

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

-----X		
JANNETTE PATTERSON;	:	
JOHN DI LEONARDO,	:	
	:	
Plaintiffs,	:	Index No. _____
	:	
v.	:	
	:	
THE STATE OF NEW YORK;	:	VERIFIED COMPLAINT FOR
THE NEW YORK STATE ASSEMBLY;	:	DECLARATORY AND
THE NEW YORK STATE SENATE;	:	INJUNCTIVE RELIEF
KATHY HOCHUL, AS GOVERNOR	:	
OF THE STATE OF NEW YORK;	:	
THE OFFICE OF THE NEW YORK STATE	:	
COMPTROLLER; THOMAS	:	
P. DiNAPOLI, AS COMPTROLLER OF THE	:	
STATE OF NEW YORK; AND THE NEW YORK	:	
RACING ASSOCIATION, INC.,	:	
	:	
Defendants.	:	
-----X		

Plaintiffs Jannette Patterson and John Di Leonardo (“Plaintiffs”), by and through their undersigned counsel, verify and allege, upon knowledge as to themselves and upon information and belief as to all other matters, as follows against the State of New York, the New York State Assembly, the New York State Senate, Kathy Hochul, in her capacity as Governor of the State of New York, the Office of the New York State Comptroller, Thomas P. DiNapoli, in his capacity as Comptroller of the State of New York, and the New York Racing Association, Inc. (“NYRA”) (collectively “Defendants”):

PRELIMINARY STATEMENT

1. This case is about the State of New York’s unconstitutional appropriation of taxpayer funds by loaning nearly half a billion dollars to NYRA, all while turning a blind eye to

NYRA's past two decades of financial mismanagement, malfeasance and scandal, and, more importantly, ignoring the State's Constitutional prohibition against providing State monies—whether by loan or by grant—to private corporations like NYRA.

2. No responsible private lender would make such a staggering loan to NYRA.

3. In fact, David O'Rourke, NYRA's President and CEO, recently confirmed in testimony at the Joint Legislative Hearing on the 2024 Executive Budget that "NYRA is unable to obtain traditional financing in the private market."

4. This is not surprising—NYRA has seen attendance at its Belmont Park racetrack plummet by an astounding 88% since 1978, and it operates in a moribund industry that has seen 41 long-established racetracks shut down in the United States since 2000.

5. Indeed, NYRA itself is not long for this world: its franchise to operate expires just ten years from now, in 2033, at which time NYRA will dissolve, according to New York State records.

6. And though the State of New York may choose to ignore sound underwriting standards that govern private lenders, and even pay no heed to Comptroller Thomas P. DiNapoli's concerns that the \$455 million giveaway "deserves further scrutiny" due to NYRA's "troubled financial past" and the fact that "its franchise agreement expires in 10 years," this Court cannot let the State ignore Article VII, § 8(1) of the New York State Constitution: "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking. . . ."

7. Accordingly, Plaintiffs bring this action to obtain a declaration that the State of New York's \$455 million loan to NYRA is and would be an illegal and unconstitutional expenditure, misappropriation, misapplication, or disbursement of State funds that violates Article VII, § 8(1)

of the New York State Constitution; to enjoin the State of New York, the Office of the New York State Comptroller, and Comptroller DiNapoli from disbursing funds to NYRA; to enjoin NYRA from receiving those funds; and to obtain an order requiring restitution to the State in the event any of those funds have been disbursed to NYRA.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action pursuant to CPLR § 301 because the conduct at issue in the Complaint occurred within this State, and pursuant to State Finance Law § 123 because Plaintiffs have an interest in the proper disposition of all State funds.

9. Venue is proper in this Court pursuant to CPLR § 505 and State Finance Law § 123-c because the State of New York, the New York State Assembly, the New York State Senate, Governor Kathy Hochul, the Office of the New York State Comptroller, and Comptroller Thomas P. DiNapoli have their principal offices in the County of Albany, and this County is where the unconstitutional disbursement has occurred, is likely to occur, or is occurring.

PARTIES

10. Plaintiff Jannette Patterson is a citizen taxpayer of the State of New York who has paid, and is paying, New York State income and sales taxes.

