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Office of the Inspector General

Investigation Regarding the Selection of Aqueduct Entertainment Group to Operate a Video Lottery Terminal Facility at Aqueduct Racetrack

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I. INTRODUCTION

A. Allegation

On January 29, 2010, Governor David A. Paterson announced that "he and Legislative Leaders have selected Aqueduct Entertainment Group (AEG) to operate a video lottery terminal facility at Aqueduct Racetrack."[1] This selection prompted immediate public outcry regarding the legitimacy of the selection process. Initially, among other claims, numerous reports in the *New York Daily News*, the *New York Post* and the *New York Times* detailed the selection of AEG, chosen by Governor Paterson, New York State Assembly Speaker Sheldon Silver and New York State Senator John Sampson despite offering an upfront licensing fee that was $100 million less than other bidders'. These reports coincided with earlier stories that politically influential members of AEG's had caused Governor Paterson to "flip-flop" on his choice.[2] It later became known that Governor Paterson had met with the Reverend Floyd H. Flake, a prominent member of the AEG group, three days after the AEG announcement, purportedly to discuss Flake's endorsement of a candidate for Governor in the 2010 election.[3] Newspaper accounts accused the Governor of selecting AEG in order to garner Flake's support.[4] Allegations later surfaced, buttressed by documents publicly released by the

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[1] *See* Statement of Governor David A. Paterson (1/29/10) available at http://www.state.ny.us/governor/press/press_01291002.html
[2] "Gov's casino flip stirs fears of rigging," *New York Post*, October 12, 2009.
[3] "After Aqueduct Deal, Governor and Pastor Talk Politics," *New York Times*, Feb. 3, 2010.
[4] *See* "Bad Smells at Aqueduct," *New York Daily News*, Feb. 4, 2010; "Wake Up, New York," *New York Post*, Feb. 7, 2010; "Why So Secret, Mr. Paterson?" *Albany Times Union*, Feb. 7, 2010.

Governor, that AEG had altered its bid after all other bidders had submitted their final offers.[5]

Pursuant to Executive Law Article 4-A, the Inspector General is statutorily charged with the authority to "receive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in any covered agency, " and to "review and examine periodically the policies and procedures of covered agencies with regard to the prevention and detection of corruption, fraud, criminal activity, conflicts of interest or abuse."[6] A host of executive agencies within the Inspector General's jurisdiction participated in the evaluation process including the Division of the Lottery (Lottery), the Office of General Services (OGS), the Division of the Budget (DOB), the Racing and Wagering Board and the Empire State Development Corporation (ESDC).

In February 2010, in the wake of the aforementioned reports of possible improprieties in the process of choosing a vendor to operate a video lottery terminal (VLT) facility at Aqueduct Racetrack, actuated by the public call to review the procedure resulting in the selection of AEG and to ensure its validity and the absence of corruption in the process, the New York State Inspector General commenced an investigation of the executive officials and agencies involved in the process of evaluating and selecting the VLT franchisee for Aqueduct.[7] Shortly thereafter, by letter dated February 11, 2010,

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[5] "Feds galloping into probe of controversial Aqueduct racino deal," *New York Daily News*, Feb. 18, 2010.
[6] N.Y. Exec. Law §§ 53(1) and (5).
[7] At the outset of this investigation, while not legally required and in an abundance of caution, Inspector General Fisch recused himself from the investigation due to the fact that he was appointed by Governor Paterson and statutorily reports to Secretary to the Governor Schwartz. Special Deputy Inspector General Philip Foglia was designated to supervise the matter within the Office of the State Inspector General. At the conclusion of the investigation, during which Inspector General Fisch had totally separated himself, Inspector General Fisch reviewed the report prepared by staff to ensure that it met standards and to prepare him, as head of the office, to present the report to the public.

Speaker Silver requested that the Inspector General commence an investigation of the process by which Lottery and other executive agencies analyzed the bidders for the Aqueduct VLT franchise. Silver's letter stated:

> Serious questions have been raised regarding the selection process for an operator of the video lottery terminal (VLT) facility at the Aqueduct Racetrack. Accordingly, I am respectfully requesting that the Office of the State Inspector General take the following actions:
>
> 1. Conduct a review of the process and procedures used by the NYS Division of the Lottery and other relevant state agencies involved in the evaluation of bids and in the making of recommendations for the selection of such operator, and determine which bidders were recommended pursuant to such process.
>
> 2. Determine whether the Division of the Lottery and relevant state agencies followed all applicable statutory provisions such as those governing the procurement of revenue contracts under the State Finance Law and the procurement of a VLT operator and the development of real estate at Aqueduct in accordance with section 1612 of the Tax Law.
>
> 3. Inquire how the Division of the Lottery will assure that the conditions I conveyed to the Governor on January 29, and restated in my February 3rd letter to him, are met.[8]

B. Methodology

1. Investigative Steps

The Inspector General employed an array of investigative techniques in the inquiry that resulted in this report. Pursuant to Executive Law Article 4-A, "covered agencies" within the Inspector General's jurisdiction comprising "all executive branch agencies, departments, divisions, officers, boards and commissions, public authorities (other than multi-state or multinational authorities), and public benefit corporations, the

[8] The four conditions to AEG's selection required by Speaker Silver for his approval of AEG are discussed later in this report.

heads of which are appointed by the governor and which do not have their own inspector general by statute," are required to provide documents and witnesses to the Inspector General without resort to a subpoena. As such, the Inspector General issued six letter requests to governmental entities. In addition, the Inspector General issued seventy-nine subpoenas to obtain relevant materials. The Inspector General examined approximately 240,000 document pages and approximately 500,000 e-mails. The Inspector General interviewed 65 individuals in 82 interview sessions,[9] generating over 4,400 transcript pages of sworn testimony. Confidential witnesses were also utilized.

Two witnesses, AEG lobbyist Hank Sheinkopf and Executive Chamber employee David Johnson, asserted their rights under the Fifth Amendment to the U.S. Constitution and refused to answer questions on the ground that their answers may incriminate them in a criminal proceeding. Another witness, the ostensible head of AEG, Richard Mays, resides out of state, beyond the reach of the Inspector General's subpoena power, and all attempts to secure his attendance were unavailing. Several witnesses, most notably Counsel to the Governor Peter Kiernan, asserted attorney-client privilege in regard to some questions propounded. Karl O'Farrell, the founder of AEG, upon the advice of counsel, refused to answer certain questions professing that they were beyond the scope of the Inspector General's authority.

2. The Senate and AEG Lobbyist Carl Andrews File Lawsuits to Prevent Disclosure

In the course of this investigation, the Inspector General was compelled to litigate two motions filed in State Supreme Court in an effort to forestall compliance with his subpoenas: one by Senators Sampson and Pedro Espada, Jr., and the Senate (at

[9] A number of witnesses were interviewed more than once.

Sampson's direction as Senate leader) as a whole;[10] the other by key AEG lobbyist Carl Andrews. That, notwithstanding the numerous subpoenas served by the Inspector General in furtherance of this inquiry, only Sampson and Andrews challenged the Inspector General's authority appears not to be coincidental. Indeed, Andrews, a former state senator, was retained by AEG solely to lobby the Senate, and his interactions with the Senate and Sampson in particular, comprise the focal point of many aspects of AEG's selection.

The Senate, Senators Sampson and Espada

At the inception of its investigation, the Inspector General by letter requested relevant documentation from the applicable executive branch agencies and the Senate and Assembly. The executive branch agencies and Assembly immediately avowed they would voluntarily comply and throughout this investigation supplied records and provided sworn testimony without the need for compulsory process. Of the state agencies and actors, only the Senate, at Sampson's direction, attempted to impede the Inspector General's review.

Shortly after the Inspector General sent the above-mentioned letters to the senators seeking their voluntary corporation, Counsel to the Majority Shelley Mayer informed the Inspector General that the Senate would cooperate fully, but quickly withdrew this offer of cooperation and indicated that the Senate would not voluntarily comply with the Inspector General's requests and would be represented by outside, privately retained counsel. Accordingly, on or about March 9, 2010, the Inspector General served subpoenas on Senators Sampson and Espada and the Senate. On March

[10] Senator Malcolm Smith retained separate private counsel and was not a party to this lawsuit.

23, 2010, Sampson and Espada and the Senate commenced a lawsuit in State Supreme Court, New York County, to quash the Inspector General's subpoenas. In this lawsuit, the Senate contended that a provision of the State Constitution, the Speech or Debate Clause, existing to protect legislative debate, shielded the Senate and senators' actions in this multi-billion dollar procurement from public scrutiny. The Senate further claimed that the Inspector General had exceeded its jurisdiction.

Notably, the Senate not only attempted to inhibit public review of its actions, but even attempted to prevent public knowledge of its lawsuit against the Inspector General. Specifically, in its legal papers, at Senator Sampson's direction, the Senate sought a "sealing order," a legal device commonly associated with protecting vulnerable litigants such as juveniles, which would have rendered the entire proceeding unavailable to the public. After strenuous objection by the Inspector General and the request for a short deadline for responses to the motion so that the sealing order could be imminently readdressed, the Senate's counsel acquiesced in exchange for later deadlines. Justice Joan Lobis therefore denied the Senate's efforts to legally conceal its actions.

On March 31, 2010, Justice Lobis denied the Senate's motion and ruled that "the acts that are being investigated are truly more akin to those of the executive and the executive branch than something privilege should attach to. Therefore – and let me say that the first and third arguments raised by petitioners [the claims that the Inspector General had exceeded its jurisdiction and the materials subpoenaed were irrelevant] I find without merit, that there was, in fact, a reason for the investigation and the requests and subpoenas are relevant to such investigation."

Although the Senate initially voiced its intent to appeal the Supreme Court's decision, it relented shortly thereafter and submitted to the Inspector General's authority.

Carl Andrews

On February 19, 2010, the Inspector General served a subpoena on Carl Andrews & Associates. Andrews, a former state senator and member of the executive chamber, had been retained by AEG to lobby the Senate on its behalf. After a meeting with officials from the Office of the Inspector General was terminated upon Andrews's refusal to answer certain questions, on April 23, 2010, Andrews filed a motion in State Supreme Court to quash the Inspector General's subpoena. Similar to the Senate's lawsuit, Andrews claimed that the Inspector General lacked jurisdiction to obtain the information in his possession. On September 24, 2010, Justice Saliann Scarpulla denied Andrews's motion and ruled that Andrews's claims were "unavailing" and "without merit" in that the Inspector General was "well within its authority" to pursue the investigation and the information sought from Andrews was relevant to this legitimate inquiry. On or about October 6, 2010, Andrews filed a Notice of Appeal.

II. BACKGROUND

A. History of Aqueduct Racetrack and Video Lottery Terminal Facility

Aqueduct Racetrack is a thoroughbred horse racing facility located in the neighborhood of Ozone Park in the New York City borough of Queens. Originally opened on September 27, 1894, Aqueduct Racetrack was named for the Queens neighborhood where a conduit for the Brooklyn Water Works was built in the 1850s. In 1941, new track offices and a clubhouse were built. In 1955, the State Legislature awarded to the Greater New York Association (which later became the New York Racing Association, or NYRA), a not-for-profit association, the exclusive franchise to conduct thoroughbred racing and pari-mutuel betting at Belmont Park, Aqueduct, and Saratoga racetracks. NYRA decided to upgrade Aqueduct, closed it for renovations, invested $33 million in a new racetrack, and reopened it in 1959. By 1960, Aqueduct had become one of the nation's leading horse racing tracks.

Subsequently, NYRA's horse racing franchise rights were expanded to include legislative authorization for the granting of a license to operate video lottery terminals, or VLTs, at Aqueduct Racetrack.[11] The combination of racetrack and VLTs has been referred to as a "racino." In 2003, NYRA reached an agreement with MGM-Mirage to install 4,500 slot machines at Aqueduct. On December 4, 2003, NYRA was indicted by

[11] In its ruling that VLTs are "lotteries" permitted under the State Constitution, the Court of Appeals explained: "The video lottery is played using video lottery terminals, which are each connected to a central system through the use of 'site controllers'-computers that connect several VLTs both to each other and to the central system. In the most common form of video lottery gaming, participants at individual VLTs play against each other by purchasing electronic instant tickets from a finite pool. In order to play, individuals place cash or other currency into the VLT to purchase an electronic instant ticket. The player then determines the 'game identifier' and the price of the electronic ticket to be purchased. The VLT receives the next ticket from the site controller and displays the predetermined outcome-win or loss. If the player

the United States Attorney's Office for the Eastern District of New York for crimes including conspiracy to defraud the United States and aiding and abetting false tax returns. On December 10, 2003, NYRA accepted responsibility for the conduct alleged in the indictment and entered into a deferred prosecution agreement on condition that it would undertake various reforms and remedial measures under the supervision of a court-appointed monitor. Pursuant to this agreement, the indictment was ultimately dismissed in September 2005, and contributed to the delay of the implementation of the deal with MGM-Mirage. On December 30, 2005, the New York State Lottery Commission approved MGM-Mirage's contract to operate VLTs at Aqueduct. Thereafter, further delays led to the abandonment of the project by MGM-Mirage in 2007. Additionally, while NYRA awaited state approval to operate VLTs at Aqueduct, Lottery extended loans to NYRA to maintain its solvency until revenue could be generated from VLTs at Aqueduct Racetrack.

NYRA's franchise was scheduled to expire on December 31, 2007, unless further extended by the Legislature. In August 2005, Governor George Pataki formed the Ad-Hoc Committee on the Future of Racing to solicit and review proposals from bidders seeking the racing franchise effective January 1, 2008. However, the franchise award was legislatively dictated pursuant to the Racing, Pari-Mutuel Wagering and Breeding Law § 208. The recommendation of the Ad-Hoc Committee was neither binding on the Governor nor the Legislature, with the final franchise award to be granted through the legislative process.

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wins, the VLT will print an 'electronically encoded instrument' which can be used to play additional video lottery games or can be redeemed for value." *Dalton v. Pataki*, 5 N.Y.3d 243, 265 (2005).

In early 2007, reports indicated that then-Governor Eliot Spitzer was considering closing Aqueduct and selling the 192-acre track and its stables, which currently house 400 horses, to developers when NYRA's lease expired at the end of 2007. Governor Spitzer reconsidered this move after rejecting the recommendation of the Ad Hoc Committee, and, on February 28, 2007, formed a new panel, the Franchise Review Panel. This panel, headed by Richard Rifkin, Special Counsel to the Governor, solicited and reviewed new bids for the management of the thoroughbred racetracks and associated VLTs. Governor Spitzer pledged to make integrity a prerequisite for any firm seeking to obtain the racing franchise, and, to that end, in early March 2007, the Governor's Office requested that the Office of the State Inspector General assist the panel by reviewing the integrity of the companies that had identified themselves as bidders. The Inspector General presented its report to the Franchise Review Panel on or about July 1, 2007.[12]

As of late December 2007, however, no decision had been made regarding the bids for the racing franchise, and NYRA's franchise was temporarily extended, in conjunction with supervision by a state oversight board, in order to avoid interruption in racing while negotiations on a new franchise continued.

In early 2008, NYRA, then in bankruptcy, reiterated its claim of ownership of the land upon which the three thoroughbred racetracks had been built, thus raising an enormous obstacle to the award. In February 2008, an agreement was reached with the state wherein NYRA would surrender its claim of title to the three racetracks, vesting clear ownership to New York State, in exchange for receipt of a new 25-year racing franchise plus a $105 million advance from the state to allow NYRA to remove itself

[12] http://www.ig.state.ny.us/pdfs/Supplementary%20Report%20to%20the%20Governor,%2010-31-07.pdf. For the 2007 report, the Inspector General utilized outside auditors and then culled together the findings.

from bankruptcy. This $105 million was to be repaid from revenue derived from the VLTs that had been previously authorized for Aqueduct. The settlement awarded NYRA the rights to operate thoroughbred horse racing at Belmont Park, Aqueduct and Saratoga, with the intention that the state would grant a separate franchise to operate VLTs at Aqueduct.[13]

B. Enactment of Chapter 18 of the Laws of 2008 (Tax Law § 1612(e))

Although it is not the special province of the Inspector General to opine on the wisdom of legislation enacted by the Legislature and signed into law by the Governor, any meaningful review of an aspect of the process for selecting a vendor to operate the VLT facility at Aqueduct necessarily requires an analysis of the statute which provides the mechanism for that choice. In the case of the Aqueduct VLT selection process, this inevitable examination reveals an inherently problematic statute which serves as the root cause of the issues that pervaded the process which resulted in the selection of AEG. Indeed, although the flawed nature of this provision does not excuse the poor and self-interested manner in which it was implemented by the executive and legislative branches, the process was doomed from the outset by a statute born of political considerations and not the public good.

On February 19, 2008, Governor Spitzer signed into law Chapter 18 of the laws of 2008 which, among other things, pertained to the selection of a VLT operator at Aqueduct. Although this statute, codified in relevant part in Tax Law § 1612, sets forth

[13] In fact, the newly enacted law specifically proscribed the operation of the VLT facility by the racing operator. Chapter 18 of the Laws of 2008, NY Racing, Pari-mutuel Wagering and Breeding Law section 206(1) states in pertinent part, "Notwithstanding any provisions of law to the contrary the franchised corporation [NYRA] shall not conduct, manage or otherwise operate video lottery gaming activities on the lands of the state racing franchise."

some minimal parameters for the ultimate agreement between the state and the chosen VLT operator (generally related to the percentage of income to be transmitted to the state and other financial considerations), in regard to the issue germane to this report – the process for selecting the actual operator – the statute is summary and uninformative. In relevant part, Tax Law § 1612(e), tersely provides: "The video lottery gaming operator selected to operate a video lottery terminal facility at Aqueduct will be subject to a memorandum of understanding between the governor, temporary president of the senate and the speaker of the assembly."

The importance of the selection of an appropriate VLT operator for Aqueduct cannot be over emphasized due to not only the lucrative nature of the award but also the long term impact of this choice on the surrounding community and the anticipated revenue generated for education in New York State. Because the chosen operator will not only construct the facility, but will also be granted a 30-year lease with the possibility of a 10-year extension, this decision will have an effect on the Queens neighborhood in which it is located as well as upon the state's finances for at least three decades. New York State law currently allocates the revenue from the VLTs at Aqueduct as follows: the state education fund receives 44 percent; the VLT operator retains 23.5 percent; the Lottery receives 10 percent; 8 percent goes to marketing the facility; and 14.5 percent supports horse racing. As will be explained later in this report, the projected revenue for the state education fund alone over a 14-year period is approximately $3 billion.

New York State government, in particular its budgetary process, has long been criticized for distilling the operation of government into the decisions of "three men in a room" – the Governor, the leader of the Senate, and the Speaker of the Assembly. In

enacting Tax Law § 1612(e), in addition to eschewing the normally applicable procurement process with its restrictions on lobbying and requirement of a fair and competitive bidding, the Legislature and Governor Spitzer shed all pretense of implementing an objective, apolitical process. Instead, Tax Law § 1612(e), which explicitly requires consent of the three individual leaders, stands as the codification of "three men in a room" government with all its pernicious consequences. Indeed, this provision serves as the culmination of three-men–in-a-room governance in that, unlike budget bills, the leaders' choice is not even subject to vote or debate by the full Legislature.

At the time of enactment of § 1612, the three actors mentioned in the statute were Governor Eliot Spitzer, Assembly Speaker Sheldon Silver and Temporary President of the Senate Joseph Bruno.[14] Various witnesses informed the Inspector General that this statute was the result of a political compromise between Governor Spitzer and his rival Senate leader Bruno. As stated by John Sabini, currently Chairman of the State Racing and Wagering Board, but a state senator and member of the Senate's Racing and Wagering Committee at the time the statute was enacted, "Clearly this process was designed when Senator Bruno was one of three and wanted to protect his turf, and said so, particularly since he represented a district that was very racing oriented, having Saratoga County in his district or the bulk of Saratoga County in his district."

Veteran Albany attorney, lobbyist, and racino bidder Delaware North principal James Featherstonhaugh echoed this common sentiment: "I believe it came from my friend, Joe Bruno's insistence . . . at the end of the day he knew this was a lot of money

and the state was going to want it, and that probably he could get what he wanted . . . Governor Spitzer at the time was . . . either the bulldozer or steamroller, or something – whatever he was calling himself – was trying to get a lot of things done in a hurry. And I think he at the time brought them up. Sure why not . . . I think the process, it's a process that's in their minds was going to make this a completely political choice. It didn't matter what the best value was or anything . . . You can't possibly look at this process and not go, 'Oh, my God, how was this devised?' But I think it was really just an issue of Joe wanting to make sure he didn't get jammed by Eliot and Shelly."

In retrospect, Featherstonhaugh elaborated, based upon his experience with the process, "It's like Dracula, you can't kill it. You can't get anybody selected, and when you think you've driven a stake through its heart, it rises again."

When asked if he was troubled by the political nature of § 1612, Sabini remarked, that "from a stylistic view of it, you might have that concern, but the fact of the matter is it's done all the time in the Legislature . . . . So while it may not be the best way for government to work and I might not teach it in the classroom, that's the way Albany often worked."

Notwithstanding Sabini's assertion, the Inspector General's research failed to reveal an analogous statutory scheme in any matter of import in the annals of New York State law. Although several statutes have alluded to the three leaders' intention to enter into future memoranda of understanding, these statutes involved relatively insignificant determinations and none explicitly required the three leaders to unanimously agree prior

[14] At the time of this report, only Speaker Silver retains his role, as Governor Spitzer was forced to resign in the wake of a prostitution scandal, and Senator Bruno resigned and then was indicted and convicted on federal charges of depriving the state of his honest services.

to effectuating a decision, much less one involving a 30-year lease worth billions of dollars.

In addition to politicizing the process on its face based upon the three decision makers given equal voice in the choice, the unique structure of Tax Law § 1612 also had consequences which removed the selection from the normal safeguards which exist to protect public expenditures and contracts from inefficiency, ignorance, and self-interest.

C. Procurement in New York State

New York State routinely purchases goods and obtains services by contracting with private vendors. New York State also frequently enters into agreements with private entities granting licenses or franchises to conduct business in exchange for the state's receipt of a percentage of the revenue generated.

As contracts with the state necessarily implicate the use of public funds and resources, these agreements are subject to various statutes to ensure that they conform to the public interest. The Court of Appeals has noted, "New York has a multitude of procurement statutes applicable to public entities, but the underlying purpose is uniform: to assure prudent use of public moneys and to facilitate the acquisition of high quality goods and services at the lowest possible cost."[15] Other New York courts have recognized that "the intended beneficiaries of these statutes are the taxpayers" and, particularly in relation to the statutes generally requiring competitive bidding, these provisions exist for "protection of the public fisc by obtaining the best work at the lowest

[15] *New York State Chapter, Inc. v. New York State Thruway Authority*, 88 N.Y.2d 56, 67 (1996).

possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts."[16]

As discussed throughout this report, in Tax Law § 1612, the Legislature enacted and Governor Spitzer acquiesced in the creation of a system outside the confines of well-settled procedures for state contracting, resulting in a process devoid of discernable rules and rife with, at a minimum, appearances of favoritism and improvidence.

In order to understand the aberrant nature of the procedure for selecting a VLT facility operator at Aqueduct, this system must be contrasted with the established system for awarding contracts by New York State. In sum, there are two general categories of procurements entered into by the state. One category involves the purchases of goods and services. The second category involves the State granting a license or franchise to a private vendor in exchange for a percentage of the profit generated. The former category is commonly referred to as an "expenditure" or "purchase" contract; the latter a "revenue contract."

Under New York law, with exceptions inapplicable to this discussion, expenditure contracts valued at over $50,000 must be competitively bid. The procedures for such a bidding process are enumerated in the State Finance Law. Additionally, New York, via the State Procurement Council, has promulgated procurement guidelines to assist agencies in making purchases in accordance with the law by providing basic, systematic principles regarding procurement practices. Under state law, a record must be kept documenting the details of the bidding process – a "procurement record" – and before finalized, the contract must be approved by the Attorney General and the State Comptroller.

[16] *Transactive Corp. v. New York State Dept. of Social Services*, 236 A.D.2d 48, 52 (3d Dep't 1997).

As opposed to an expenditure contract, New York law does not mandate competitive bidding in the case of a revenue contract; however, a procurement record still must be maintained and the contract still must be approved by the Comptroller. Notably, the State Comptroller has long held that while competitive bidding may not be legally required in the case of a revenue contract, the entity entering into the revenue contract must demonstrate that a "fair and impartial competitive process" was employed.[17] In order to ensure the proper dispensation of state funds and resources, the Comptroller will examine the record to determine whether reasonable and fair standards were applied in an equitable manner. The Comptroller has also recognized that the easiest manner (and best practice) to guarantee such a fair and impartial competitive process is to secure competitive bids regardless of whether legally mandated.

It is not always readily apparent whether a contract falls within the category of an expenditure contract (requiring competitive bidding) or revenue contract (not requiring competitive bidding), and in determining under which rubric a state contract falls, the "total character" of the proposed arrangement is taken into account. In regard to the selection of a VLT operator at Aqueduct, while the process implemented was novel, for all intents and purposes, it appears to fall under the definition of a revenue contract: a vendor is granted an exclusive franchise from which the state is to receive a percentage of revenue. In fact, semantics notwithstanding, the award of the VLT franchise at Aqueduct is most likely the most lucrative revenue contract ever awarded in the history of the state. Based upon these generally accepted principles, for purposes of this report, the Inspector General assumes that, if this contract award had proceeded through well-settled channels, competitive bidding, while strongly advisable, would not have been legally required.

[17] See, *Financial and Audit Solutions* (http://www.osc.state.ny.us/audits/sep02.pdf) at p. 5.

Nevertheless, the resulting process would still be subject to a "fair and impartial" analysis by the State Comptroller. As discussed throughout this report, what actually occurred clearly did not meet this standard.

D. New York's Restrictions on Procurement Lobbying

In light of the substantial financial interests at stake, it is not surprising that lobbyists have long been employed by vendors seeking to do business with the state. Recognizing the distortive effects lobbying can have on the procurement process and how procurement lobbying activities can undermine the public's perception of the objectivity of state contracting decisions, in 2005 New York enacted a law strictly limiting lobbying activities on state contracts for the stated purpose of "foster[ing] continued public confidence in the governmental procurement process."

This legislation, codified in State Finance Law § 139-j, 139-k, and Article 1-A of the Legislative Law, created a "restricted period," which commences when a state entity issues a request or solicitation for proposals or bid and ends upon final approval of the contract. During this restricted period, lobbyists are generally prohibited from contacting officials and employees of that entity except in very limited enumerated circumstances and may only communicate with an individual or individuals specifically designated by the contracting agency for that purpose. All contacts with any official or employee of the state agency including the designated contact, which can reasonably be inferred as seeking to influence the award, must be documented by the recipient of the communication and memorialized in the procurement record. If a lobbyist contacts anyone other than the designated agency representative, the person contacted is required to report the contact to the appropriate authorities. Knowing and willful violation of

these restrictions generally disqualifies the bidder from receiving the contract and the failure of a recipient to document or report contacts could result in sanctions. Bidders further must certify that they have not colluded with other potential vendors or offended the provisions of the statute.

Notably, in extending this legislation in 2010, the Legislature more fully articulated the justification for the procurement lobbying restrictions, declaring that:

> The legislature hereby finds and declares that it is important to the well-being of the state and its citizens to preserve and enhance both the integrity and efficiency by which New York state entities . . . procure goods and services. In order to use the revenues of the state effectively and to maximize value from such procurements to the residents of the state, the procurement laws of the state seek to structure the procurement process so that there is broad-based competition for state procurements, which promotes both lower costs for necessary purchases and greater value. . . [B]oth vendors who participate in the procurement process and the residents of the state should feel confident that the process is fair and that decisions are made on the merits, not on the basis of favoritism or past relationships.

Despite the stated goals of encouraging a transparent, apolitical process conducted by individuals knowledgeable in the contract area, in creating these lobbying restrictions, the Legislature exempted itself (and the judiciary) from one significant category of state contracting: revenue contracts. In other words, when the Legislature is involved in the award of a revenue contract, unlike every other state and local official (save the judiciary) who cannot be lobbied without restraint, the Legislature left itself amenable to unhindered and undocumented lobbying.

The deleterious effects of lobbying upon public confidence in the state procurement process were manifestly exposed by the attempted selection of an Aqueduct VLT operator. Indeed, seemingly every lobbyist of note in New York was engaged by

the bidders at significant cost to the participants. These lobbyists employed common tools in their arsenal to persuade the decision makers – in particular, the Senate – to choose their respective clients including making significant campaign contributions and focusing their arguments upon the political advantages to the individual decision-maker of selecting their client.

Coupled with the highly politicized nature of the selection process and the considerable ignorance of the decision makers regarding the true substance of the bids, this extensive lobbying campaign rendered an ill-conceived process even more disconnected from an objective assessment of the most qualified bidder.

III. THE 2008 VLT OPERATOR SELECTION PROCESS

A. Executive Chamber Solicits Bids

The selection process under review in this report was the second of three efforts to choose an operator under Tax Law § 1612(e). As its failure directly affected the process under review and the influenced the actors involved in this process, a brief discussion of the previous round, conducted in 2008-2009, is required prior to delving into the 2009-2010 process.

In April 2008, then Director of State Operations Paul Francis forwarded a draft Memorandum of Understanding (MOU) to Aqueduct VLT facility bidders with a submission deadline of April 25, 2008.[18] Three groups submitted responses: Manhattan-based SL Green Realty Corp. with Hard Rock Entertainment as its gaming[19] entity; Delaware North Companies,[20] a Buffalo, New York-based company; and, Capital Play Inc.,[21] a New York corporation, partnered with Mohegan Sun.

The vetting process involved financial analyses by both DOB and Lottery and a pre-qualification review by Lottery. New York State Law authorizes Lottery to license the operation of video lottery gaming at Aqueduct and other facilities throughout New

[18] Prior to the formal enactment of the aforementioned laws, in a letter dated September 12, 2007, Francis solicited bids for a VLT franchise at Aqueduct Racetrack. At that point, the State had anticipated building the VLT facility itself and merely finding a company to run it. That letter established a deadline for submissions of October 15, 2007, and proposed that "[t]he State, in consultation with NYRA, will review submissions and expects to make a selection within approximately 60 days." However, the process lagged and then Francis and Empire State Development Corporation Chairman Patrick Foye transitioned the request to the construction of the VLT facility by the company. They later also decided to request an upfront payment for the opportunity to build and run the VLT facility which culminated in the April 25, 2008 MOU.

[19] The term "gaming entity" in this context typically refers to a company that operates a licensed gambling facility.

[20] For the purposes of bidding for the VLT franchise at Aqueduct, Delaware North formed a New York limited liability company called Aqueduct Gaming, LLC. In the interest of clarity, this report refers to the vendor as Delaware North.

York State.[22] This process requires the vetting of principals, managers and employees. The pre-licensing by Lottery of all the potential operators rather than of the operator ultimately chosen to run the racino was unique in the history of VLT franchises in New York State and, as a result, Francis requested that New York State Inspector General Joseph Fisch assist Lottery in the pre-qualification review of the candidates. At Francis's direction, the Inspector General reviewed the application process and recommended changes but did not review the applications ultimately submitted to Lottery. Delaware North had been previously licensed by Lottery for other New York State facilities it operates[23] and SL Green proved eligible for a license as well.

B. Capital Play and its Leader Karl O'Farrell

In contrast to its competitors, Capital Play was in serious jeopardy of being deemed not licensable by Lottery after a number of issues arose related to its chairman, Karl O'Farrell's Australian bookmaking license. An inquiry by Lottery had revealed that, during a legal proceeding in Australia seeking revocation of his license in that country, O'Farrell had voluntarily surrendered his bookmaking license. O'Farrell claimed to the Inspector General that Lottery's issues with him involved misunderstandings which, had he had more time to present evidence, could have been resolved in his favor. O'Farrell maintained that the chairman of Capital Play Pty Ltd, an Australian wagering company of which O'Farrell was CEO and major shareholder , had engaged in some improprieties and two of the board members dismissed him. The former chairman then

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[21] Capital Play's name is derived from Capital Play Pty Ltd., an international wagering company based in Australia. Karl O'Farrell was CEO of both companies.
[22] N.Y. Tax Law, Article 34 §1617-a.

surrendered Capital Play Pty Ltd's license and raised some allegations; Capital Play Pty Ltd retained counsel and had the license reinstated. However, an inquiry had been commenced, and O'Farrell claimed that counsel advised that, since the business was essentially defunct, Capital Play Pty Ltd should surrender its license.

Lottery was also concerned about an Australian court case in which O'Farrell was adjudicated an "unreliable witness." In that case — a dispute as to whether a loan that a former employer of O'Farrell had made to him had been forgiven — the lower court held (and the appellate court cited): "I find that his allegation that the loan was forgiven at a meeting of 24 February 1999 has not been established. There is no reliable corroborative material to support the proposition. The records of the companies concerned, together with the conduct of Mr. O'Farrell at relevant times, tend to not support the proposition that the loan was forgiven: that included Mr. O'Farrell continuing to borrow from the company after the alleged forgiveness, his signing annual reports showing the loan is still in existence and his being prepared to deal with the existence of the loan on his resignation." O'Farrell, in his testimony to the Inspector General, claimed that he had been told by his attorneys that he would be successful in this lawsuit, and therefore did not take it very seriously, and that an auditor who could have supported his claims had been unavailable to testify.

