

## The Inspector General, Ethics, and the New York Franchise Applicants

We've often thought that horse racing had put its own twist on the old advertising slogan that General Electric used to use. The GE slogan was "Progress is our most important product." For racing the proper slogan should be "Rumor is our most important product."

The trend to racing rumor must be highly contagious. Not only does it affect people in racing, but it has clearly rubbed off on government agencies that deal with racing. The trend to racing rumor can most be recently and gloriously be viewed in the July 2 report of the New York State Inspector General on the integrity of those groups seeking to obtain the thoroughbred racing franchise in New York<sup>1</sup>

As part of the process established by Governor Eliot Spitzer, the Inspector General was to issue a report on the applicants for the franchise. Governor Spitzer "directed the state Inspector General (IG) to conduct a mandatory integrity review of each entity and its principals seeking to be the operator. The IG's review may include data searches, interviews, and other examinations of the records and backgrounds of the individuals."<sup>2</sup> When the report was released on July 2, the Governor stated that "with the IG's release of its Integrity Review of the four potential operators, one of the important predicate steps in the selection process has been completed."<sup>3</sup>

Yet, there's little more than public record rumor in the Inspector General's report. There are 145 pages of gossip. Walter Winchell never wrote as much concentrated gossip as this. Maybe instead of hiring investigatory consulting firms, the IG should have located Rona Barrett. Perhaps Earl Wilson or Ed Sullivan could have been resurrected. By now, they could have learned to use Nexus, Google, or Westlaw just as effectively as the IG's office.

A comprehensive ethics review of four major bidders is not an easy undertaking, but the product that the IG has produced is not particularly helpful. Stringing together a compilation of public record documents about the bidders and their key personnel resolves almost nothing about the integrity and the ethics of the competitors for the New York racing franchise.

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<sup>1</sup> The report can be found at <http://www.ig.state.ny.us/pdfs/Report%20to%20the%20Governor%20on%20the%20Integrity%20of%20Those%20Seeking%20to%20Operate%20the%20Racetracks%20at%20Aqueduct,%20Belmont%20Park%20and%20Saratoga.pdf>. For purposes of this paper, the report will be called IG Report. The four bidders each paid \$800,000 each to finance the investigations.

<sup>2</sup> "Racing Panel Sets Dates For Public Presentations," Executive Chamber Press Release 3/15/2007.

<sup>3</sup> "Statement By Governor Eliot Spitzer Regarding The Inspector General's Integrity Report On The Potential Operators Of New York's Thoroughbred Racing Franchise," Executive Chamber Press Release 7/2/2007.

## The Report

The IG reported on the integrity of the four groups which made bids on the racing franchise. The groups were the New York Racing Association (NYRA), Empire Racing Associates (Empire), Excelsior Racing Associates, (Excelsior), and Capital Play, Inc. (Capital Play). Each bidding group beaten up somewhat, Capital Play seems to have largely been dismissed by the IG. The report on Capital Play runs only 16 pages. While it contains a significant amount of adverse material, it almost seems as if Capital Play is not being treated by the IG as a serious contender for the franchise. NYRA gets 31 pages, Excelsior merits 34, and Empire checks in at 38.<sup>4</sup>

If there is a winner among the groups, it is NYRA. NYRA is effectively praised by faint damnation. The clear loser is Empire which seems to be singled out for a multitude of supposed sins, including the manner in which it was established.

## Report Methodology

Based on reports from the consultants hired by the IG, the IG set forth “a summary of potential integrity concerns, as well as information from the consultants’ report deemed relevant for consideration by the Franchise Review Panel.”<sup>5</sup> In turn, most of the information retrieved by the consultants was gathered from electronic records.<sup>6</sup> The following topics were identified as part of the integrity review process: key persons and business entities, affiliations with rebate shops, discrepancies and omissions in response to questionnaires, legal and regulatory issues, judgments, liens and bankruptcies, political contributions and lobbying, and media reports.<sup>7</sup> To a certain extent the review of the key personnel at NYRA was more limited than the reviews of the other bidders since many of the NYRA personnel had been subject to the oversight of a federal monitor in 2004 and 2005.<sup>8</sup>

The bidders were to be treated uniformly throughout the process,<sup>9</sup> and the report “relates only potential integrity concerns.”<sup>10</sup> Only negative-integrity related concerns are to be discussed.”<sup>11</sup> The analysis according to the IG was independent, consistent, fair, and

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<sup>4</sup> Since Capital Play has been dismissed by the IG’s report, the IG’s findings on Capital Play will not be discussed in this memorandum. It may, however, be that since Mohegan Sun has joined the Capital Play bid, that Capital Play may merit more discussion in the future.

<sup>5</sup> IG Report at 10.

<sup>6</sup> IG Report at 8.

<sup>7</sup> See generally IG Report at 7 and the captions concerning the bidders in the IG report. The political contribution and the media report section of the IG report largely are cherry picked version of stories which largely seem to have the juiciest gossip value.

<sup>8</sup> IG Report at 7.

<sup>9</sup> IG Report at 5.

<sup>10</sup> IG Report at 10.

