10 truthful and accurate. See Springer Decl.<sup>4</sup> While NGV raises  
11 questions concerning the credibility of the Gaming Agency's  
12 decision that NGV was ineligible for a license, credibility  
13 determinations are jury functions. See Anderson, 477 U.S. at 255.  
14 The Gaming Agency's decision was based, in part, on an  
15 investigative report authored by the Spinelli Corporation and  
16 Lewis and Roca LLP. See June 12, 2009 Letter. If Harrah's  
17 attempts to introduce this report at trial, then NGV can challenge  
18 its admissibility by filing a motion in limine. The Court DENIES  
19 NGV's Motion to Strike.

20 **B. Intentional Interference with Contract**

21 Under California law, "[t]he elements of a cause of action  
22 for intentional interference with contract are: (1) a valid  
23 contract between plaintiff and a third party; (2) defendants'  
24 knowledge of the contract; (3) defendants' intentional acts

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26 <sup>4</sup> Terry Springer, President of the Guideville Band of Pomo  
27 Indians Gaming Agency, filed a declaration in support of Harrah's  
28 Opposition to NGV's Motion to Strike. Docket No. 229.

1 designed to induce a breach or disruption of the contractual  
2 relationship; (4) actual breach or disruption of the contractual  
3 relationship; and (5) resulting damage." Tuchscher Dev. Enters.,  
4 Inc. v. San Diego Unified Port Dist., 106 Cal. App. 4th 1219, 1239  
5 (Ct. App. 2003). In a suit for intentional interference with  
6 contract, the plaintiff must show that the act complained of was  
7 the proximate cause of the injury. Bauer v. Interpublic Group of  
8 Companies, Inc., 255 F. Supp. 2d 1086, 1095 (N.D. Cal.  
9 2003)(quoting Augustine v. Trucco, 124 Cal. App. 2d 229, 246 (Ct.  
10 App. 1954); see also Dryden v. Tri-Valley Growers, 65 Cal. App. 3d  
11 990, 997 (Ct. App. 1977) (describing proximate causation as "a  
12 vital element" of the cause of action).

13 **C. Genuine Issues of Material Fact**

14 Here, the Court finds that there are genuine issues of  
15 material fact concerning whether Harrah's caused the Tribe to  
16 rescind the Agreements, and concerning whether Harrah's conduct  
17 resulted in damage to NGV.

18 **1. Proximate Cause**

19 Contrary to NGV's contention that there is irrefutable  
20 evidence of proximate cause, see Pl.'s MPSJ at 16-20, Harrah's has  
21 set forth specific facts showing that there is a genuine issue as  
22 to whether Harrah's caused the Tribe to rescind the Agreements.  
23 Contrary to Harrah's contention that the Court can determine as a  
24 matter of law that Harrah's did not cause a breach or disruption  
25 of the contract, see Def.'s MSJ at 19-23, there is also evidence  
26 to support NGV's position.

27 NGV relies on the fact that Harrah's was negotiating with the  
28

1 Tribe concerning developing and managing a casino and hotel at  
2 Point Molate during the months preceding the Tribe's decision to  
3 rescind the Agreements, which occurred on August 2, 2004. See  
4 Calvacca Decl.<sup>5</sup> Tab I ("April 30, 2004 Letter"); Tab. J ("May 12,  
5 2004 Letter"); Tab K ("May 14, 2004 Letter"); Tab. M ("First Draft  
6 Discussion Document"); Tab. N ("Second Draft Discussion  
7 Document"); August 2, 2004 Letter. Also, NGV has presented  
8 evidence in support of its contention that the Tribe was not  
9 prepared to terminate its relationship with NGV until it had a  
10 firm commitment from Harrah's that it would be the Tribe's new  
11 gaming partner. See Calvacca Decl. Tab N ("Draft Discussion  
12 Document") at 1; Tab L ("June 16, 2004 Email").

13 However, Harrah's has presented evidence showing that the  
14 Tribe was unhappy with NGV's performance under the Agreements.  
15 This evidence supports Harrah's contention that the Tribe would  
16 have rescinded the Agreements even if Harrah's had never contacted  
17 the Tribe. Michael Derry ("Derry"), C.E.O. of Black Oak  
18 Development, testified that by April of 2004, the Tribe was  
19 discussing terminating its contract with NGV. Siegel Decl. Ex. E  
20 ("Dep. of Michael Derry") at 189:22-23, 202:17-23. Derry  
21 described it as an "understatement" to say that "the relationship  
22 between the Tribe and the Fears-Noram team was very shaky by the  
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26 <sup>5</sup> Stephen J. Calvacca, counsel for NGV, filed a declaration in  
27 support of Plaintiff's Motion for Partial Summary Judgment. Docket  
28 No. 190.



1 Spring of 2004."<sup>6</sup> Id. at 201:11-14. Before Harrah's spoke to the  
2 Tribe, the Tribe was concerned about NGV's failure to find a  
3 parcel of land suitable to the Tribe, and NGV's unwillingness to  
4 take seriously a parcel of land identified by the Tribe. Id. at  
5 189:22-191:11, 193:2-194:4. At a meeting in Antioch, members of  
6 the Tribe were disappointed when Kevin Gover, the NGV  
7 representative, provided no assistance to the Tribe. Id. at  
8 197:23-199:11. Daniel Kirby, who served as a liason between NGV  
9 and the Tribe, testified that in the spring of 2004 he grew  
10 concerned that the relationship between NORAM and the Tribe "was  
11 leading towards collapse." Siegel Decl. Ex. A ("Dep. of Daniel  
12 Kirby") at 78:13-19. Merlene Sanchez, the Tribe's Chairperson,  
13 testified that at the time Harrah's approached the Tribe, the  
14 Tribe did not believe NGV was performing on its obligation to get  
15 land into trust for the Tribe. Id. Ex. D ("Dep. of Merlene  
16 Sanchez") at 91:16-21; 107:8-19.