As a result of these findings, Lottery determined that O'Farrell was not eligible to receive a VLT license in New York State. In order to ensure that Capital Play could be deemed able to be licensed, Capital Play represented that O'Farrell had withdrawn as chairman of Capital Play and had agreed not to have any role in the operation of a VLT

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[23] Delaware North previously operated three VLT facilities in New York State: Saratoga, Finger Lakes in Farmington, and Fairgrounds Gaming in Buffalo. The VLT facility at Saratoga is now run by the company

facility in New York.[24] O'Farrell's effective disqualification requiring his removal from the Capital Play group had direct ramifications on the 2009 process, the central subject of this report, as Lottery expressed the same concerns about O'Farrell's participation in AEG's proposal. Indeed, O'Farrell's apparent continued participation contributed to the ultimate demise of AEG.

C. Lottery's July 2008 Report

On July 17, 2008, Lottery issued a report to Governor Paterson, Senator Dean Skelos and Speaker Silver entitled "Pre-Qualification Review of Candidates for License to Operate a Video Lottery Facility at Aqueduct Racetrack," which explained the process by which it deemed all groups qualified to receive a license. In a July 18, 2008 letter to then-Secretary to the Governor Charles O'Byrne, Inspector General Fisch provided Lottery's report, noted his involvement in the pre-qualification process, and concurred with Lottery's findings.

Furthermore, on October 3, 2008, in response to a request from the Governor's Office, Lottery Director Gordon Medenica drafted a memorandum to O'Byrne and then-Director of State Operations Dennis Whalen summarizing an investigation the Lottery had conducted as to the financial wherewithal of each potential vendor given the recent financial crisis. The memorandum concluded: "[E]ach bidder expressed no reservations about their ability to access capital necessary to fund the project, but only Delaware North provided letters from outside funding sources to confirm their ability to do so."

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that owns it but Delaware North continues to operate the other two facilities.

[24]Lottery Deputy Director and Counsel William Murray testified that "the state Senate asked the Governor's Office and the Lottery to allow more time for Capital Play to give [Lottery] more information." O'Farrell testified members of Capital Play received a call from Senator Bruno's office that a decision was imminent and asked O'Farrell to step down.

D. October 2008 Selection of Delaware North

On October 10, 2008, six months after the submission of the draft MOUs by the bidders, Governor Paterson announced the selection of Delaware North to operate the Aqueduct gaming venue:

> After several months of three-way discussions, today Governor Paterson and Speaker Silver recommended that Buffalo-based Delaware North operate the VLTs at Aqueduct. The three bids were carefully examined by all three parties and underwent significant due diligence, including another review over the past few weeks to ensure financial viability in light of the turmoil in the markets.
> Of the bids put forth, Delaware North presents the strongest financial proposal with an upfront payment of $370 million. . . .

Speaker Silver testified that, as to the 2008 choice of Delaware North to operate the VLT facility at Aqueduct, he had deferred to Governor Paterson: **"'**Governor, this is your process. You make a recommendation. If I don't believe it will embarrass us, I'll go along with your recommendation.' And he came up with Delaware North, and I said, 'Fine.' And we all agreed to Delaware North**."** As discussed in detail below, Silver repeated this same refrain – deferral to the Governor – in the 2009-2010 process under examination in this report.

Apparently, however, a consensus had not been reached among the Governor, the Speaker and the Senate President Pro Tempore. Senator Dean Skelos, then-President Pro Tempore and Majority Leader, expressed reservations regarding Delaware North and issued a press release against the choice: "It appears that in an effort to close the budget deficit, Governor Paterson has made a choice that may not be in the best long term

interests of the state or for the communities that surround Aqueduct."[25] In response, Governor Paterson admonished Senator Skelos in a press release:

> It is shocking that Senator Skelos, who claims to understand the importance of this revenue stream and who has repeatedly and publicly called on the Governor to award this contract, has now decided to stall a significant economic development project. Equally troubling is that he has refused to state what proposal he supports and why. In this time of a financial crisis, every day we delay hurts New York.

Senate Minority Leader Malcolm Smith also immediately issued a press release in response to Skelos which stated in pertinent part: "By rejecting the Aqueduct Proposal, Senate Majority Leader Dean Skelos puts his dead-end politics above the well being of the State during a major financial crisis. While I personally supported a different proposal, as a leader I would have worked with the Governor and Speaker to secure an immediate agreement." When confronted by the Inspector General with this statement and queried as to which proposal he had supported, Smith claimed to not recall. However, the Governor testified that Smith had expressed support for Capital Play.[26]

A period of intense lobbying by Delaware North ensued, consisting of oral and written presentations to the Queens Community leaders, specifically, the community board of the area in which Aqueduct is located (Community Board 10), Assemblywoman Audrey Pheffer, Senator Serphin Maltese, Senator Skelos, and Counsel to the Majority Michael Avella in an attempt to convince them that it was the best choice to run the VLT facility at Aqueduct. Delaware North was ultimately successful and, on October 23,

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[25] *New York Times*, October 13, 2008, "Fight Heats Up Over Aqueduct's Future." Karl O'Farrell testified to the Inspector General that after the Governor and Speaker selected Delaware North, Senator Skelos was still negotiating with O'Farrell's company, Capital Play.

[26] Public records obtained from the New York State Board of Elections indicate that on May 2, 2008, Smith received a $5,000 contribution from O'Farrell.

2008, Governor Paterson issued a second press release naming Delaware North as the unanimous selection to operate the VLT facility at Aqueduct.

The tortuous path wherein the Governor first announced his choice of Delaware North only to have the Senate President Pro Tempore withhold consent directly impacted Governor Paterson's actions in the 2009 process that resulted in the eventual selection of AEG. Governor Paterson testified:

> If [the 2009 selection] was my selection it would have been done in August. Now, I could have taken a group and gone out there by myself, as I had done in 2008, but that was a very unpleasant experience. And I indicated to both leaders that I was not inclined to do it again. Because I got pilloried by the other two groups for selecting Delaware North in 2008, threatened with lawsuits and the same rumors about relationships and that kind of thing. I didn't want to go through that. I wanted the three leaders to move together this time. I did not want to go through that again.

It was this "very unpleasant experience" over his choice of Delaware North which, at least in part, caused the Governor to view consensus among the leaders for the 2009 selection as the most politically expedient path. Moreover, Governor Paterson's aversion to selection absent contemporaneous consensus was heightened by the eventual deselection of Delaware North.

E. The March 2009 Deselection of Delaware North

Delaware North had originally pledged the state $370 million by March 31, 2009, the end of the state's fiscal year. Specifically, in its April 25, 2008 draft MOU indicating the terms of its proposal, with regard to the upfront licensing fee, Delaware North proposed payment of the $370 million in four equal installments, with the final payment occurring on March 31, 2009. After the selection of Delaware North, Counsel to the

Governor Peter Kiernan[27] testified that discussions ensued, given the recession, regarding Delaware North's ability to pay the upfront licensing fee.[28] Delaware North proposed an alternate schedule which included payment to the state of $50 million by March 31, 2009, and another $50 million by May 30, 2009, with the remaining $270 million to be paid to the State through a modified vendor fee arrangement or debt financing should that become available in the future.

After numerous discussions with Delaware North and members of the executive chamber and agencies, on March 9, 2009, Kiernan sent a letter to William Bissett, president of Delaware North, indicating that only a $370 million lump sum payment by March 11, 2009, would be acceptable, or the State would rebid the project.[29] As required, Bissett responded by March 11, 2009, and noted his disappointment in the State's refusal to accept Delaware North's alternate, and from his perspective given the dire state of the financial markets, reasonable proposal. Notably, the letter cautioned:

> Given the continued instability in the financial markets, we feel strongly that our restructured financial offer still provides the state with the best possible outcome. A prolonged re-bid of the project will ultimately cost the State even more in terms of added delays in construction and a missed opportunity to capitalize on a phased opening as contemplated by law without the assurance of a larger payment than Delaware North has offered.

On March 23, 2009, Bissett sent a more detailed letter to Kiernan, outlining the great expenses Delaware North had incurred in both the bidding process and after having been

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[27] Peter Kiernan was appointed Counsel to the Governor in November 2008 and was, therefore, not involved in the selection of Delaware North.

[28] He related that Delaware North's lawyers argued that their proposal included conditions prior to the payment of the licensing fee (finalizing the transaction documents, settling the building issues, etc.); notwithstanding, the Governor's Office maintained that while those issues should be brought to a conclusion, these conditions did not have to be met prior to the payment.

[29] The letter was copied to Speaker Silver, Senator Smith, Lawrence Schwartz, Secretary to the Governor, and Laura Anglin, Budget Director. It should be noted that at the time of the selection of Delaware North,

selected, and again, reiterating Delaware North's position regarding the $370 million licensing fee. Governor Paterson ultimately rejected Delaware North's proposal, opting instead to restart the bidding process by issuing a press release and placing a new solicitation on his Web site.

Lottery Director Medenica and Lottery Deputy Director and Counsel Murray both testified to the Inspector General that they had advised the Governor's staff to accept Delaware North's revised proposal because, in the deep financial crisis that was occurring, the state would receive a significant amount of money in a short period and, more importantly, the construction of the VLT facility would commence, which promised to generate hundreds of millions of dollars yearly for the state. Their words, however, were not heeded.

Recognizing that hindsight affords clarity unavailable at the time the decision was made to rebid for the Aqueduct VLT facility operator, had the Governor not rejected Delaware North's alternate financial proposal, the state would have received $100 million from Delaware North by May 30, 2009, an amount that, as will be demonstrated later in this report, was the approximate amount initially offered by most of the bidders as their upfront licensing fee during the 2009-2010 round of bidding. That being said, had the Governor accepted Delaware North's vastly different financial proposal, he may have exposed New York State to a lawsuit from the other two bidders, Capital Play and/or SL Green, who had offered upfront licensing fees of and well in excess of $100 million.

Moreover, on March 11, 2009, the day on which Delaware North was officially deselected as the VLT operator for Aqueduct Racetrack, Medenica sent an e-mail to

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Senator Skelos was the President Pro Tempore; nevertheless, had the Delaware North selection been finalized, the MOU would have been signed by a new President Pro Tempore, Senator Smith.

Sylvia Hamer, then-Deputy Secretary to the Governor for Technology, Operations and Gaming, and Laura Anglin, then-Budget Director, urging them to proceed with a new selection process as a request for proposals (RFP) by Lottery:

> Given our difficulties with Aqueduct, the State once again faces the prospect of a delay of several years before we can benefit from the revenue opportunities there. The process used in the past, originally with MGM and now with Delaware North, clearly is time consuming, cumbersome and prone to failure. We need to consider a different approach.
>
> Respectfully, we propose that the selection process for an operator of the Aqueduct gaming facility be managed as an RFP [request for proposals] process by the Lottery. We volunteer to develop the RFP, with appropriate input from relevant parties, according to transparent business-like standards. Our experience in managing the Video Lottery business for the State makes us uniquely qualified to oversee the selection process for an operator of our ninth facility. We also have strong RFP procurement experience as evidenced by our recent RFP process for the next Lottery central system operator. And we report to experienced procurement and financial executives on the Governor's staff (you!).
>
> We believe an RFP process could help in isolating the selection process from the inevitable political pressures that come with awarding large contracts. Again, the Lottery is uniquely positioned as an apolitical and business-like organization with a clear and simple constitutional mandate to maximize earnings for New York's schools. By creating a transparent and business-like decision making process, with relevant constituencies represented on the evaluation committee, we can hopefully close the gap between vendor selection and implementation that have plagued the last two awards.
>
> We have not yet developed the specific plan to conduct this RFP process or the resources we would need, but we felt that time was of the essence in getting this idea to you to consider. We stand ready to work with you immediately to begin this process.

Medenica's words proved prescient, as noted in detail later in this report, because following the 2009-2010 VLT selection process debacle, the Governor chose to have the Lottery manage the selection as an RFP and a vendor was selected and rendered payment in a mere four months.

IV. THE 2009-2010 VLT OPERATOR SELECTION PROCESS

A. Governor Paterson Directs His Counsel to Commence a New Process

The day following the deselection of Delaware North, Governor Paterson approached Counsel to the Governor Peter Kiernan and directed him, in regard to a new process, "I want to start this as soon as possible."

Despite the long and arduous process of selecting and deselecting Delaware North and Director Medenica's pleas to implement a fair and professional selection process, the Governor's office proceeded not only to repeat but also magnify the systemic deficiencies endemic to the prior process. Specifically, from the outset, the process lacked any direction by the Governor who completely deferred to his counsel:

> **Question:** Who were the executive personnel that were going to be part of this evaluation process?
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> **Paterson**: Peter Kiernan, my counsel, and Larry Schwartz, secretary to the Governor.
>
> * * *
>
> **Question**: Did you give any directions to your secretary or your counsel as to how this process should proceed?
>
> **Paterson**: I don't remember giving them any direction. I was more trying to follow directions.
>
> **Question**: Follow direction from whom?
>
> **Paterson**: From my counsel, based on the process.]

When asked whether he served as the "point person" for the executive branch, "[s]omeone who had the responsibility for coordinating the various entities that were evaluating the bids," Kiernan responded, "I don't think that would be entirely a fair description, but I was like at the top of the pyramid in the process." While Kiernan

heeded the Governor's words and restarted the process expeditiously, he did so without any effort to analyze or cure the deficiencies of the prior round, the agencies below received little to no guidance from him, and essentially were left to wade through the intricacies of the process absent direction from the Executive Chamber. Similarly, the other high ranking executive official identified by the Governor as supervising the process, Secretary to the Governor Lawrence Schwartz, who, as discussed later, described himself as the "Chief Operating Officer" of the State, also provided no guidance to the executive agencies despite being acutely aware of the need to refine the process. Kiernan assigned the day-to-day duties involving the selection to Assistant Counsel to the Governor David Rose, who coordinated the selection effort within the aforementioned lack of direction, conducted competent coordination efforts and digested and collated the analyses only to have such ignored and thereby rendered an empty and futile exercise.

B. The Solicitation

On April 17, 2009, Governor Paterson posted on his Web site a press release, a new solicitation, and proposed memorandum of understanding (MOU) announcing "New York State is seeking new proposals to select an experienced gaming operator to build and operate a Video Lottery Terminal (VLT) facility at Aqueduct Racetrack in Queens."

The solicitation superseded the April 2008 solicitation and, in a clear reaction to the failed negotiation regarding the upfront licensing fee with Delaware North, included the following condition: "This MOU is structured to be a binding obligation of the potential Vendor for payment of an upfront Licensing Fee with the State within 10 business days of execution of the MOU, without conditions precedent. No minimum bid

has been established." The solicitation further required that the selectee pay $1 million to the State Expenses Fund.

The solicitation also announced that the Empire State Development Corporation (ESDC), a corporation created to expand economic development in New York State, would fund a $250 million capital construction grant to the chosen vendor toward construction of the VLT facility. The vendor was permitted to spend more than the amount of the ESDC capital construction grant. The state and the chosen vendor, in turn, would enter into a VLT development agreement and a VLT facility ground lease, for a fixed period of 30 years with a possible 10-year extension, which provided that the state would own all improvements constructed on the site.[30]

The solicitation also alerted potential vendors to an environmental impact review pursuant to the State Environmental Quality Review Act (SEQRA) undertaken by Lottery regarding 2004 plans for a VLT facility at Aqueduct where a negative declaration – a declaration that no significant environmental impacts would be affected or created – was issued. The solicitation then delineated the details of the plans that had received the negative declaration and advised potential bidders that the plans were available to be viewed at the Office of General Services, Lottery, or NYRA. The SEQRA review fares prominently in the solicitation because architectural plans of the potential vendors deemed to have a significant environmental impact would necessarily cause great delays in the opening of the racino and, consequently, delay any monies realized for the state.

[30] The solicitation also placed the burden on the selected vendor to reimburse the state for all "costs and expenses" incurred, "including those of ESDC, associated with the development and implementation of the transaction, not to exceed $3 million."

The solicitation provided that the vendor chosen to operate the VLTs at Aqueduct would be "selected" by "the Governor and the Legislative leaders" and that "the Executive and Legislative parties . . . making a selection" would review any proposed changes to the ultimate finalized MOU with the vendor.

Foreshadowing and enabling the standardless, haphazard and ultimately chaotic nature of this process, the solicitation included the following disclaimer: "The State reserves the right to select a Vendor on the basis of its initial proposal in response to this solicitation without further negotiation, to negotiate exclusively with one potential Vendor or to negotiate with more than one potential Vendor, to request revised or supplemental proposals from one or more potential Vendors, or to cancel this solicitation without a selection."

The solicitation further advised that the Lottery would conduct a "pre-qualification review of all potential Vendors" in order to determine if Lottery's standards, contained in regulations promulgated under its statutory authority, for issuing a Lottery license are met, and that this review would "concentrate on the skills, experience and financial resources each entity proposes to employ at the Aqueduct VLT facility, as well as the reputation of each entity and individual for honesty and integrity."

Lottery's role notwithstanding, the solicitation reaffirmed: "The Vendor selected will be chosen by the unanimous agreement of the Governor, Senate Majority leader and Speaker of the Assembly [who] will enter into the MOU promptly thereafter." The responses were to be submitted to Assistant Counsel to the Governor David Rose.

C. The Proposed Memorandum of Understanding

Contemporaneous with the publication of the solicitation, a proposed memorandum of understanding (MOU) was made available to potential vendors.[31] Unlike standards procurement proposals, in their responses, the vendors were permitted to modify the proposed MOU without significant limitation. As became quickly evident, permitting each vendor to alter the proposed MOU made comparison among the bidders unnecessarily complex and rendered comparison difficult if not impossible. This added complexity concomitantly impaired the decision making process as when staff who conducted analysis of the bids briefed their superiors, the myriad nuances differentiating the offers were either not conveyed, not understood, specifically ignored, or some combination of the three. Coupled with the fact that this decision, which in an ideal world would be made by individuals with some financial and gaming expertise, but under Tax Law § 1612(e) became a political decision, the difficulty in comparing bids only further enhanced the subjectivity which permeated the selection process. Notably, in contrast, the succeeding 2010 selection process which required acceptance of the terms of the proffered MOU allowed for easy comparison and rendered the process noticeably more efficient and not susceptible to subjective predilections of the reviewers.

The 45-page proposed MOU included all of the conditions enumerated in the accompanying solicitation and numerous other specifications.[32] For instance, the MOU permitted the vendor to open a temporary facility with fewer VLT machines during the construction of the full VLT facility. The MOU also permitted "Mixed Use Facilities,"

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[31]Governor's Counsel's Office retained the law firm of Mannat Phelps & Phillips to, among other things, assist in the drafting of the solicitation and the proposed MOU.

[32] The proposed MOU also required compliance with all applicable labor laws.

defined as "compris[ing] one or more mixed use projects that may include retail, entertainment, hotel and other developments." With regard to those mixed use facilities, the proposed MOU provided vendors the opportunity "for a period of twelve (12) months following substantial completion of the VLT Facility and its opening to the general public, a first right of negotiation . . . after which period, if no binding agreements have been reached, such rights shall expire and State shall have the right to negotiate with any other parties regarding development of the Mixed Use Facilities."

One provision that must be noted for the significant role it played in the evaluation of the bidders is the requirement to include minority and women participation. Specifically, the proposed MOU mandated:

> VLT developer shall use best efforts to achieve (i) not less than twenty percent (20%) minority/women-owned business enterprise contractor and/or subcontractor participation for the development of the VLT facility, which includes the design, pre-construction, construction and operation/maintenance phases; and (ii) an overall goal of twenty-five percent (25%) minority and female workforce participation for the construction of the VLT facility.

The vendors accepted these terms and some expanded on them as explained below.

D. The May 8, 2009 Responses

Six vendors responded to the solicitation on May 8, 2009, the deadline for submissions: Aqueduct Entertainment Group, Delaware North, The Peebles Corporation, Penn National, SL Green and Wynn Resorts.[33]

[33] On that same date, Mohegan Sun submitted a letter which stated that it would run the Aqueduct racino if the state built it. This offer was quickly rejected.

Aqueduct Entertainment Group, LLC (AEG)

AEG is a consortium solely organized for the purpose of bidding on the rights to construct and operate the VLT facility at Aqueduct Racetrack.[34] AEG was formed by two principal partners of the 2008 bidder Capital Play: Mohegan Sun, the well-established gaming operator, and Karl O'Farrell, the individual jettisoned by Capital Play due to his inability to obtain a New York State Lottery license. However, a few days prior to the May 8, 2009 submission deadline, Mohegan Sun announced it would not participate in the bid and AEG was required to find another gaming partner. Although O'Farrell was described by AEG to the executive agencies as an "independent consultant," O'Farrell's testimony, other AEG members' testimonies, and documentary evidence demonstrate that he was an organizer and founder of AEG and clearly was a moving force behind AEG and its bid submissions.

Notwithstanding O'Farrell's crucial organizational role, AEG's submission listed Richard Mays, a former Arkansas judge with close ties to former President Bill Clinton, as its chairman. Judge Mays's chairmanship is curious due to his seeming lack of any gaming experience. In fact, officials both within and outside of AEG perceived his role as purely political. Joseph Logan, another AEG founder, testified that he prevailed upon Judge Mays to be AEG's chairman. Logan admitted that he was unaware of Mays's gaming experience, if any, but noted his vast political experience as a former state legislator and a lobbyist in Washington, D.C. Lottery Director Medenica testified, "It became very clear to us that Richard Mays had no real role other than political window dressing at AEG."

[34] Even though AEG submitted its proposal to the state on May 8, 2009, it did not incorporate with the New York State Department of State until May 11, 2009.

AEG's submission indicated that the consortium included Greenstar Services Corporation (construction), The Navegante Group (gaming), PS&S (architecture), Clean Power (environmentally sound energy usage), Siemens (electrical engineering), and The Darman Group working with Empowerment Development Corporation (development and minority participation). AEG proposed an upfront licensing fee payable 10 days after execution of the MOU of $101 million: $76 million for the VLT facility and $25 million for "the absolute rights to develop the Mixed Use Facilities." AEG also promised an additional $50 million payable when the VLT facility was fully operational, also contingent upon the absolute right to develop the mixed use facility. Factoring in these contingencies, however, AEG's guaranteed upfront licensing fee truly amounted to only $76 million.

AEG, through The Darman Group (Darryl Greene) and Empowerment Development Corporation (the Reverend Floyd Flake), presented its minority- and women-owned business goals, including, but not limited to, the following: "[T]o achieve or exceed ten percent (10%) and five percent (5%) of preconstruction contract dollars to minority owned and women owned professional service firms respectively." With regard to actual construction dollars, AEG proposed a goal of achieving or exceeding 20 percent and 10 percent to minority- and women-owned business participation respectively, with preference given to Queens-based firms. To accomplish this, AEG noted its intent to implement a program entitled the "Community Labor Exchange (CLE)," under which one of every four construction jobs would be offered to project area residents. AEG promised community residents inclusion in the permanent workforce as well. It also noted its intention to award not less than 20 percent of total contract dollars of post-

construction purchasing and service contracts to qualified minority and women owned firms, especially those based in Queens. AEG would develop a full community benefits program to facilitate achieving these goals.

AEG, through its design firm, PS&S, presented architectural plans which included a round entrance lobby, a hotel with rooms overlooking the racetrack or JFK Airport, a new parking structure and porte cochere (covered walkway), a future shopping area (mixed use), and a three-floor casino. PS&S, in conjunction with Clean Power,[35] "developed Green Building Strategies . . . to reduce the impacts of natural resource consumption, lower carbon footprint, reduce a building's operating and life cycle costs, enhance occupant comfort and health, improve occupant productivity, and improve the quality of life." Siemens was to assist in the industry, energy and healthcare sectors.

2. Delaware North (Aqueduct Gaming, LLC)

Despite its previous deselection, Delaware North submitted a response to the April 2009 solicitation. William Bissett, President of Delaware North, related to the Inspector General that, for a day or two, having been soured by the 2008 process, the company considered not bidding; however, as Bissett testified, "it is a tremendous opportunity, it is in our home state, we know the business,[36] we know the participants, we know the market. We thought it was important enough to go through the process again, so we convened, talked about it and decided to go forward."[37] Assistant Counsel to the

[35] The board of Clean Power includes Richard Mays, Chairman of AEG, and Joseph Logan, an AEG investor.
[36] As noted previously in this report, Delaware North operates two other VLT facilities in New York State.
[37] Harold Iselin, Esq., of Greenberg Traurig, sent a letter on behalf of SL Green to Assistant Counsel to the Governor David Rose on April 30, 2009, questioning the propriety of allowing Delaware North to bid in this process when it had failed to "perform on its prior commitments." Marc Holliday, Chief Executive Officer of SL Green, testified, and the letter so indicates, that Empire Racing Associates, LLC, in which SL

Governor David Rose related that there may have been some discussion to prohibit Delaware North's bid but ultimately the decision was made to let the submission stand on its own merits.

Delaware North's May 8, 2009 response indicated that its group was comprised of Delaware North, a privately held entertainment company; Saratoga Gaming and Raceway, a New York raceway and gaming company; McKissack & McKissack, the oldest African-American and women-owned professional design and construction firm in the nation; and, the Peebles Corporation, the country's largest African-American real estate company. Bissett soon learned that the Peebles Corporation had submitted its own separate proposal and, on May 12, 2009, Bissett sent a letter to Baron Channer of Peebles memorializing that Peebles no longer wished to be part of Delaware North's bid.

Delaware North proposed an upfront licensing fee of $100 million payable 10 days after the signing of the MOU. It also offered an additional $100 million at the end of the 30-year lease in exchange for a 10-year extension of the lease. Furthermore, in response to what was considered to have contributed to the post-award delays of the 2008 process, Delaware North provided completed copies of all transaction documents which Bissett testified represented their efforts to expedite reaching the environmental SEQRA review and construction phases.

Delaware North estimated that its plans would create 1,100 construction jobs and 1,000 gaming jobs. It also accepted the minority/women-owned business enterprise terms of the proposed MOU. Delaware North further noted its intention to establish an Employment and Small Business Development Center in Queens "to work in

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Green and Delaware North were involved, has sued Delaware North for allegedly violating a non-compete clause for submitting a bid in contravention of that agreement.

coordination with the community surrounding Aqueduct in order to provide support to those individuals seeking employment, and local companies seeking to provide goods and services to the gaming facility. . . . [Delaware North reported it was] . . . commit[ed] to hosting job fairs in coordination with local media outlets and community organizations to ensure that constituents in the surrounding areas [were] fully aware of the vast array of employment opportunities that will be available to further support the community." Delaware North also intended to enter into a Project Labor Agreement for the construction work and intended to operate the VLT facility with union labor.

The physical premises would include a 307,000-square-foot VLT gaming and entertainment facility and a 2,000-space parking garage. The gaming facility would include the 4,500 VLT machines, fine-dining restaurants, bars, entertainment lounges, a deli and a 600-seat buffet all located on the same floor. The proposal did not include any plans for a mixed use facility, but retained the first right of negotiation. Delaware North also proposed creating an initial temporary facility of smaller square footage and including only 1,200 VLT machines which it projected could open as soon as seven months following the SEQRA (environmental review) approval.

3. The Peebles Corporation [38]

Initially unbeknownst to its putative partner, Delaware North, the Peebles Corporation (Peebles) submitted a separate proposal on May 8, 2009. The bidding consortium also included MGM Mirage as the gaming operator, and Harbinger Capital as

[38] On May 22, 2009, Aqueduct Gaming Investors, LLC, was incorporated by Don Peebles with the Florida Department of State. For clarity, this report continues to refer to the vendor as "Peebles."

the financing partner. Peebles offered an upfront licensing fee of $150 million payable in full 10 days after the signing of the MOU.

With regard to minority/women participation, Peebles agreed to the proposed MOU terms and also asserted that "it would establish a business development center to support and develop small local businesses and an entrepreneurship academy to expose students at surrounding schools to the benefits of entrepreneurship through seminars, mentorship programs and internships."

Peebles indicated it would create a $300 million facility that would feature 4,500 VLTs and a variety of upscale dining establishments. Peebles offered that, in addition to the $250 million Capital Construction Grant from ESDC, it would expend or finance between $25 million and $100 million in hard and soft construction costs.[39] It also stated that it "anticipated" undertaking a $250 million mixed-use development which featured a 350-room luxury hotel, a large conference center, an entertainment center, and a fitness center.

4. Penn National

Penn National owns and operates 19 gaming and racing facilities, with an emphasis on VLT entertainment, in 15 jurisdictions. Penn National also constructs its own projects. Penn National offered the state a $5 million upfront licensing fee and stated it would consider a payment of up to $150 million conditioned upon confirmation by the state of certain details of the MOU. Penn National represented that it was able to pay its upfront licensing fee off its balance sheet.

[39] Hard costs include labor and materials, while soft costs are generally not considered to be directly related to physical construction but are commonly perceived to entail non-construction costs such as taxes, marketing expenses, interest payments, and finance charges.

Penn National provided no modifications to the proposed MOU but stated that it was prepared to proceed with the existing physical plans, presumably the SEQRA-compliant ones that had been evaluated and deemed environmentally sound, and spoke positively about the construction of a temporary facility as discussed in the MOU.

5. SL Green Realty Corp.

SL Green Realty Corp. (SL Green), New York State's largest commercial landlord, partnered with Hard Rock[40] as its gaming component. SL Green offered as its upfront licensing fee $5 million within 10 days of execution of the MOU; an additional $5 million after execution of all transaction documents; and $90 million after the "closing," *i.e.* the satisfaction of certain conditions precedent set forth by SL Green.[41] SL Green also offered an additional $150 million, payable over a ten-year period on the anniversary of the opening of the preliminary facility. These future payments, however, would be reduced by the amount SL Green invested for hard and soft construction costs above the $250 million capital construction grant.[42]

SL Green agreed to the MOU minority/women-owned business enterprise requirements and also promised to "maintain an extensive, first class program to combat and curtail compulsive gambling and work with the New York Council on Problem Gambling or other not-for-profit organizations dedicated to assist problem gamblers."

SL Green engaged SOSH architects who had developed the Aqueduct MGM plans and indicated that its physical plan for the VLT facility was "consistent with and

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[40] SL Green noted in its response MOU that Hard Rock, its current gaming partner, was determined to be pre-licensable by Lottery in the 2008 round.

[41] Because SL Green qualifies as a "real estate investment trust," for federal income tax purposes, it termed the upfront licensing fee "advanced rent."

within all SEQRA approvals." Marc Holliday, Chief Executive Officer of SL Green, testified that, as compared to its 2008 plan which he considered SEQRA compliant, for the 2009 submission, SL Green adjusted its plans to exactly conform to the SEQRA. Holliday opined "that given the [previous] failed . . . effort, the government would be very focused on speed to open, so we made certain adjustments in materials and staging and otherwise so that we could be quickest to open."[43] In that same vein, SL Green also noted in its MOU response that it had already submitted the plans to NYRA which was in the process of review. SL Green's plans included the opening of a preliminary facility. SL Green also modified the MOU to provide itself the absolute right to develop the mixed use facility.

6. Wynn Resorts, Limited

Wynn Resorts, Limited, (Wynn) led by Stephen Wynn, the famed casino entrepreneur, owns and operates Wynn Las Vegas and Wynn Macau (China). Wynn submitted a proposal that included an upfront licensing fee of $75 million. Wynn boasted $1.3 billion in available cash and the ability to provide all financing for the VLT project. Wynn did indicate an intention to pursue financing but noted that its obligations were not contingent on obtaining financing.

Wynn agreed to the minority/women-owned business enterprise requirements contained in the proposed MOU. Wynn provided extensive plans that exceeded the square footage allotment delineated in the proposed MOU and did not favor a temporary facility.

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[42] SL Green indicated that it was willing to invest between $50 million and $150 million above the capital construction grant.

E. Analyses by Executive Agencies and Legislative Staff

The responses by the six bidders were sent to Assistant Counsel to the Governor David Rose, the counsel member assigned the racing and wagering portfolio. Rose then disseminated the responses among staff of numerous executive agencies: DOB; Lottery; OGS; Racing and Wagering; ESDC; and the Assembly and the Senate. He also disseminated them to his counterparts in the Legislature: Louann Ciccone, Assistant Secretary on Program and Policy of the Assembly; Christopher Higgins, Assistant Counsel to the Majority in the Senate; and Bradley Fischer, Counsel to the Senate Racing and Wagering Committee.

The law firm of Manatt, Phelps & Phillips, LLP, which the executive chamber had engaged to assist in drafting the solicitation, MOU and transactional documents, also analyzed vendors' responses on behalf of the executive chamber.