<sup>11</sup> IG Report at 11.

comprehensive.<sup>12</sup> Nonetheless, much of the information obtained by the consultants was not independently verified by the IG's office.<sup>13</sup> Finally, the IG noted in the conclusory remarks that "all significant negative information relating to the integrity of a potential franchisee is reflected in this report."<sup>14</sup>

Much of the focus in the report concerns the work performed by the federal monitor Getnick and Getnick during its work for NYRA in 2004 and 2005. Getnick and Getnick had been selected to monitor NYRA as a result of a deferred prosecution agreement entered into December of 2003 between NYRA and United State Attorney for the Eastern District of New York. Getnick and Getnick determined at the conclusion of its work that NYRA had reformed itself and had complied with the terms of its deferred prosecution agreement.

Getnick and Getnick's work product at NYRA has tended to be accepted by many of the political entities in the State.<sup>15</sup> On the other hand, it has been derided by much of the non-NYRA racing world and by the racing regulatory agencies, who have tended to view the Getnick work product as simplistic and self-serving.<sup>16</sup>

### The World of Rebates

Much of the Getnick and Getnick praise for NYRA concerned NYRA's actions regarding rebate shops. Rebate shops are firms that offer pari-mutuel wagering on races that provide an incentive to bettors by returning additional money or merchandise to bettors based on the size of their wagers. Rebates provide a service similar the Discover for bettors offering a price discount for the major bettors in racing. By now, many racetracks offer rebates to their customers, but the practice was initially associated with firms which did not offer any live pari-mutuel racing of their own. These firms could afford to provide higher rebates to their best players.

In particular, the major impetus for rebating started in 1995 when the takeout rates were raised at the NYRA tracks. Some of the major NYRA bettors left New York moved to hotels in Las Vegas which provided then with hospitality and significant rebates on their wagers.<sup>17</sup> Nevada banned cash rebates on racing in the late 1990's,<sup>18</sup> and with that move the large rebate bettors moved their bets to other venues.<sup>19</sup> Some of the large rebate venues were in North Dakota, South Dakota, Indian reservations, and in offshore locations.

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<sup>12</sup> IG Report at 1.

<sup>13</sup> IG Report at 5.

<sup>14</sup> IG Report at 145.

<sup>15</sup> See [http://www.getnicklaw.com/media/article\\_32.html](http://www.getnicklaw.com/media/article_32.html)

<sup>16</sup> For an early example of the governmental complaints about Getnick and Getnick, see

<http://www.hbpa.org/newsdisplay.asp?section=3&key1=5374>

<sup>17</sup> See for example Grimes, "The Wizard of Odds," New York Times, June 3, 2001; McAllester, "Hijacked High Roller,," Newsday, January 28, 1996.

<sup>18</sup> Carp, "Slumping race books try to pick up pace," Las Vegas Review-Journal, October 29, 2005.

<sup>19</sup> Beyer, "Rebate Shops Gain Inside Track," Washington Post, August 16, 2000.

By and large, there are three concerns about rebates. Two have limited connections with governmental ethics. The first is whether rebates are good overall for racing. Most racing entities are now involved in rebates. While many of them do it out of the need to compete with other groups in racing, the notion of whether rebates are bad or good is not so much a governmental ethics concern<sup>20</sup> as much as it is an economic one for the components of the racing industry. The fact is that the American racing industry has decided that rebates are a fact of life.

The other concern is that of batch betting where the largest bettors with better access to the tote system can place their wagers at the very last moment thereby giving these bettors the ability to arbitrage the wagering pools. Again – as long as the bets are not being made after the race has started – this is not an overwhelming governmental integrity concern. It is largely a matter of whether the host track (the track where the race is taking place) wants as a matter of its business judgment to allow these large bets to enter the pools.

The third issue is an ethics issue, rather than a racing issue. That is the issue of whether the rebate shops are engaged in money laundering.

In January of 2005, many of the industry concerns with rebate shops came to the fore in the Uvari indictment. In this case, a number of gamblers, allegedly associated with the Gambino crime family,<sup>21</sup> using certain rebate shops helped to fix a race at Aqueduct, by drugging a horse and operated a gambling business. The Uvari group concealed the identities of the most of the gamblers in its operation thereby promoting tax fraud and also allegedly engaging in money laundering.

Based on the Uvari indictment, NYRA – and for a time the New York Racing and Wagering Board – decided that offshore rebators had significant potential for money laundering and stopped doing business with these offshore firms. This notion of preventing money laundering by cutting off the offshore rebators is treated as a significant notion of NYRA's good works in the ethics area.<sup>22</sup> Yet, this notion really makes limited logical sense. It is an action that is both over and under inclusive.

Let's look at money laundering. Any entity taking bets in the simulcasting industry can engage in money laundering, and by now most every racetrack is engaged in rebates. Most every racing entity has some policy which allows for the return of some portion of the bettor's cash back to the bettor. Most every pari-mutuel clerk at a track could do some money laundering on his or her own. Rebates are not just an offshore thing. To condemn a whole category of firms – whether or not there existed even the slightest bit of evidence of money laundering - makes little sense. For example in 2002, several NYRA clerks pleaded guilty to charges of money laundering.<sup>23</sup> One could make the assertion that given

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<sup>20</sup> There is an issue of fairness to consumers/the betting public which could logically be treated through appropriate disclosure rules.