11. Ms. Patterson currently resides in the County of New York.

12. Plaintiff John Di Leonardo is a citizen taxpayer of the State of New York who has paid, and is paying, New York State income and sales taxes.

13. Mr. Di Leonardo currently resides in the County of Suffolk.

14. As New York citizen taxpayers, Plaintiffs have standing to pursue this action for declaratory and injunctive relief under State Finance Law § 123-b.

15. Defendants State of New York, the New York State Assembly, the New York State Senate, Governor Kathy Hochul, the Office of the New York State Comptroller, and Comptroller Thomas P. DiNapoli are representatives of the citizens of the State of New York, and bound in their duties to the public by the New York State Constitution.

16. NYRA is a private New York not-for-profit corporation that has the exclusive franchise to operate New York State's three major thoroughbred racetracks: Aqueduct Racetrack, Belmont Park, and Saratoga Race Course, through 2033.

17. A copy of the Summons and this Verified Complaint will be served on the Attorney General of New York, as required by State Finance Law § 123-c(3).

NYRA HAS BEEN A BURDEN, NOT A BOON, ON NEW YORK TAXPAYERS

18. For the past two decades, NYRA has been mired in financial mismanagement, malfeasance, and scandal.

19. NYRA's financial solvency is, at best, questionable, and whatever nominal benefit the public derives from its mere existence is opaque.

20. In 2003, the U.S. Attorney's Office for the Eastern District of New York entered into a Deferred Prosecution Agreement with NYRA following an indictment charging NYRA, two former directors of NYRA's Pari-Mutuel Department, and four former pari-mutuel tellers with participating in a scheme that enabled pari-mutuel employees to falsely deduct from their federal and state taxable income millions of dollars for purported unreimbursed employee expenses.

21. Pursuant to the Deferred Prosecution Agreement, NYRA agreed to pay \$3 million in fines and the cost of prosecution; to restructure its management; and to appoint an independent monitor who would ensure compliance with relevant laws and regulations and would deter and report on unethical or illegal conduct by NYRA.

22. When announcing the appointment of the monitor, then-acting U.S. Attorney Andrew C. Hruska stated that, “[t]he appointment of the monitor is a significant step towards ensuring NYRA’s full compliance with all federal, state and local laws, and purging the organization of the corrupt culture that sanctioned the tax evasion scheme.”

23. In November 2006, NYRA declared bankruptcy under Chapter 11 of the United States Bankruptcy Code.

24. NYRA obtained bankruptcy protection even after it had received \$11 million of a \$30 million loan package approved by the State Legislature to address NYRA’s financial problems.

25. NYRA emerged from bankruptcy in 2008, and as part of its bankruptcy plan, the State of New York forgave nearly all of NYRA’s State-debt obligations, totaling more than \$54 million.

26. In that same plan, the State of New York also provided NYRA another \$105 million to pay off approximately \$80 million in non-State debt.

27. In exchange, NYRA deeded the properties on which The Aqueduct Racetrack, Belmont Park, and Saratoga Race Course operate to the State.

28. In May 2010, less than two years after it emerged from bankruptcy, the financial blackhole that is NYRA sucked more money from the State. This time, NYRA received a \$25 million loan to keep it solvent for the rest of that year.

29. Just two years later, NYRA’s financial mismanagement surfaced to the public’s view once more, this time with revelations that NYRA had wrongfully withheld \$8.5 million from bettors, of which \$1.1 million went to NYRA.