1. Division of the Budget

The Division of the Budget (DOB) is charged with the responsibility of advising the Governor in matters that affect the financial health of the state. Under the State Constitution, the Governor is also responsible for developing a revenue and expenditure plan for the state, which DOB prepares for the Governor's review. DOB assigned two teams to the analysis of the Aqueduct proposals: the Strategic Analysis Unit headed by Chief Budget Examiner David English, and the Revenue Unit headed by Principal Fiscal Policy Analyst James Sherman. The Strategic Analysis Unit acts as an in-house financial advisory group to the State Budget Director, the head of DOB. With regard to the Aqueduct VLT facility, it attempted to determine what type of operator each vendor

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[43] SL Green also provided in the 2009 submission and offered, at the state's preference, to use the previous

would be for the facility. To that end, the Strategic Analysis Unit reviewed the proposals, examined income and outgo statements, evaluated branding and marketing of the facility, the type of proposed food concessions, and demographics of who the vendor, given the proposal, could expect as potential patrons of the VLT facility. In addition, the Revenue Unit, which forecasts gaming facility revenue for New York State and possess substantial in-house expertise with internal modeling capabilities, analyzed the projected revenue for each vendor over a 14-year period.

On or about May 8, 2009, DOB received the response MOUs, reviewed them and determined that far more financial information was needed to further the respective units' analyses. Staff members, therefore, prepared a detailed financial evaluation questionnaire which was disseminated to all of the vendors on June 15, 2009, which included, but was not limited to, requests for the vendor's expected start date, its financial projections (operating revenue, operating expenses, and capital expenses), and certain risk assessments. The financial request form stated, in pertinent part: "Of crucial importance to the financial evaluation of the various proposals is establishing a time line leading up to the opening of either a temporary VLT Facility or a permanent VLT Facility and the expected win per machine over a foreseeable period of years." The evaluation form asked the vendor, in regard to its calculations as to certain start dates, to assume selection of a VLT operator by August 1, 2009, a date chosen by DOB to facilitate comparison of the bidders and not established by any of the political leaders as a date certain for selection. The deadline for responses was June 24, 2009.

2008 SEQRA-compliant plans which had already been approved by NYRA.

June 24, 2009 Responses

AEG

In its response to the June 15, 2009, questionnaire, AEG reiterated its upfront licensing fee of $101 million: $76 million for the VLT facility and $25 million for "the absolute rights to develop the Mixed Use Facilities," and an additional $50 million payable when the VLT facility was fully operational, also contingent upon the absolute right to develop the mixed use facility. AEG represented that the upfront licensing fee would be financed as 35 percent equity from its investors and 65 percent debt.

Assuming a selection date of August 1, 2009, AEG anticipated a closing date, *i.e.* execution of the MOU, completion of the transaction documents, and authorization of the $250 million capital construction grant, by October 1, 2009. AEG anticipated all SEQRA determinations to have been made and all construction permits to have been issued by October 1 as well, a mere two months after selection (a highly unrealistic time frame based on testimony regarding the process of obtaining environmental approval under SEQRA) and obtaining construction permits. As will be shown later in this report, OGS determined that based on AEG's submitted plans, the required SEQRA environmental review would take at least one year.

AEG asserted that construction would commence on November 15, 2009, and a temporary facility which included 1,200 VLTs would be completed by April 1, 2010. By June 15, 2010, another area would be completed that would include an additional 2,000 machines with the full 4,500-VLT facility anticipated to be completed by October 31, 2010. Two months later, on December 31, 2010, the atrium and porte cochere (covered walkway) would be completed and, on September 30, 2011, a 2,600-car garage would be

completed. With regard to the mixed use facility, AEG contemplated completion of a 300-room hotel and a 2,500-seat entertainment center by August 31, 2012, and left open the possibility of creating future retail establishments. It anticipated construction costs would exceed the $250 million capital construction grant by $22 million, which it intended to fund from monies generated by the expedited VLT operation commencing on April 1, 2010.

Delaware North

Based on the proffered selection date of August 1, 2009, Delaware North reiterated that it would pay the state the promised upfront licensing fee of $100 million and the required $1 million for the State Expense Fund by August 17, 2010. These payments would be entirely financed by equity contributions from its investors. With this response, Delaware North also offered an additional $150 million to be paid from available cash flow of the gaming operations at Aqueduct Racetrack following completion and opening of the full 4,500-VLT facility.

With regard to the anticipated date of the completion of the SEQRA process, Delaware North noted that it had presented its plans to O'Brien & Gere, the State's consultants for the completion of the SEQRA review process, who had advised that "inclusive of completion of an updated traffic study and Environmental Assessment Form, the SEQRA review can be completed within 90 days." Based on their review of the plans and the work previously performed for the proposed MGM/Mirage project at Aqueduct Racetrack, O'Brien & Gere advised "that [the] plans should result in a negative

declaration."[44] Hence, Delaware North proposed a closing date of October 31, 2009, the commencement of construction as early as November 1, 2009, and the completion of the temporary facility which would include 1,200 VLTs and food and beverage amenities by May 31, 2010. The permanent facility and parking garage would be completed by December 31, 2010. Delaware North also reiterated its commitment to evaluate a potential mixed use facility upon the opening of the full 4,500-VLT facility.

Peebles

With an anticipated selection date of August 1, 2009, Peebles represented that the upfront licensing fee of $100 million and the $1 million for the State Expense Fund would be paid by September 10, 2009. With this submission, a $50 million discrepancy appeared to exist between the original response MOU and this June 24 submission regarding the upfront licensing fee. Notwithstanding, a subsequent August 13, 2009 submission by Peebles indicated that it was offering a $100 million upfront licensing fee, a $25 million supplemental licensing fee to be paid upon commencement of construction, and $25 million additional distribution to the state during the first full calendar year of operation of the permanent VLT facility. Peebles had also represented that the $100 million upfront licensing fee would be financed with $50 million in equity and $50 million in debt.

MGM, Peebles's gaming partner, indicated that it did not favor a temporary facility, asserting that such would undermine the customers' perception of the permanent

[44] As discussed in detail below, in regard to OGS's review, a "negative declaration" means that a determination has been made that the proposed development will not have an adverse impact on the environment.

facility. As such, Peebles anticipated SEQRA approval by January 31, 2010, a closing date wherein all transaction documents were completed and approved by March 12, 2010, and a grand opening on May 5, 2011.

Penn National

Penn National restated its intention to pay between $5 million and $150 million as its upfront licensing fee and anticipated a closing date of October 31, 2009, upon which date payment would be tendered. Penn National did not expect construction costs to exceed the $250 million capital construction grant. Penn National anticipated the opening of a temporary facility with 1,000 VLT machines on April 1, 2010, and the permanent facility with 4,500 machines on April 1, 2011.

SL Green

SL Green reiterated its upfront licensing previously set forth in its response MOU of May 8, 2009. With regard to start dates, SL Green asserted: "Vendor is prepared to commence work immediately upon selection, assumes that all of the Transaction Documents will be simultaneously negotiated and will continue to work round the clock, 24/7 to close as soon as State is ready to do so." It anticipated opening a temporary facility with 1,500 VLT machines on April 1, 2010, and the permanent 4,500-machine facility and garage on April 1, 2011. Upon the opening of the permanent facility, SL Green would commence construction of the mixed use facility with an expected completion date of October 1, 2014, which would include a 100-150 room hotel, the "Legendary Hard Rock beach and pool experience," a "Hard Rock Live!" 2,000-6,000

seat entertainment venue, 750,000 square feet of retail shopping, 1,500 residential units, and an auxiliary hotel or convention center.

Wynn

Wynn reiterated its intention to pay the $75 million upfront licensing fee and $1 million to the State Expense Fund by August 17, 2009. Wynn stated, based on an August 1, 2009 selection, that all SEQRA evaluations and determinations would be completed by November 30, 2009. Based on testimony from OGS staff, Wynn's plans, like AEG's, would clearly have exceeded the previous negative declaration requiring a new SEQRA evaluation. In other words, Wynn's extensive plan would have required a new environmental review that would have delayed the project for at least a year. Hence, Wynn's SEQRA projection and subsequent start and completion dates could only have been deemed unrealistic. Wynn anticipated a project closing date of December 31, 2009. The permanent facility and garage would be completed by April 1, 2011. Wynn's plans did not contemplate a temporary facility because, like Peebles, it felt it would tarnish the customers' perception of the permanent facility; however, unlike Peebles, Wynn offered a fee in lieu of a temporary facility of $75 million payable at the closing. Wynn suggested a post-award discussion regarding the market demand for a mixed use facility and was prepared to consider development of a hotel, entertainment venues and additional retail offerings so long as the SEQRA review was not adversely affected.

July 2009 Presentations

After receiving these responses, DOB determined that in-person interviews were advisable to help it gather additional data to analyze, and thus asked all six vendors to appear at the Capitol with their financial officers. Despite the limited nature of this invitation, however, the vendors brought many members in addition to financial officers and generally made large-scale presentations. DOB worked with the Governor's Counsel's Office to develop areas of inquiry to enable the vendors to prepare for the presentations. Staff members from DOB, Governor's counsel's office, Lottery, the Racing and Wagering Board, the Assembly and the Senate were all present to view the presentations by the six vendors.

David English of DOB opined to the Inspector General that Penn National's presentation was lackluster: it proposed spending the least amount of money on the project; it intended to create a facility geared to the local population; it appeared the least prepared of all the vendors; and it had neither visited Aqueduct nor met with NYRA. English had similar feelings about Peebles's presentation albeit for different reasons. Peebles's gaming partner, MGM Grand, had presented a proposal that included a high-end facility and could boast a national reputation; those assets notwithstanding, MGM had experienced heavy losses in 2008 and 2009 and had considered filing for bankruptcy. Moreover, MGM was in the middle of a large project in Las Vegas and had incurred much debt. Finally, Peebles's financing for the Aqueduct project included substantial leveraging.

AEG's presentation focused on implementation of its structural plans and was almost entirely conducted by its architects, PS&S, and Turner Construction. English

stated that it was clear that PS&S were architects who understood gaming. They presented a facility divided into areas of neighborhoods and different themes. The members of Turner Construction then discussed the timetable for construction. English noted that a by-product of AEG's presentation was the generation of an understanding that AEG was a large consortium consisting of many partners and that AEG would also need to secure substantial debt financing to complete the project, indicating potential financial vulnerabilities.

SL Green brought a model of a proposed "high-end" facility and placed it on the table for all to view during its presentation. SL Green reaffirmed that it had sufficient resources on hand to finance the project and would not need to incur debt or secure other financing. Delaware North presented more of a "locals" racino facility and did plan to secure some of its financing through debt.

English relayed that DOB was most impressed by Wynn's presentation. Steve Wynn personally appeared for the presentation and, rather than speaking of his extensive gaming experience, focused on customer service, employee morale, and "how to think about the facility." Accompanying Wynn were individuals from operations and finance. The finance officer touted Wynn's consistent success rate and its large balance sheet of over $1 billion in cash while operations discussed Wynn's successful operations which would create a high-end facility run with the professionalism consistent with the Wynn name. It was recognized that the downside of Wynn's plans was that the facility would be built outside the grandstands (beyond the racetrack) which raised questions about the environmental review, potential start delays, and the resultant delays to revenues for the state.

Win-Per-Day Projections

Each of the six bidders also presented its projected win-per-day for the VLT machines. Win-per-day reflects how much one VLT machine generates per day at a given facility, and is calculated by dividing the total revenue a VLT facility generates in one day by the number of VLT machines in the facility. In contrast to an actual number, the projected win-per-day is an estimate of what each vendor approximates it could produce per day, based on a number of variables, including brand name, type of facility, and patron demographics.

Because win-per-day at a facility typically will increase over time, the vendors were also asked to present their projected net machine income per year for a 14-year period. The net machine income is a yearly projection of what each machine will generate based on the win-per-day. The vendors were instructed to provide these projections for a 14-year-period, a time span which DOB determined was reasonable given the varying start times among the vendors and probable delays.

DOB's Revenue Unit then calculated the net present value for each vendor's revenue to be generated for education in New York State — a combination of the upfront licensing fee and present value of the 14-year net machine income projections. The Revenue Unit did not analyze the feasibility of the wins-per-day and net machine incomes presented by the vendors; rather, the unit took the win-per-day and net machine income at face value for purposes of calculating the net present value. When presenting the information to staff members of the executive and Legislature, the Revenue Unit commented on its findings with the aforementioned disclaimer, and asked each

participant to assess the reasonableness of each vendor's estimates by utilizing a report generated by an outside firm.

The feasibility of the proffered win-per-day and resulting net machine incomes was analyzed by Public Financial Management (PFM), a firm with which DOB had a stand-by contract, which was retained to engage in an independent analysis of the win-per-day estimates. Preliminarily, PFM recommended that these win-per-day estimates be viewed as "in-the-ballpark educated guesses." Nonetheless, in order to construct a baseline to gauge the feasibility of the proffered wins-per-day, PFM engaged in an analysis of various similar facilities nationwide. PFM determined that the closest analog to Aqueduct was the VLT facility then being operated at Yonkers Raceway. Since January 2008, Yonkers had attained win-per-day amounts in the range of $218 to $311. Furthermore, for point of reference, Yonkers has been operational since October 2006, and in 2007, with 4,048 machines, Yonkers produced a win-per-day of $221. Ultimately, PFM projected an Aqueduct facility would generate $307 win-per-day, and if the management could overcome the standard learning curve associated with new businesses, the win-per-day could reach $383.

The following chart presents each vendor's projected first-year win-per-day, and the net present value for the first 14-year period, as calculated by the DOB Revenue Unit.

Vendor	First Year Win-Per-Day	Net Present Value for Education (in millions)[45]
AEG	$350	2,851.8
Delaware North	$372	3,282.7
Peebles	$350	3,026.2
Penn National	$240	3,234.6
SL Green	$467	3,220.3
Wynn	$400	3,243.1

PFM engaged in telephone conference calls with each of the bidders to better determine the attainability of the proffered win-per-day calculation. The DOB Strategic Analysis Unit served as PFM's point of contact and usually participated in the conference calls. After much analysis, PFM produced a lengthy report which reached specific conclusions about each vendor.

In its report, PFM deemed AEG's win-per-day of $350 attainable and "in line with expectations for the first year of the Aqueduct facility," and credited the regional experience of AEG's gaming operator, Navegante. Nevertheless, PFM cautioned that Navegante's lack of name recognition and the dearth of details provided regarding AEG's financing plan could adversely affect the attainability of the $350 win-per-day. Like AEG, Peebles first year win-per-day of $350 was deemed attainable. PFM noted MGM's significant brand name and experience but also highlighted its concern with MGM's financial status.

[45] These net present value numbers represent the calculations presented at a September 21, 2009 meeting of executive and legislative staff. Later in this report, the numbers change slightly because the vendors have changed their upfront licensing fees and AEG went as far as to change its win-per-day.

Delaware North's projected first year win-per-day of $372 was considered "on the high end of likely performance." PFM noted Delaware North's significant experience in the New York gaming market, but had some concerns about the longer-term capital investment, and observed that Delaware North had produced uneven performance at some of its New York facilities and lacked experience in large metropolitan markets.

Penn National's $240 first year win-per-day was regarded as readily attainable and even conservative given Penn National's experience with pari-mutuel properties in other large urban markets. PFM reported its concerns over Penn National's projected significant growth in subsequent years and numerous contingencies to its proposal.

SL Green's first year win-per-day of $467 was deemed "difficult to attain in the short term." While PFM recognized Hard Rock's entertainment brand name, its strong financial position, and its strong performance in gaming regions in Florida, a $467 win-per-day had not been achieved in gaming facilities across New York State and other northeastern facilities, let alone in a gaming facility's first year of operation. PFM also noted the potential impact on future projected wins-per-day should SL Green opt out of managing the VLT facility, one of its many proposed changes to the MOU.

Wynn's projected first year win-per-day of $400 was considered "attainable but above the likely first year performance for a generic facility at Aqueduct." PFM stated that factors contributing to the possibility of attaining that win-per-day were Wynn's strong brand name and quality of its other high-end properties; experience and results in attracting high-level gamers; a database with significant contacts of premium customers in the New York City metropolitan area; and, a strong financial position. PFM only

questioned Wynn's reliance on other markets besides New York to justify its win-per-day.

Gordon Medenica, Director of the state Division of the Lottery, and William Murray, Counsel to the Lottery, were both highly critical of any evaluation of and reliance on what they considered the totally self-serving, baseless, and unguaranteed win-per-day projections and net machine income submitted by the bidders. Murray expounded in his testimony to the Inspector General:

> What PFM and DOB has done is simply take these projections at their word and just arranged them and compared them in a table as if they were all equally reliable, and we don't think they are all equally reliable. I don't remember exactly when, but I think in repeated conversations we had pointed out to the governor's office and to the Legislature, and to the budget division, if the state was requiring and expecting the competitors to guarantee the performance that they were predicting, then it's reasonable to rely on those projections. If, for example, Wynn would guarantee that he would pay the state a share of the $450 per day per machine, then that would be a very good way of evaluating the competing proposals. But if Wynn says 450 and he's not guaranteeing it and someone else says 350 and they are not guaranteeing it, it doesn't matter. They might as well have said 550 or 950. They are just made-up numbers. Every chance we got, the lottery communicated that caution.

In addition, Murray pointed to a state-wide weekly win-per-day average that is generated and reported by Lottery:

> Throughout the history of the video lottery program it's generally been in the low 200s. Lately it's been trending upward and most recently in the last month it's been higher up, the high 200s into the low 300s, and that has been greatly influenced by the recent success of Yonkers getting up into the low 300s. Yonkers, the financial performance of the casino at Yonkers Raceway is larger than all seven of the other video lottery casinos combined. So Yonkers has an outsized influence on the overall performance of the video lottery program, and when Yonkers is doing well that just naturally raised the average for the whole program.

Murray averred that, rather than engage in extensive evaluations of the attainability of the proffered but unguaranteed win-per-day, a better benchmark would be the actual win-per-

day of Yonkers Raceway, a facility of similar demographics and size to Aqueduct. While PFM did conclude that Yonkers Raceway provided the best comparison for Aqueduct, it still engaged in a lengthy and costly analysis. Indeed, further exemplifying the disorganization and lack of structure that plagued this process, rather than utilize a state agency with the expertise in the required area, DOB paid almost $60,000 for an outside consultant to conduct an analysis that Lottery was well-equipped to do.

2. Governor's Counsel's Office

Governor's Counsel's Office is headed by Peter Kiernan, Counsel to the Governor, and employs approximately 10 assistant counsels, of whom Assistant Counsel to the Governor David Rose is tasked with the racing and gaming portfolio. All evidence confirms that the Governor's Counsel's Office oversaw the vetting of the potential VLT operators for Aqueduct Racetrack and that Rose was the person to whom all documents were submitted. Rose engaged in very little independent analysis but rather depended on DOB's and Lottery's analyses. He was, however, the locus of inquiries and requests by the bidders and their lobbyists. One inquiry of note was an August 6, 2009 letter from SL Green CEO Marc Holliday to Counsel to Kiernan:

> According to recent press reports,[46] during Steve Wynn's [July] presentation of his proposal to State officials for a video lottery facility at Aqueduct Race Track, Mr. Wynn offered to change the amount of the bid he submitted in order to beat out his competitors. As one of those competitors, I am writing to express my concern that the State would even consider allowing bidders to increase their bids after they have been made aware of the amounts bid by their competitors.
>
> As we have pointed out in the past, the selection of the Aqueduct VLT facility operator must be accomplished through a fair and open process that guarantees a level playing field to all bidders. Allowing a

[46] A July 30, 2009 *Times Union* article by James Odato, entitled, "'Big A' Hunter Makes a Six-Star pitch," reported that Steve Wynn had stated, "We said we will match any payment." http://www.timesunion.com/local/article/Big-A-hunter-makes-a-six-star-pitch-553061.php

> proposed bidder to increase his bid after he learns that other bidders [sic] proposed higher amounts fails to meet this criteria [sic]. Moreover, if that bidder were selected, it would inevitably lead to criticism that the process was arbitrary and capricious, tainted by favoritism and subject to challenge.
>
> At this time in history, after all of the previous attempts to select a VLT operator at Aqueduct, it is crucial that the people of New York State have full confidence that the process was evenhanded for all participants. We trust that the State will ensure this result and look forward to the conclusion of the process in the near future.

This correspondence is remarkable in that, even at what would prove to be an early stage, a bidder was disheartened by the chaotic nature of this process and urged the executive chamber to employ an objective, transparent procedure. Indeed, this report reveals that the ensuing process was anything but fair and open.

August 2009 Requests for Updated Financial Information

Evincing the ad hoc reactionary nature that plagued the process, on August 10, 2009, in response to the aforementioned complaint about unsolicited alterations to proposals, Kiernan disseminated a letter to the six bidders offering "the opportunity to submit a Supplemental Submission revising the financial terms of [their] offer[s] previously submitted in its Memorandum of Understanding on May 8, 2009 (or its Aqueduct Financial Evaluation submitted on June 24, 2009), including revision to your Financial Projections." The responses were due on August 13, 2009.

AEG amended its initial financial proposal and indicated that it would pay the state $151 million within 10 days of the signing of the MOU, still conditioned on the rights to develop the VLT facility and mixed use facilities. It also offered that if Lottery

were to approve an additional 3,150 VLTs,[47] for a total of 7,650 VLTs, AEG would pay the state an additional $100 million when the Aqueduct VLT facility opens, which it defined as completion of the new atrium lobby and porte-cochere and operation of all 7,650 VLTs. AEG further refined its offer to include a pro rata adjustment of the $100 million if the state approves more than 4,500 VLTs but fewer that 7,650 VLTs. Finally, AEG proposed an additional $50 million payment when AEG broke ground on the hotel and entertainment center if Lottery were to approve an additional 2,350 VLTs, for a total of 10,000 VLTs and again offered a pro rata adjustment of the payment for any number of VLTs between 7,650 and 10,000.

Delaware North reiterated its offer of an upfront licensing fee of $100 million within 10 days of execution of the MOU and transaction documents and provided documentary proof from JP Morgan Chase that the funds were being held in escrow. Delaware North also offered an additional $200 million dollars from the VLT facility's available cash flow payable in full in the first 27 months of operation of the permanent 4,500 VLT facility.

Peebles stated that it would modify its original offer to include $100 million upon execution of the MOU; $25 million upon commencement of construction; and another $25 million of additional distribution during the first full calendar year of operation of the full permanent VLT facility.

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[47] With this conditional monetary offer, AEG asserted that it was seeking only Lottery approval and not new legislation. Indeed, no legislation or regulation exists limiting the number of VLTs at Aqueduct to 4,500. As Lottery Counsel William Murray explained, the 4,500 number was determined among NYRA, the Racing and Wagering Board and Lottery when NYRA was engaged in discussions with MGM Grand to run the VLT facility. Because the 2004 negative declaration was based on a 4,500 VLT facility, this number has been perpetuated. An increase in the number of VLTs would only require Lottery approval; however, Lottery would have to consider at what point increasing the number of machines would have an environmental impact to require a new environmental quality review.

Penn National increased its upfront licensing fee to $250 million but reiterated some of it previous conditions: "retention of control of the access and parking in regards to any NYRA or non-gaming/mixed-use development; protection in the manner of refundability of the fee on a pro rata basis over the term of the right to operate Aqueduct VLT's if the state allows tribal gaming south of Yonkers Raceway or east of Walt Whitman Road/Route 110; a cap of $1 million on pre-existing and NYRA generated environmental liability; NYRA expenses to be paid from the $250 million fee; and the Aqueduct ground lease not to exceed one half of one percent of gaming revenue."

SL Green announced the recent addition of Bob Johnson, the owner of Black Entertainment Network, to its bid, highlighted his expertise in marketing, entertainment and gaming, and noted that his participation allowed SL Green to strengthen its financial proposal. SL Green increased its upfront licensing fee to $125 million and imposed a $25 million penalty upon itself payable to the state if the temporary facility was not completed eight months after the closing date. It further reiterated its intention to pay the state $150 million over a 10-year period on the anniversary date of the completion of the permanent facility, future payments which would be reduced by the amount SL Green invested for hard and soft construction costs above the $250 million capital construction grant.

Wynn modified its initial proposal and instead offered $100 million payable upon award and an additional $100 million upon closing. Wynn also offered an additional

$100 million payable over the 30-year term of the lease in equal annual installments.[48] Wynn retracted its offer of payment in lieu of a temporary facility.

August 2009 Request for Additional Non-Financial Terms

On August 13, 2009, Counsel to the Governor Kiernan permitted bidders to propose other non-financial terms. In correspondence to bidders, Kiernan wrote:

> On August 10, 2009, David Rose, Assistant Counsel to the Governor, advised each Aqueduct bidder that there would be an opportunity to provide a Supplemental Submission revising the bidder's financial terms submitted on May 8, 2009 in the Aqueduct bidders' respective Memoranda of Understanding. Supplemental Submissions are to be made by 5:00 PM (EDT) today, August 13.
>
> To avoid all confusion, should any bidder desire to propose other, non-financial additional terms, it may do so by 5:00 PM (EDT) on August 18, 2009. **Thereafter, no additional information of any kind will be accepted or considered. The final decision making process will begin August 19, 2009 and will be concluded as soon thereafter as practicable**. (Emphasis supplied)[49]

In its August 18, 2009 response, AEG stated that it was not modifying its non-financial terms. Peebles noted the recent addition of Perini Building Company, a "premier gaming construction" company to its team. Penn National simply reiterated the financial terms of its August 13 response. SL Green did not submit a response.

Delaware North reiterated its recently established business relationship with Harrah's Entertainment which would provide Delaware North with a large database of gaming customers in the New York metropolitan area. It noted the creation of Aqueduct

[48] Consistent with SL Green's claim, on August 4, 2009, Wynn had submitted a modification to its financial terms: $100 million payable upon award; an additional $50 million upon closing; and an additional $100 million payable over the 30-year term of the lease in equal annual installments.

[49] Kiernan's imposed deadline of August 18, 2009, as discussed below, proved relevant in late September 2009 when AEG submitted new, significantly higher win-per-day and net machine income projections which were rejected as past the deadline.

Gaming Neighborhood Foundation, Inc., which would provide financial support to established charitable organizations, primarily in Queens. The foundation would be funded from Aqueduct VLT income and disbursed by board members that would include leaders of the Queens community. Aqueduct Gaming Employment and Small Business Center would assist Delaware North in its "plan to maximize the number of local residents hired to fill the approximately 2,000 good paying jobs that will be created at [the] new gaming facility, to ensure that [Delaware North's] 30% Queens community minority participation goals are achieved, and to enable neighborhood vendors to receive fair consideration in connection with the purchase of goods and services during the construction and operation of [the] gaming facility." Delaware North also planned to create a daycare center and children's game arcade for the benefit of its "employees, patrons and the broader Queens community." Delaware North stated its intention to maintain regular communication with businesses and individuals within the Queens community.

Wynn re-emphasized its certainty of execution – the $1 billion on its balance sheet, its singularity as compared to the other consortia bidders, and its long track record of success. In that vein, Wynn reported that Wynn Las Vegas had produced a 40 percent higher rate of return per machine than the market average, a proven performance level which would produce that much more tax revenue for New York State. Wynn offered that this project would generate at least 1,000 construction jobs and 1,700 operating positions, and pre-qualified seven New York -based general contractors and construction managers. Wynn represented that it maintained excellent labor relations (and proffered

seven letters of recommendation from labor unions), stellar community relations in every facility locale, and consistent dedication to its employees.

3. Office of General Services

The Office of General Services (OGS) "manages and leases real property, designs and builds facilities, contracts for goods, services, and technology," and delivers a number of support services for New York State.[50] OGS was designated to participate in the vendor evaluation process because Aqueduct Racetrack is located on state property, and OGS would be tasked with negotiating the ground lease, providing permits and opining on any potential environmental issues. The environmental review for all submitted plans fares prominently in the evaluation process because architectural plans of the potential vendors deemed to have a significant environmental impact would necessarily impede the opening of the racino and, consequently, significantly delay any monies realized by the state.

As noted earlier in this report, under state law, all physical plans for the Aqueduct facility need to be subjected to an environmental impact review pursuant to the State Environmental Quality Review Act (SEQRA). As a result of the prior aborted efforts to select a vendor to operate the facility, a SEQRA evaluation had already been completed in 2004 for specific plans for a VLT facility and a "negative declaration" – a declaration that no significant environmental impacts would be affected or created – was issued. SEQRA evaluations do not expire quickly, and potential vendors were advised that if their plans substantially conformed to the previously approved plans, the probability that their plans would not require a time-consuming environmental review was high.

[50] http://www.ogs.state.ny.us/

Conversely, if new proposals for the facility exceeded the previously approved "footprint" – the space occupied by the physical plant – then a new environmental review would be required engendering significant delay.

OGS Deputy Commissioner and Counsel Howard Zwickel, Assistant Counsel Noreen VanDoren and Associate Counsel Michele Reale evaluated the May 8, 2009 MOU responses for potential SEQRA issues. VanDoren had been involved in the previous SEQRA environmental review that resulted in the 2004 negative declaration, the finding that the then-proposed plans would not have a deleterious environmental impact.

OGS's review of AEG's physical plans noted the inclusion of a hotel and entertainment center, both of which were not included in the 2004 plans which had passed environmental muster. Therefore, OGS determined that AEG's plans would require an entirely new SEQRA evaluation thereby causing a delay of at least a year.[51] Furthermore, OGS determined that if AEG were successful in obtaining permission from Lottery for a total of 7,650 to 10,000 VLT machines, that increase could have potential environmental effects requiring a new environmental impact study and additional delays. OGS's conclusion that AEG's plans would require a new environmental impact study thereby delaying the construction start date for at least a year proves highly relevant in evaluating the process and serves as an example of the lack of communication and resulting misinformation which pervaded it. As discussed below, although legislative and executive staff appear to have digested this vital piece of information, evidence

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[51] Even though AEG's June 24, 2009 response presented a six-phase plan, OGS considered the entire proposal in terms of its impact on the SEQRA evaluation. Zwickel explained that segmentation, or breaking a proposal into parts, would not cure the SEQRA issues. Indeed, AEG's clear intent to build the hotel and entertainment center is evident in its proposed upfront licensing fee which it conditioned on the absolute right, as opposed to the right of first refusal, to build the mixed use facilities.

abounds that only Speaker Silver was cognizant of this foreshadowed delay as opposed to the relevant members of the Senate who touted AEG's supposed exemplary "speed to market" – the ability to begin construction quickly. Indeed, upon AEG's selection, one of Speaker Silver imposed conditions spoke to the need to conform to the prior approved environmental review.

OGS expected that because Delaware North had employed the same architects who had drafted the 2004 environmentally sound plans, its proposal would be deemed equally sound and thus incur minimal delay. SL Green's plans also appeared to fit within the previously approved environmental review. OGS could not comment on Peebles's plans because, according to VanDoren, not enough information was provided by the bidder. Similarly, OGS could not assess Penn National's plans because none was submitted. Wynn's plans for the physical plant substantially exceeded the scope of any plans previously submitted and clearly would have required a new SEQRA environmental evaluation that would have delayed the project for at least a year.

4. Racing and Wagering Board and Chairman John Sabini

The New York State Racing and Wagering Board was established in 1973 by the Legislature to combine the functions of the various existing racing commissions into one centralized authority. Pursuant to statute, the Board possesses "general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and persons engaged therein." John Sabini was appointed Chairman by Governor Paterson in August 2008. Prior to that appointment, Sabini served in the state Senate as the ranking member of the Senate Racing and Wagering Committee. He also served on the 2006-2007 Ad-Hoc Committee

to Determine the Future of Thoroughbred Racing in New York and the operations of Belmont Park, Aqueduct Racetrack and Saratoga Racecourse.

Sabini testified that upon his appointment as Chairman of the Racing and Wagering Board and learning that the Board was not involved in the Aqueduct VLT operator evaluation process, he actively sought a role from Governor Paterson: "When the process seemed to start, based on signals I was getting in the media that the process was starting in earnest, that's when I made a vow to myself that the next time I saw the Governor I would speak to him about it." Sabini explained that his justifications for involvement were based both upon his capacity as head of the Racing and Wagering Board and his experience in the area. As to his seeking involvement as head of the Board Sabini testified:

> What happened was the solicitations went out and I believe had been answered, and I feel very strongly, having been both the ranking member of the Senate Racing, Gaming and Wagering Committee, I saw how the process worked. I saw what the board and others had involvement in the Racino trade, if you will, throughout the state, and how prior administrations had kind of shut the Racing and Wagering Board out of the process under the guise of the Lottery ran these machines. It was my strong feeling, based on the law and based on the franchise agreement and the land settlement agreement with New York Racing Association, that New York State was now the landlord at Aqueduct, at least, and that would make it a unique Racino venue; and that in effect as the leader of the Racing and Wagering Board, that I was in effect part of the stewardship of that building, and that we should have at least some participation in the process. Maybe not the final say. Obviously, it was a process that was set up by the Legislature and would be an essentially political process, but that we at least be consulted.