<sup>21</sup> See <http://www.usdoj.gov/usao/nys/pressreleases/January05/uvarietalindictmentpr.pdf>.

<sup>22</sup> IG Report at 19.

<sup>23</sup> "NYRA Clerks Admit Money Laundering Charges," Albany Times Union, April 25, 2002.

these crimes, a racetrack would be acting more ethically if it refused to deal with NYRA but decided to deal with the offshore rebating firm of Racing and Gaming Services, Inc, which was apparently eventually able to prove to the State Racing and Wagering Board that it was not involved in money laundering.<sup>24</sup> Moreover, NYRA has continued to deal with rebating firms located in states in American states on the ground that these firms are regulated.<sup>25</sup> But two of the named firms in the Uvari indictment – Racing Services Inc. in North Dakota and Lakes Greyhound in New Hampshire -were subject to state regulation.<sup>26</sup> You can't say that offshore rebators are bad but that onshore rebators are good.

The fact is that all cash gambling businesses need to be scrutinized in order to avoid money laundering concerns. Racing commissions – with extremely limited resources - are not in any manner able to police money laundering. Limiting money laundering concerns to certain offshore rebating houses is far too simplistic a notion. You don't resolve money laundering concerns by banning a category of wagering provider, where there is no evidence that many members of this category are engaged in money laundering.<sup>27</sup> If you have reason to believe there is a suspect class, force the members to establish their good standing, don't just ban them. Try to establish a policy that both protects integrity and stimulates business by increasing revenue for the tracks and their horsemen.

The odd part of this debate is that there does exist a clear bad apple in worldwide racing.<sup>28</sup> While the report mentions no money laundering, that particular bad apple is Agua Caliente in Baja California, and NYRA, and the racetrack components of the Excelsior and the Empire bid largely deal with Agua Caliente. The Agua Caliente issue is an interesting one in that Agua Caliente provides limited revenue to the tracks,<sup>29</sup> and apparently State racing commissions have taken no action to restrict tracks from selling their signals to Caliente. Why racetracks bother to send to Caliente when the revenue from Caliente is so slight, and why racing commissions allow tracks to send to Caliente is not made clear in this report.

### Excelsior

The Excelsior portion of the report has a considerable focus on Richard Fields who through Coastal Development is the most significant part of Excelsior. For example, the report discussed Mr. Fields' ownership interest in Suffolk Downs racetrack in Boston.

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<sup>24</sup> IG Report at 20.

<sup>25</sup> IG Report at 25.

<sup>26</sup> In fact, Lakes Greyhound was not purely a rebating firm. It conducted licensed greyhound racing in New Hampshire.

<sup>27</sup> In the NYRA example, the NYRA action against rebate shops also remains of questionable utility when NYRA continues to take wagers from rebate shops based in American states.

<sup>28</sup> IG Report at 17.

<sup>29</sup> For example, Caliente pays NYRA a total of \$4,125 per month, and Caliente is "only authorized to distribute NYRA's signal to 212 secondary sites in Mexico, Latin America, and the Caribbean." IG Report at 40.

Fields owned 36.9% of Suffolk in 2005 and now is the majority partner. There is no discussion of when he acquired this minority share. He acquired a majority share in 2007.

Yet, while Fields only recently took control of the track, he is associated with a slew of prior bad acts taken by the racetrack. For example, the track allowed a controversial trainer named Burton Sipp to race there. Sipp had in the past been denied a license by many jurisdictions and had also been disallowed access to the track in a number of jurisdictions where he had been licensed.<sup>30</sup> According to the report, “Sipp trains horses at Suffolk Downs.”<sup>31</sup> Only it doesn’t seem that Sipp trains there any more. Sipp last regularly raced at Suffolk in 2005. Since then, he has raced at Mountaineer in West Virginia, Delta Downs in Louisiana, and Thistledown in Ohio. He has been a regular at Thistledown over the past two years. He is – at the time of this writing - the number five trainer and number two owner in terms of wins at Thistledown.<sup>32</sup> The point here is that Sipp does not train at Suffolk. He did train at Suffolk for a time when it appeared that Fields may have been a minority shareholder in the track. Most importantly, Thistledown is a Magna track, and Magna is part of the Empire bid. Yet, Burton Sipp is not discussed at all in the Empire portion of the report.

Suffolk – and by connection Fields – is also mentioned as having problematical relationships with the account wagering firms, Youbet.com and TVG.<sup>33</sup> Yet, NYRA has a contractual relationship with Youbet as do the Delaware North and the Woodbine portions of the Empire bid.<sup>34</sup> NYRA’s tote company is United Tote which is owned by Youbet. Similarly, NYRA and some of the Churchill owned tracks continue to do business with TVG.<sup>35</sup> Nonetheless, the Youbet connections are only discussed in the IG report in connection with Empire and with Fields who may not have had any connection with Suffolk at the time that the Youbet contract was entered into. There is no mention of any relationship between NYRA or Empire with TVG at all. TVG only is discussed in the IG report in connection with Fields.