30. As a result, in 2012, the State took temporary control over NYRA to oversee and reform its operations.

31. In June 2017, NYRA was re-privatized.
32. Though NYRA is obligated to pay a franchise fee annually to the State of New York, it has not done so in years.
33. Attendance at NYRA's Belmont Park plummeted over the past 40 years by 88%, from 12.6 million in attendance in 1978 to 1.5 million in attendance in 2019, the last year before the COVID-19 pandemic.
34. Over the same period, taxes paid to the State of New York flowing from wagers on NYRA races fell by 90%, from \$80.3 million in 1970 to \$8.2 million in 2019.
35. While NYRA claims it supports thousands of jobs in the State of New York, most of those jobs are part-time, low paying, and often seasonal. In the words of former New York State Deputy Secretary for Gaming and Racing Bennett Liebman, "[w]e may not know how many jobs [racing] has produced, but it is certainly nowhere near the levels that surveys authored on behalf of the industry have indicated."
36. A 2021 Marist Poll found that more than 90% of New Yorkers say they never go to New York racetracks in a typical year.
37. The public's appetite for thoroughbred racing has no doubt soured at least in part due to the cruelty of an anachronistic spectacle in which approximately 1,600 horses have died at New York tracks since 2009.
38. Indeed, at Belmont Park alone 322 horses died between 2014 and 2021, making it the fourth-deadliest track in the United States during that time span.
39. That number continues to rise: most recently, two thoroughbreds were euthanized after suffering catastrophic injuries during races at Belmont Park on June 10 and June 11, 2023.

40. The fatal injuries are painful to watch, and of course even more painful for the horses who rupture tendons and ligaments, suffer shattered bones, and experience immense agony prior to being euthanized.

41. The horses who escape fatal breakdowns also suffer tremendously. For example, many horses suffer from exercise-induced pulmonary hemorrhaging (bleeding from their lungs) and are often forced to train and race with pre-existing injuries that are masked with non-therapeutic drugs.

42. The public's appetite for horseracing in New York has also likely decreased in part due to NYRA's chronic failure to operate in a sound and transparent manner, all while receiving heaping helpings of corporate welfare from the State of New York.

COMPTROLLER THOMAS P. DiNAPOLI CALLS NYRA'S ACCOUNTING PRACTICES "MISLEADING" AND EXPRESSES RESERVATIONS OVER THE \$455 MILLION LOAN TO NYRA DUE TO ITS "TROUBLED FINANCIAL PAST"

43. NYRA is already heavily reliant on State subsidies, receiving millions in such subsidies since 2011.

44. These subsidies derive from Video Lottery Terminals ("VLT") established in 2011 with the opening of the Resorts World Casino at Aqueduct Park.

45. Under NYRA's Franchise Agreement, NYRA will continue to receive VLT subsidies until 2033.

46. Comptroller Thomas P. DiNapoli and the Office of the New York State Comptroller ("State Comptroller") have questioned NYRA's claims of "profitability" over the years and expressed reservations about the \$455 million loan at issue in this case.

47. In June 2016, the State Comptroller audited NYRA's financial condition for the period January 1, 2012, through December 31, 2014.

48. The audit found that NYRA's traditional racing operations had generated multi-million-dollar annual deficits.

49. The audit also found that excluding the VLT subsidies NYRA receives, and which are supposed to be used, in part, for capital expenditures, NYRA would have generated cumulative operating losses of \$109.3 million from 2010 through 2014.

50. In that same audit report, the State Comptroller observed that in 2011 the Franchise Oversight Board ("FOB"), which was formed to oversee NYRA's financial operations, had previously stressed the need for NYRA to develop a plan to become profitable without reliance on VLT subsidies, but that NYRA had not developed a sufficient plan to make its racing operations profitable without those subsidies.

51. In that same audit report, the State Comptroller also observed that NYRA had used non-Generally Accepted Accounting Principles accounting standards to convey the illusion of profitability where none exists.

52. Specifically, the State Comptroller criticized NYRA's exclusion of its pension costs, other post-employment benefits ("OPEB") and depreciation expenses, thereby understating its actual costs by more than \$13.2 million.

53. Had those costs been properly accounted for, NYRA would not have been able to report the meager \$1.7 million surplus it claimed in 2014 (with VLT subsidies excluded from that calculation).

54. The State Comptroller characterized NYRA's claim that it had generated a profit from racing-related operations as "very misleading."

55. In 2018, the State Comptroller issued a report that assessed how NYRA implemented the recommendations contained in the State Comptroller's 2016 audit.

56. In that 2018 report, the State Comptroller found that NYRA's racing operations had continued to produce annual deficits.

57. Further, the State Comptroller found that NYRA failed to include all ordinary and necessary expenses, including pension contributions, OPEB, and depreciation, when assessing its financial condition.

58. The State Comptroller again criticized NYRA's failure to implement accurate and transparent accounting standards, stating: "We maintain that reporting such numbers to the general public and to NYRA Board in this way is not a fair representation of the profitability of NYRA's racing operations, and can leave decision makers with the false impression that no actions are required."