Sabini added that his involvement was also valuable due to his expertise and role in the administration:

> Additionally, when the Governor asked me to take this job he made a convincing argument that I had been his advisor as a ranking member of the senate Racing, Gaming and Wagering Committee while he was the

> leader and had appointed me . . . that if I were in effect his top advisor on these issues when he was the minority leader, he essentially needed me to do that role, as governor, and I was going to have a broad portfolio of issues involving things related to gaming and racing in New York State. So that when I wasn't involved and when the agency wasn't contacted in the initial process, and understanding that Lottery had sort of cut out a hegemony, if you will, on this, and that there were people institutionally in government who wanted their territory protected in other parts of government as well, that if I wanted the [Racing and Wagering] board to have some impact in this, particularly in view of the fact that I believe we are in effect a sort of government agency in charge of the building or sort of first line of defense of the building, that we have more of an involvement. And I also knew that my personal relationship with the governor was such that if I was going to get something done I could go right to him.

Although, as discussed below, it was not unreasonable for the Chairman of the Racing and Wagering Board to seek involvement in the process for selecting a VLT vendor at a racetrack which it oversees and Sabini clearly had significant experience related to gaming operations, Sabini's involvement provokes suspicion due to his relationship with Karl O'Farrell, a key actor in AEG and former chairman of Capital Play.

When presented with a contemporary newspaper account reporting that he had expressed "strong support" for Capital Play during the 2009 bidding, Sabini denied having done so but did admit to having praised the gaming aspect of its proposal. [52] Further, while acknowledging that Capital Play had contributed money to his Senate campaign, Sabini averred that he did not recall who from that group had made the contribution. In fact, Board of Election records reveal that O'Farrell personally donated $3,000 to Sabini's Senate campaign between November 2007 and May 2008. Sabini

[52] Reports in the press reveal, however, that Sabini publicly supported AEG's predecessor, Capital Play. http://www.queenscourier.com/articles/2008/06/20/news/top_stories/news14.txt

testified that he voluntarily returned any campaign contributions made by those involved in racing or gaming upon his appointment to the Racing and Wagering Board.

O'Farrell testified that he had become acquainted with Sabini during Sabini's service on the 2006-2007 ad hoc committee prior to O'Farrell's involvement in Capital Play. O'Farrell added, "I had a personal relationship with John [Sabini]. We actually would catch up for a beer now and again."

Although Sabini admitted that he was acquainted with O'Farrell, he was more circumspect in his testimony about their relationship:

> **Question**: Were individual names mentioned [during Lottery's review of AEG's licensing issues]?
>
> **Sabini**: I guess Mr. O'Farrell's name was mentioned.
>
> **Question**: Had you ever heard that name before?
>
> **Sabini**: Certainly.
>
> **Question**: In what context?
>
> **Sabini**: Mr. O'Farrell was part of the bidding process of the ad hoc committee that I sat on for Governor Spitzer and Senator Smith.

When confronted with O'Farrell's description of their relationship and questioned as to its accuracy, Sabini characterized O'Farrell "as someone I came to respect his knowledge, but occasionally would have lunch. I would say maybe twice over the five years." When the Inspector General asked Sabini whether O'Farrell had ever contacted him during the VLT operator selection process, he responded, "I have seen him, but not in the better part of a year [as of March 17, 2010]," when he related that he saw him at a lunch meeting but stated that he did not believe that O'Farrell was "directly" involved in AEG's bid at that time. Notwithstanding his efforts to become involved in the process,

Sabini testified that he was not involved in the ultimate selection of AEG and the Inspector General unearthed no evidence undermining this claim. O'Farrell similarly asserted that he did not meet with Sabini after Sabini became formally involved in the 2009 process and further maintained that Sabini did not support AEG for VLT operator at Aqueduct.

Regardless, O'Farrell clearly capitalized on his friendship with Sabini to gauge the relative merits of the various submissions and seek information regarding the status of the process. Indeed, evidence reveals communications between O'Farrell and Sabini even before Sabini sought involvement in the selection process. For instance, on March 10, 2009, the day before Delaware North was officially deselected from its award as the then chosen VLT operator, O'Farrell sent an e-mail to an individual named Michael Bean regarding "John Sabini": "Just had a call from John Sabini (former Senator) and now Chairman of the Racing and Wagering Board. Confidentially he is pleased with the turn of events which have been on [sic] the cards for many months. He is currently on vacation but wants to have lunch on Tuesday either in the city or Albany. He wants to make sure the DN [Delaware North] deal is finally dead without any chance of resurrection." Thereafter, on March 19, 2009, under the subject "Senator Sabini," O'Farrell sent an e-mail to Andrew Frank, AEG's soon-to-be public relations consultant: "I have lunch with The Senator at 1 pm tomorrow." On May 9, 2009, the day after the initial submission by potential vendors in the 2009-10 process which resulted in the selection of AEG, O'Farrell revealed in an e-mail exchange with AEG member Larry Roman: "Spoke to both Pat Foye (former head of ESDC) and Senator Sabini, Chairman of Racing and Wagering Board. We are in good shape." Again on May 12, 2009,

O'Farrell e-mailed Roman, "Sabini told me not to worry about SL Green, DN [Delaware North] & Peebles. Worry about Penn National and Wynn."

While denying specific recall of any of these conversations with O'Farrell, Sabini admitted that he ate lunch with O'Farrell during the period between when he had left the Senate in September 2008 and June 2009. When asked if the Aqueduct VLT facility was discussed at their lunch, Sabini replied, "Well at the time I wasn't involved in the process but I suspect that was part of the subject matter and the big part of the subject matter was the horse racing and what his expertise to lead to a better product here in the United States." Sabini averred that he could not remember whether O'Farrell indicated that he was preparing a bid for the racino project at this meeting. When confronted with O'Farrell's e-mails, Sabini denied recollection of the referred to conversations and specifically denied as having been "pleased" with the deselection of Delaware North or that he possessed any bidding information at the time of the May 12, 2009 e-mail.

Ironically, although Sabini was unable to state with certainty when his formal participation in the selection process commenced (he speculated it to be around July 13, 2009), the Inspector General is able to place a timeframe on his involvement based on internal AEG e-mails greeting his appointment as a boon to its chances of securing the franchise. Specifically, on July 23, 2009, O'Farrell e-mailed Frank regarding a discussion he had had with his "friend at lunch" on a matter unrelated to the racino. After a reply by Frank regarding whether O'Farrell's "friend" would be in Albany for a meeting the succeeding Monday, O'Farrell replied, "our friend has just been appointed by the governor to be a part of the aqueduct decision making process." Frank responded, "That is very good." O'Farrell confirmed for the Inspector General that his "friend"

referenced in these e-mails was Sabini. Based upon a review of his calendar, Sabini testified that he attended a July 23, 2009 meeting with AEG officials including O'Farrell arranged by AEG lobbyist Stanley Schlein. Sabini denied foreknowledge that O'Farrell would be attending that meeting and averred that he had no contact with O'Farrell thereafter.

Evidence obtained by the Inspector General evinces that AEG still considered Sabini an influential potential ally in their efforts. Specifically, in a November 17, 2009 e-mail exchange, members of AEG discussed having Larry Woolf, Navegante's chairman, speak to Sabini at a Las Vegas gaming event: "John Sabini is speaking in the morning – would be good for Larry to connect with him. They met in Saratoga at the NY Gaming conference." [53] In fact, Sabini acknowledged speaking to Woolf at this event specifically about AEG's proposal.[54]

While the Inspector General notes that it is not illogical that, because the selectee would necessarily reside under essentially the same roof as NYRA (the horse racing operator), the Racing and Wagering Board would be included in the evaluation of the bidders, even after Sabini actively inserted himself and his agency in the process, neither he nor his agency was tasked with any duties to assist in the selection. Indeed, although he personally received summaries of the proposals and attended presentations by the vendors, Sabini confirmed that his agency did not engage in any analysis of the proposals. Sabini averred:

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[53] Sabini was the keynote speaker at the June 2009 New York Gaming Summit which took place in Saratoga Springs. http://www.nysummit.com/index.php?option=com_content&view=article&catid=49%3Apress-releases&id=118%3Ajohn-sabini-headlines-new-york-gaming-summit&Itemid=58. Andrew Frank, AEG's public relations person, testified that AEG was one of the sponsors of this event and that Larry Woolf of Navegante met him there.

[54] He also related that at some point in the process he met with representatives of Wynn.

> And since Lottery was ultimately – there were two final arbiters here: Lottery was going to issue a license and the two legislative leaders and the governor were going to make the decision. So my attitude, I would say I was there for more kibbitzing and also to advise the governor, when I was called upon to advise the governor, and frankly to use my expertise in things gaming, because I believe I do have some expertise in the gaming end of things more than the racing end; and, B, to protect the interests of racing's interests and promote racing in New York State, which was part of the portfolio the governor asked me to do.

In addition to not securing any official role for his agency, in regard to Sabini's unofficial advisory role in the process, the Inspector General determined that he was clearly uninformed as to the hierarchy of analysts and unduly critical of those actually tasked with certain duties. Specifically, Sabini was critical of Lottery's evaluations regarding the pre-licensing of potential VLT vendors and questioned Lottery's conclusions, alleging that it presented no evidence substantiating them. Sabini further attested to having taken issue with Lottery Director Medenica's and Counsel Murray's assertion at a meeting discussing the various criteria to be weighed that the vendors' ties to horse racing should not be considered in the analysis of the different proposals. Specifically, Lottery had advised that it "had learned from our casinos, there is almost no interaction between the horse racing fans and the VLT fans," and contended that to the extent that the awardee would have any interaction with horse racing, it would only relate to residing under the same roof as NYRA, the horse racing operator. With regard to this analysis, Sabini related: "Especially, since it was directed specifically at me by name during a meeting, you tend to wake up a little bit." Indeed, further reflecting this bureaucratic tension, Sabini went so far as to question the propriety of the entire pre-licensing process established by the Governor in the April 2009 solicitation:

> Based on criteria that they set that they didn't discuss with us, and didn't show evidence of, and unless I see specific reasons, I sort of questioned why they would say that. I didn't think that was their role unless they were told, okay, who was licensable and who wasn't. I think that they . . . were supposed to determine who would do the best job for the State of New York. And I thought that they were sort of backfilling the process by saying we'll tell you what parameters you can pick from first, rather than decide who would do best, and then say who is licensable and who is not. I frankly didn't think that's the way it should go because I thought they were trying to steer the process.

Sabini noted that at meetings among the executive agencies and legislative staff, Lottery posited that Peebles and AEG would not be licensable. He recalled Lottery announcing that Peebles had not submitted all the required paperwork and that AEG "had some bad people around." As demonstrated below, Lottery's pre-licensing review was instituted by the Governor's office and was actually quite comprehensive.

In sum, while it was not inherently inappropriate for Sabini to seek a role in the process for the Racing and Wagering Board, based upon the interrelationships between the proposed VLT facility and the racetrack, or himself, based upon his experience, his inclusion absent any official role and duties further evinces the haphazard procedure for evaluation in the executive. Moreover, while the majority of Sabini's exchanges with O'Farrell preceded his formal entry into the selection process, this contact between the head of an executive agency and a party to a group attempting to win a significant state contract, especially if the contact was initiated by Sabini as O'Farrell's e-mail states, at a minimum, lends to the appearance of impropriety. Furthermore, his relationship with O'Farrell and AEG's efforts to utilize him as a source of information, at a minimum, is further evidence of the deleterious effects Tax Law § 1612's removal of the selection from established procurement rules and the politicization of the process.

5. Division of The Lottery

As discussed earlier in this report, the April 2009 solicitation advised that the Lottery would conduct a "pre-qualification review of all potential Vendors" in order to determine if Lottery's standards, contained in regulations promulgated under its statutory authority, for issuing a Lottery license are met, and that this review would "concentrate on the skills, experience and financial resources each entity proposes to employ at the Aqueduct VLT facility, as well as the reputation of each entity and individual for honesty and integrity."

After the May 8, 2009 submissions, Lottery, pursuant to its governing regulations, requested "license applications for each entity that was involved, for each individual that was involved, including all of the people who would act as managers, directors, key individuals, employees and major investors, meaning any investor with ten percent or more of the equity of the company." [55] Each individual was also required to submit fingerprint cards which were presented to the New York State Division of Criminal Justice Services and the FBI for background checks. While certain misdemeanor and/or felony convictions either divulged on an application or discovered via the background check previously would automatically disqualify a potential licensee, current Lottery regulations permit Lottery officials to exercise discretion in all instances. [56] Potential licensees must also provide five years of tax returns and list any gaming licenses held in other jurisdictions. In addition to analyzing the applications and provided information,

[55] Lottery's regulations provide for the right to require applications from investors owning less than 10 percent of equity at Lottery's discretion.

[56] Speaker Silver's post-award January 29, 2010 condition on AEG's selection that Lottery prohibit "anyone who has been . . . convicted within the past 15 years of a felony or other crime or offense involving fraud, larceny of any sort, theft, misappropriation or conversion of funds, or tax evasion . . . from obtaining a license," essentially removed this discretion from the Lottery.

Lottery engages Pinkerton, a private investigation firm, to further investigate potential licensees.

Lottery's Pre-Licensing Review Reveals Significant Licensing Issues for Peebles and AEG

Lottery Director of Licensing Jeffrey Allen and his staff examined the 55-page applications submitted by each entity and associated individuals. Allen testified that Wynn, Delaware North, Penn National and Hard Rock (SL Green) – all established gaming entities readily familiar with licensing procedures and licensed in other jurisdictions – produced timely and complete submissions. Lottery deemed all four pre-licensable.

Peebles's Gaming Partner MGM Under Investigation New Jersey

Peebles was delinquent in its application submissions and unresponsive to repeated requests from Lottery to provide the requisite information. More importantly, Allen confirmed that Peebles's gaming partner, MGM, was under investigation by the New Jersey Casino Control Commission, an issue relevant to MGM's licensure in New York State because Lottery weighs heavily, as part of the licensing process, the status of a potential licensee in other jurisdictions. The New Jersey investigation stemmed from MGM's half interest in the Borgata in Atlantic City, New Jersey, and its efforts to obtain a gaming license there.

The New Jersey commission was investigating MGM's Macau (China) Casino and a possible tie by one of its investors to organized crime, an inquiry that was pending

at the time of Lottery's review with no final decision anticipated for quite some time. Lottery would not deem MGM licensable absent a resolution in New Jersey. Notably, Lottery's unwillingness to pre-qualify MGM prior to the resolution of the New Jersey investigation proved prudent as, on or about May 18, 2010, the New Jersey Division of Gaming Enforcement issued a report which found MGM not licensable in New Jersey if the Macau Casino retained the investor with ties to organized crime. [57]

AEG and Karl O'Farrell

Lottery's concerns with AEG's ability to qualify for licensure arose almost immediately upon its May 8, 2009 submission. Indeed, as recounted above, due to Karl O'Farrell's legal difficulties in Australia, Capital Play, one of three vendors from the 2008 process which resulted in the selection of Delaware North, had been obligated, as communicated by Capital Play's compliance counsel Andrew Goodell, to claim that it had jettisoned O'Farrell from its proposal. Yet, an internal Lottery May 14, 2009 e-mail from Associate Attorney Julie Barker to Deputy Director and Counsel William Murray indicated that Goodell, now AEG's compliance counsel and still O'Farrell's personal attorney, had informed Lottery of both his representation of AEG and Karl O'Farrell's involvement with the AEG consortium:

> Goodell wanted to know if the Lottery would permit O'Farrell's interests in this group in a blind trust until after the Lottery clears him for a VLG license. O'Farrell is not an officer of the corporation – he is just the "organizer" of the group. If Aqueduct Entertainment group wins the bid and the Lottery will not clear O'Farrell for a license, his interests in the

[57] Seehttp://www.state.nj.us/casinos/home/info/docs/MGM/dge_%20report_redacted.pdf. According to Director Medenica, rather than cease business in Macau, MGM placed its Borgata holdings in escrow to sell.

> blind trust would be transferred to someone who does meet the Lottery's standards.

Murray responded by e-mail, "Oy!"

Murray's consternation appears justified because although Goodell represented to Lottery that O'Farrell was merely an "organizer" of AEG, the Inspector General determined that O'Farrell was integrally involved in AEG's bid and stood to reap substantial profit if AEG were to obtain the award. Specifically, the Inspector General obtained by subpoena from O'Farrell an initial document of AEG's organizational structure (a "term sheet") dated May 7, 2009, which listed Karl John O'Farrell and J&J Partners (to be discussed later) as "Founders" of AEG. Significantly, the document further provided that: "Founders have invested $25 million to date ('Founder Interest')." Furthermore, a section of the term sheet entitled, "Membership Interests" stated, "In exchange for its investment in AEG; each Investor will receive a membership interest ('Percentage Interest') in AEG in an amount equal to a fraction, expressed as a percentage, the numerator of which is such Investor's Investment in AEG, and the denominator of which is the aggregate amount of investment of all Investors in AEG."

In addition, the Inspector General by subpoena obtained from O'Farrell an unexecuted letter "dated as of May 7, 2009," which "sets forth the agreement between Aqueduct Entertainment Group, LLC ('Aqueduct Entertainment') and Karl O'Farrell ('O'Farrell')." The letter provides under the heading "Equity Participation," in pertinent part, that if AEG is awarded the VLT franchise, "in consideration for O'Farrell being the founder and strategic investor of Capital Play Limited . . . and being a founder of Aqueduct Entertainment, Aqueduct Entertainment will assign and transfer to O'Farrell (or his nominee or nominees) Convertible Preferred Securities of such Aqueduct

Entertainment Entity with a value . . . of $12,500,000, together with any future securities the founders will be entitled to in the capital structure of the Aqueduct Entertainment Entity." The letter continued under the heading "President & CEO Position," "If an Aqueduct Entertainment Entity is awarded the franchise to operate and manage the casino facility to be built at the Aqueduct Race Track . . . then O'Farrell will be appointed to the position of President & CEO of Aqueduct Entertainment with a Compensation Package commensurate with a Senior Executive position of this status, subject to O'Farrell satisfying the requirements of New York State's Integrity Review and Licensing processes (the 'Integrity Review')."

Therefore, Goodell's semantic minimization of O'Farrell's role as an "organizer" aside, O'Farrell possessed a substantial financial investment and equity interest in the AEG consortium. When, during a sworn interview of O'Farrell, the Inspector General attempted to ask O'Farrell about the substance of these agreements, Goodell, who appeared to represent O'Farrell in this capacity as well, refused to allow O'Farrell to answer any questions in this regard.

Contrary to Goodell's characterization of him as a passive facilitator, O'Farrell's actual vibrant role in AEG is further revealed in internal AEG e-mails which go so far as to characterize O'Farrell as the consortium's Chief Executive Officer. A May 18, 2009 e-mail exchange between O'Farrell and Andrew Frank, the public relations consultant spearheading AEG's bid, discussed the propriety of publicly releasing information revealing O'Farrell's position as CEO. The e-mail includes the following:

> **Aqueduct Entertainment, LLC** was founded by Karl O'Farrell. Mr. O'Farrell is the Company's CEO and is a resident of New York City, a graduate of the Wharton School of Business (MBA) as well as Trinity College and The Dublin Institute of Technology in Dublin. He is the

> founder of the Company and the CEO and major shareholder of Capital Play Pty Ltd, one of the most successful wagering companies based in Australia.

Frank wrote to O'Farrell: "Karl – I am concerned about this – true false or indifferent, we have NEVER said this publicly." (Emphasis in original). When questioned by the Inspector General about this e-mail, Goodell again silenced O'Farrell. Frank testified regarding this e-mail:

> Well, my concern was that we had a chairman, we had a gaming operator, we had the local representatives, Greenstar and others, so we had never said that Karl – I was not – we never talked about that he would be the company's CEO, so I think that was something that someone else drafted, so my concern was we were diminishing the roles of the gaming operator and the local participants because that was the focus of our efforts.

Effectuating the formation of the blind trust Goodell had presented to the Lottery as an option to permit O'Farrell to recoup his purported investment,[58] on June 2, 2009, Goodell incorporated Aqueduct Community Enterprise, Inc. (ACE), for this purpose. In late August, Goodell described ACE to AEG members:

> ACE is a stock corporation that owns Mr. O'Farrell's prior interest in AEG. Mr. Goodell is the sole officer, director and shareholder. Mr. O'Farrell had a stock option to acquire all the ACE shares, but only upon approval of Lottery. The stock option is transferable to a third party (who would likewise be subject to Lottery approval).
> ACE was formed specifically to remove Mr. O'Farrell from any direct right to acquire equity in AEG and, instead, to subject that right to Lottery approval. Unless or until Lottery approved of the exercise of that stock option, Mr. O'Farrell had no ownership interest or any other rights in ACE, and thus was removed from any ownership or management rights in AEG. This arrangement is similar in form to what was done last year when Plainfield [Asset Management] purchased Mr. O'Farrell's shares, subject to his right to repurchase the shares if and when he received Lottery approval.

[58] Michael Wagman of Clairvest, AEG's financing member, testified that Ernst & Young, its accountants, attempted to verify the amount of money invested by O'Farrell to no avail.

In late June, at O'Farrell's request, the term sheet was amended to substitute O'Farrell's name with ACE. Once again, when the Inspector General inquired of O'Farrell about this blind trust created to enable AEG to be deemed licensable by Lottery while still permitting O'Farrell to maintain a significant financial interest, Goodell intervened and muted O'Farrell.

Goodell proceeded to present numerous different scenarios to Lottery in an attempt to appease Lottery while retaining O'Farrell's interest in AEG. On July 1, 2009, Goodell wrote to Director of Licensing Jeffrey Allen: "As we discussed this morning, Karl O'Farrell has been assisting the Aqueduct Entertainment Group as an organizer and consultant. He is not now and will not become an officer, director or significant shareholder (10% or more) unless and until approved by the New York State Lottery."[59] On August 7, 2009, Goodell stated in an e-mail to Murray:

> As we discussed this afternoon, Mr. O'Farrell has been involved with AEG as a developer and consultant in its efforts to submit a bid to New York State. Mr. O'Farrell is not an employee, officer, director, or shareholder of AEG, but has worked solely as an independent contractor. In addition to sharing his knowledge and experience from the last bid process, he has assisted in negotiating terms and conditions between AEG and its team members; helped to arrange financing with Deutsche Bank and Clairvest; helped arrange for a contract to the Navigante [sic] Group, the largest privately owned casino operator in the world; and assisted in negotiating appropriate term sheets.
>
> If AEG is awarded the franchise, it is anticipated that Mr. O'Farrell will continue to assist AEG in coordinating construction contacts and construction financing. Any role for Mr. O'Farrell after bid award will, of course, be subject to the review and approval of the Division for the Lottery.

[59] On July 3, 2009, a company called AEG New York Limited, opened a bank account at Deutsche Bank. The three signatories on the account were Richard Mays, Joseph Logan, and Karl O'Farrell. Logan testified that this company was formed and the account opened solely as a means to pay AEG's bills. The papers were filed with the New York State Department of State by Andrew Goodell.

> Once the casino is constructed, AEG does not envision any role for Mr. O'Farrell regarding the operation or management of any aspect of the VLT facility. Navigante [sic] Group will be solely responsible for operating all aspects of the VLT facility, and Mr. O'Farrell will not be involved in any manner with the VLT operations or any aspect of the project regulated by the New York State Lottery.
>
> Although no documents or contracts have been signed, it is anticipated that Mr. O'Farrell will be granted stock options to acquire a small equity interest in AEG conditioned upon approval by the New York State Lottery. Mr. O'Farrell will not be able to exercise his stock option without such approval. If fully exercised (with the approval of the New York State Lottery), it is anticipated that his equity ownership would be in the 7-9% range.

Lottery Senior Attorney Kent VanderWal and Associate Attorney Julie Barker, noted in an e-mail, in reference to Goodell's latest proffer, "This deal seems to have been carefully arranged to avoid licensing [review]. I wouldn't be surprised if Karl O'Farrell ends up with a 9.9% ownership share." Similarly, Lottery Video Gaming Director James Nielsen observed in an August 11, 2009 e-mail: "Based on this morning's comments I thought he was out. This sounds like he is trying to stay in."

Lottery's suspicions appear to have been well justified. Among the documents obtained by the Inspector General during this investigation was a July 14, 2009 letter agreement between a company entitled, "Aqueduct Construction Group, LLC," (ACG) and AEG which states, in pertinent part, that if AEG is the successful bidder, AEG and ACG will enter into an agreement whereby ACG "will receive a development fee equal to one percent (1%) of all hard and soft costs related to the full development of all phases of the Project." Notably, AEG had proposed exceeding the $250 million capital construction grant which alone would have provided ACG, under the agreement, $2.5 million. The agreement is signed by Richard Mays as AEG Chairman and agreed to by

Andrew Goodell as manager of ACG. According to the New York State Department of State, ACG articles of organization were filed on July 27, 2009, and list the same address as AEG as the location at which to serve process on ACG.

In a August 21, 2009 e-mail, Allen questioned AEG's honesty about O'Farrell's role throughout the pre-licensing process, noted Lottery's difficulty in obtaining necessary information about his role, and opined that this lack of candor and forthcoming should count against AEG. [60]

Murray testified that throughout the vetting process, Lottery questioned whether Mays was the true leader of AEG, or if O'Farrell was actually running AEG from behind the scenes with Mays "masquerading" as the leader. In late August, Murray drafted 21 detailed questions regarding Lottery's issues with O'Farrell primarily to inquire of AEG Chairman Mays and Navegante's Chief Executive Officer Larry Woolf about how much these purported leaders of AEG knew of O'Farrell. Both Mays and Woolf, the ostensible heads of the consortium, claimed ignorance of O'Farrell's history.

O'Farrell's and Goodell's indefatigable efforts to devise methods to maintain O'Farrell's involvement in AEG were summarized by Lottery Deputy Director Murray to the Inspector General:

> I think throughout from May all the way through August there were a large number of conversations between the Lottery Licensing Director Jeffrey Allen and Andrew Goodell, the attorney for Capital Play, and between me and Andrew Goodell, in which Jeffrey Allen and I said over and over and over again, if O'Farrell is involved with AEG, AEG is not going to qualify for a video lottery license.

* * *

[60] For instance, Lottery also learned, on August 20, 2009, that O'Farrell was involved in bankruptcy proceedings in both Australia and New York, information which Lottery deems relevant to licensure and which had not been disclosed by Goodell.

> Goodell didn't seem to believe it because he kept coming back and asking questions like, well, suppose he's just a consultant and he really doesn't do anything about running the video lottery casino? We said no. Well, suppose he's just a minority shareholder and he doesn't have any role at all, not even consulting or giving advice, he just participates in the equity? And we said no. Finally, we came to a head and said AEG is just not going to qualify.

Other internal AEG e-mails demonstrate not only O'Farrell's active and continuing involvement in the consortium, but a knowing effort to conceal his participation. For instance, on August 17, 2009, at the same time Goodell was attempting to minimize O'Farrell's role to Lottery, O'Farrell engaged in an e-mail exchange with AEG operative Hank Sheinkopf and AEG principal Larry Roman regarding approaching the New York Times. During this exchange in which O'Farrell concurred with this plan, O'Farrell explicitly advised Roman and Sheinkopf, "Of course my name is not to be mentioned. Larry Roman will take the lead."

Lottery also learned of potential issues with J&J Partners, the other listed founder of AEG. A confidential informant provided Lottery with information regarding Joseph Logan and Jason Wynn, the two "Js" that apparently comprised J&J Partners. When Murray questioned Goodell about that entity, Goodell insisted that Jason Wynn was not involved and the only member was Joseph Logan. Contradicting Goodell's claim and further evincing his disingenuousness, AEG's articles of organization indicate that they were originally filed by Jason Wynn.[61] Moreover, a review of J&J Partner's "2009

[61] Indeed, the Inspector General later confirmed that it was Joseph Logan who suggested Richard Mays for AEG Chairman and that he and Mays serve on the board of Clean Power, one of the firms that comprise the AEG consortium, and the two had worked jointly on various bankruptcy restructurings in Arkansas. Notably, Mays had also represented Eric Wynn, Jason's father, in an unsuccessful appeal of a securities fraud conviction.

Limited Liability Company Report" filed on April 30, 2009, with the Florida Department of State, lists only Jason Wynn as its member followed by a "2009 Limited Liability Company Amended Report" filed on September 2, 2009, effecting the change of Logan as its sole member. Indeed, Logan admitted to the Inspector General under oath that J&J Partners was formed by Jason Wynn, and Logan had it changed "sometime in August" during the pendency of the bidding process to list himself as the only member of this single entity LLC.

Lottery-led Meetings

In the first week of August 2009, Lottery, in an attempt to impose some semblance of order and standards to the selection process, organized a number of meetings among staff participating in the analysis of the Aqueduct proposals, including the Governor's counsel's office, DOB and the Racing and Wagering Board, and Assembly and Senate staff. To that end, Lottery staff prepared a list of evaluation criteria ranked as they deemed most to least important, to be discussed and analyzed with the members of the other executive agencies and legislative staff. The list included: speed to market (ability to do deal quickly); gaming experience (operational ability); financing; understanding of market uniqueness; marketing strategic fit; brand; upfront licensing fee; construction timetable; licensing issues; and political "baggage." Also discussed were items that Lottery felt should not be considered: political considerations; tie-in with horse racing; and net win-per-machine.

Lottery explained each criterion, presented its bases for the ranking, discussed how each vendor fared within each category, and specifically detailed AEG's and

Peebles's licensing issues. Murray, as characterized by Lottery Director Medenica, then "went on a rant" regarding AEG's licensing issues and that it shouldn't be licensed. At a certain point in the meeting, Murray and Medenica suggested excluding both Peebles and AEG and proceeding with the remaining four potential vendors. Medenica testified that both Christopher Higgins and Brad Fischer from the Senate were amenable to the proposition, but ultimately the consensus was that the analysts and staff members lacked the authority to do so and the information should simply be presented to the decision makers. Medenica offered:

> I think in our mind the notion of a definitive us excluding them really wasn't as necessary because we thought they were such weak bidders anyway. So we weren't focused on we got to get rid of these guys because they're dangerous, even though we believed it, but it was more about how do we make the more important decision, which was who was going to get the franchise.

Murray related to the Inspector General that the concept of establishing specific evaluation criteria and ranking the vendors was similarly rejected by most others present:

> [T]he reaction we got from the other state agencies was kind of disappointing. The other agencies didn't really seem to be that interested in doing a rigorous comparison and evaluation of the competing proposals, particularly the Racing and Wagering Board chairman, John Sabini, the budget division employees. I don't remember whether it was in the meeting or after the meeting or in some informal comments, but the reaction we got from the other agencies was, we're trying to figure out what direction the decision makers want to go in, the governor, the leader of the senate and the leader of the assembly, and we're going to give them a kind of a . . . report that just lays things out, kind of a menu they can pick things from. We're very leery about the idea of trying to rank the competing proposals in the order of from best to worst, because we've learned, especially DOB, have learned over the years that if you get too far out in front of the decision makers that have to approve the decision, you can wind up putting them into a corner that they might not want to be in.

The derision directed at Lottery's perceived insolence in attempting to impose objective standards and make a recommendation is telling. Yet another byproduct of politicizing a

procurement is that the experts evaluating the proposals are hesitant to commit to a concrete assessment for fear of hamstringing the politicians tasked with making the decision but who are not bound to make the most financially sound one.

Shortly thereafter, another meeting was held that included DOB staff and also Counsel to the Governor Kiernan and Assistant Counsel Rose, who had not been present for the first meeting.[62] At this meeting, Lottery introduced a chart that has received much media attention, referred to as the "Harvey ball" chart.[63] The chart, which resembles a *Consumer Reports* chart, evaluated each vendor based on the criteria discussed at the previous meeting. While the chart did not rank the competing vendors in any specific order, it did rate them as positive, neutral or negative in the aforementioned categories. Medenica explained the basis for each score in each category. Upon hearing comments about AEG's licensing problems regarding O'Farrell, Kiernan, as related by Medenica:

> made a comment that, because we were then talking about the unlicenseability of AEG and Peebles, he really articulated better than even we had at that point: If you take Karl O'Farrell away, you have another issue. It's a management issue. Who is driving the bus? Who is leading this organization? It triggered a thought. Here's another criteria. I missed this one. It's what we call -- it appeared on a later chart called leadership management. Leadership management was – we added that criteria [sic] because of Peter's comment and we realized, yeah, that's a really good point. He was also making the point that these consortiums that had come together for the process really had no history of working together. He got construction guys. They got gaming guys. How would they all work together? Who is pulling it all together? It's easy on a Penn National or a Delaware North. These are big public companies, and they run these things, and they have a chairman, a CEO and a president. It's fairly straight forward. Peter was saying he's had experience with these consortiums where as long as things are going well it's fine, but whenever there's a problem it's always difficult to deal with the organizations.

[62] Rose had been on vacation for the first meeting but had appeared via telephone.
[63] Medenica explained that the type of chart was developed by Harvey Poppel, a management consultant, and included circles (or balls) that were left empty, partly filled, or entirely filled, to facilitate the comparison of information.

Kiernan confirmed that he had presented this assessment, and noted further to the Inspector General that, "with or without O'Farrell," the significant number of groups that comprised the AEG consortium itself was problematic.