Another focus in the Excelsior section is on Dr. Jerry Bilinski, who is a member of the Excelsior Advisory Board.<sup>36</sup> While the report describes Dr. Bilinski’s issues with The IG’s office and the State Ethics Commission, the most notable development here is that the IG report manages to toss in State Senate Majority Leader Joe Bruno a number of times in its discussion of Jerry Bilinski. For example, Bilinski in his investigatory interview with the IG’s people, thought he made one out-of-state trip with Senator Bruno<sup>37</sup> Yet, he actually made the trip with another friend.<sup>38</sup> The report notes that Bilinski was also subpoenaed in respect to an ongoing FBI investigation of Senator

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<sup>30</sup> IG Report at 104 -105.

<sup>31</sup> IG Report at 105.

<sup>32</sup> See <http://www.thistledown.com/Handicapping/Overall+Statistics/>

<sup>33</sup> IG Report at 105 -108.

<sup>34</sup> See <http://www.youbet.com/partnertracks/>

<sup>35</sup> See <http://www.tvg.com/Open/Tracks/TVGTracks.aspx>.

<sup>36</sup> Dr. Bilinski is a co-chair of the advisory committee of the Program on Racing and Gaming Law.

<sup>37</sup> IG Report at 112 – 113.

<sup>38</sup> IG Report at 113.

Bruno.<sup>39</sup> The report also mentions that Bilinski was asked by Senator Bruno to become the chairman of the Racing and Wagering Board in 1995. The point here is not the treatment of Jerry Bilinski. The point is that the references to Senator Bruno are superfluous. They have little investigatory significance but only increase the gossip value of the report by throwing in references to the Senate Majority Leader.

Wayne Diesel, another member of the Excelsior Advisory Board, gets mentioned because he was on the board of Friends of New York Racing.<sup>40</sup> and there is an apparent investigation of Jared Abbruzzese for his activities in connection with Senator Bruno. Abbruzzese was also with Friends of New York Racing, but was a major founder of Empire Racing. Even though Diesel is associated with Excelsior bid, he is somehow linked in the report to questions regarding supporters of Empire Racing.

Steven Roth, the CEO of Vornado Realty, seems to receive odd treatment from the IG. He is mentioned as the defendant in a shareholders suit in Delaware<sup>41</sup> His campaign contributions are noted, and he is mentioned as a tough bargainer as part of Vornado's dealings with the Port Authority.<sup>42</sup> What tough bargaining has to do with ethics is not disclosed. Again, gossip is our most important product.

Despite some of the more aggressive shots at part of the Excelsior team, very limited mention in report is made of William Mulrow. Mr. Mulrow is part of the Fields investment with Excelsior, and he is only mentioned as a friend of Governor Spitzer's. In response to this, Mulrow said that his contacts with Governor Spitzer were minimal. He had once taken a group trip to Ireland which included e Governor Spitzer but that he had never discussed the Excelsior bid with Governor Spitzer, never been to Governor Spitzer's house, and never shared a meal with Governor Spitzer.<sup>43</sup> The report does not mention any of Mr. Mulrow's campaign contributions.<sup>44</sup> It does not mention that press reports have called Mr. Mulrow Spitzer's closest political ally,<sup>45</sup> or that reports mentioned that Spitzer sought to make Mulrow the replacement for State Comptroller Alan Hevesi.<sup>46</sup> In short while the report often seems to go out of its way to stir up conflicts, it seems to soft pedal any connections between Governor Spitzer and William Mulrow.

## NYRA

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<sup>39</sup> IG Report at 125.

<sup>40</sup> IG Report at 127.

<sup>41</sup> IG Report at 111.

<sup>42</sup> IG Report at 121.

<sup>43</sup> IG Report at 118.

<sup>44</sup> See

[http://www.elections.state.ny.us/plsql\\_browser/CONTRIBUTORB\\_COUNTY?NAME\\_IN=mulrow&position\\_IN=ANYWHERE&date\\_from=&date\\_to=&CATEGORY\\_IN=IND&office\\_IN=ALL&county\\_IN=AL L&amount\\_from=&amount\\_to=&ZIP1=&ZIP2=&ORDERBY\\_IN=N](http://www.elections.state.ny.us/plsql_browser/CONTRIBUTORB_COUNTY?NAME_IN=mulrow&position_IN=ANYWHERE&date_from=&date_to=&CATEGORY_IN=IND&office_IN=ALL&county_IN=AL L&amount_from=&amount_to=&ZIP1=&ZIP2=&ORDERBY_IN=N)

<sup>45</sup> "Spitzer Unchills," New York Observer, February 6, 2006.

<sup>46</sup> "Already, Signs of Strain," Newsday, January 3, 2007.