59. In that same report, the State Comptroller found that NYRA had still failed to develop a detailed plan to eliminate its annual deficits from racing operations (excluding VLT subsidies)—something stressed by the FOB seven years earlier, in 2011.

60. The State Comptroller found that NYRA had an \$18.1 million loss from racing operations in 2016, representing an increase of about 46% from its \$12.4 million loss in 2015.

61. Even worse, for the first six months of 2017, NYRA's racing-related expenses grew by \$5.3 million, while racing revenues grew only by \$2.2 million, resulting in a \$16.3 million loss for just the six months which ended on June 30, 2017.

62. In another damning audit of NYRA issued in 2022, the State Comptroller found that NYRA "does not have adequate monitoring and oversight over its purchasing and procurement process," and that "overspending may have occurred."

63. As an example, the State Comptroller found that NYRA's deficient procurement practices allowed a NYRA employee to select his own company to do business with NYRA, resulting in that employee receiving payments of close to \$200,000.

64. Adding insult to injury, the State Comptroller also found that NYRA awarded vendor contracts that did not meet the requirements for competitive bidding and purchasing of goods and services, including "one purchase that did not appear to be related to the regular business of NYRA."

65. Notwithstanding NYRA's abysmal financial track record, the low attendance at racing events, and the multi-million-dollar annual deficits from its racing operations, and despite the New York Constitution's prohibition against giving or loaning State funds to any private corporation, the State of New York has raced full speed ahead to finance the renovation of NYRA's Belmont Park racetrack to the tune of \$455 million. This Court should stop this unconstitutional transaction.

FACTUAL ALLEGATIONS

66. On or about April 27, 2023, Governor Hochul announced agreement on the fiscal year 2024 New York State budget.

67. Shortly thereafter, the final budget language was released (the "2024 Budget").

68. Part X, Section 1 of the 2024 Budget provides in pertinent part:

The legislature finds that it is in the interests of the state to assist The New York Racing Association, Inc., which is the franchised corporation pursuant to section two hundred six of the racing, pari-mutuel wagering and breeding law, to renovate Belmont Park racetrack and repurpose the Aqueduct property. The legislature further finds and determines that the anticipated cost of renovating Belmont Park racetrack is four hundred fifty-five million dollars and that the renovation of Belmont Park racetrack shall initially be financed by the state subject to the provisions of the repayment agreement of the franchised corporation . . . The franchised corporation will be responsible for repayment of the state funds in accordance with the terms of such repayment agreement.

69. In short, the State of New York authorized a loan to and in aid of NYRA.

70. Part X, Section 2 of the 2024 Budget provides:

Prior to, and as a condition to the state initially providing funds for the renovation of Belmont Park racetrack, the franchised corporation shall enter in a repayment agreement with the state acting through the budget director authorizing and directing that a portion of the funds of the franchised corporation dedicated for capital expenditures of the franchised corporation pursuant to paragraph 3 of subdivision f and paragraph 3 of subdivision f-1 of section 1612 of the tax law shall be used to repay the state for the funds provided by the state for the renovation of Belmont Park racetrack, in accordance with the repayment agreement between the state and the franchised corporation. . . .

71. Paragraph 3 of subdivision f of Section 1612 of the Tax Law provides that a portion of the funds generated by the VLTs located at Aqueduct Racetrack shall be deposited into a NYRA account and “used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack, and Saratoga race course.”

72. Paragraph 3 of subdivision f-1 of the Tax Law provides that a portion of the funds generated by the VLTs located in Nassau or Suffolk counties shall likewise be deposited into a NYRA account and shall also be “used for capital expenditures in maintaining and upgrading Aqueduct racetrack, Belmont Park racetrack, and Saratoga race course.”

73. In other words, the State’s nearly half-billion dollar loan to NYRA to renovate Belmont Park will purportedly be repaid from the very VLT subsidies NYRA already receives from the State, the same subsidies that should already have been used to “maintain and upgrade” Belmont Park.