F. The First Restructuring of AEG

At the end of August, a number of events converged whereby the members of AEG learned that Lottery was about to disqualify AEG. After Murray questioned Mays and Woolf extensively regarding O'Farrell's background, Woolf contacted Murray and, with what Murray termed a "forceful" posture, averred, "'We have discovered that there's a cancer in our organization and we're determined to cut it out; and that is Mr. O'Farrell, and the attorney that O'Farrell recruited to work on AEG,' and that was Andrew Goodell." Moreover, Stanley Schlein, an AEG attorney, testified to the Inspector General that he had met with Kiernan around this time to inquire regarding media reports that AEG was having licensing problems. According to Schlein, Kiernan reported unequivocally that O'Farrell was not licensable; he had been found unlicensable when he was part of Capital Play; and AEG would not be considered if O'Farrell were not excised. [64] Finally, AEG lobbyist Giorgio DeRosa testified to the Inspector General that he had contacted Assistant Counsel to the Senate Chris Higgins who informed him, after one of Lottery's meetings wherein Murray and Medenica presented findings that AEG would not be licensable, "'You have an O'Farrell problem. . . If it doesn't get fixed, you guys are gone.'" [65]

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[64] NYRA, which oversees the horse racing at Aqueduct, had also contacted Kiernan and informed him that AEG was unacceptable because of O'Farrell.

[65] Higgins testified that he recalled telling DeRosa (or Draves) that O'Farrell was a problem, but was unable to place a time frame on the conversation.

These revelations culminated in a September 1, 2009 telephone conference during which DeRosa and another AEG lobbyist, John Cordo, confronted Goodell regarding O'Farrell and the possible disqualification by Lottery. After some prodding, Goodell divulged to them that he had created a company called ACE, of which he was the sole principal, but that he was merely holding the shares for O'Farrell. At that point in the conversation, Cordo refused to speak to Goodell and the conversation ended. Cordo was upset because he had been a lobbyist for Capital Play and recalled that, at that time, O'Farrell was not permitted an equity stake and had to relinquish his position. Cordo testified that when he agreed to lobby on behalf of AEG, his assent was conditioned on the requirement that O'Farrell not have any equity stake or management position and he was assured that O'Farrell would merely be an independent contractor assigned to community relations. Cordo, an attorney as well as a lobbyist, was irate when he learned that Goodell was compliance counsel to AEG, a principal of ACE, and O'Farrell's personal attorney, a scenario he deemed "unethical." DeRosa also testified to the Inspector General that he was also indignant about what he considered Goodell's obvious conflict in being AEG's compliance attorney and O'Farrell's personal attorney.

DeRosa and Cordo insisted upon a telephone conference with Michael Wagman, of Clairvest (the financing entity behind AEG) and Larry Woolf, the Chief Executive Officer of Navegante. Stanley Schlein and Carl Andrews (a former state senator and another AEG lobbyist) also participated in the conference call. DeRosa related in his testimony that the seriousness of the situation became readily apparent to all; the lobbyists threatened to quit; all involved were concerned about taint to their reputations; those who had invested significant money in the project were concerned about possible

disqualification. DeRosa, Ed Draves (a partner of DeRosa), Cordo, Schlein and Andrews discussed whether to cease representing AEG, but decided that they would remain if AEG removed O'Farrell, Goodell and Logan. DeRosa informed Woolf of their collective decision. Woolf in turn assured DeRosa that he would personally take charge and, among other things, would retain new compliance counsel whom he had used in another gaming venue to replace Goodell. Prompted by this outcry, in a August 26, 2009 letter faxed to Mays, O'Farrell purportedly ended his "consultancy" with AEG.[66] This resignation letter, however, did not resolve the issues with ACE and Goodell.

Woolf asked DeRosa to schedule a meeting with the Governor's Counsel and Lottery to address AEG's licensing concerns. DeRosa and Cordo were able to schedule a meeting on September 3, 2009, with David Rose, who then asked members of the Lottery to attend. Murray testified that no one from the Governor's office directed him not to disqualify AEG; rather, Rose merely asked Lottery to attend the meeting with members of AEG. DeRosa and Cordo brought with them Robert Reilert as new compliance counsel, Stanley Schlein as an attorney for AEG, and Clairvest Managing Director Michael Wagman. According to Murray, they professed to be "shocked" to learn of Lottery's problems with Goodell and O'Farrell, information which Goodell had secreted from them. Reilert assured Lottery that O'Farrell, Goodell, Joseph Logan, the Wynns, and anyone else with whom Lottery had concerns would be addressed.

Wagman testified that almost concurrent with this meeting, his company had engaged in due diligence regarding O'Farrell and Logan, and determined "some of their background . . . wasn't appropriate to be investing in a gaming operation that's highly

[66] Again, on the advice of counsel, O'Farrell refused to discuss any conversations that prompted his resignation; Goodell argued that the information was irrelevant to the Inspector General's investigation.

regulated." Wagman testified that he had direct conversations with O'Farrell regarding removing him from the project. Wagman related that O'Farrell was "disappointed" to be removed and demanded compensation. O'Farrell initially requested $50 million and these negotiations culminated in a document entitled "Withdrawal Transfer and Amendment Agreement" ("Withdrawal Agreement") executed on September 3, 2009, in which Clairvest agreed to pay ACE $15 million to be paid in three equal installments in exchange for a transfer of all rights and interests in AEG from ACE to Clairvest.[67] Furthermore, Logan related that in early September, the lobbyists and the lawyers contacted him and stated that he would have to complete the Lottery license application within a short time and, given his somewhat suspect past (a double homicide where he was with the victims a few hours earlier and refused to cooperate with authorities, and some questionable financial deals) it was unlikely that he would be deemed licensable. The aforementioned withdrawal agreement also removed Logan from AEG.[68]

After the September 3, 2009 meeting in the executive chamber, Lottery was told that O'Farrell, ACE and Goodell had been removed, informed of the terms of the Withdrawal Agreement, and provided a copy of it. Upon review, Murray commented that an agreement to pay ACE $15 million upon award of the VLT franchise still guaranteed ACE, O'Farrell and Goodell a continuing interest in AEG.[69] Murray then consulted Inspector General Fisch, who concurred. Murray informed Reilert that the agreement was unacceptable to Lottery. Reilert testified that they "attempted to do

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[67] This document was signed by Richard Mays as Chairman of AEG; Michael Wagman and Ken Rotman of Clairvest; J& J Partners by Joseph Logan; and ACE by Andrew Goodell and Karl O'Farrell.
[68] Joseph Logan's interest, if AEG were awarded the VLT contract, was to be purchased by a company called "Gain Global Investment Network, LLC," which included Shawn Carter, more commonly known as Jay-Z.
[69] Murray further noted that this proposed $15 million settlement to O'Farrell supported Lottery's assessment that O'Farrell was in fact greatly involved in the formation and operation of AEG.

something that would take O'Farrell out in an agreement. We were unsuccessful and we just unilaterally then severed the relationship formally with O'Farrell." Indeed, among the documents provided to the Inspector General pursuant to subpoena from O'Farrell was a September 9, 2009 "Termination Notice Letter of Intent for Aqueduct Race Track VLT and Mixed Use Development," from Clairvest to Mays of AEG, Logan of J&J Partners, and Goodell of ACE, which declared, in pertinent part: "We hereby notify you that we are not satisfied with the results of our due diligence investigation, including, without limitation, with respect to each of J&J and ACE. Accordingly, pursuant to the provisions of the Clairvest LOI [Letter of Intent], the Clairvest LOI and each party's rights and obligations thereunder are automatically terminated."

Lottery insisted that AEG categorically represent in writing that ACE, O'Farrell and Goodell would not be compensated in any way. AEG proffered numerous letters to Lottery which Lottery deemed insufficiently unequivocal. As Lottery and other executive agencies prepared to brief the legislative staff and the Governor in anticipation of a leaders' meeting, whether AEG was licensable was still, at a minimum, an open question.

V. LOBBYING AND THE SELECTION OF A VLT OPERATOR

As noted above, as interpreted by the relevant parties, Tax Law § 1612(e) required a vendor to be selected by the unanimous consent of the Governor, the Speaker of the Assembly, and the President Pro Tempore of the Senate. Typically, such awards are made by officials of the executive branch and, thus, covered by the aforementioned lobbying restrictions. However, § 1612(e) paired the Governor with the Speaker and the President Pro Tempore who, as members of the Legislature, are generally exempt from the procurement lobbying law in regard to revenue contracts. This unique construct left unresolved the issue of whether the executive branch officials involved, including the Governor, could be lobbied. Notably, although it would appear anomalous and unreasonable to interpret the statute to allow two out of three selectors (the legislative leaders) to be lobbied while barring lobbying for the third, (the Governor) the statute is silent on the application of the state's procurement and lobbying laws. Moreover, the legislative history is devoid of any record or discussion regarding application of the procurement lobbying restrictions.[70]

Despite the lack of any guidance as to how the statute was to be applied, Counsel to the Governor and other individuals involved in the process who contemplated the issue determined: 1) that the selection process was not a procurement subject to established procurement rules; and 2) that, as with the Legislature, the Governor and other executive branch officials could be lobbied. David Rose, Assistant Counsel to the Governor

[70] Interestingly, if Tax Law § 1612 is read not to require consent by all three actors to the selection but, rather, a process in which the Governor makes the VLT vendor selection and then the Legislature becomes involved in the specifics of the deal via an MOU, this aberration is somewhat resolved. Conversely, as the legislators were arguably acting in an executive capacity, it is defensible to assert that the procurement

assigned to the Aqueduct VLT matter for the selections of Delaware North and AEG, posited that the Aqueduct VLT operator selection process "wasn't a formal procurement and because the Legislature can . . . be exempt from the procurement law when it comes to executive procurements, that it wouldn't be applicable. So at the end of the day I think we all decided that lobbying could take place, and we knew it would take place with the Legislature regardless."

Further reflecting the executive branch's view, in February 2010, Counsel to the Governor Peter Kiernan commented to a *New York Times* reporter:

> Your first question is, "Was it like a normal RFP process?" It was decidedly not like a normal RFP process because it had been decided – when Governor Spitzer was the Governor and Senator Bruno was the Majority Leader and the Speaker – had decided at one point to have this process, and it was a statutory process, that the three leaders would have to agree unanimously. Each of them had a vote of equal weight. That meant a couple of things by definition. First, it means it was not an RFP process and that the procurement law would not be applicable. The procurement process is only applicable to the executives and it's not applicable to the Legislature. Secondly, it also meant by definition that it was a political process because one of the things in the normal RFP process is that there's a quiet period in which it cannot be lobbied. But those restrictions did not [u/i] in this instance, so it was a political process.

Governor Paterson also testified that this process was antithetical to the standard procurement process: "I knew it had to be at variance with the standard procurement process. Because principally there were three decision makers. So I saw it as more analogous to the budget process." In fact, the Governor recalled being lobbied by Patricia Lynch, one of Delaware North's lobbyists, during the preceding phase of the bidding process that resulted in the selection of Delaware North. The Governor was also

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lobbying ban should have applied to all involved. Nevertheless, the statute was not interpreted in such a manner and instead was interpreted to require mutually three-way consent.

lobbied by several bidders during the phase that resulted in the selection of AEG, which will be discussed in greater detail later in this report.

The lack of clarity and forethought as to the application of the procurement lobbying restrictions reflect the chaos endemic in the process created under § 1612. Indeed, although the actors involved informed the Inspector General as to the supposed consensus opinion that the restrictions did not apply, when Speaker Silver referred this matter to the Inspector General he specifically requested that this office: "Determine whether the Division of the Lottery and relevant state agencies followed all applicable statutory provisions such as those governing the procurement of revenue contracts under the State Finance Law and the procurement of a VLT operator and the development of real estate at Aqueduct in accordance with section 1612 of the Tax Law." Further reflecting the universal confusion over the application of state law to the selection process, when the Inspector General queried the Speaker as to which provisions of the State Finance Law he was referring to in his letter to this office, the Speaker was unable to articulate any specific section he deemed applicable or to whom such would apply, and, to the contrary, averred, "clearly the state procurement laws were not followed nor were they intended to be followed."

The effects of unrestricted lobbying were exacerbated by the lack of clear guidelines and unintelligible rules which would apply to the selection. Noting the uniqueness of the process and the result of permitting lobbying, Lottery Deputy Director and Counsel William Murray testified that, in his three decades in government, he had:

> [N]ever seen any competition for a state contract that was anything like that competition. It was rather less like a procurement competition and rather more like what the Governor's Office called it, a political process in

> which contending groups were trying to influence policymakers in the Governor's Office and in the Legislature to craft a decision that would be most favorable to each of the contending groups.

Similarly, veteran Albany lobbyists and public relations professionals testified they had never encountered anything resembling this process in their years of interacting with the government, noting that the process was "a real odd duck" and "very unstructured . . . where lobbying and advertising was allowed, public relations outreach was allowed." One experienced lobbyist, AEG lobbyist John Cordo, went so far as to suggest that the statute was intentionally written to circumvent the lobbying laws: "If they wanted the procurement [lobbying laws to apply], they would have known how to write that."

A. "A Political Free-for-All"

Into this process, devoid of rules and unfettered by the procurement lobbying laws' restrictions, most of the top lobbyists and public relations professionals in Albany were retained by the competing vendors. All of the vendors, with the exception of Peebles, retained at least one lobbyist and three vendors hired four or more lobbyists. Many of these lobbyists had previously been employed by the same vendor or, in the case of AEG, had lobbied on behalf of Capital Play, in the previous round.

Veteran lobbyist Giorgio DeRosa of Bolton-St. John's aptly testified as to the profound effect the lack of clear rules had on the process to choose a VLT operator at Aqueduct Racetrack. DeRosa averred that the enactment of § 1612, as interpreted by the Governor and the State Legislature, transformed "a very standardized process for bidding and turned it into a political free-for-all." Noting that "every top lobbyist in Albany was

engaged on this thing[,]" DeRosa commented, "You look down the list, and it's the who's who. And that only happens if this is a pure political process."

AEG formally retained as many as seven lobbyists directly and one indirectly through one of its composite companies, including: Bolton-St. Johns, Cordo & Company, Carl Andrews & Associates, Francis J. ("Frank") Sanzillo Associates, Polsinelli Public Affairs, and Sheinkopf Ltd. [71] Delaware North's lobbying and public relations team included Patricia Lynch Associates, Davidoff Malito & Hutcher, and Brian R. Meara Public Relations. Five firms lobbied on behalf of SL Green's Racino effort, including Bill Lynch Associates, the MirRam Group, and the law firm of Wilson Elser Moskowitz Edelman & Dicker. To lobby on its behalf, the Wynn Group retained the law firm of Buchanan, Ingersoll & Rooney and the firm of L&J RAD, whose principal, Jerry Weiss, is a well-known Albany lobbyist. Penn National hired the lobbying firm of Ostroff, Hiffa.[72] Based upon records provided to the Inspector General and information provided by the lobbyists, the Inspector General estimates that over $1.2 million was spent on racino lobbyists during the period from March 2009 through February 2010, including over $500,000 by AEG.[73]

As in any large-scale, political enterprise, each group of lobbyists sought out government officials not only to promote its principal's interests by emphasizing its

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[71] Although Stanley Schlein testified to the Inspector General that he served only as counsel to AEG, others testified that he played a role as a lobbyist. One even testified that "he seemed to switch roles." Individual members of the AEG team also apparently believed that contributions to entities associated with the Reverend Al Sharpton had, in some fashion, advocated for AEG.

[72] While not a registered lobbyist, businessman and philanthropist Russell Simmons, a member of the Penn National team, testified that he spoke to Speaker Silver and to David Johnson, a member of the Governor's staff, about how an award to Penn National "would be beneficial to the community."

[73] Media reports have cited figures released by the New York Public Interest Group in April 2010 as reflective of amounts spent on lobbyists relating to the racino process. *See, e.g.,* "Lobbyists Are Big Winners so Far in Aqueduct Racino Mess, " Glenn Blain, *Daily News,* April 27, 2010. Based upon a discussion with a NYPIRG representative, lobbyists, and firm principals, the Inspector General has

relative strengths, but also to highlight the real and supposed weaknesses of its competitors. Executive branch officials testified that throughout the process, lobbyists fed information discrediting their competitors to reporters who published articles including the bad publicity. For example, AEG lobbyists sought to besmirch SL Green's gaming partner, Hard Rock, by suggesting that Hard Rock's association with the Seminole tribe might be problematic due to a lack of a gaming compact in Florida, where it operated a casino.[74]

Lobbyists also engaged in a barrage of ongoing e-mail, multiple presentations – often with their principals – and promotional materials. The Inspector General's review of documents further reflects lobbying efforts targeted to garner the support of local politicians, including Assemblywoman Audrey Pheffer and Senator Joseph Addabbo, the legislative representatives for the area in which Aqueduct is located, as well as Elizabeth Braton, Chair of Community Board 10, the division of New York City government which includes the Aqueduct neighborhood. For example, in relation to the efforts to discredit SL Green by emphasizing its supposed issues with the Seminole tribes, one AEG lobbyist e-mailed another stating, "We are going to need it and we are going to need Audrey, adabbo [sic] and sharpton to piss on hard rock." Each of these representatives testified to having been lobbied heavily. Braton recalled having been subjected to "dog and pony

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determined that the figures published by NYPIRG represent total spending on lobbyists during the period in question, some portion of which should be attributed to lobbying on other issues.

[74] In testimony before the Inspector General on May 24, 2010, Lottery Counsel William Murray likened the dispute over the Seminoles' Florida casino to a similar dispute in New York State over the Turning Stone casino. He noted that both cases involved a "political controversy" between the governor, who had accepted the ongoing operation though it had not been ratified by the legislature. Murray also noted that "the last time I looked at it, it seemed like the Seminoles and the State of Florida were making progress towards resolving that controversy." In fact, the Seminole compact was approved by the Florida Senate in April 2010. *See* Sunshine State News, April 16, 2010 available at http://www.sunshinestatenews.com/story/senate-okays-state-win-big-seminole-compact.

shows" and "all those kinds of people that come along that have a PowerPoint presentation of some kind . . . I think we had two meetings, at least, with each of the different companies."

B. Effect of Extensive, Undocumented, Unhindered Lobbying

As expected, each of the lobbyists sought to influence the process by gaining direct or indirect access to the three men who would ultimately choose the VLT operator. Exacerbating this "political free-for-all," since no objective measures of the bids had been promulgated and each decision maker had unlimited discretion to decide what subjective measures to emphasize, the lobbying teams not only sought to learn the details of their competitors' bids, but also sought information regarding what factors each of the decision makers was emphasizing. As discussed in detail below, AEG's array of lobbyists was particularly successful at making direct contact and asserting influence for its gain with the Senate leadership. More importantly, AEG's lobbying team was able to utilize its access to the Senate to secure internal materials unavailable to its competitors not only exposing the details of competitors' bids but providing direct information as to the concerns of various key players.

Unsurprisingly, a number of lobbyists were hired based upon their perceived individual connections to particular government officials who were deemed important to the process. For example, Frank Sanzillo, who had known Secretary to the Governor Lawrence Schwartz for a long time, was hired by AEG specifically due to his professed "unique relationship" with Schwartz and ability to "take [Schwartz's] temperature." During his short tenure working for the AEG team, Sanzillo "had one specific assignment, and that was to ask . . . Secretary to the Governor, Larry Schwartz, if the

Governor made a choice of vendors, would the Secretary work with the Governor to sell it or would he try to impose his own will and perhaps choose another vendor." Similarly, AEG lobbyist Fred Polsinelli testified to the Inspector General about his friendship with Senate Assistant Counsel Christopher Higgins, who was tasked with analyzing the competing proposals for the Senate, and others. His connections to Higgins and to Brad Fischer, Counsel to Senator Eric Adams and the Committee on Racing, Gaming, and Wagering, were particularly noted by DeRosa in an October 4, 2009 e-mail to Sanzillo and Carl Andrews: "FYI Fred hangs out with Chris Higgins (assistant counsel to the Senate Majority) and Brendan Fisher [sic] (Eric Adams counsel)." Polsinelli's connections to Republican senators were also recognized when he was originally hired by Capital Play.

Not surprisingly, meetings between lobbyists and personnel involved directly or indirectly in the process of evaluating the bidders could be time consuming. For example, Louann Ciccone of Speaker Silver's office testified that she personally set a limit of one meeting per bidder. Robert Megna, Director of the Division of Budget, testified that despite his attempts to "put them off . . . certain lobbyists did try to talk to me about [the Racino]." David Rose, Assistant Counsel to the Governor, similarly testified about the many lobbyists who contacted him throughout the Racino process, and Gordon Medenica of the Division of Lottery testified that, "I remember talking to senate staffers, David Rose, and they were complaining about, "God, these lobbyists are just all over us."

Interestingly, although as reported by at least one AEG principal that he boasted that Secretary to the Senate Angelo Aponte was a key resource and his efforts to obtain

access and inside information bore particular fruit in relation to Senator Smith and Aponte, AEG e-mails suggest that lobbyist Hank Sheinkopf was originally hired by the consortium due to his perceived influence with Speaker Silver. Namely, on August 19, 2009, Eugene Christiansen, head of Christiansen Capital Advisors,[75] e-mailed AEG member Larry Roman his opinion that "Silver is key. There is a person named hank who has access. I forget hank's last name . . ." The next day, "hank" was identified as Sheinkopf, as Christiansen informed AEG member Larry Woolf, "I've seen Hank Sheinkopf in action. If you want some quality time with Silver Hank's your man. . ." After Woolf forwarded this e-mail to O'Farrell, O'Farrell informed him that "Hank is already on our team. Hired by GreenStar. Hank is working on it." Although Sheinkopf opined that Silver secretly favored SL Green, the Inspector General found no evidence that Sheinkopf gained any information or leverage due to his purported connections with Silver. In fact, in response to a query from AEG members as to whether he had spoken with the Speaker recently, Sheinkopf replied on December 14, 2009, "No. He did however ask me for campaign dough today."

Silver admitted that Sheinkopf and he had been friends "over the years," but denied knowledge that Sheinkopf was employed by AEG. Silver further testified that he did not recall any discussion regarding the racino or campaign contributions with Sheinkopf in December 2009.

These references could neither be confirmed with nor repudiated by Sheinkopf because, when questioned by the Inspector General, he invoked his Fifth Amendment

[75] The Inspector General's examination of documents filed with the executive branch and AEG documentation did not unearth any formal agreement between the consortium and Christiansen. Christiansen's appearance in these e-mails further demonstrates the difficulty in cataloguing all individuals associated with the bid proposals.

right against self-incrimination and refused "to answer any and all questions to the Office of the Inspector General about [his] involvement on behalf of clients relating to the bidding process for the provision of a video lottery terminal facility at Aqueduct Racetrack or any related questions" as his answers could incriminate him in a criminal proceeding and noted his intention to do so with every question.

Sheinkopf's invocation of the Fifth Amendment also frustrated the Inspector General's efforts to gain insight into a cryptic December 8, 2009 e-mail he sent to Lawrence Roman which raises concerns. In this e-mail, Sheinkopf informed Roman, "Had a nice lunch today with a friend. Things he says are on track. Also he says he and hius [sic] buddy john want to keep it that way. Thought you would like to know." As Sheinkopf refused to answer questions due to potential criminal implications and Roman denied knowledge of the references, the Inspector General can only speculate as to the identity of the named individuals, but does note that other evidence obtained by the Inspector General indicates that Sheinkopf had one or more conversations and lunch meetings with Aponte during the week encompassing December 8, 2009.

C. Lobbying the Governor

When asked whether the executive chamber had a policy regarding lobbying during the selection process, Governor Paterson testified that, "we were relying on what had already been agreed upon by the Spitzer administration. And there was lobbying all over the place during that time." The Governor further attested to various efforts to lobby him on behalf of vendors including telephone communications from Penn National's Chairman and Chief Executive Officer Peter Carlino and Steven Wynn to introduce themselves,but that: "[T]here was no discussion of the bidding process. But when they

started calling back, I knew that no matter what they said, the call was for that. Now they were going to try to advocate. And in those cases I passed them to Peter Kiernan to steer them away from me."

Interestingly, Russell Simmons, a member of Penn National, testified that although he did not speak with Governor Paterson until after the selection was made, he spoke with "someone who worked for the Governor, Dave Johnson." David Johnson is an employee of the executive chamber, currently under investigation by several law enforcement entities and suspended without pay by the Governor, whose primary duties included transporting the Governor. Simmons further testified, "I left a message I think, and maybe he [Johnson] called me back, but I can't say for sure, but I spoke to him, and he said I got this. I am responsible for this, and, you know, I understand, you know, and I think I sent him a subsequent e-mail with the kind of stuff that was, you know, part of it, information for the bid that would be useful to the Governor in making a decision." When asked whether Johnson ever indicated that he would relay the information to Governor Paterson, Simmons responded, "Yes, he did absolutely. He said . . . he was handling it for the Governor. I felt like I was talking to the Governor. In other words, by speaking to him, I felt he was the person."[76]

Evidence demonstrates that although AEG did not directly lobby Governor Paterson, it lobbied David Johnson on several occasions in an effort to indirectly influence the Governor and his administration. In particular, several AEG officials

[76] Simmons also testified that he had contacted Speaker Silver but, "he was kind of dismissive . . . he was kind of it is not his business. I should call other people . . . He made me think he wasn't part of it, and I think his words were that 'I am not part of the decision making process. That is not something I am focused on.'"

testified that Steven Acevedo, who is associated with AEG member Gain Global Investments Network LLC (the company that included Jay-Z), had a prior relationship with Johnson and "periodically" advocated to Johnson on the consortium's behalf. AEG's efforts appear to have successfully persuaded Johnson, but had little or no impact on the Governor. On September 15, 2009, AEG public relations consultant Andrew Frank e-mailed Lawrence Roman: "We're having Steve [Acevedo] set up a call with DJ [Johnson] for Michael [Wagman]." A week later, on September 23, 2009, Frank e-mailed Wagman: "Steve understood the Murray (of Lottery) issue and has hammered it into DJ and others. He said just straighten it out." Counsel to the Governor Peter Kiernan testified that on two subsequent occasions Johnson engaged him regarding the racino as to why Lottery Deputy Director and Counsel William Murray was "beating up on AEG."

For his part, the Governor testified that although Johnson traveled with him and he surely discussed "issues from the previous meeting" with him, he denied that Johnson ever informed him of having been contacted by any lobbyists in the selection process. Notwithstanding this disclaimer of involvement, it was Johnson who telephoned AEG principal Michael Wagman on January 29, 2010, to inform him on behalf of the Governor that AEG had been selected. Moreover, Wagman informed the Inspector General that Johnson attended a meeting arranged by AEG lobbyist Carl Andrews with AEG representatives and Senator Sampson within weeks of AEG being selected wherein AEG sought to learn the state's understanding of the conditions Speaker Silver had placed on the award and "where the flexibility was on some of the contract terms" in the MOU.

That Johnson was lobbied and had the ability to advocate for AEG, even if without effect, further highlights the ad hoc, unrestrained nature of the process and the need for application of procurement lobbying restrictions for all significant procurements. Moreover, the discovery that Johnson, who despite his various titles served primarily as the Governor's chauffer and lacked any procurement experience or official role in the process, attended a post-award meeting with Sampson and AEG in Wagman's eyes, "from the Governor's Office" is troubling.

Johnson invoked his Fifth Amendment rights when called to testify before the Inspector General and refused to testify as his answers might incriminate him in a criminal proceeding.

Johnson also attended a fundraising luncheon for Governor Paterson in Philadelphia in November 2009 with a suggested donation of $2,500. Although the Inspector General determined that Richard Mays, the Chairman of AEG, was in attendance, no record was found of him making a contribution. This fact is curious as Philadelphia lobbyist Charles Breslin e-mailed Johnson on January 27, 2010, specifically to inquire about the Aqueduct VLT selection. The Inspector General obtained telephone records which indicate 108 telephone calls between Breslin and Mays from October 2009 to April 2010. Breslin also met Johnson on February 4, 2010, just days after AEG's selection. As to this November 2009 fundraising event, Governor Paterson testified that he recalled encountering Mays in the hotel in Philadelphia "the first time and only time I have ever met him." Governor Paterson further testified that Mays advocated for AEG, stating: "I hope we get selected. We'd do a great job for the State. I said: 'Thank you

very much and thank you for participating in the process.' That kind of thing. I got to say this almost every day during this period to somebody."

Roberto Ramirez of the MirRam Group, a former elected official and a veteran of New York State politics who became a lobbyist, was able to speak to the Governor in early 2010 on behalf of SL Green. In his testimony before the Inspector General, Ramirez recalled "having a drink . . . in . . . mid-Manhattan." In fact, the Governor's schedule reflects a dinner on January 13, 2010, at The View restaurant in the Marriot Marquis, with the notation, "reservation will be under Ramirez." At that time, according to Ramirez, he "attempted to make the case that SL Green was . . . the most rational choice for Aqueduct." Ramirez also had sufficient access to members of the executive staff that he was able to discuss the time line of the process with Secretary to the Governor Schwartz in Schwartz's office in late 2009.

One SL Green lobbyist, William "Bill" Lynch of Bill Lynch Associates testified that he has advised and supported Governor Paterson at various times over more than 20 years, and informed him of his representation of SL Green. As discussed later in this report, Lynch's involvement with the Governor was eventually raised by Senator Sampson as a fatal complication to selection of the group, although Senator Sampson's testimony is contradicted by both the Governor and Speaker Silver. Ironically, although the Governor and Lynch testified that Lynch did not lobby the Governor on behalf of SL Green, Lynch related having discussed his client with Senator Eric Adams, "laying out . . . SL Green's qualifications" and why it ought to be selected. Lynch testified to the Inspector General that, "I do remember [Senator Adams] saying that SL Green had an

interesting bid." When asked about Lynch, Senator Adams testified, "Bill is my political mentor."

VI. SENATE LEAKS INFORMATION TO AEG LOBBYISTS

A. O'Farrell Obtains Bid Information Days After Submissions

The Inspector General confirmed that from the inception of the process, AEG was a favorite of the relevant Senate decision makers, first Senator Smith and then, after the so-called "coup" in the summer of 2009 which changed the leadership of the Senate, Senators Sampson and Adams. While it is appropriate for a state official, such as the relevant senators, after due consideration of bidders' submissions to conclude that a particular potential vendor in a procurement presents the best proposal, it is inconsistent with public office for a state official to provide any particular bidder a competitive advantage by supplying it with information unavailable to its competitors. Nevertheless, the Inspector General found a pattern of the Senate disclosing internal Senate information to AEG throughout the process, information which AEG could then use to its competitive advantage.

As stated above, each bidder sought information regarding both the nature of their competitor's bids and the mindset of the relevant governmental actors. The evidence demonstrates that AEG was uniquely successful in obtaining accurate, first-hand information due to its connections with the Senate. Indeed, by May 11, 2009, 3 days after bid responses were submitted by the competing vendors, AEG had obtained through a self-described "leak" detailed information regarding the bids of other vendors as indicated in a May 12, 2009 e-mail from O'Farrell in which he informed other AEG members:

> Fred Polsinelli [an AEG lobbyist] heard last night that Penn National offered $5M up-front fee. SL Green over $200M. Not sure of terms. Wynn somewhere north of $5M by Penn National but a lot less than us.

> They are stating that our offer is $151M, so we get the headline number. I suspected we would get this. Nothing on Peebles and DN yet. Moheghan just issued a letter. On the information leaked so far we are looking good. Hopefully more today.

As O'Farrell had hoped, by later that same day, AEG had acquired precise information, including the eagerly sought information concerning the upfront bid amounts. O'Farrell wrote an e-mail to all the AEG principals and lobbyists under the subject "Competitive Bids":

> Information on competitive bids we have heard so far:
> 1. Wynn- fee of $75 million
> 2. Delaware North – fee of 100 million
> 3. Penn National – fee of $5 million
> 4. Peebles with MGM – fee of $150 million
> 5. A.L. Green – fee of over $200 million with lots of conditions
> 6. Mohegan Sun – letter offer to manage, No fee
> 7. Us [AEG] fee of $151[77] million
>
> We are the only party that discussed building the Mixed Use Facility which seems to be a competitive advantage for us, particularly on the hotel side.

The Inspector General's comparison of the information that was "leaked" to O'Farrell on or about May 12, 2009, with the state of the bids at the time reveals O'Farrell's information to have been accurate.

B. May 22, 2009 Leak: "Here is What I Have As Per Angelo"

The Inspector General further determined that due to its contacts and influence in the Senate, within two weeks AEG was not only able to secure information about its competitors bids, but also to acquire the actual Senate review documents which provided the exact components of each of its competitors' submissions. Specifically, the Inspector General found that a Senate staffer, under the auspices and most likely, at the direction of

Senate Secretary Angelo Aponte, disclosed to an AEG lobbyist an internal, confidential Senate analysis of pending proposals.

As a prelude, on May 12, 2009, AEG lobbyist Sheinkopf e-mailed Matthew Rey, Special Assistant to Secretary to the Senate Angelo Aponte; "What does your boss think of all this?" Rey had encountered Sheinkopf professionally in his employment with Aponte at the Senate and reported that his only boss was Aponte.