NYRA, as a corporation, does better than any other entity in the IG's reports. However, many of the NYRA trustees get hammered. Despite the fact that only negative integrity concerns were supposed to be discussed in the IG report,<sup>47</sup> about a third of the NYRA report is devoted to the reforms adopted at NYRA as a result of the Getnick monitorship. These reforms include: pre-race monitoring barns, a strict drug testing policy, a segregated trust account for horsemen, a refusal to send the NYRA signal to certain rebate shops, a code of ethics, and registration as a money service business. Additionally, NYRA is credited with alerting the Attorney General's office to the possibility of problems involving jockeys carrying more weight than properly than noted in the conditions of the race.

Lacking in this report is any discussion of the efficacies of the NYRA reforms. Has NYRA, in fact, acted strictly against individuals who violated drug rules? If the segregated horsemen's funds worked out well, why are the horsemen suing NYRA in bankruptcy court over the use of these funds?<sup>48</sup> Have the pre-race monitoring barns prevented drug abuses at NYRA when there is a belief that the most contemporary and sophisticated drug cheating schemes are administered well in advance of race day? If NYRA has changed its governance structures, how did it authorize – despite bankruptcy – raises for its management personnel which were recently questioned by the State Oversight Board?<sup>49</sup> Were competitive bidding rules followed at NYRA?<sup>50</sup>

For example, the report credits NYRA with alerting the Attorney General's Office about the jockey weight issue. But, there is never an accounting as to what NYRA officials actually told the Attorney General's office. If there was so much cooperation, why was there a need by the Attorney General's office to raid the NYRA tracks?<sup>51</sup> And if NYRA officials thought something was wrong, why didn't they contact the more appropriate authorities, which would have been a) the NYRA racing office which supervises the clerk of scales office, b) the stewards, c) the Racing and Wagering Board, or d) the local district attorneys who would have presumptively has jurisdiction over all crimes committed at the tracks? Perhaps, if the disclosures had been made to the more appropriate authorities, the jockey weight scandal, if it actually was a scandal,<sup>52</sup> could have been prevented without the public having been misled by incorrect posted jockey weights. In short, the IG report never addresses the issue of whether the Getnick reforms at NYRA are effective or simply window dressing.

Perhaps most significantly, the IG report simply does not treat negative NYRA ethical concerns that seemed to be fairly well known. The large numbers of lawsuits against NYRA that are disclosed in the NYRA bankruptcy filings are not disclosed. The concerns that caused the Ad Hoc Committee to grade NYRA below Empire and Excelsior in ethics are not mentioned. These concerns were the regulatory actions taken by governmental

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<sup>47</sup> See note 11 supra.

<sup>48</sup> IG Report at 42; "Horsemen Sue NYRA Over Purses," Daily Racing Form, December 6, 2006.

<sup>49</sup> "NYRA Raises, Pension Contributions Questioned", Associated Press, June 1, 2007

<sup>50</sup> IG Report at 41.

<sup>51</sup> "Jockey 'Weight' Scandal," New York Post, December 16, 2004.

<sup>52</sup> Two and a half years after the tracks were raided by the Attorney General's office, the criminal cases are still pending against the NYRA clerks.

authorities against NYRA and the fact that many NYRA trustees who were on the NYRA board during the pre-Getnick scandals remain on the NYRA board.<sup>53</sup> By contrast, the regulatory issues involving the racetracks associated with the Empire Racing bid are highlighted in the IG's report.<sup>54</sup> While the other bidders have ethical and corporate compliance programs,<sup>55</sup> none of them are given serious consideration by the IG. NYRA – as a corporate entity – is accorded far better treatment than its rivals.

The same cannot be said about NYRA's trustees. Al Fried gets cited for a 29 year old SEC violation and for a real estate transaction in Utah where the alleged misdeed was committed by the CEO of a company who sold the property to Fried.<sup>56</sup>

Fairly recent NYRA trustee Leonard Riggio gets hammered in the report. He failed to supply tax returns to the IG's people.<sup>57</sup> He is the subject of a shareholder's derivative action at Barnes and Noble<sup>58</sup> which the SEC is apparently looking onto,<sup>59</sup> and was dismissed as a trustee at Adelphi.<sup>60</sup> He also refused to make his tax returns available.<sup>61</sup> Trustee Joseph Cornacchia was cited for owning horses with a mob associate, a member of the Ad Hoc Committee, and for a donation to Governor Pataki who had appointed him to the NYRA board.<sup>62</sup>

NYRA trustees with tax liens included Richard Santulli, John Meriwether, and Steven Duncker.<sup>63</sup> Trustee Stuart Subotnick is cited for his donation to Governor Pataki,<sup>64</sup> his campaign donations to the 2002 Spitzer campaign,<sup>65</sup> and for an SEC investigation of his corporation.<sup>66</sup> Finally trustee Meriwether is cited for an SEC violation,<sup>67</sup> and for being involved in the notorious Long-Term Capital Management collapse.<sup>68</sup>

The NYRA trustees are cited by the IG for a host of concerns, whether or not these concerns are new or old, real or illusory, or significant or trivial.

### Empire<sup>69</sup>

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<sup>53</sup> Report of Ad Hoc Committee on the Future of Racing, February 21, 2007 Pg. 194  
[http://ftp.racing.state.ny.us/ad\\_hoc\\_docs/Report/Report,%20February%2021,%202007.pdf](http://ftp.racing.state.ny.us/ad_hoc_docs/Report/Report,%20February%2021,%202007.pdf)

<sup>54</sup> IG Report at 86 -88.