17 Communications between the Tribe and the National Indian  
18 Gaming Commission ("NIGC") in November and December of 2003 raised  
19 serious questions about whether the Tribe should be doing business  
20 with NGV. See Dep. of Michael Derry at 209:6-15, 212:5-22, 213:4-  
21 10. At the very first meeting between the Tribe and Harrah's, the  
22 Tribe indicated that it intended to terminate its relationship  
23 with NGV. Dep. of Clayton Rice at 116:2-13; Ex. F ("Dep. of James  
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25 <sup>6</sup> Mr. Fears was the majority shareholder of FEGV. See Siegel  
26 Decl. Ex. P ("December 8, 2003 Letter") at GUI 00320. North  
27 American Sports Management, Inc. ("NORAM") was working with FEGV on  
the Tribe's gaming project. See id. NORAM was owned by the Alan  
Ginsburg Family Trust. Siegel Decl. Ex. C ("Dep. of John  
Gruttadaurio") at 5:17-18.

1 Levine") at 47:6-12. The Court concludes that there are genuine  
2 issues of material fact as to whether Harrah's actions caused a  
3 breach or disruption of the Tribe's contract with NGV.

4 **2. Damages**

5 Contrary to NGV's contention that it has established, as a  
6 matter of law, that it has been harmed or suffered damages as a  
7 result of Harrah's conduct, see Pl.'s MPSJ at 20-25, the Court  
8 finds that there are genuine issues of material fact relating to  
9 this element of the cause of action. As well as the evidence  
10 suggesting that the Tribe might have rescinded the Agreements even  
11 if Harrah's never contacted the Tribe, see Section IV.C.1., supra,  
12 there is also evidence suggesting the Agreements would not have  
13 survived regulatory review.

14 Before Harrah's contacted the Tribe, NORAM was concerned that  
15 the Agreements were not likely to be approved by the Bureau of  
16 Indian Affairs ("BIA") and the NIGC. Paul Filzer, General Counsel  
17 of NORAM, wrote a letter to the Tribe in which he proposed  
18 replacing and superceding the Agreements because the BIA may "be  
19 reluctant to exercise its discretion and accept land into trust  
20 for the Tribe." December 8, 2003 Letter at GUI 00322. Mr. Filzer  
21 was concerned about the provision in the Agreements that provided  
22 for a ten-year term, which exceeded the maximum seven-year term  
23 permitted under IGRA. Id.

24 There is evidence that Mr. Filzer was correct to be concerned  
25 about the regulatory hurdles the Agreements would have faced. In  
26 a letter to several United States Senators, NIGC Chairman Philip  
27 Hogen presented an "egregious example" of an unconscionable

1 agreement between a casino developer and a tribe, and the terms of  
2 this egregious example appear to be those contained in the  
3 Agreements between NGV and the Tribe:

4 In an even more egregious example, the tribe had  
5 a 5-year obligation to pay rent equal to all the  
6 developer's costs, plus interest, plus an  
7 additional "rent" of 75% of net revenue.  
8 Following that, the tribe had a 10-year  
9 obligation to pay 16% of gross revenue, an  
10 amount roughly equal to 50% of net revenue, and  
11 all of these payments were to be made long after  
12 the developer ceased to providing services of  
13 any kind. . . . The Commission's review has  
14 enabled tribes to avoid such illegal and  
15 unconscionable agreements and has thus assured  
16 that they are the primary beneficiaries of their  
17 casinos.

12 Siegel Decl. Ex. EE ("February 1, 2005 Letter"). Based on this  
13 evidence that the Agreements would have faced significant  
14 regulatory hurdles, coupled with the evidence that the Tribe might  
15 have independently terminated its relationship with NGV, see  
16 Section IV.C.1, supra, a reasonable jury could conclude that NGV  
17 has not suffered damage as a result of Harrah's conduct. Indeed,  
18 this evidence is sufficient for a reasonable jury to conclude  
19 there have been no damages even without considering the Gaming  
20 Agency's decision to deny NGV a license.

21 Nevertheless, the Court cannot say, as a matter of law, that  
22 NGV has not been harmed by Harrah's conduct. See Def.'s MSJ at  
23 23-25. It is plausible to assume that a valid and enforceable  
24 contract with a Northern California tribe that was eligible for  
25 restored lands has value, and if a jury determines that Harrah's  
26 caused a breach or disruption of the Agreements, and that the  
27 Agreements were capable of overcoming the hurdles identified

1 above, then a jury could conclude that Harrah's conduct resulted  
2 in damage to NGV. There are too many questions of fact here for  
3 the Court to make a determination regarding this element of the  
4 cause of action for intentional interference with contractual  
5 relations.

6  
7 **V. CONCLUSION**

8 For the reasons set forth above, the Court DENIES Plaintiff's  
9 Motion for Partial Summary Judgment, and DENIES Defendant's Motion  
10 for Summary Judgment.

11  
12 IT IS SO ORDERED.

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14 Dated: August 13, 2009

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UNITED STATES DISTRICT JUDGE