Subsequently, on May 20, 2009, at 9:35 p.m., Rey replied by e-mail to Sheinkopf: "Hey – I finally got back some information in regards to the bidding process, and I believe a staff member prepared an assessment of the bids. Would you like to see that?" Two days later, on May 22, 2009, Sheinkopf replied: "Need as much info as possible on most recent rfp fpor [sic] aqueduct."[78] That night, at 11:06 p.m., Rey e-mailed Sheinkopf the complete internal Senate memorandum prepared by the Office of Majority Counsel for Angelo Aponte and Shelley Mayer with the following message: "Here is what I have as per Angelo."

Unlike Senator Sampson, as discussed later in regard to his disclosure of internal memoranda, Rey freely admitted to the existence of confidential memoranda in the Senate, a type of which he had "handled many," and reported the categorical policy that internal Senate memoranda such as what was supplied to AEG are confidential: "Well, with Angelo [Aponte] the policy was always that anything that happened in the office was confidential within me and Angelo . . . By virtue of that, virtually everything was confidential." When asked whether he would send the internal Senate memorandum

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[77] AEG's upfront bid when conditions were considered was only $76 million
[78] "RFP" refers to "request for proposals" in a standard procurement process.

without approval from his superiors, specifically Aponte, Rey testified that he would only send such materials if he "had instructions to do so. I would not do it on my own . . . I would not have been doing something on my own." Accordingly, Rey further averred that although he did not specifically remember, he "presumed" that Aponte indicated to him to provide the materials to Sheinkopf and AEG. Pointedly, in regard to the confidential memorandum he sent to Sheinkopf, the following colloquy ensued:

> **Question**: Is this the type of information that you were not authorized to give to anybody on your own?
>
> **Rey:** Yes.
>
> **Question**: And you would not have done that, right?
>
> **Rey**: No.
>
> **Question**: So you would have to have instructions from somebody to actually provide this document to Mr. Sheinkopf, am I correct?
>
> **Rey**: Yes.

C. AEG Attempts to Conceal the Source of the Information Obtained From Angelo Aponte's Office

In his interviews, undoubtedly cognizant of some of the Inspector General's discoveries regarding the leaks of information emanating from the Senate, Senator Sampson and various Senate officials either evaded the question of the confidentiality of internal Senate materials or, most egregiously, as in the case of Senator Sampson, denied the Senate possessed confidential materials at all. In addition to the facially specious nature of this claim, the obvious confidentiality of the documents disclosed and the

surreptitious character of their acquisition is underscored by AEG internal e-mails obtained by the Inspector General.

AEG lobbyist Frederico Polsinelli testified that Sheinkopf supplied him with the Senate memorandum Sheinkopf had obtained through his contacts with Aponte's office by e-mail. Thereafter, on May 27, 2009, Karl O'Farrell forwarded the memorandum to AEG's public relations consultant Andrew Frank. An hour later, Frank replied to O'Farrell's e-mail: "Karl – I just spoke to Fred [Polsinelli] I will be seeing [sic] it this out to a few people as we discussed. And I will be taking certain things off of it -." About a half hour later, Frank e-mailed O'Farrell and Joseph Logan: "Karl – please DELETE this document that you received from our friend in Albany. Only have the one I sent earlier." (Emphasis in original). Three hours later that evening, O'Farrell e-mailed the AEG team (subject: "Comparative bids") that he had "Just got the competitive bids from a source in the Senate. Just sent them to Andrew [Frank] to take trace evidence off, PDF them and he will then send to you. Obviously, we need to keep these very confidential." O'Farrell went on to summarize the bid information contained in the Senate material he had obtained.

"Trace evidence" refers to the "metadata" contained in electronic text documents which describe the file and might include such information as the identity of the author and when the document was written. This descriptive information can be removed or replaced before dissemination thereby concealing the true author, date of creation, and other information. Portable Document Format (PDF) is a file format created by Adobe which is often used for distributing documents to limit editing or manipulation. By removing "trace evidence" and converting the format of the materials it had obtained

through its connections in the Senate, AEG concealed the identity of the author and source of the information.

Hank Sheinkopf, under subpoena from the Inspector General, invoked the Fifth Amendment and refused to answer questions on the grounds that the answers might criminally implicate him, when questioned concerning his role in procuring and disseminating the memoranda.

D. Aponte Denies Knowledge of the Leak of Internal Senate Information to Hank Sheinkopf and AEG

Angelo Aponte was appointed Secretary to the State Senate in January 2009 by Senator Malcolm Smith. As Secretary to the Senate, according to Aponte, he is charged with overseeing the "operations of the Senate" and all 62 senators. In an interview conducted under oath by the Inspector General, Aponte claimed to be on the "periphery" of the Aqueduct VLT selection and that he had no involvement in the selection process. He also maintained that he did not know how the Senate was to participate in the process and that his assistant Rey was not involved. As discussed below, although Aponte may not have been afforded weight in the decision, he actively involved himself in the process and apparently served as a conduit of information for AEG.

Aponte conceded that he has had both a professional and personal relationship with Sheinkopf, who Aponte described as a "well-known political operative," for the "better part of 30 years." While admitting that he was Rey's only supervisor and that Rey had been assigned no responsibilities in regard to the Racino, Aponte incredulously denied any "recall" of why Rey would provide the internal Senate memorandum to Sheinkopf or directing Rey to speak with him. Incredibly, Aponte went so far as to claim

that Rey, a recent college graduate, had the authority to retrieve Aponte's e-mails in order to obtain the materials and "probably" had the authority to unilaterally disseminate the memorandum and that this action would not be "inappropriate." Upon being confronted with the e-mails by the Inspector General, Aponte testified "Let me see – any phone conversations that were related to that e-mail, it was no information that I recall involving anything in terms of, you know, where the status was, anything else like that, because I wasn't involved in the procurement process. I was totally outside of that." Contrary to his earlier testimony denying that he had ever read Senate documentation on the Racino bids and was ignorant of the process, Aponte opined that the leaked memorandum was not confidential and that the selection was not a "typical procurement process."

While the Inspector General uncovered no evidence that Aponte had a voice in the ultimate decision to select AEG, under questioning and examination of his schedule, Aponte admitted having numerous Racino-related meetings with what he described as "architects and consultants" of the various bidders. Curiously, Aponte conceded that no other member of Senate staff was present or participated in the meetings and that he did not report or discuss the meetings he was having with anyone else in the Senate. Aponte's schedule indicates that he met with representatives from SL Greene, Wynn and AEG.

Notably, other evidence gathered indicates that Aponte met with AEG lobbyist Hank Sheinkopf on at least two additional occasions. In addition to these formal meetings, Aponte testified that he would have lunch with Sheinkopf "both socially and professionally." Indeed, internal AEG e-mails confirm that Aponte had conversations and telephone conferences with its lobbyists, including Sheinkopf. In response to AEG

member Lawrence Roman's December 13, 2009 request that Sheinkopf keep him "abreast the second" Sheinkopf heard something because Roman was "told they are in intensive discussions," Sheinkopf informed Roman of the status of his efforts to lobby for AEG: "Smith returns tonight from san diego. [sic] Aponte and I had lunch on thursday. Larry schwartz [sic] will not talk about it. Shelly is a sphinx. Am on it." Three days later, on December 16, 2009, in response to Roman's request for "the scoop," Sheinkopf informed Roman: "Spoke with Aponte. Soon. They need the dough." Later, on December 20, 2009, Roman informed Sheinkopf that "Norman (Levy)[79] had info on the Aqueduct. Do you know what it is?" Sheinkopf replied that "He spoke with aponte and others." [sic] Aponte denied to the Inspector General a "specific recollection" of speaking with Levy regarding Aqueduct but admitted that he "had a lot of conversations with him." Nor was Sheinkopf the only AEG lobbyist with apparent access to Aponte. On August 10, 2009, Polsinelli e-mailed AEG principal Roman, "I'm setting up a meeting for you with Angelo Aponte. What's your availability for the next 2 weeks or so? It's important you stay very close to him." An examination of Aponte's schedule demonstrates that Aponte met with Roman and Levy on August 18, 2009; Aponte claimed to have left the meeting after 20 minutes due to a family emergency.

When asked whether he indicated to the various representatives of the bidders with whom he was meeting his assertion to the Inspector General that he was not involved with the process, he responded "It was obvious, because I wasn't part of the discussions that took place. I wasn't part of any committee meetings or any other topics related to Aqueduct. They knew clearly that I wasn't involved in the process." Aponte

[79] Levy, an attorney, and Sheinkopf share office space and Levy was retained by Roman's company, WDF, to assist with AEG's efforts to obtain the VLT franchise.

further claimed that he affirmatively advised the bidders of his status at his numerous racino-related meetings.

Aponte's testimony is implausible, particularly his claim of non-involvement in Rey's disclosure to Sheinkopf, an assertion directly contradicted by contemporaneous e-mails and by the sworn testimony of his former assistant. Coupled with the ample other evidence of his continued interaction on the matter with Sheinkopf, Aponte's testimony is simply not credible.

E. Senate Majority Counsel's Office Discloses Information to AEG

The Inspector General determined that the disclosure of information to AEG from the Senate Majority was not limited to Aponte and Sheinkopf. For example, in an e-mail on July 27, 2009, AEG Lobbyist Frederico Polsinelli informed team members:

> Guys I just met with the majority. Here's what I picked up: [Chris] Higgins and Brad Fischer are sitting on the panel. Today, Delaware North and Penn National presented. Both groups feel that you cannot build a destination at aqueduct, which is of course BS. I explained that they're trying to win the bid without putting any $$$ into the facility. Most members of the panel feel aqueduct should be a destination, so that's a point we must get across on friday. Malcom [sic] seems to be relying heavily on Senator Adams for info. Steve Wynn will be in Albany on Weds to present. According to Maj Counsel, Wynn and SL Green/Hard Rock are our biggest competitors. They don't see the "out of state tribe" issue as being a big problem . . . We should show them how this COULD be a big problem. Also, DOB will ask tough financial questions relating to all financial issues . . . projected out of pocket costs, maintenance costs, marketing . . . etc. We already knew this but we need to ensure that the partners are prepared on friday. Again we need to leverage our relationship with the "community" since this is one of the major things that sets us apart from the competition. [sic]

Polsinelli testified that he and Christopher Higgins, Assistant Counsel to the Majority in the senate and the Senate's point person (along with Bradley Fischer) on the Aqueduct project, had been "friends for a few years." In response to being asked whether

his friend, Higgins, had ever provided him with "any information about how things were going, his views of what the Senate thought of AEG's bid, or anything like that," Polsinelli responded, "Yeah. Yeah. I mean, nothing too in depth, nothing really of substance, but if he felt that, you know, he would give us his take on maybe some of the others compared to ours, without overstepping his bounds that I can even remember."

Higgins admitted to the Inspector General that bidders continually asked him for information: "They would want to know what was in other bidders – in Albany, nothing is secret. Either they would already know and they would ask you to confirm something. But the big thing everybody was interested in was how much the licensing fee was, obviously." When the Inspector General inquired, "Was that information that you shared with the bidders?" Higgins equivocated, "I don't remember. Maybe. You know, it's going over a year now since that was originally submitted, but maybe I did, maybe I didn't." Higgins's absence of denial and declared lack of memory regarding one of the largest projects of his young legal career is revealing.

On March 11, 2010, when Governor Paterson withdrew the award to AEG, AEG lobbyist DeRosa disseminated an e-mail, the content of which exemplified AEG's access to the Senate:

> I just spoke to [Senator Sampson]. He said we should tell everyone we'll tie this thing up in court if they bounce us without cause. He was not happy with our handling of this issue since being selected. We gave him no cover for the selection. He said that there are people still questioning our ability to pay the $300 million. Bottom line – he selected us and we have not closed the deal.

DeRosa testified that this e-mail was the result of a brief conversation he had with Senator Sampson when the two encountered each other while walking through the

concourse of the Empire State Plaza in Albany. DeRosa testified that Sampson, as one of the decision makers who selected AEG, was unhappy that AEG had failed to meet public criticism and publicly demonstrate its ability to fulfill Speaker Silver's conditions. DeRosa further averred that actually it was he who raised the possibility of a lawsuit against the State to Sampson to which Sampson responded that AEG "should tell people that."

VII. BRIEFING THE DECISION MAKERS

A. The Executive Chamber

After a four-month review, members of the executive chamber were preparing to brief the Governor on the vendors' proposals. To that end, in early September 2009, DOB prepared a memorandum detailing the "pros and cons" of each bidder to present to Counsel to the Governor Peter Kiernan and Assistant Counsel David Rose in which, considering all the delineated factors, DOB recommended Wynn as the "preferred bidder."[80] Rose then used the information provided by DOB and prepared, at Kiernan's direction and under his guidance, a nine-page draft memorandum dated September 17, 2009, from Kiernan, DOB Director Robert Megna, Rose and DOB Chief Budget Examiner David English and addressed to Governor Paterson and Lawrence Schwartz, Secretary to the Governor. The memorandum provided an overview of the process thus far and an analysis of all six potential vendors. Notably, the draft included under the heading "Assessment" the following recommendation: "Our recommendation is to conduct further due diligence on Wynn and SL Green and suggest no further consideration be given to Delaware North, Penn National Gaming, Aqueduct Entertainment Group and Peebles."[81]

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[80] DOB's internal memorandum provided to Rose listed the vendors as follows: Wynn, SL Green, AEG, Delaware North, Penn National and Peebles. Chief Budget Examiner David English informed the Inspector General that this order reflected a grouping with Wynn as DOB's preferred bidder, a second tier including SL Green, Delaware North, and AEG, and a third tier including Penn National and Peebles.

[81] Counsel Kiernan's and Budget Director Megna's opinion that the two "most important" criteria for selection were "assuredness of the financial capacity to meet the obligations" and "the ability to meet them quickly," comports with the conclusion to include SL Green with Wynn as the two preferred vendors as SL Green, like Wynn, could pay the upfront licensing fee from its balance sheet and required no financing.

The analysis of each bidder was presented in that exact order: *i.e.* AEG was the fifth of six presented. In fact, testimonial evidence reveals that the order presented in the September 17 memorandum in which Rose, and presumably Kiernan, placed AEG and Peebles fifth and sixth, respectively, was accounting for their licensing issues. To be sure, licensing is a bright-line issue: even the otherwise most qualified potential vendor could not be considered if deemed unlicensable by Lottery.

Despite the obvious hierarchy of choices presented in their memorandum and its unmistakable recommendation, Rose and Kiernan were loath to admit to the Inspector General that the vendors were ranked. Upon being shown the memorandum by the Inspector General, Rose remarked: "Let me look and see if we actually say we rank them. There is certainly an order, one through six, but I don't think that there is an actual ranking. I don't think you can read this and say that one is one and six is six. Naturally, you would think that would be the case." Kiernan similarly reported: "I don't consciously recall ranking them or intending this to be a ranking. It probably was in the sense that we knew that five [AEG] and six [Peebles] were having licensing issues." Although Kiernan would not characterize the list as a ranking, he conceded that the list is clearly not presented in alphabetical order, the first vendor listed, Wynn, was Kiernan's and Megna's emphatic choice for VLT operator, and he provided no alternative explanation for the order.

According to Governor Paterson's and Kiernan's schedules, on September 17, 2009, from 3:50 p.m. until 4:20 p.m., Kiernan briefed the Governor on Aqueduct by telephone while the Governor traveled to Poughkeepsie. While the call might have lasted longer than the scheduled half hour, this briefing represents the sole formal briefing of

the Governor on this multi-billion dollar contract for New York State after thousands of hours of analysis by members of the participating executive agencies.[82]

Kiernan testified that he did not read the memorandum to the Governor verbatim, but in briefing him attempted "to be faithful to it," using it as an "aid" or a "guide," and giving his "version" of it. Notably, despite the fact that the memorandum bore his name as one of its authors, Kiernan testified that he did not agree with its assessment to limit consideration to Wynn and SL Green:

> It was a pretty lengthy conversation, so I think we covered every salient point in that memorandum. Not literally, but actually discussed every bidder. I had had other conversations that aren't necessarily reflected in that memorandum which I related to him. I tried to be – I think as I said before – [an honest] broker, so I wasn't trying to weight it in any fashion whatsoever or suggest there was a ranking or anything like that.
>
> * * *
>
> I did tell him that Bob Megna and I had a similar view, which was with respect to the ability to pay quickly. I told him – I think I told him that Bob and I agreed that was the most important thing. I probably told him Bob and I both thought – because it's true, we both did think – Wynn was the best.

Consistent with Kiernan's testimony, Governor Paterson testified that Kiernan had explained to him the relative strengths and weaknesses of the six potential vendors, and expressed, albeit hesitantly, the preferences among the analysts:

> I wasn't given a scoring of the groups. My counsel advised me that there seemed to be a strong preference for the Wynn group, Steve Wynn from Las Vegas, and S&L [sic] Green. And he expressed some disappointment, that he felt that the agencies were trying to score them, but he didn't see that as their role. He thought that – I mean, what I got from the conversation was that it was clear that the leaders would be making the determinations. And that the evaluations would be fair and the facts

[82] Neither the Governor's nor Kiernan's schedule reflects any additional briefings, but Kiernan testified that a later, slightly modified version of this memorandum formed the basis for additional briefings if the Governor inquired about any particulars.

> would speak for themselves, and if the facts were accurate, that the leaders would come to the same decision that the analysts had.

This inveterate reticence among the executive (and legislative) staff to provide both a definitive evaluation and recommendation for this politicized procurement, which existed as high as the Counsel to the Governor, whom the Governor had assigned to administer the selection of an Aqueduct VLT operator for the executive chamber, contributed heavily in removing the VLT selection process from any objective assessment in favor of political considerations. Indeed, the Governor endorsed Kiernan's sentiment: "I can see why [Kiernan] would have said that, because the last thing that would be helpful to the state would be for me to come into the meeting and attempt to ram this decision down the other leaders' throats. Not unless I wanted six months of absolute acrimony." Interestingly, an internal DOB e-mail from English to Megna, discussing this briefing reflected a different version of events: "Dave [Rose] said that Peter [Kiernan] briefed the Governor . . . who was pleased with the briefing. Dave also said that the Governor, for now, does not want to formally scale it back to Wynn and then SL Green, but to keep these two and Delaware and AEG in the process."

With regard to the substance of the briefing, Kiernan testified that, upon hearing Kiernan's assessment of the vendors, the Governor commented that he had heard that Wynn's record with respect to minority and women business enterprises was less than stellar and he wanted Kiernan to further investigate. Kiernan recalled that the Governor also opined that SL Green would be a difficult vendor with which to negotiate. Kiernan had apparently commented that, as reported to him, Penn National was virulently anti-labor, to which the Governor responded that he had also heard as much.

Although recognizing that under the flawed structure of Tax Law § 1612's requirement of the assent of the legislative leaders, political considerations and potential compromise were reasonably considered by the Governor in choosing a preferred vendor, these factors do not obviate the need for his critical, objective assessment of the potential bids. As such an assessment could not feasibly be performed by the Governor or his Counsel, these tasks were properly delegated to the agencies within the executive branch possessing the requisite expertise – DOB to examine the financial aspects of the bids and Lottery to review the licensability of the potential vendors. As discussed above, the result of this analysis was an unequivocal recommendation to only consider two potential vendors and exclude the others, including AEG.

At the time of his briefing of the Governor in September 2009, Kiernan could not know what is now evident in hindsight: that a choice would not be rendered for over five months. To the contrary, as discussed further below, Kiernan himself testified that at the time of the September 23, 2009 leaders' meeting the choice appeared "poised for decision" and the state was in dire need of the infusion of funds from the upfront fee. Therefore, when providing the Governor with his only formal briefing during the entire process, by choosing to not communicate the evaluation of the information and the resulting recommendations provided by those experts, Kiernan deprived the Governor of important information and left the Governor in a position of potential embarrassment and the state at risk of a choice of a substandard vendor.

Kiernan's choice not to inform the Governor of the agencies' recommendation, particularly in regard to AEG, is also interesting in light of his personal preferences. Kiernan testified to the Inspector General that he was not inclined toward AEG's bid

because of its nature as a consortium and because it would require substantial debt financing. As to the former, Kiernan testified:

> I remember saying, as a result of my experience as a private lawyer – I was a transaction lawyer, and I've been involved in many commercial deals. And when – if there are two parties to a deal, and on one side you have a consortium, a lot of partners, you end up having to negotiate with every member of the consortium because if they don't agree, it's a mess . . . And I remember relating the experience to colleagues with respect to AEG.

Kiernan further testified that he had agreed with Budget Director Megna's opinion that the two "most important" criteria for selection were "assuredness of the financial capacity to meet the obligations" and "the ability to meet them quickly." Accordingly, Kiernan testified that "with respect to Wynn . . . the most important criteria was the ability to pay and the ability to pay right away. Wynn clearly was superior because AEG needed financing . . ." However, despite his individual assessment discounting AEG's bid for these non-licensing related reasons which comported with the findings of the agencies entrusted to analyze the materials submitted, Kiernan elected, in his presentation to the Governor, to minimize the conclusions they had reached.

In regard to his apparent failure to inform the Governor of AEG's licensing issues, Kiernan testified that by the time of this briefing of the Governor on September 17, 2009, Lottery had "made it very clear that AEG would not be licensable because of O'Farrell. And I think there was another guy. O'Farrell had some associates or cronies [referring to Joseph Logan and Jason Wynn]." In fact, as stated above, Kiernan personally attended a meeting in late August or early September 2009, with AEG representatives where, based upon Lottery's findings, he averred, "I said we needed to have . . . absolute legal certainty and binding legal documentation that showed O'Farrell

was out" before AEG would be considered. Similarly, AEG associate Stanley Schlein testified that at this meeting, Kiernan "said, your problem is Karl O'Farrell, and you should do your research, but he is certainly not licensable, that he was disqualified – the Capital Play bid was disqualified last time around because of Mr. O'Farrell's participation, and that certainly if he were still remaining part of this bid process, the State of New York would not consider . . . a part of this process, AEG would not be considered within the ultimate decision making process. He made it very clear that that was an unequivocal position."

Furthermore, between the time of Kiernan's meeting with AEG and his September 17 briefing of the Governor, AEG provided Lottery with several letters purporting to remove O'Farrell which were rejected by Lottery as insufficient because O'Farrell was still determined to be financially intertwined with AEG.[83] Indeed, the day before the leaders meeting, on September 23, 2009, Lottery rejected an attempt by AEG designed to remedy its licensing issues informing AEG that it had "not seen any document that categorically nullifies [the] payment obligation" AEG had with O'Farrell.[84]

Despite possessing this knowledge of serious issues related to AEG's licensability, the Governor had no recollection of Kiernan informing him that Lottery had deemed AEG (or Peebles) unlicensable at that time and testified that he only became

[83] The memorandum clearly states: "At this time, Lottery does not recommend that AEG is qualified to receive a VLT license due to ongoing changes in composition of team. However, Lottery states that AEG recognizes it has problems with some components of its team and is trying to rectify them. AEG continues to provide documentation to verify problems have been addressed." In regard to Peebles's pre-licensing status, it states, "Lottery: Does not recommend that Peebles is qualified to receive a VLT license due to refusal by equity investor Harbinger to submit prequalification application and ongoing routine investigation by New Jersey . . . into MGM license issues."

[84] As discussed below, it was not until September 30, 2009, that Lottery found these issues to have been addressed to its satisfaction.

aware of this fact "after the selection process." Similarly, Kiernan testified that he had no recollection of informing the Governor during this phone briefing that Lottery did not consider AEG and Peebles licensable. Although Kiernan testified at length about this September 17, 2009 briefing, when pressed as to whether he informed the Governor about licensing issues and, in particular, whether he informed the Governor that AEG may be unlicensable, Kiernan would not expound, asserting attorney/client privilege as counsel to the Governor.

Providing insight into Kiernan's apparent failure to inform the Governor of AEG's licensing status, when the Inspector General inquired as to why Lottery's determination that an entity was unlicensable should not simply disqualify that group from consideration, Kiernan responded:

> Lottery has said to me many times – I've become much more familiar with the Lottery because we designed a different process that's currently underway – but Lottery kept emphasizing and still does that licensing is an ongoing matter, that someone could be licensed today and found unlicensable the next day because of intervening events or new information, so the licensing is an ongoing thing. Even the existing VLT facilities, it is a constant review process, so when you said someone was unlicensable and therefore disqualified, I don't think that's necessarily so. Someone may be deemed unlicensable on August 1st and therefore not qualified, but by August 31st may be licensable and therefore qualified.

While Kiernan is surely correct that licensing issues, especially in regard to consortiums, are not static and may be remedied in certain circumstances, at the crucial time of his only formal briefing of the Governor to prepare him to enter scheduled negotiations with the legislative leaders, Kiernan apparently decided not to inform the Governor of a salient fact clear to him at that time – that AEG as it existed at that point could not qualify for a lottery license.

Further adding confusion regarding the information provided to the Governor is the revision to the memorandum subsequent to Kiernan's briefing. This draft memorandum was completed on September 17, 2009, and then circulated to other executive agencies for comment and/or edit. Nonetheless, Kiernan briefed the Governor prior to receiving any response. Lottery submitted its edits to Rose in the evening of September 18, 2009, after Kiernan's briefing of the Governor. While Lottery's edits did not vastly alter the substance of the memorandum, briefing the Governor prior to their receipt demonstrates a disregard for Lottery's expertise and input, a sentiment similarly expressed earlier with regard to Lottery's chart. The finalized memorandum dated September 23, 2009, the date of the first leaders' meeting, did include some of Lottery's edits; however, given the Governor's visual impairment, he did not consult it during the meeting or at any later point, and, according to his testimony, he was not extensively briefed again after September 17.

The derivation from the September 17, 2009 draft to the final September 23, 2009 memorandum provides further proof that the order was in fact a ranking. The September 17 version includes a recommendation section which stated: "We recommend that further due diligence be conducted into Wynn to determine if a term sheet can be agreed to between the State and Wynn. If unsuccessful, similar due diligence should be conducted into SL Green to determine if a term sheet can be agreed to between SL Green and the State." Upon being provided the draft, Lottery suggested an amendment to the recommendation section that included a time limit of 30 days to engage in due diligence with a vendor before continuing to the next vendor. Lottery, however, chose not to limit consideration to Wynn and SL Green, and added, "If negotiations with both Wynn and

SL Green fail, consecutive discussions should proceed with each of the other competitors, in the order listed in this memorandum, for the same 30-day periods, until and agreement is reached." As noted earlier, the memorandum listed the vendors in the following order: 1) Wynn; 2) SL Green; 3) Delaware North; 4) Penn National; 5) AEG; and 6) Peebles.

Lottery's suggested amendments to the memorandum were provided to Peter Kiernan's office. After receiving Lottery's suggested additions, Governor's Counsel prepared a final version. Consistent with Kiernan's decision to not inform the Governor of the recommendations of the September 17 draft memorandum authored by the Budget Director and Governor's Counsel's Office, this new version deleted the recommendation contained in the original memorandum to commence negotiations with Wynn, and, if such failed, to proceed to SL Green, and to reject all other bidders including AEG. Furthermore, although the final September 23 version edited by Governor's Counsel's Office included Lottery's concept of sequentially negotiating with the bidders, Keirnan and Rose eliminated the ranking which motivated Lottery's advice. In the place of these recommendations, the final version edited by Kiernan's office read:

> Subject to the concurrence with the Legislative leaders, we recommend that further due diligence and negotiations be conducted with a preferred bidder to determine if a term sheet can be agreed to between the State and the bidder within 30 days. If unsuccessful, similar due diligence and negotiations should be conducted with the next preferred bidder and the State within 30 days. If negotiations with both fail, consecutive discussion should proceed with the remaining preferred bidders, for the same 30-day periods, until an agreement is reached.

As noted, Secretary to the Governor Schwartz was the other member of the executive chamber identified by Governor Paterson as part of the evaluation process and other named recipient of these memoranda. Under New York State Executive Law § 4,

the Secretary to the Governor has the statutory duty "to assist the Governor in matters pertaining to the executive department and perform such duties as the Governor may assign him." Schwartz described his role in the Paterson administration:

> **Question:** What are your duties and responsibilities as Secretary to the Governor?
>
> **Schwartz**: I see my role as basically the chief operating officer of state government for the executive branch.
>
> **Question:** Are you a policy adviser to the Governor as well?
>
> **Schwartz:** That's part of my role.

In regard to the VLT selection process, as stated above, Schwartz testified that he envisioned his role to be "to make sure that whatever the reasons were that led to Delaware North not complying with the bid terms, if there were any mistakes that were made or things that we can improve upon from what we learned from phase one, that we didn't repeat them and we improved the process in phase two." This self-description notwithstanding, Schwartz testified that once the bids were submitted, "I didn't have a role other than I wanted to be kept informed as to the progress of the process, making sure that the process stayed on some kind of schedule so that the administration wasn't being criticized for dragging its feet or taking forever to come up with a list of qualified bidders." Schwartz added that he "was not a part of the evaluation process" and was "outside of the process."

Schwartz's testimony regarding his role in the administration and involvement in the selection process is confounding. Contrary to Schwartz's testimony, the Inspector General found no evidence that Schwartz took any steps to remedy the mistakes of the previous selection process. Indeed, despite his self-professed state COO status and

statutory duties, Schwartz admitted that he didn't "recall having any conversations with any state agencies throughout the process." Indeed, Schwartz claimed ignorance of the entire bidding process; asserted unfamiliarity with Tax Law § 1612; stated that he did not attend any of the official presentations by the bidders; and, notably, averred that he had never reviewed the relevant memoranda prepared by agencies under his supervision specifically for his review until asked to produce documents in his possession regarding the Aqueduct bidding process:

> **Question**: Mr. Schwartz, I am first going to show you . . . a memorandum to Governor David A. Paterson and Larry Schwartz. It is from [Messrs.] Kiernan, Megna, Rose and English. This is dated September 17, 2009. I am going to ask you if you have ever seen that. (Pause.)
>
> **Schwartz:** I don't recall seeing this document back on September 17, 2009. I do recall seeing a document which might have been this document that I looked at when I was asked to hand over any documentation I may have had in my files regarding the Aqueduct situation, so I do recall receiving a memo from Peter Kiernan. I don't remember the other people on here. That is when I probably recall actually seeing it and having actually read it.
>
> **Question**: I'm going to show you . . . a similar memorandum by the same team as the September 17 memorandum with some differences. Now, it may be the document I showed you . . . is a draft and that's why I asked you if you saw the draft. Maybe you hadn't seen the draft. . . .
>
> **Smith**:[85] Any difference in your answer on this document versus the other one?
>
> **Schwartz**: No.
>
> **Question**: I am showing you both documents because there are differences between the two. I am asking if you had seen the first.

[85] Schwartz was represented by Patrick J. Smith, Esq. of DLA Piper.

Smith: I think his testimony is contemporaneously he has no recollection of seeing the documents, but he saw them in response to responding to the IG's document request.

Question: If you take a look on page 3 of the September 17 document, there is a category marked assessment. Do you see that?

Schwartz: Yes.

Question: It says: "Our recommendation is to conduct further due diligence on Wynn and SL Green and suggest no further consideration be given to Delaware North, Penn National Gaming, Aqueduct Entertainment Group and Peebles." Do you remember being told that?

Schwartz: No.

Question: If you look at the final page, page 9, there is a recommendation. It says: We recommend that further due diligence be conducted into Wynn to determine if a term sheet can be agreed to between the State and Wynn. If unsuccessful, similar due diligence should be conducted into SL Green to determine if a term sheet can be agreed to between SL Green and the State. Were you told that?

Schwartz: I don't recall, no.

Question: I would ask you to take a look at the September 23rd memo. This memo apparently is the final product, we have been told by Mr. Kiernan and the others on the memorandum. This I assume is filed somewhere in the Governor's office?

Schwartz: I can't answer that question.

Smith: If you know. Tell him if you know or don't know about where it's filed.

Schwartz: I believe I had a copy in my file.

Question: It's addressed to you, so you filed it somewhere in your office?

Schwartz: I believe I handed it over as I mentioned before.

Question: The original?

Schwartz: I believe, to the best of my recollection, that that exhibit is the one I handed over to the counsel's office, was in my folder.

Question: This was delivered to you?

Schwartz: I don't recall.

Question: When you received it you read it?

Schwartz: I don't recall.

Question: If you take a look at it now and see if that refreshes your recollection.

Schwartz: It does not.

Question: Do you recall whether or not in mid September when you received this memorandum that the various groups were ranked in any particular order?

Schwartz: I do not recall.

Question: Do you recall whether or not you were told that any of the groups, the six that is, any of the groups bidding had licensing difficulties?

Schwartz: On September 22, I don't recall.

Question: When you received this memorandum did you have cause to speak to the Governor concerning it?

Schwartz: I'm not sure I understand the question.

Smith: Did you speak to the Governor about it?

Question: Did you speak to the Governor concerning this memorandum?

Schwartz: No.

Question: Did you speak to any of the people who are listed as sending you the memorandum?

Schwartz: I don't recall.