<sup>55</sup> See the Report of the Ad Hoc Committee supra at note 53.

<sup>56</sup> IG Report at 51

<sup>57</sup> IG Report at 46

<sup>58</sup> IG Report at 47.

<sup>59</sup> IG Report at 52

<sup>60</sup> IG Report at 48 and 53.

<sup>61</sup> IG Report at 46.

<sup>62</sup> IG Report at 50, 54, and 55.

<sup>63</sup> IG Report at 49 -50.

<sup>64</sup> IG Report at 50.

<sup>65</sup> IG Report at 51.

<sup>66</sup> IG Report at 56.

<sup>67</sup> IG Report at 48.

<sup>68</sup> IG Report at 55.

<sup>69</sup> Albany Law School received \$25,000 from Friends of New York Racing in March of 2005 for work on a study of a revised Racing Law for New York State.

Empire Racing receives appreciably worse treatment than any of its major rivals. One concern voiced by Empire partisans is that the report performed on Empire by the consulting firm of Thacher Associates was performed in large measure by a former employee of Getnick and Getnick who might have some predisposition against the individuals who helped found Empire Associates. As reported it appears that Getnick and Getnick may have played a role in denying Tim Smith – who is treated in the Thacher report as the patriarch of Empire - a position as CEO of NYRA.<sup>70</sup>

The crux of the Empire complaints involves the inclusion of the special report on the relationship between Friends of New York Racing (Friends) and Empire Racing Associates. In large measure this report tries to establish the link between Tim Smith the head of the non-profit group Friends and Empire Racing. The contention seems to be that Smith used a non-profit group to form and to profit from the for-profit group Empire Racing.

The problem is that the relevancy and the proof are missing from the Thacher report.

The relevancy issue comes first. The Thacher report deals with Tim Smith and secondarily Jared Abbruzzese who no longer have any connection with Empire. It is unclear whether Tim Smith ever had any connection with Empire. The Thacher report shows that he made an investment in Empire,<sup>71</sup> but we have no idea what Smith actually invested. Without this information, how can we even guess as to whether Smith used Friends to establish Empire as a vehicle from which he could profit? If this was a modest investment, is this an issue at all?

Abbruzzese was an original founding member of Empire, but apparently left Empire in the fall of 2006 near the time that word spread that he was the subject of several criminal investigations. The relevance issue is as follows. If the IG's report does not review the ethics of former investors in Excelsior (the Steinbrenner family) or the ethics of former NYRA trustees (Say Barry Schwartz or Gene Melnyk), why are the ethics of former Empire investor Abbruzzese and former Friends head Smith relevant? There is simply a level of scrutiny applied to Empire that was not applied to its rivals.

Beyond that, the actual Thacher work product is not at all helpful. Again, the notion is that Smith and his Friends investors -especially Abbruzzese - morphed Friends into Empire. It is clear from the report that the only listed sources for the material are people associated with Empire's rivals at NYRA<sup>72</sup> and Excelsior.<sup>73</sup> It is obvious that Thacher did not talk to

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<sup>70</sup> IG Report at 63.

<sup>71</sup> IG Report at 69.

<sup>72</sup> NYRA President Charles Hayward and NYRA trustee Barry Ostrager.

<sup>73</sup> Trainer Gary Contessa who is on the advisory board of Excelsior. The Thacher report needs clarification here. It reports that the horsemen's board voted 9-1 in support of Empire with only board member Michael Shanley voting against Empire. The report identifies Gary Contessa as a board member who clearly was dissatisfied by the vote for Empire. How did Contessa vote? Did only the executive committee of the full horsemen's board vote? Why wouldn't the full horsemen's board vote? IG Report at 68.

Abbruzzese or Smith. Much of the Thacher report is unsourced, making it next to impossible to judge the validity of the Thacher commentaries. The issue should be – again if it is relevant – did Smith and his associates do anything unethical or illegal at Friends in whatever work they may have done to help establish Empire. The record from the Thacher report is obviously bare on his point. Smith made a presentation to the horsemen’s group on behalf of Empire after Friends had concluded its work.<sup>74</sup> He invested something in Empire. Five of the top ten contributors to Friends invested in Empire. Was any of this illegal or unethical? Thacher tries to place a negative spin on this, but there is nothing in this report that would make it unethical or illegal.

One of the more questionable documents is the table produced on page 74 of the report showing the major investors (over \$25,000) in Friends and their subsequent role. The report lists eight entities. Six of them invested in Empire. One other was the apparently ethically suspect Youbet, and the other was the Jockey Club. What the table doesn’t contain are the other major contributors to Friends that did not invest in Empire. These were the Breeders’ Cup, Keeneland, Oak Tree, and John Oxley. None of these contributors invested in Empire. So of the 13 largest contributors to Friends, six had no connection to Empire, and one –the Abbruzzese entity– left Empire. You wouldn’t know it from the table.