74. Part X, Section 2, subsection (2) of the 2024 Budget also provides that “the franchised corporation shall provide to the franchised oversight board, as an exhibit to the [repayment] agreement, descriptions of the construction work to be paid for with the loan provided by the state to the franchised corporation. . . .”

75. The 2024 Budget does not identify the terms of the loan, including its duration and interest rate, if any, when the loan repayment will begin, or what the consequences, if any, will be for NYRA's failure to repay the loan in full before NYRA dissolves in 2033.

76. None of those details have been made known to the public.

77. Instead, Part X, Section 2, subsection (8) of the 2024 Budget only provides that the repayment "agreement shall be subject to approval of the franchise oversight board" and that at some unspecified time "the gaming commission shall publish such agreement on its website."

78. Part X, Section 2, subsection (8) also provides an alternative Belmont Park financing plan. That plan provides that "[a]t any time prior to the repayment of the state funds for the renovation of Belmont Park racetrack, the state *may* issue state personal income tax revenue bonds or state sales tax revenue bonds."

79. In that event, Part X, Section 11, subsection (1) authorizes "the dormitory authority, the urban development corporation, and the New York state thruway authority" (collectively, "Pass Through Entities") to issue those bonds in an aggregate principal amount not to exceed \$455 million.

80. Subsection (2) of Section 11 provides that "to assist" the Pass Through Entities "in undertaking the financing for the renovation of Belmont Park, the director of the budget is . . . authorized to enter into one or more financing agreements" with those entities "so as to annually provide" to them "in the aggregate a sum not to exceed the principal, interest, and related expenses required for such bonds and notes."

81. The principal, interest and related expenses of the bonds are the costs of servicing the bonds, *i.e.*, the "debt service costs." With interest and related expenses, the amount would far exceed \$455 million.

82. In other words, if bonds are issued, then the Pass Through Entities will not absorb the costs of making payment on the bonds. Instead, the State will “assist” them by covering the debt service costs based on State “monies available.” *See* Part X, Section 11, subsection (2).

83. While Plaintiffs do not challenge the 2024 Budget authorizing potential bonds, Plaintiffs do challenge the constitutionality of what would be a *de facto* loan in aid of NYRA because, if bonds are issued, the State’s “monies available” would be advanced to the Pass Through Entities to cover the debt service costs, which subsequently NYRA will purportedly “fully repay.”

84. In that regard, Part X, Section 2, subsection (8) makes clear that “[i]n the event of the issuance of such bonds, the repayment agreement shall be revised to reflect the obligation of the franchised corporation to fully repay the debt service costs associated with such bonds.”

85. Thus, the State’s appropriation to pay the debt service costs of bonds combined with NYRA’s obligation to fully repay the State for those costs makes the arrangement an unconstitutional loan “in aid of” NYRA. Article VII, § 8(1).

86. Section 3, Part X of the 2024 Budget provides that “[p]rior to, and as a condition of, the state initially providing funds for the renovation of Belmont Park racetrack, the franchised corporation shall also enter into an agreement with the state relinquishing to the state its leasehold interest in real property located in South Ozone Park, commonly known as Aqueduct Racetrack, upon substantial completion of the renovation of Belmont Park racetrack. . . .”

87. In other words, Aqueduct Racetrack, which has seen its attendance plummet by 94% since 1978—even more drastically than Belmont Park’s 88% reduction in attendance since that same time—will be shuttered.

88. Because NYRA’s franchise will expire in 2033, Part X, Section 4 of the 2024 Budget provides that the “New York State Gaming Commission shall ensure that to the extent that

the law allows for a franchise agreement for the operation of Belmont Park racetrack with a franchisee other than the franchised corporation, the term of any such franchise agreement awarded after funding provided by the state for the renovation of Belmont Park racetrack . . . shall include a provision obligating such franchisee to assume the payments of the franchised corporation. . . .”

89. In other words, after 2033, it is unknown who—if anyone—will be responsible for repayment of funds the State has unconstitutionally appropriated to loan to NYRA.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

90. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the preceding paragraphs with the same force and effect as though set forth at length herein.

91. Under State Finance Law § 123, the New York State Legislature recognizes “that each individual citizen and taxpayer of the state has an interest in the proper disposition of all state funds and properties.”