Question: Do you know if the Governor was briefed by any of the people who signed off on this memorandum?

Schwartz: I do not recall.

Question: Did the Governor ever indicate to you that he had been briefed by anyone with respect to this memorandum?

Schwartz: I do not recall.

Likewise, Schwartz admitted to not having reviewed any financial information regarding the bidders until after the Governor's selection of AEG was made public. Schwartz's disassociation with the Aqueduct VLT operator selection process included, incredibly, even his purported lack of awareness of any "point person" (known to the Inspector General to be Counsel to the Governor Peter Kiernan, with whom Schwartz attends daily senior staff meetings) having been designated by the Governor. Schwartz further confirmed that although at a point in the process he became aware of "a concern by Lottery regarding O'Farrell," he "had no indication that Lottery did not think that AEG was – that Lottery thought AEG was unqualified." He affirmed that he did not contact Lottery upon learning of AEG's selection, but instead proclaimed that he had an "open door policy" and, therefore, Lottery staff could have contacted him at any time with any concerns.

When questioned regarding what actions he actually took to fulfill his claimed goals of expediting the process, Schwartz informed the Inspector General that, apparently in lieu of contacting the agencies under his supervision or examining the detailed memoranda prepared for his review, he contacted so-called "stakeholders" in the process who stated their preference for SL Green but also allegedly placed AEG "in their top three." Schwartz stated that these "stakeholders" included Assembly member

Audrey Pheffer, Senator Joseph Addabbo, and several unions. Schwartz admitted that although he did "have a number of conversations with the Governor" any suggestions he provided to him "did not include any judgment with respect to the financial aspect of the [bidder's] packages."

Despite Schwartz's claims of being "outside" of the process resulting in the selection of AEG, the Inspector General found numerous instances of his direct involvement, from the commencement of the process. For example, in August 2009, Schwartz had a conversation with AEG lobbyist Hank Sheinkopf. Moreover, on August 18, 2009, Schwartz convened a multi-agency meeting in his Albany office attended by Kiernan, Rose, Megna, Deputy Secretary to the Governor Timothy Gilchrist, and Schwartz's Deputy Valerie Grey. The topic for this meeting "Scheduled at Larry's request" was "Aqueduct" and the subject of an accompanying e-mail was "Aqueduct Committee." When asked if there existed an assembled "Aqueduct Committee," Schwartz responded that "there was a group of agencies or . . . officers that were involved in the process" and stated that his "management style" was to convene appropriate staff through a collaborative process because "things get done more efficiently." Thereafter, Schwartz's schedule indicated a further meeting held on September 8, 2009, with the subject "Larry Schwartz, review Aqueduct bids" from 11:00 a.m. to 1 p.m. Invited to this meeting were Kiernan, Megna, Grey, Rose, DOB officials English and James Sherman as well as the Governor's Communications Director Peter Kauffmann. Schwartz testified that he had no recollection of either the August meeting of the "Aqueduct Committee" or the September meeting to "review Aqueduct bids." Kiernan, however, testified that it was at a meeting with Schwartz, Gilchrist and Megna

that an agreement was reached as to approximately six criteria that were deemed relevant, with two in particular – "assuredness of the financial capacity to the meet the obligations" and "the ability to meet them quickly" – that were determined to be "the most important."

Schwartz's testimony reveals that, although Secretary to the Governor and self-proclaimed Chief Operating Officer of the State, he was completely uninformed of the salient facts of the bidders' proposals, most notably financial information, and failed to provide any assistance to the Governor in processing information collected and analyzed by agencies under his control, much less expedite the process or attempt to avoid the errors of the prior round, his stated goals. While having apparently abdicated all executive responsibility, Schwartz appears to have actively participated in the process, albeit to no discernable end.

B. September 21, 2009 Meeting to Brief Legislative Staff

On September 21, 2009, members of the executive and legislative staff convened to exchange information about the potential VLT operators to enable briefing of the Speaker and Senate leaders prior to the September 23, 2009 leaders' meeting.[86] Attendees included: David Rose and Brendan Fitzgerald (Assistant Deputy Secretary to the Governor for Gaming) from the executive chamber; Gordon Medenica, William Murray, Gardner Gurney and James Nielsen from Lottery; Howard Zwickel, Noreen VanDoren and Michele Reale from OGS; David English, Luz Martinez and Wook-Jin

[86] As will be discussed later, while Senator Smith held the title of President Pro Tempore, Senator Sampson, the Democratic Conference Leader, was at all times the senator present at the leaders' meetings.

Hwang from DOB; John Sabini and Ron Ochrym from the Racing and Wagering Board; Richard Dorado from ESDC; Paul Gangsei, Esq., from Manatt, Phelps & Phillips; Louann Ciccone and Steven Bochnak (Ciccone's assistant) of the Assembly; Assemblywoman Audrey Pheffer; Assemblyman J. Gary Pretlow,[87] Chairman of the Assembly Racing and Wagering Committee; and Christopher Higgins, Bradley Fischer, and members of Senator Joseph Addabbo's staff from the Senate.

At this meeting, Murray and Medenica spoke extensively regarding the licensability of each potential vendor. Copious notes contemporaneously taken by Higgins[88] provided to the Inspector General reveal that Lottery informed those present that Wynn, Delaware North, SL Green and Penn National were all licensable. Lottery considered Peebles unlicensable because its members had not submitted the necessary licensing applications. Higgins memorialized with regard to AEG:

- Lottery is still having problems with Karl O'Farrell and whether he is part of the organization. Apparently he helped assemble the team and now that Lottery has made it clear AEG is not licensable with him in the organization they are working toward divesting him.
- The only problem is Karl O'Farrell has a $15 million buy-out from AEG and they have not satisfactorily demonstrated through legal documents that this has either occurred or that the contract has been relinquished. All AEG has given to Lottery are some letters expressing so much, which the Division does not consider to be conclusory evidence that the partnership has been severed. They want to see a formal release or waiver.
    - Karl O'Farrell is also in bankruptcy court in both Australia and the S.D.N.Y. So lottery [sic] believes the bankruptcy trustee will seek

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[87] According to Assemblyman Pretlow's testimony, he appeared via telephone conference.

[88] Higgins's notes also included comments purportedly made by Chairman Sabini at this meeting: 1) cautioning that when dealing with a tribe (presumably Hard Rock Seminole partnered with SL Green) sometimes tribal politics becomes infused in those business dealings which are seemingly separate; 2) because the Franchise Oversight Board, comprised of state appointees, has input into certain shared services and shared portions of the facility, the state would maintain some control over the interaction between NYRA and the selected vendor; and 3) as the state delays choosing a vendor, the gaming landscape was changing (Penn National was contemplating purchasing a Las Vegas casino which, if accomplished, would absorb much of the cash on its balance sheet).

to go after this money as well. Lottery believes ultimately this will end up in litigation.

- Lottery also has a problem with one of AEG's financial backers – J&J Partners. Apparently the son of one of the J's, Eric Wynn got into some federal securities fraud. Richard Mays, the head of AEG unsuccessfully represented the son in court at the appellate level.
    - It now appears that AEG has completely replaced J&J as a financial partner.
- Lottery is still waiting on GreenStar and Levine Builders to submit applications for licensing. At this point in time, because no licensing applications have been submitted the Division simply cannot say whether they are licensable or not.

Higgins's notes, which were attached to the materials disseminated to the Senate leadership, clearly and accurately summarized the pertinent information discussed at the meeting. Had the senators who were presented this information chosen to read it, they would have been as equally informed as their own staff members and others analyzing the bids. Unfortunately, as discussed later in this report, this analysis was ignored and Higgins's efforts essentially went for naught.

Lottery also presented its "Harvey ball" chart with the modification suggested by Kiernan regarding leadership management: Lottery disseminated copies of the chart and also used an enlargement of it during its discussion of the different criteria and how each vendor scored. When questioned by the Inspector General about the chart and the analysis therein, Kiernan was dismissive and characterized it as "unsolicited. It was also unwelcomed. By some, it was ridiculed; by others, it was given no credence." The sentiment was noted by Lottery Counsel Murray: "At the end of the meeting, David Rose took pains to say, 'This is not an official position by the executive branch. This is something the Lottery wanted to talk about. But now the copies that have been handed out in this meeting, I want you all to hand those copies back to the Lottery.'" English, reporting about the meeting to Megna in an e-mail, remarked: "The only bobble was that

Gordon [Medenica] decided to hand out his matrix on criteria. This took Dave [Rose] somewhat by surprise, but I think he adjusted for it." Indeed, at the conclusion of the meeting, Murray testified that he and the other members of the Lottery realized that "no report was being asked for or was desired by the Governor's Office or by the Legislature. No one from any of these three sides asked us for a report."

Although Kiernan and Rose are undoubtedly correct that in preparing its "Harvey ball" chart assessing the various bidders under multiple criteria of its own design absent any request or direction, Lottery exceeded its designated role in the process – to examine the bidder's qualifications for a lottery license – by doing so, Lottery filled a void in the process which Kiernan and the executive chamber had previously ignored and subsequently failed to remedy. In fact, it was Kiernan who actively rejected any efforts to rank the competing vendors throughout the process, professing to acting as an "honest broker." Of note, after AEG was deselected in March 2010, this same executive chamber, in formulating a new process, opted to not only utilize a weighted evaluation system similar to Lottery's "Harvey ball" assessment, but also to provide Lottery with the preeminent role in the evaluation. This procedure resulted in the selection of an operator within four months and a payment to the state of $380 million.

DOB also presented extensive analysis at the meeting, but, unlike its memorandum to the Governor's Counsel's Office, did not announce its preference for Wynn. Rather, DOB presented its net present value analysis and the PFM report findings. Regarding the present value, DOB acknowledged that these calculations accepted the information each bidder had proffered at face value and did not assess the reasonableness of the submissions. Further neutralizing the analysis, DOB also noted

that there existed little difference among the vendors over the present value period of analysis: they were all in the $3 billion range. Louann Ciccone, Assistant Secretary on Program and Policy of the Assembly, reported that DOB had asserted that all the potential vendors could build a successful racino. DOB also presented PFM's findings regarding the submitted win-per-day projections as discussed earlier in this report. Finally, DOB highlighted a number of considerations it deemed important: competency of the management team and whether a vendor had cash on hand or must acquire debt.

With regard to management, an internal DOB chart dated September 21, 2009, notes "AEG has too many participants in the project to manage the team. Peebles and SL Green partnered with national gaming operation entities. Wynn, Penn and DNC are single gaming operation entities." The chart also notes that Wynn, SL Green and Penn National do not anticipate acquiring debt whereas Peebles, Delaware North and AEG would do so in order to finance the project, with AEG dependent on the most debt acquisition of any potential vendor.

OGS presented its evaluation of the impact of SEQRA (environmental review) on the vendors' submitted plans. VanDoren informed the legislative staff that the plans submitted by Delaware North, Peebles and SL Green fit within the prior approved SEQRA evaluation and could be approved within 90 days. In contrast, AEG's plans, which included a hotel, would require a new SEQRA assessment which would take at least one year. If AEG removed the hotel from its plans, they could fit within the existing SEQRA assessment. Furthermore, Wynn's plan to build in front of the existing Aqueduct facility and not use any of the old buildings would require a new SEQRA evaluation causing at least a one-year delay.

C. Speaker Sheldon Silver and the Assembly

1. Speaker Silver

Louann Ciccone, the Assembly's Assistant Secretary on Program and Policy, was tasked with evaluating racing and wagering issues for the Assembly including the drafting of Tax Law § 1612. Ciccone reported to the Inspector General that she routinely discussed the competing vendors and their proposals with Speaker Silver throughout the process. While the Speaker could not recall specific dates when he was briefed, he confirmed that these briefings occurred. The Speaker, however, classified his personal participation in the analysis as minimal: "Mainly, my personal participation is, when the staff felt they needed some direction, they come to me. They would come to me and brief me at some critical juncture, if there was one. But I had very little participation in this." He further explained: "But, you know, specifics on specific days, I was not aware of. Louann would brief me. I wasn't that interested. Ultimately, I was interested in – when they give us an ultimate decision on who's eligible and what – you know, what money is involved, then I want to see who's bidding what."

Ciccone stated that she neither ranked the vendors nor recommended one, as no recommendation was requested of her; rather, she provided extensive information regarding each vendor to the Speaker and to her immediate supervisor Dean Fuleihan, Secretary to the Assembly Ways and Means Committee. To facilitate comparison, Ciccone created a chart detailing the relevant information as provided by the vendors themselves and the executive agencies. The information detailed in the chart significantly mirrors the information in Higgins's chart and notes.

A number of Assembly members also provided input to Speaker Silver on the selection of the VLT operator at Aqueduct. Silver noted that the Assembly member from Buffalo advocated for Delaware North. He also received input from Assemblywoman Audrey Pheffer who represents the area in which Aqueduct is located, and Assemblyman J. Gary Pretlow, Chairman of the Assembly Racing and Wagering Committee.

2. Assemblyman J. Gary Pretlow

Assemblyman J. Gary Pretlow was elected to the Assembly in 1992. In 2005 Asssemblyman Pretlow was appointed Chairman of the Assembly Racing and Wagering Committee. From the outset of his testimony, he noted his disgust with the process:

> I'm on record as saying that the process was flawed from its inception. I never liked the way Governor Spitzer set this up because it didn't set a fair criteria where everybody could operate on and you could compare apples to oranges – I mean you could compare apples to apples. The way Governor Spitzer set it up it was apples and oranges and pears and peaches, and here's what I want to do and you couldn't really look at each of the parts of it and figure out whether it's good or bad for the state. I've already operated that, you know, on the premise that I want to do the best for the state, what brings the most revenue for the state.

Assemblyman Pretlow related being approached and lobbied quite frequently; however, Pretlow scoffed at the attempts to persuade him. "[T]he seven bidders all paid a visit to myself or my committee, basically to me individually, to tell me what their plans were. I won't say I threw them all out. I told them that their pretty pictures didn't impress me. I told it to all of them, including Steve Wynn, because they didn't. I told them I was only interested in what they were going to do for the state and that was basically it." Nevertheless, recognizing the political nature of the process and the novel construction of Tax Law § 1612, Assemblyman Pretlow declared: "I knew I didn't have a voice in who

would be the ultimate choice. I didn't want to feel good towards anyone and then have the Governor pick who he wanted to pick anyway. And to be quite honest with you, I was kind of shocked when AEG was picked."

Assemblyman Pretlow proclaimed that he never divulged his preferences to any of the principals or lobbyists, only to Speaker Silver: "My first choice was Steve Wynn and my second choice was SL Green. And I couldn't go with – well, AEG wasn't offering anywhere near what we were looking for. Penn National I really didn't like their brochures. They had 1950s looking casinos. And Delaware North had already screwed us and I was not interested in dealing with them again."

3. Assemblywoman Audrey Pheffer

Elected to the Assembly in 1987, Assemblywoman Audrey Pheffer has represented the area of Queens in which Aqueduct is located for the last 20 years. As such, she and her constituents have a vested interest in the chosen builder and operator of the Aqueduct racino. During both the 2008-2009 and 2009-2010 selection processes, Assemblywoman Pheffer worked in conjunction with Community Board Chair Elizabeth Braton and the Senator from the area, first Serphin Maltese and then Joseph Addabbo, Jr., to assess the various vendors.

As noted earlier, Assemblywoman Pheffer attended the September 21, 2009 meeting at which the executive agencies briefed those present regarding their respective agencies' findings concerning the potential vendors. She recalled, among other things, the circulation of Lottery's "Harvey ball" chart and the indication by Lottery that AEG was unlicensable at that time. Assemblywoman Pheffer also contacted Ciccone periodically for updates and information. Nevertheless, while Pheffer was aware of the

evaluations of the various executive agencies – DOB, Lottery and OGS – she deemed those evaluations within the purview of others and chose to focus, apparently exclusively, on the vendors' relationship with the community, based on the numerous presentations by lobbyists and principals. Assemblywoman Pheffer expounded:

> The ones that were most important to me was as representative of the community, what we dealt with, I didn't deal with the financial part, I didn't deal with the vetting, the Lottery. The only thing we were concerned was is how were they going to relate to the community. I have my kind of a pat answer is that, this is a racetrack in the middle of a community. So it's not like Saratoga and the others, so there were certain things we were concerned about, about how they were going to expand, how they were going to provide security, how they were going to deal with the traffic, were they going to have somebody who was going to be the liaison, were they going to hire from within the community first, were they going to have the first job fair in the community. Really that was the questions. And the way they answered was – I mean that's the only thing we went by, our gut really, feeling about how he answered and how they seemed to respond to the questions. Were they prepared. You know, some said well, we're going to have the State Police so we'll do it. That was really the thrust of our concern.

While these criteria are all worthy of consideration and it is reasonable for a representative of an area to focus on the effect on the local community, advocating for a particular vendor to be awarded a billion dollar franchise solely on a "gut feeling" not fortified by financial and licensing examination further reflects the subjective and standardless nature of this process.

The three area representatives – Assemblywoman Pheffer, Senator Addabbo, and Community Board Chair Braton – routinely entertained lobbyists and principals together at Community Board 10 or their respective offices. After considering the presentations, Pheffer related her preference for SL Green because she felt "that Hard Rock Café was a good selling point for the community." While Pheffer expressed a preference for SL

Green, she posited that she "could live with anybody as long as we had somebody and then they would learn to work with the community." Pheffer did note that AEG had "a beautiful proposal." With regard to Wynn's proposal, Pheffer expressed the community's cautious optimism at its grandness:

> When they presented it it was a beautiful proposal, it was the most professional presentation. I was very impressed by it. I'm not sure if he would've stayed in if we wouldn't have, you know, gone maybe his way. The community board was very impressed. They were just a little frightened because it was just so different than what everybody else presented and it was really out of the box. But they were very impressed. You had to be impressed as Steve Wynn wanted to come to New York City, wanted to come to Aqueduct, and I guess everybody felt that it would be a success, you know, we all in talking. They were a little frightened that he was a corporation and they might not have as much input in that process. I don't mean the process that took effect, I mean you know as far as his running the operation, as much input as they would when it would be one of the more local groups, New York City bound group.

Pheffer reported that she informed both Louann Ciccone and Speaker Silver of her preference and had discussions with Assemblyman Pretlow, Chairman of the Assembly Racing and Wagering Committee.

D. Community Board 10 and its Chair Elizabeth Braton

Community Board 10 is an agency of New York City representing the community in which the Aqueduct Racetrack is located. Elizabeth (Betty) Braton has served on Community Board 10 for over 25 years and was appointed its Chair in 1990. Braton testified that the Community Board had attended "dog and pony shows" presented by representatives of the various bidders along with Senator Addabbo and Assemblywoman Pheffer. Braton related that "we tried to get the community to understand that the community did not have a say, did not have a vote in this, that the decision was defined to

be made by the Governor and the two legislative leaders." Braton added that the only manner for the community to express its opinion was through its elected representatives. Braton explained the Community Board's view of the process and the difficulties in evaluation:

> The state determined it was going to go ahead with this process. We agree with it in concept because it will help keep it a racetrack, but nobody's asking you which company you want. You know, nobody's asking for a recommendation out of the Community Board. We're going to have to work with whomever gets picked, and our effort was to try and develop relationships with the different companies to try and compare the different bids; and that was difficult to do because the bids were not – it wasn't an apples to apples comparison. It was a lot of apples to oranges.

Accordingly, Braton testified that although, "All of the companies . . . were pushing me to say, support us, support us, we told all of the companies, both publicly and privately, the board is not making a statement in support of any of the proposals. We will work with whoever gets selected, yes." Braton stated that although she provided her ranked preferences for selection, "[i]t really was none of the proposals were unacceptable to us." Although Braton reported that the Community Board was not favorable to Delaware North's bid based upon its failure in the previous round coupled with Delaware North's "limited reach out to the community prior to their selection," that the Board was "comfortable" with both AEG and SL Green based upon familiarity with them from prior rounds. Assemblywoman Pheffer, however, testified that while Braton "felt comfortable with AEG and SL Green," she was "leaning" toward AEG.

When queried regarding controversial AEG member Karl O'Farrell, Braton explained that she had interacted with O'Farrell since his involvement in Capital Play's bid in the previous round and that O'Farrell was a "very talkative Irishman" who would

telephone her periodically and provide her "gossip" consisting of "a zillion, million clippings from newspapers and magazines, reports from other places, dishing dirt on his competitors," and that even after O'Farrell "was out of it, he was very clear to say he was no longer involved with AEG, but he continued to shoot off his mouth and gossip." Braton elaborated that after O'Farrell had supposedly withdrawn from AEG, "I wasn't talking to him as the head of that company. I was talking to him as a guy who wants to gab. In the process he's throwing out information." Notably, Braton described O'Farrell's role in AEG as that of an "ambiguous figure" and claimed that his presence caused the Community Board to "tip[] a little bit towards" SL Green until his ostensible exclusion from AEG.

Braton informed the Inspector General that although the Community Board refused to state a preference for the reasons discussed above, her personal preference was AEG, but that "we were not and I was not pushing either of them. I was saying, this is why I think AEG was better, and I was saying the same thing about the different companies." Braton preferred AEG due to its "impact on the community," including job opportunities for residents, and the physical plans it produced. Braton added that "SL Green was also acceptable."

Those assertions notwithstanding, a review of e-mail communications between O'Farrell and Braton suggests that Braton was more than a mere passive recipient of "gossip" from O'Farrell, and, contrary to the Community Board's official position, affirmatively provided O'Farrell with information to aid AEG's bid as reflected in an April 4, 2009 O'Farrell e-mail to other AEG officials that "Betty and Donna [Gilmartin, a Community Board official] will work on Addabbo and Audrey [Pheffer] for us."

O'Farrell and Braton also shared sensitive documents and information labeled "confidential." For instance, on May 28, 2009, O'Farrell forwarded Braton an e-mail (subject: "CONFIDENTIAL — NOT FOR DISTRIBUTION) with, as an attachment, the complete internal Senate memorandum O'Farrell and Sheinkopf had obtained from Angelo Aponte with the Senate memorandum heading removed by AEG associates. In the note accompanying this e-mail, O'Farrell stated, "Betty. You will find this interesting." On May 28, 2009, Braton e-mailed O'Farrell informing him that SL Green officials had met with Assemblywoman Pheffer and Senator Addabbo and that she would "see them both tonight and get more info" and asked whether AEG had met with the elected representatives as of that time. Subsequently, on June 24, 2009, Braton e-mailed O'Farrell stating that she had "[j]ust finished reading the file you sent" and based upon this file ranked AEG first. Braton proceeded to inform O'Farrell of her meetings with various vendors and concluded by stating that the Community Board publicly was for any vendor except Delaware North and "Audrey [Pheffer] or Joe [Addabbo] would be hard pressed if they took a different stance." O'Farrell then forwarded Braton's e-mail to various AEG officials stating, "please keep the e-mail below confidential to our group." Additionally, on June 26, 2009, Braton e-mailed O'Farrell her review of an article appearing in a local newspaper regarding the Peebles bid including her assessment of two people quoted (referred to by Braton as "a nut job" and "an idiot"). Braton then provided O'Farrell with the following advice: "Your press people may want to put something out about your website or something related to your proposal. If you do, focus on the [Queens] *Forum*. It's easiest to manipulate."[89] A month later, on August 4, 2009, Braton

[89] Notably, on August 6, 2009, an article appeared in the *Queens Forum* entitled, "Aqueduct Bidder AEG May Be Community Favorite."

e-mailed O'Farrell what O'Farrell described as a "Confidential Report from tonight's 'National Night Out'," a community event in Queens. Braton proceeded to provide O'Farrell advice including to "ignore" the "little kid" on the council because "there's not much he could do for you." Braton further disclosed a copy of the Community Board's annual statement of needs, a document O'Farrell disseminated to AEG officials as "Very Confidential."

Braton's activities on behalf of AEG provides yet another example of the problems inherent in removing a procurement from the confines of standard procurement practices and lobbying restrictions as contributing to a selection made through private conversations rather than objective assessment.

E. U.S. Congressman Gregory Meeks

Gregory Meeks is a Congressman whose district includes the neighborhood of Aqueduct Racetrack. Congressman Meeks voluntarily appeared before the Inspector General and attested: "My involvement was basically that I represent the district of Aqueduct, and those individuals who were bidding, I wanted to make sure that local and community people would be involved in the job creation that would be created from Aqueduct, because we knew about the revitalization of Aqueduct, and the area right now needs a lot of work, a lot of renovation." Accordingly, Meeks testified that during the 2009-2010 selection process that resulted in the selection of AEG, he was lobbied by three of the six vendors – SL Green, Peebles and AEG – but did not advocate for any of them.

Congressman Meeks related that he succeeded the Reverend Floyd Flake in Congress and worshipped at his church. As to communication with Flake regarding the

Reverend's participation in AEG, Meeks seemed to indicate that his communication was limited to Flake's involvement with "home development" and community, and affirmed that the Reverend Flake never asked him to support AEG. Congressman Meeks also noted his long personal friendship with Darryl Greene, the Reverend Flake's business partner.

Congressman Meeks reported that he had no conversations with Senators Addabbo, Adams or Assembly members Silver or Pretlow, but did speak with Senators Smith and Sampson, to inquire if a decision was imminent. Meeks also related that he inquired of Assemblywoman Pheffer about the minority participation of the various vendors and requested that she inquire of Speaker Silver as to the timing of the selection. Congressman Meeks similarly testified that he spoke with Governor Paterson but solely to inquire as to the timing of the selection and to impress upon the Governor the importance of minority participation.

The Inspector General found no evidence that Congressman Meeks played any meaningful role in the selection of AEG or, regardless of his relationships with AEG principals, undermining his testimony that he did not act as an advocate for the group.

F. Briefing the Senate and "The Coup"

Unlike the Assembly, wherein Speaker Silver has served as Speaker since 1994 and is its clear leader, a transition occurred in the Senate during the summer of 2009 which muddied the hierarchy thereby directly affecting who would be actually rendering the racino decision and to whom the staff would be disseminating information. The Democrats had assumed a slim majority (32-30) in the Senate as a result of the November 2008 elections. On June 8, 2009, in what has been labeled a political coup, Democratic

Senators Hiram Monserrate and Pedro Espada, Jr., joined the 30 Republican Senators in a vote to replace Senator Malcolm Smith, then Majority Leader and President Pro Tempore, with then Republican Minority Leader Senator Dean Skelos as Majority Leader and Senator Espada as President Pro Tempore. Aside from the obvious turbulence of the coup itself, traditionally both positions had been held by the same senator. The coup's legality was challenged, but regardless, the Senate ceased functioning for nearly two months.

On June 15, 2009, Senator Monserrate abandoned the coalition and rejoined the Democratic Majority; nevertheless, the Senate remained hamstrung because his return left the Senate deadlocked at 31-31 and, because of the vacancy in the lieutenant governorship after Governor Paterson's ascension, any tie vote could not be broken. When a tie occurs in the Senate, the Lieutenant Governor, the Constitutional leader of the Senate but who does not vote in any other instance, is empowered to cast the tie-breaking vote. With the vacancy in the Lieutenant Governor's Office, according to the State Constitution, the President Pro Tempore of the Senate is to perform all required duties, which include casting a deciding vote. However, since Senators Smith and Espada both claimed this title, a tie could not be broken. On July 9, 2009, Senator Espada rejoined the Democratic majority and, as a condition of his return, became the Majority Leader while Senator Smith retained his title of President Pro Tempore. Senator John Sampson assumed the position of "Democratic Conference leader," a newly created title. After much ensuing tumult and confusion as to the effect of this re-assignment and dispersal of titles, it eventually became clear that Senator Sampson was the actual leader of the Senate

while Senators Smith and Espada held mere titular positions divested of meaningful leadership responsibility.

Reflecting the lingering chaos resulting from the settlement of the coup, Lottery Director Gordon Medenica related to the Inspector General that, after an August meeting, Christopher Higgins and Bradley Fischer, the two Senate staff members tasked with evaluating the racino vendors' proposals, remarked: "We don't even know who [sic] we have to convince. There's [sic] four, five, six people, and we don't know who's really in charge. It's great you guys did all this work, we appreciate it . . . but we don't even know, as the people who were going to feed the information to their leader to make the decision, how . . . to do that." Medenica stated they seemed "confused and unsure about what their role would be." As discussed below, not only did it soon become evident that, regardless of the various titles, Sampson was the de facto leader of the Senate who would be making the Aqueduct selection, but this change in true leadership directly impacted AEG's strategy.

1. Senator Malcolm Smith's Illusory Recusal Due To Relationship With AEG

Senator Smith assumed the leadership of the Senate in January 2009, with the titles of Majority Leader and President Pro Tempore. Senator Smith, therefore, held these positions during the Delaware North negotiations and its eventual deselection, the release of the 2009 solicitation and proposed MOU, and the submission of the responses by the six potential VLT operators. Shortly thereafter, the coup occurred and the landscape of the Democratic-controlled Senate changed with Senator Smith's role, both in name and status, in flux.

Notwithstanding titular diffusion and ensuing uncertainty caused by the coup, Tax Law § 1612(e) specifically provides in relevant part: "The video lottery gaming operator selected to operate a video lottery terminal facility at Aqueduct will be subject to a memorandum of understanding between the governor, **temporary president of the senate** and the speaker of the assembly." (Emphasis added) Therefore, after the coup and the resulting transformation of the Senate leadership, Senator Smith, who retained the title of President Pro Tempore but was stripped of much actual power, was still statutorily required to consent to the selection of a VLT operator at Aqueduct.

Even prior to the coup and Senator Smith's reduction to a position of largely ceremonial status, his involvement in the VLT operator selection process was problematic given his widely reported connection to AEG. As early as May 19, 2009, only one week after the vendors' submissions, it was reported in the media that Smith had relationships with AEG members Reverend Floyd Flake and the Darman Group. Smith testified that from 1986 to 1991, he was employed as Flake's district manager when Flake was a member of Congress. Moreover, Senator Smith is a parishioner of Reverend Flake's church located in Queens.

Smith's testimony to the Inspector General reveals that he was undoubtedly cognizant of the media coverage and the appearance of impropriety arising from Flake's participation in AEG and Smith's role in the decision making process. Smith related that, prior to the revelation of this potential conflict of interest, after he attended services in Flake's church, he would regularly adjourn to Flake's personal office and discuss matters with Flake. After it was revealed that Flake was part of AEG, Smith claimed that he consciously avoided speaking to Flake at all during the pendency of the selection process.

Smith did acknowledge that they might have had one or two telephone conversations in which Flake inquired about the timing of the decision, with Smith replying that he was unaware of when the process would conclude. In contrast, Reverend Flake testified that he had one telephone conversation with Smith in the beginning of the process in which Smith cautioned that because he "might be involved in the decision . . .we would not have any conversations about it."

Smith also affirmed that he and Darryl Greene had been business partners in the late 1990s and had formed the Darman Group, another AEG member partnered with Flake. As early as May 19, 2009, a spokesperson for the Senate confirmed both relationships but proclaimed that they had not and would not influence "any governmental decision" made by Smith and that the connections did not pose a conflict. The spokesperson further reported that Smith had divested himself of any interest in the Darman Group over a decade ago. Therefore, prior to the coup while serving as the uncontested leader of the Senate, Smith publicly declared that, even considering the aforementioned apparent conflicts of interest, he could and would participate in the VLT decision making process.

Almost immediately after that press statement, the Senate coup and the resulting turmoil commenced, lasting from early June until late July. After the coup, even though Smith was statutorily mandated to sign the MOU, his disempowerment called into question his role as a decision maker. Indeed, well-established Albany lobbyist Giorgio DeRosa averred: "The reality is that Malcolm ceased to exist in the Senate. They left him in an office, and he got to go to meetings. It was ceremonial in nature only. He wasn't making decisions anymore." Notably, by the end of March 2010, Senator Smith was

even physically moved from the Senate President Pro Tempore's office which was then occupied by Senator Sampson.[90]

The Inspector General, in response to media reports that Smith had recused himself at some point, inquired of various witnesses regarding Smith's role throughout the selection process, and received conflicting accounts. Smith claimed in his testimony that he voluntarily removed himself from the selection process because of the aforementioned apparent conflicts of interest: "I told Senator Sampson – this was after the coup – Senator Sampson and Senator Adams that I was recusing myself, 'cause I didn't want to get involved. I knew clearly at that point that [Flake] was actually interested. Not that I felt there was anything wrong with it, but I felt better to not be involved." Smith placed the timing of this conversation sometime after the coup, in July or August 2009. Senator Eric Adams, Chair,an of the Senate Racing and Wagering Committee, attested to having a conversation with Smith about his removal from the process but was unable to place a time frame on it. Adams also reported that, shortly thereafter, he had a conversation with Senator Sampson, who indicated after the coup that he was going to run the "day-to-day operations in the Senate" which included the selection of the Aqueduct VLT operator.

Interestingly, when the Inspector General queried Sampson as to when Smith informed him of his removal from the selection process, Sampson contradicted Smith and averred that Smith did not in fact remove himself; rather, it was Sampson who "told [Smith] that he is not [to be] involved with this process" because of what had been reported about the Reverend Flake's involvement with AEG and the inherent conflict.