The Thacher report concludes that the weight of the evidence is that Empire was not created by New York horsemen for New York horsemen. If it received the franchise, the horsemen would likely lose control to out-of-state interests.<sup>75</sup> The problems with this conclusion are many. One is this an ethics concern at all? If the New York horsemen supported Empire and were part of the negotiations with the other partners in Empire, why is this an ethics issue, and what does this have to do with the relationship between Friends and Empire which is supposed to be the subject of the Thacher report. Secondly, what evidence is there that Empire will be effectively taken over by its out-of-state partners? Finally, isn’t the conclusion directly contradicted by the non-Thacher part of the IG report on Empire which states that “most of the individual members of Empire are horse owners or breeders”<sup>76</sup> and that the out-of-state interests are relegated to 30% of Empire.<sup>77</sup> This conclusion is of limited relevance and has little factual support in the text of the report.

The other conclusion of the Thacher report has Tim Smith saying that if he went down, others would go down with him.<sup>78</sup> Again, there is no source offered for this Jimmy Cagney style statement. In fact, other than its gossip appeal, there is a limited notion of what it actually refers to. Thacher suggests that this might have something to do with the Lobbying Commission, but that is sheer conjecture. It exists to put a negative spin on Empire.

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<sup>74</sup> IG Report at 68.

<sup>75</sup> IG Report at 73.

<sup>76</sup> IG Report at 57.

<sup>77</sup> IIG Report at 58.

<sup>78</sup> IG Report at 73.

On the parts of its Empire report, the IG devotes four pages of its report to Abbruzzese and his political contributions and relationships with Senator Bruno and his family.<sup>79</sup> It goes into the political contributions made by Empire Racing<sup>80</sup> although the IG report never looks into the political contributions of NYRA's PAC or NYRA's trustees.<sup>81</sup> The report excoriates the record of Scientific Games and its history of sordid relationships with lotteries in North Carolina and Colorado.<sup>82</sup> Based on this discussion, you might wonder why Scientific Games supplies instant tickets for the State Lottery in New York.<sup>83</sup> Other individuals and entities cited in the IG report on Empire for ethical concerns are investor/horseman/ board member Michael Dubb<sup>84</sup> (many lawsuits), investor/horseman Richard Simon<sup>85</sup> (judgments and tax lien), and investor the Cordish Company<sup>86</sup> (concerns about tax exempt financing).

With this attention to its founding, Tim Smith, and Jared Abbruzzese, Empire Racing fares far worse in the IG's report than its competitors for the racing franchise. The problem with the IG report on Empire is that so much of the Thacher part of the report is unsubstantiated, biased, and conclusory, that it detracts from whatever value the IG's report on Empire might otherwise have.

### Gossip

Here comes the real value of the IG report It is the gossip factor. Senate Majority Leader Joseph Bruno is obviously a key figure in New York state government. He has had a significant interest in New York racing, but one would think that his presence would be a secondary one – if not a tertiary one - in a report about the ethics of the bidders for the NYRA franchise. Yet the words “Bruno” and “Bruno's” appear 53 times in the IG report in referring to Senator Bruno and his son Kenneth. By contrast, Assembly Speaker Sheldon Silver is mentioned twice – and only in connection with the fact that Speaker Silver and his wife dined with Steve Wynn's current general counsel in Las Vegas in 2002.<sup>87</sup> At the time of the incident, the counsel was not employed by Wynn and did not work for any of the bidders for the franchise. The reference to Speaker Silver was far-fetched enough in the report, but Senator Bruno is thrown in – especially in the Thacher Report – whenever it could be considered convenient.

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<sup>79</sup> IG Report at 89 -92. Again, a comparison would be to the Steinbrenner interests at Excelsior. If Abbruzzese who left Empire in October of 2006 is relevant, why aren't the Steinbrenners who left Excelsior in March of 2007?

<sup>80</sup> IG Report at 94.

<sup>81</sup> See New York Thoroughbred Racing Industry PAC reports at [http://www.elections.state.ny.us/plsql\\_browser/getfiler2?filerid\\_in=A05881](http://www.elections.state.ny.us/plsql_browser/getfiler2?filerid_in=A05881).

<sup>82</sup> IG Report at 85, 87, and 92 -93.

<sup>83</sup> See <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-10-2006/0004279261&EDATE=>

<sup>84</sup> IG Report at 84.

<sup>85</sup> IG Report at 88.

<sup>86</sup> IG Report at 87 -88.

<sup>87</sup> IG Report at 122..

The gossip and Senator Bruno include the following:

1. Tim Smith and Senator Bruno thought it was a good idea to continue the Getnick monitor ship beyond mid -2005.<sup>88</sup>
2. In November of 2005, Senator Bruno and his major aides had a meeting to discuss NYRA. While NYRA people were present, then NYRA co-chairman Steven Duncker was not asked to attend. Senator Bruno denigrated Duncker and his co-chair Peter Karches at the meeting and Joseph Torani, a friend of Senator Bruno's and Senator Bruno's appointee to the NYRA Oversight Board, said Senator Bruno wanted both Duncker and Karches to resign.<sup>89</sup>
3. The report highlights what it terms the questionable dealings between Senator Bruno and Jared Abbruzzese.<sup>90</sup>
4. The report mentions Senator Bruno in connection with all the ethical issues concerning Dr. Jerry Bilinski at the Racing and Wagering Board.<sup>91</sup>
5. The report mentions Senator Bruno's campaign committees made loans to a corporation which was headed by NYRA board member Timothy McGinn.<sup>92</sup> The report suggests that loans were unusual but legal.