92. Plaintiffs dispute that the State of New York is constitutionally permitted to provide State monies—whether by loan or by grant—to or in aid of NYRA.

93. The constitutionality of the State’s appropriation is a definite, concrete, and substantial legal controversy that requires judicial intervention.

94. Thus, a real justiciable controversy exists between Plaintiffs and Defendants because the parties are genuine adversaries with a stake in the outcome of this litigation.

95. Money damages against Defendants are inadequate because such damages will not rectify the harm created by the State’s unconstitutional appropriation of funds to NYRA.

96. Pursuant to State Finance Law § 123-e, the declaratory and injunctive relief requested below are the only adequate remedies available to Plaintiffs.

97. Accordingly, under CPLR § 3001 and State Finance Law § 123, Plaintiffs are entitled to a declaratory judgment declaring that the State of New York's loan to or in aid of NYRA is and would be an illegal and unconstitutional expenditure, misappropriation, misapplication, or disbursement of State funds that violates Article VII, § 8(1) of the New York State Constitution.

SECOND CAUSE OF ACTION
(Temporary Restraining Order & Preliminary Injunction)

98. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the preceding paragraphs with the same force and effect as though set forth at length herein.

99. NYRA has received or will imminently receive funds from the State of New York's unconstitutional appropriation.

100. Plaintiffs dispute that the State of New York is constitutionally permitted to provide State monies—whether by loan or by grant—to NYRA.

101. Plaintiffs have a probability of success on the merits because the clear language of Article VII, § 8(1) of the New York State Constitution prohibits the State from giving any loan or grant to or in aid of a private entity like NYRA.

102. Given that the State has already approved the appropriation, Plaintiffs believe that NYRA is on the verge of receiving, or has already received, some or all of the funds encompassed by the State's loan.

103. Under State Finance Law § 123, the New York State Legislature recognizes “that each individual citizen and taxpayer of the state has an interest in the proper disposition of all state funds and properties.”

104. Plaintiffs will suffer an immediate and irreparable injury to that interest in the absence of an injunction preventing NYRA from receiving funds from the State.

105. Moreover, given the imminent receipt of funds by NYRA, Plaintiffs' immediate and irreparable injury will occur if the Office of the New York State Comptroller is not judicially restrained from disbursing State funds to or in aid of NYRA, and if NYRA is not judicially restrained from receiving State's funds before any hearing on a preliminary injunction.

106. Granting injunctive relief restraining and enjoining the State of New York and the Office of the New York State Comptroller from disbursing funds to or in aid of NYRA, and restraining and enjoining NYRA from receiving State funds, is critical to protecting Plaintiffs' rights and interests in the proper distribution of State funds.

107. In contrast, the State of New York and the Office of the New York State Comptroller will suffer no harm from being enjoined from disbursing State funds to or in aid of NYRA.

108. Further, NYRA will suffer little to no harm by being enjoined from receiving State funds because the injunction will not impose any new obligations upon NYRA.

109. An injunction will simply preserve the status quo pending the Court's determination of the parties' rights and obligations.

110. Accordingly, under CPLR § 6301 and State Finance Law § 123, Plaintiffs are entitled to a temporary restraining order and a preliminary injunction enjoining the State of New York and the Office of the New York State Comptroller from disbursing funds to or in aid of NYRA, and enjoining NYRA from receiving, any State funds.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that the Court provide the following relief:

(a) On the first cause of action, a judgment declaring that the State of New York's loan to or in aid of NYRA is and would be an illegal and unconstitutional expenditure, misappropriation,

misapplication, or disbursement of State funds that violates Article VII, § 8(1) of the New York State Constitution;

(b) On the second cause of action, an order enjoining the State of New York and the Office of the New York State Comptroller from disbursing funds to or in aid of NYRA, and enjoining NYRA from receiving, any State funds. If some or all of the State's funds have already been disbursed to or in aid of NYRA, an order requiring restitution to the State of those funds pursuant to State Finance Law, § 123-e(1);

(c) An award to Plaintiffs for costs and expenses, including attorney's fees, pursuant to State Finance Law, § 123-g(1); and

(d) Any further relief that the Court deems just and proper.

Dated: June 22, 2023
New York, New York

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