The reference to Senator Bruno make good reading for page six of the New York Post, but they are of limited value in evaluating the bona fides of the franchise bidders.

Much of the same gossip value can be applied to Tim Smith.

1. Tim Smith told many people in the summer of 2004 that he was going to be the next CEO of NYRA. He asked Charlie Hayward to head Friends, which would be the cover group to take NYRA private.<sup>93</sup>
2. Smith's CEO plans seemed to be thwarted by Getnick and Getnick which apparently believed that Smith's privatization plans would be a conflict of interest. Smith told Hayward he had underestimated the monitor.<sup>94</sup>
3. Smith urged Hayward to apply for the NYRA CEO position.<sup>95</sup>
4. Smith knew that Jared Abbruzzese had major clout with Senator Bruno.<sup>96</sup>

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<sup>88</sup> IG Report at 63.

<sup>89</sup> IG Report at 66.

<sup>90</sup> IG Report at 89 -92.

<sup>91</sup> IG Report at 125 and 126.

<sup>92</sup> IG Report at 55.

<sup>93</sup> IG Report at 63.

<sup>94</sup> IG Report at 63. Why privatization would be a conflict but NYRA's present plan to switch from its status as a nonprofit racing association to a traditional not-for-profit corporation is not discussed.

<sup>95</sup> IG Report at 63.

5. In August of 2005, Smith told Barry Ostrager that he planned to take NYRA private.<sup>97</sup>
6. With the Jockey Club withholding \$500,000 of its promised \$1 million commitment to Friends, the Smith effort to take NYRA private likely faltered.<sup>98</sup>
7. Smith offered the job of head of the for-profit racing association to Greg Avioli in October of 2005.<sup>99</sup>
8. Smith told the horsemen's board that if they invested \$50,000 they would earn a million.<sup>100</sup>
9. Smith said that if he wasn't going to take the fall alone.<sup>101</sup>

#### The Other Gossip Snippets

1. Former Assembly counsel Michael Boxley is part of the Excelsior team.<sup>102</sup>
2. Dennis Brida was able to handpick his successor Richard Bomze, as head of the horsemen.<sup>103</sup> Who knew that Dennis Brida had this kind of clout?
3. Fingerprint packets were never received from Jeffrey Tucker, Steve Wynn, David Smuckler, Richard Santulli, and Georgette Mosbacher.<sup>104</sup>
4. The IG's people and the consultant met with Neil Getnick to get a better understanding of the issues.<sup>105</sup>
5. An undisclosed key person at Empire was arrested for driving under the influence. The case is still pending, and the arrest was not disclosed.<sup>106</sup>
6. Barry Ostrager thought that Tim Smith's investors were carpet baggers and opportunists.<sup>107</sup>

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<sup>96</sup> IG Report at 66.

<sup>97</sup> IG Report at 65.

<sup>98</sup> IG Report at 67.

<sup>99</sup> IG Report at 66.

<sup>100</sup> IG Report at 68.

<sup>101</sup> IG Report at 73.

<sup>102</sup> IG Report at 119.

<sup>103</sup> IG Report at 69.

<sup>104</sup> IG Report at 26.

<sup>105</sup> IG Report at 31.

<sup>106</sup> IG Report at 88.

<sup>107</sup> IG Report at 65.

Instead of a substantive report on the bona fides of the applicants for the racing franchise, the IG delivered gossip. \$3.2 million doesn't seem to produce that much anymore. It might earn you an apprenticeship for Page Six of the New York Post, but not much else.

### Conclusion

Governor Spitzer's press release accompanying the IG report stated that the IG's report "illustrates why racing is one of the most heavily regulated industries in the nation. History has shown that large amounts of cash at stake in racing pose risks for illegal activities including money laundering at rebate shops, tax schemes, and race fixing."<sup>108</sup>

If that is the case, then racing regulation has failed abjectly. With all the wrongdoing and questionable practices mentioned throughout the IG's report, have any of the individuals been stopped from participating in racing? There are a few minor suspensions and fines applied to trainers and horse owners, but everyone else mentioned in this report has maintained their pristine record of licensure. Nobody has even stopped Caliente from doing business. The racing commissions are the ones authorizing a license for Burton Sipp. If horse racing needs strict regulation, it is not getting it anywhere.

Moreover, the IG states at the conclusion of the report, that this report "reflects all the significant negative information relating to the integrity of a potential licensee."<sup>109</sup> The IG also believes that the report "makes an important contribution"<sup>110</sup> to applying the standards of integrity and ethics. The self-congratulatory tone is unwarranted. Just like racing regulation, the IG's report just doesn't work.

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<sup>108</sup> See note 3 supra.

<sup>109</sup> IG Report at 145.

<sup>110</sup> IG Report at 145.