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[90] http://www.nydailynews.com/blogs/dailypolitics/2010/03/senate-dems-moving-day.html

Sampson, noting the importance of this selection process, reported that, as a lawyer, he knew to avoid conflicts and the appearance of impropriety, and, therefore, he informed Smith that he would rely on Senator Adams as Chairman of the Racing and Wagering committee, and Senator Joseph Addabbo, who represents the Aqueduct area, and "at the appropriate time, [would] let [Smith] know," presumably to attend to the ministerial act of signing the MOU as the legislation required. Smith attested to that exact intention.

Smith's post-coup disenfranchisement supports Sampson's version of events rather than any proactive recusal on Smith's part. Initially, Smith's testimony that he only "clearly" knew of Flake's involvement after the coup is directly undermined by the Senate's press statement in May that despite this acknowledged relationship, Smith would continue his involvement in the process. This press statement was undoubtedly spawned by Reverend Flake having been unambiguously identified as a member of AEG in its May 8, 2009 submission to the state. Additionally, Smith did not inform Speaker Silver or Governor Paterson either in writing or orally of his recusal; Senator Pedro Espada, Jr., the post-coup Majority Leader, learned of Smith's purported recusal from reading about it the press; Higgins attested to only having heard about Smith's recusal from the media and not from any communication with Smith; Fischer stated that he did not interact with Smith but knew that Senator Sampson would be making the decision; and Counsel to the Governor Kiernan testified that he possessed no knowledge of any recusal.

Notwithstanding whether his "recusal" was voluntary or Smith's rationale for his purported lack of involvement, Smith's actions belie any recusal on his part. Specifically, an August 13, 2009 e-mail from Higgins to Smith stated, in pertinent part:

"Per our discussion a short while ago, attached please find an updated chart that reflects all of the pertinent information to date regarding the companies that have submitted bids to operate a VLT facility at Aqueduct." Smith responded, "Thanks." The attachment is entitled "REVISED AqueductBidderTable with NOTES for Senator Smith 08 13 09.doc." When confronted by the Inspector General with this e-mail and the accompanying chart, Smith claimed not to recall the e-mail but acknowledged his apparent receipt and response. He also denied having reviewed the contents:

> I don't recall looking at it, no. No. It may have come to my office. And I honestly may have seen it. But because in my mind I'm out of the process, I may have looked at it and said, I'm not dealing with this and put it on the desk. You're going to see me cc'd in e-mails throughout this process because my name is constitutionally the person, but, you know, I don't – I wouldn't go through all this stuff.

That assertion notwithstanding, in an August 13, 2009 e-mail from Senior Assistant Counsel Higgins to Counsel for the Majority Shelley Mayer, provided to the Inspector General well after Smith's interview, Higgins informed Mayer: "I briefed MAS [Malcolm A. Smith] this a.m. over the phone for ½ an hr. and e-mailed my updated memo/chart." While Smith can deny having read a chart sent to him via e-mail, he clearly listened to Higgins discuss the aspects of the various bids in great detail without mentioning any purported recusal on his part.

In addition, in an earlier August 5, 2009 e-mail between Higgins and Senate Majority Counsel Shelly Mayer, after Higgins attended one of the aforementioned Lottery-led meetings, Higgins recognized that Smith's demotion notwithstanding, he still had to be placated given his well-known connections to AEG, Higgins therefore recommended, in relevant part:

> We need to inform Sen. Smith that Lottery is not recommending AEG be put forth. They have serious concerns about the licensing of this organization and its individual principals [sic] because they have a member with a bad history. Lottery recommends this group be ranked last or not at all. This is the organization Floyd Flake is involved in. Lottery is not claiming Mr. Flake is the problem, rather a separate principal of the conglomerate who is the issue. But at the very least MAS [Smith] needs to be made aware of this. I have to imagine the Governor and Assembly will be agreeing with Lottery's analysis of the licensing of this organization. . . . " [91]

Mayer responded, "Pls set up mtg through kink [a senate staffer] with sampson and smith and adams and espada and klein if they want for early next week. Can be videoconferenced." Tellingly, not only did the Counsel to the Majority fail to indicate any knowledge of a purported recusal by Smith, but she deemed it necessary to actively involve him in the discussion. When queried by the Inspector General about this exchange, Higgins initially claimed that he had no independent recollection of the e-mail but asserted it "speaks for itself." After some coaxing, he finally admitted, "Mr. Flake is the reverend of that church. He is also a former congressman. And I believe he has a very close political relationship with Senator Smith. I thought it would probably be a good idea to give Senator Smith a heads up that this is an issue. I don't know if we ever did it or not."[92] When confronted with the contents of this e-mail, Smith testified that he could not recall being so advised.

Further evincing that Smith did not in fact remove or attempt to distance himself from the selection process, in a November 13, 2009 e-mail with an attached chart of the most recent updated Aqueduct VLT bidders information, Majority Counsel Mayer commented, "Assume you received this for today's meeting." Of note, Mayer copied

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[91] This e-mail also reveals that Higgins found Lottery's presentation sufficiently persuasive as to assume that the executive chamber would abide by its recommendation. As discussed earlier, in fact, the executive chamber summarily dismissed the perceived impudence of Lottery's attempted ranking.

both Senators Adams and Smith on the e-mail. In addition, in a December 17, 2009 e-mail exchange, Mayer asked Higgins to evaluate the potential impact of a Shinnecock casino on Aqueduct and, upon receiving a response, instructed Higgins to forward the information solely to Smith. Even as late as December, Mayer was still providing Smith with updated information and, to the extent Smith intended to recuse himself, he apparently did not share his recusal with counsel.

Despite the aforementioned evidence to the contrary, Smith publicly denied his involvement, as evidenced by a September 4, 2009 New York Magazine article, entitled, "Malcolm Smith Eyeing Cushy Aqueduct Afterlife?"[93] The article reported, "A spokesman for Smith insisted he's not involved in the casino talks: 'Senator Smith has a long personal relationship with Reverend Flake, but never in the past, and certainly not now or in the future, will that personal relationship bear any influence on a decision the senators make related to state business,' says the aide." Providing further evidence of Smith's public face of recusal, AEG public relations consultant Andrew Frank testified that he had learned that early in the process Smith had recused himself from the discussions and would not meet with any of the bidders.

In fact, while publicly Smith maintained a façade of recusal, testimonial and documentary evidence reveal that Smith was very much involved in advocating for AEG including advocacy to the Governor. Governor Paterson related that toward the end of the 2009, he "got the impression" that Smith had a preference for AEG. Upon being pressed, the Governor acknowledged, "Then, fine, yes, he spoke to me about AEG." Contrary to the Governor's testimony, Senator Sampson emphatically replied

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[92] Higgins also testified that, to his knowledge, no such meeting ever took place.
[93] http://nymag.com/daily/intel/2009/09/malcolm_smith_eyeing_cushy_aqu.html

"Absolutely not" when queried as to whether Smith had ever indicated to him that he was in favor of AEG. Adams similarly testified that Smith never expressed a preference for any group to him, and even added that when Adams proclaimed Wynn as his preferred vendor, Smith said, "go with the best choice."

While based upon his supplanting Smith as true leader of the Senate, Sampson may very well have not afforded Smith any weight in the decision, the Governor's testimony of Smith's uninterrupted efforts championing AEG is corroborated by contemporaneous e-mails among AEG members and their lobbyists which are replete with references to not only Smith's support but his assistance. For instance, on August 9, 2009, Larry Woolf, an AEG principal, wrote "It appears we have the support of Senator Smith, they have challenged his credibility due to past business with Rev. Flake. Hence, Sen Smith has formed a committee of four senators that will vote as one block for us. The Senators in that block are; Sampson, Adams; Abaddo; [sic] and Johnson." More bluntly, a September 1, 2009 e-mail among AEG lobbyists and principals, noted, in relevant part, "It's been confirmed tonight that malcolm [sic] is still with us." And, on September 30, 2009, in an e-mail exchange among numerous members of AEG, Andrew Frank stated: "Holding Senate – we will go back to Malcolm Smith to make sure he holds."

It is further clear that, at a minimum, Smith utilized his position to act as AEG's eyes and ears in the Senate. Most notably, in a January 13, 2010 e-mail exchange two weeks before AEG's tentative selection, AEG-affiliated lobbyist Hank Sheinkopf and AEG member Lawrence Roman discussed the favorites among the decision makers as divulged by Smith and others:

Roman: Have you heard anything new? I get 1 to 2 phone calls a month, not happy

Sheinkopf: Had smith in my office on Friday. Spoke with Aponte twice last week. Am all over my part of the matter which it would seem logical to keeo[sic] the senate from moving one nanometer. Norman [Levy, a partner of Sheinkopf] speaks with the governor's counsel who is also my friend, peter Kiernan several times a week. I am working. It might be better to be unhappy with the rest of your squad. AM holding up my end and do not know what the rest of them are doing.

Roman: The info has to be shared so I am in the loop. What is the latest you are hearing?

Sheinkopf: Shelly not with us.

Roman: Who is he with? Who is governor with?

Sheinkopf: Rather . . .sorry . . .Shelly with green. Gov with us then retreated. Now back.

Roman: My guys are telling me Shelly is backing Delaware North. You are sure he is backing SL Green?

Sheinkopf: Malcolm reports last Friday.

Roman: Ok. I guees [sic] no one REALLY knows. The only one who has publicly stated his choice is Sampson.

Sheinkopf: Wrong. Delaware North is now a stalking horse for shelly as cover for sl green.

On January 19, 2010, Roman and Sheinkopf continued to speculate about the decision:

Roman: Heard decision coming tomorrow. Is that what you hear?

Sheinkopf: Malcolm says possible. As of yesterday when I spoke with him he said the decision could be soon or not . . . .he and Sampson standing one way. Shelly as I told you hiding behind Delaware north and really for sl green . . . . hunch that Kenny Shapiro is sl green lobbyist and the campaign

> contribution delivery believable by shelly because he trusts Kenny. Paterson back and forth still . . .
> [Ellipses in original]

This e-mail exchange is also notable for its reference to Angelo Aponte, Smith's appointee as Secretary of the Senate, who, as discussed earlier, was involved in the leak of Senate materials to AEG via Sheinkopf in May 2009.

When asked by the Inspector General, Smith admitted knowing Sheinkopf but claimed they only spoke of the timing of the decision. These contacts could neither be confirmed with nor repudiated by Sheinkopf because, when questioned by the Inspector General, he invoked his Fifth Amendment right against self-incrimination and refused to answer substantive questions, as his answers could incriminate him in a criminal proceeding, and noted his intention to do so with every question. Finally, as detailed below, further manifesting his support of AEG, Senator Smith accompanied Senators Sampson and Adams to an AEG victory party following the announcement of the award at the Albany home of AEG lobbyist Carl Andrews on February 2, 2010.

2. Senate Staff Memoranda And Briefing the Senators

Throughout the process, Senate Senior Assistant Counsel Higgins was preparing and updating multi-paged charts and notes that included both information submitted by the vendors and analyses by the executive agencies. Despite Higgins's attempts to analyze and consolidate information, testimony from Senators Smith, Addabbo, Sampson and Adams establish that the senators essentially disregarded Higgins's efforts, and relied instead on short oral briefings, their impressions from vendors' presentations, and meetings with lobbyists.

Senator Malcolm A. Smith

As noted above, Higgins both briefed Senator Smith and provided his chart and notes to him. Smith, however, testified that he had no recollection of reviewing the charts.

Senator Eric Adams

Senator Eric Adams testified that his role, as Chair of the Racing and Wagering Committee, was "to speak with Senator Sampson and give him my . . . nonbinding recommendation." In turn, Adams inquired of Sampson as to which criteria he deemed important to evaluate the vendors: Minority/women-owned business involvement, which was "on the top of Sampson's list," speed to market, and community involvement. Adams testified that Sampson also requested input from Senator Addabbo as Aqueduct is located in his district. When queried by the Inspector General as to whether Adams considered the 14-year present value calculation compiled by DOB of expected revenue for education, Adams responded that digesting those numbers were "outside his pay scale" and "it was for someone else to concern themselves with."

In order to evaluate the vendors, Adams was briefed by Counsel to the Racing and Wagering Committee Brad Fischer who also provided him with Higgins's charts.[94] He recalled a briefing by Fischer (following a Lottery-led meeting) during which Fischer informed him of Lottery's issues with MGM and some members of AEG, specifically Karl O'Farrell. When shown by the Inspector General a number of Higgins's charts and

[94] Adams also attested to meeting with all of the potential vendors at some point in the process, including both lobbyists and principals.

notes, Adams initially stated that he could not recall having seen them and maintained, "Chris Higgins e-mailed me. I probably was on his cc list, and actual reading the documents was something that I just didn't have time to do." Upon further review, Adams clarified that, throughout the process, he reviewed information that was provided to him in chart form rather than in memoranda:

> The document that has, you know that is probably in a memo form, I rarely received or read these during the selection process because it was just too wordy. I would look at this [chart] style here. I recall seeing this formatted style, and this is what I used throughout the process. This was just too much. This other document that was in a memo format was just too much for me to read. I needed a quick bite to make the determination.

Aside from the obvious disregard for the analysis and diligence involved in creating these documents, it seems reasonable to expect the Chairman of the Racing and Wagering Committee in the Senate to actually review all proffered information thoroughly before recommending a vendor for a 30-year contract that meant billions of dollars to New York State.

Adams averred that his preferred vendor was Wynn because, in his estimation, "We were in a tough position. The industry is dying. Steve Wynn was going to bring the industry back. He had a vision to turn the location to a destination. He touched on two of the three important issues for Senator Sampson. He had an unbelievable MWBE program that was innovative. Second, speed to market was slow because he was going to turn it into a destination. And he was loved by the community. Addabbo and I spoke about him and we were on the same page." Indeed, the Governor recalled that Adams had expressed his preference for Wynn. Adams's counsel, Bradley Fischer, similarly attested to Adams's expressed preference for Wynn.

After Wynn, Adams's second choice was AEG and his "reluctant" third choice was SL Green because of concern over potential problems with the Seminoles and its ownership of Hard Rock. Adams stated that he had another conversation with the Governor in November or December in which he expressed a preference for AEG because his first preference, Wynn, had withdrawn. Adams testified that he provided his ranking to Sampson on or about October 29, 2009, and then considered his participation in the selection process to be completed. That assertion notwithstanding, as will be revealed later in this report, Adams was instrumental in persuading the Governor in January 2010 that the Senate was standing firm with its choice of AEG.

Senator Joseph P. Addabbo, Jr.

Aqueduct is located in the district of Senator Joseph Addabbo, Jr., and, as such, his constituency had a vested interest in the selection of the most qualified vendor and the expedient commencement of the project. In Addabbo's words: "I have residents who live a stone's throw away from Aqueduct and certainly, being from the area, too, I want to make sure, obviously, whatever happens at Aqueduct has longstanding credible viability within the community." Indeed, the people of Ozone Park had been awaiting the rejuvenation of Aqueduct for at least eight years. After assuming control of the Senate, Senator Sampson requested the input of Senator Addabbo as the representative of the Aqueduct area. Addabbo testified that he attended presentations by all of the vendors "on average twice." At those meetings, the vendors presented their proposals and he (and at times, Community Board 10 chair Elizabeth Braton and Assemblywoman Audrey

Pheffer) would present feedback to the vendors of criteria important to the community such as public safety, traffic, jobs and local economy.

Addabbo provided testimony to the Inspector General on May 24, 2010, a mere four months after AEG had been chosen to construct and operate the VLT facility which directly affected Addabbo's constituents, however, he could not recall most details about the potential vendors or even his preferences among them. When initially queried by the Inspector General as to which vendor he preferred, Addabbo responded, "Throughout the process, it was a question of, pick someone. . . . I was comfortable with [any of] them, knowing that I could probably work with them. But for the sake of my people, we needed to get something started." Similarly, Addabbo acknowledged speaking to Senator Sampson, Senator Adams, Larry Schwartz and Peter Kiernan, but only regarding his and his constituents' frustration with the process. Moreover, Assemblywoman Pheffer, who also represents the people of Ozone Park, testified that Addabbo did not express a preference to her and noted his neutrality.

In contradiction to Addabbo's claims of neutrality, Senator Adams, Chairman of the Senate Racing and Wagering Committee, testified that Addabbo had in fact provided him a ranking among the vendors: Wynn, SL Green and then AEG. Nevertheless, when the Inspector General confronted Addabbo with Adams's testimony that Addabbo had provided a ranking, he equivocated: "If I did give a ranking, I don't recall at this time. If I did give a ranking, it was basically – it was superseded by the fact that we need to move on and choose anyone."

To the extent Addabbo did express a ranking to Adams, it is not clear that his preferences were based upon any substantive analysis. When the Inspector General

proffered to Addabbo e-mails from Higgins to him, which included Higgins's charts and information regarding the various proposals and analyses by the executive agencies, Addabbo averred: "I opened them, printed them and put them in my file for informational purposes." When pressed further as to whether he actually read them, Addabbo responded, "I may have glanced at them." Indeed, when queried regarding the details included in the charts and notes, Addabbo could not recall that although four bidders were deemed pre-licensable by Lottery, Peebles and AEG were not; he recognized the name "Karl O'Farrell" but could not associate him with any specific bidder; he could only recall that Penn National had offered the highest upfront licensing fee, but summarily claimed that the other bidders "were all in the same ballpark"; he could not distinguish which vendors could supply the upfront licensing fee from its balance sheet versus requiring financing; he acknowledged awareness that the proposed upfront licensing fees had changed over time but only based upon media accounts; while noting the great importance of "speed to market" to his constituents, he could not recall the differences among the bidders regarding that criterion; he disclaimed any knowledge of the 14-year projected net present value that the facility would generate for education in New York State; and he only recalled a SEQRA issue as to Wynn.

Senator Pedro Espada, Jr.

After the coup, which he referred to throughout the interview as "the reform," Senator Espada became the majority leader in the Senate; nonetheless, as has been demonstrated, he had no input in the selection of a VLT operator at Aqueduct. AEG, Delaware North, SL Green and Wynn made presentations to him and, part of the Senate production to the Inspector General's Office included an e-mail from Higgins with his

chart and notes attached for Espada, dated August 7, 2009, but Espada could not recall having received it.

Regardless, Espada attested to his "minimal and very peripheral" role in the process: "What did I do with [this information]? Nothing other than form my own opinions about the urgent need to get state revenue into the state coffers and having a sense that any one of these bidders would get the revenue it was counting on." In point of fact, as has been shown, despite the official titles, Senator Sampson was the leader of the Senate and the decision maker for the VLT operator at Aqueduct. And, when Sampson was asked by the Inspector General if Espada, the majority leader, was involved in the decision making process he exclaimed, "Absolutely not."

Senator John L. Sampson

Senator Sampson testified that since the coup and his ascension to the title of Democratic Conference Leader, he "run[s] the day-to-day operations of the New York State Senate internally." Specifically, with regard to the Aqueduct VLT operator selection, he was "involved in the process" and met with the bidders, the Governor and the Speaker. As confirmed by Adams, Sampson deemed three criteria important to him, and by extension, the Senate: "M/WBE, community involvement and speed to market." Conspicuously missing from Sampson's listed criteria is the revenue generated for education in New York State. When confronted by the Inspector General with this glaring absence, Sampson cited the chaotic and constantly changing process as an excuse for minimizing or even ignoring the financials: "[Revenue] was important, but the numbers kept changing all the time. That's why when I talk about this problem being

chaotic and hectic, because, you know, everything would change." Notwithstanding, Higgins's comprehensive chart, which included information regarding all criteria as well as the up-to-date financial information, was readily available to Sampson had he taken the time to consider it.

Considering Sampson's leadership position in general and his well-documented role in the VLT operator selection in particular, his testimony before the Inspector General is remarkable for the lack of recall and specificity that should behoove the Senate leader deciding a contract as large and important to New York State as the Aqueduct VLT operator selection. In fact, Sampson claimed lack of recall for over a hundred different inquiries posed by the Inspector General. For example:

> **Question**: Was there someone in particular on the Senate staff that was responsible for going to those meetings?
>
> **Sampson**: I think our analyst, Chris Higgins.
>
> **Question**: And anyone else that you're aware of?
>
> **Sampson**: I'm not aware of anyone else. Could have been someone else, but I'm not sure. I mean, this is a whole big operation, and I'm not aware of everything that goes on.
>
> **Question**: Did he brief you on the meetings that [he] attended?
>
> **Sampson**: He could have. I'm not certain.

Although Senator Sampson admitted that licensability is an insurmountable threshold step for any vendor, testifying, "If you have no license, you're not in the game," Sampson lacked basic knowledge of the pre-licensability of the vendors. Moreover, his uncertainty as to the sources of the information he did possess was disconcerting:

Question: Did there come a time in the process when you became aware that any of the bidders had licensing problems?

Sampson: Yes, through conversations. Through the grapevine, you hear it.

Question: Did you receive any staff reports to that issue?

Sampson: Could have. Could have.

* * *

Question: Do you recall any staff members indicating to you that Peebles had a problem with licensing?

Sampson: Yes.

Question: And what do you remember about that?

Sampson: He had a problem with licensing. I think it came out in a meeting with the Governor and Speaker. We were going down, looking – talking about the bidders, and who had issues and didn't.

Question: Did you become aware that AEG also had a licensing issue?

Sampson: Sure enough.

Question: Do you recall what that issue was?

Sampson: I don't recall what it was, but I know the Speaker had brought it up.

Question: Had you ever heard the name called O'Farrell?

Sampson: Definitely.

Question: In what context?

Sampson: Meaning that he was a problem.

Question: In terms of the group being licensed?

Sampson: Yes.

Question: And when did you first hear that he was a problem?

Sampson: I'm not certain when I heard, but during the process, I heard.

* * *

Question: Were you aware that there were meetings that were conducted in August of 2009 and September of 2009, where Lottery indicated to the Senate staff and others that they believed that AEG would never be able to get a license?

Sampson: Was I –

Question: Aware of it. Or was it reported to you by staff?

Sampson: Not that I recall, but – not that I recall, but during the period of time, during one of our leaders' meetings, it was raised.

Question: Who was it raised by?

Sampson: The Speaker.

Question: He indicated that he believed – he indicated that Lottery indicated that AEG was problematic in terms of receiving a license?

Sampson: Our analysis during those meetings when we went through the groups were to determine which groups were viable. If there was a question of licensability, the group would not be considered. So if you did not have a license and were not licensable, we did not consider you.

Question: With respect to AEG, other than Karl O'Farrell, were you aware that there were any other members of the group that were problematic in terms of licensing?

Sampson: Not that I was aware of.

In fact, as noted earlier in this report, Higgins's chart and notes revealed, in significant detail, the licensing issues associated with Peebles and AEG. Essentially, Higgins attendance at meetings and organization of the accumulated information were futile

exercises as none of the senators, and particularly Sampson, took the time to comprehend much less thoroughly digest it.

When asked by the Inspector General if he had a preference among the bidders, Sampson responded that his "strong" preference was Wynn. Sampson then related an August 22, 2009 meeting[95] in a New York City hospital room with Steve Wynn after Wynn had had back surgery, and recalled noting Wynn's wherewithal to have brought with him to the hospital large, elaborate charts and his acumen to have focused on his strong M/WBE record, one of Sampson's valued criteria. As will be explored below, however, Sampson was not nearly as categorically supportive of Wynn at the first leaders' meeting.

[95] Evidence indicates that Senators Adams and Jeffrey Klein attended as well. Senator Espada was expected but did not attend.

VII. SEPTEMBER 23, 2009 LEADERS' MEETING

On September 23, 2009, Governor Paterson, Speaker Silver, and Senate Conference Leader Sampson met for the first time to discuss the selection of a VLT facility operator at Aqueduct. While executive and legislative staff had dedicated much time and resources to analyzing the different proposals and preparing cogent and concise memoranda/charts for their leaders, the leaders devoted comparatively little time and effort to reviewing and considering the various proposals. Accordingly, while the executive officials and legislative staffers viewed the leaders' meeting as the culmination of their efforts, and in Kiernan's words "poised for decision," the leaders appeared to have regarded it as merely their first foray into the selection process and acted with no sense of urgency.

Given the state's well-publicized and obvious dire fiscal crisis, the lack of imperativeness is all the more inexcusable. In fact, immediately following the September 21, 2009 meeting in which the executive agencies briefed the legislative staff, Thomas Andriola of DOB sent an e-mail to Assistant Counsel to the Governor David Rose imploring him to impress upon the leaders the drastic nature of the state's financial affairs:

> Upon returning from the Aqueduct briefing this afternoon, we regrouped internally and I wanted to share with you our unit's concern with making sure that we proceed on closing down the selection process as expeditiously as possible. As you know, revenues have continued to deteriorate over the past several months, which has left us with a fairly significant current year gap to close in relatively short order. Given the uncertainty surrounding a special session and steps that are needed to resolve the current year gap, we are planning to use $150 million in cash in the form of an Aqueduct franchise payment as part of our gap closing plan to get through 2009-10. To the extent that you are able to push the Legislature toward a resolution quickly on this in order to ensure that we

> will secure payment from the winning bidder within the next couple of months, it would be greatly appreciated.

Rose responded, "Message heard, loud and clear. Will do my best." It is unknown whether this urgency was expressed to the Governor. If it were, it clearly went unheeded.

A. The Political Situations of the Three Men in a Room

In order to understand the nature of the negotiations, it is essential to place these discussions within the context of the time accounting for the relative political weaknesses and strengths that each leader brought with him to the room. On March 17, 2008, Governor Paterson was unexpectedly thrust into the Governor's Office upon Eliot Spitzer's resignation. After initially receiving favorable public approval ratings, by June 2009, the *New York Times* reported about a poll which found Governor Paterson to be deeply unpopular, with only 21 percent of New Yorkers having a favorable view of him.[96] Exacerbating the Governor's precarious political position, on September 19, 2009, only days before the first leaders' meeting to discuss the selection of a VLT operator at Aqueduct, the *New York Times* reported that President Barack Obama had asked Governor Paterson not to run for reelection: "Mr. Obama's political team and other party leaders have grown increasingly worried that the governor's unpopularity could drag down Democratic members of Congress in New York, as well as the Democratic-controlled Legislature, in next fall's election."[97] Despite this high-level vote of no confidence, Governor Paterson affirmed his intention to run for re-election for a full term.

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[96] "Poll finds Paterson Deeply Unpopular," *The New York Times*, David M. Halbfinger and Dalia Sussman, June 9, 2009. http://www.nytimes.com/2009/06/10/nyregion/10poll.html

[97] "Paterson Says He Will Run, Rejecting Call From Obama," *The New York Times*, Raymond Hernandez and Jeff Zeleny, September 19, 2009. http://www.nytimes.com/2009/09/20/nyregion/20paterson.html

Hence, as Governor Paterson met with the other leaders on September 23, 2009, he did so knowing that he wished to run for re-election in the face of sweeping disapproval ratings from even the President of the United States, and rendering him averse to risk or criticism.

Speaker Silver, on the other hand, entered the room as one of the strongest political figures in New York State. As a recent *New York Times* article reported about Silver:

> [T]he speaker of the State Assembly, Sheldon Silver, [is] a shrewd political tactician who wields enormous power inside the statehouse. Assembly members cross Silver at their peril: he controls how much money flows to them, both for projects for their districts and, in many cases, for their re-election campaigns. He also doles out Assembly leadership positions, which come with cash bonuses known as "lulus," and his handpicked allies become the chairmen of the key committees that determine which bills come to the floor. Silver, in other words, can pretty much single-handedly bring the workings of the New York State government to a standstill.
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> "Shelly is a master of what we call the rope-a-dope strategy," someone who has worked closely with . . . Silver . . . told me. "His philosophy is that it's smarter to wait for an opponent to make a mistake than to force a fight. . . ."[98]

While the Inspector General does not comment on the Speaker's general strategy, the depiction by the *New York Times* aptly describes Silver's tactics in the Aqueduct racino selection process.

As documented earlier in this report, the political coup which incapacitated the Senate and changed its hierarchy, catapulted Democratic Conference Leader Senator John Sampson into the position of de facto leader. Sampson succinctly noted the simple

[98] "The Making of Andrew Cuomo," *New York Times*, Jonathan Mahler, August 11, 2010. http://www.nytimes.com/2010/08/15/magazine/15Cuomo-html?scp=2&sq=cuomo%20magazine%20governor&st=cse

yet devastating problem that plagued this first meeting and those subsequent throughout the process: No leader wanted to be the first to commit to a vendor lest he be blamed for the choice. Senator Sampson testified, "[I]t was like no one wanted to pull the trigger, because they were scared of – if you pull the wrong trigger, you might be embarrassed. So everybody was concerned about the public hit, you know, from my involvement." This inertia, at a minimum, delayed the selection and essentially doomed it from the start.

B. The Meeting

In retrospect, it is clear that by the time of the initial leaders meeting at which the Aqueduct VLT vendor was discussed, September 23, 2009, while the Governor ostensibly possessed the backing of Speaker Silver, the initiative for selecting a vendor laid in the hands of the Senate and its leader Senator Sampson.

When questioned regarding the September 23, 2009 leaders' meeting as it pertained to Aqueduct, Governor Paterson, Speaker Silver, and Senator Sampson all related that they had met several times on the subject and were unable to distinguish what was explicitly discussed at each meeting. Notwithstanding this inability to particularize, the three leaders testified consistently that from the inception of the process the Governor and Speaker refused to voice support for a specific candidate, effectively demurring to the Senate's decision.

Governor Paterson reported generally that, as during the 2008 selection process, Speaker Silver "did not have a group that he was advocating. Just indicated he wanted it to be a worthy group and otherwise would rely on my judgment." In accord with this testimony, Speaker Silver reported to the Inspector General what he characterized as his oft-repeated refrain to the Governor, "I have no horse in this race . . . You come up with

somebody who you think is appropriate, and I'll go along with you unless I think it's embarrassing." Speaker Silver added, "I can only tell you what I've told the Governor many times: 'It's your job. Come up with a recommendation. If it doesn't embarrass us, I'll go along with you.'" Senator Sampson confirmed both Speaker Silver's and the Governor's neutrality by testifying that neither had a preference at this time and regurgitating Silver's coined phrase which he also attributed to the Governor: "basically the Speaker always said he didn't have a horse in the race. The Governor also said he didn't have a horse in the race." Although Senator Sampson also claimed to not "have a horse in the race," as discussed below, he and the Senate clearly not only held a preference but acted to ensure that their preference, AEG, secured the award.

As a result of Speaker Silver's submission to the Governor's choice and the Governor's hesitancy to actively promote a bidder or voice a preference, Senator Sampson's and the Senate's preferences became paramount. As noted previously, Sampson maintained to the Inspector General to have had a "strong preference" for Wynn entering the September 23, 2009 meeting stemming from his August 22, 2009 discussion with Wynn at a hospital, a month prior to this first leaders' meeting. Although Senator Sampson may very well have been impressed by Wynn, evidence calls into question the strength of Senator Sampson's reported preference and evinces that even at this early juncture the Senate was inclined toward AEG. Notably, subsequent to Wynn's withdrawal from consideration in November 2009, the Senate's preference for AEG became manifest ultimately leading to its selection.

Governor Paterson testified: "Senator Sampson seemed interested in the Wynn group and AEG, but as time went on he became, as I saw it, irrevocably wed to AEG."

Later, in an August 18, 2010 letter to the Inspector General, the Governor, through his counsel, clarified and elaborated on his testimony, stating: "From at least September of 2009 (and likely earlier), it was the Governor's strongly-held belief that the Senate's choice for the Aqueduct bid was AEG. Although he does not recall specific conversations to this effect, his belief came from both direct conversations with leaders of the Senate and from conversations with his staff." Interestingly, contrary to Senator Sampson's testimony as to holding a "strong" preference for Wynn, Speaker Silver testified that he had no recollection of Sampson ever advocating for Wynn; rather, the Speaker expressed that Senator Sampson had indicated that the Senate was "for AEG on many occasions." Senator Adams, handpicked by Sampson to assist in the selection process based upon his chairmanship of the Racing and Wagering Committee, was also unaware of Sampson's professed backing of Wynn, or any bidder for that matter, even though Adams himself supported Wynn's bid for the franchise. However, contrary to Senator Adams's testimony, Bradley Fischer, Counsel to the Senate Racing and Wagering Committee, testified that sometime in the late fall of 2009, "I remember Senator Adams telling me that Senator Sampson had a preference for AEG."

Internal AEG e-mails obtained by the Inspector General provide further evidence of Senator Sampson's early support of AEG based upon reports of his meetings with Carl Andrews, the former Senator and lobbyist specifically retained by AEG for his strong ties to the Senate. On September 19, 2009, AEG public relations consultant Andrew Frank e-mailed AEG principal Michael Wagman informing him, in relevant part: "I spoke to Carl [Andrews]. He will see the Senator tonight." A September 20, 2009 e-mail from Frank to lobbyist Georgio DeRosa discussed the same meeting: "Carl [Andrews] and I have

been talking most of the weekend. He has some good meetings this weekend and sees Sampson in morning." Regarding the nature of Andrews's meeting, a September 21, 2009 e-mail between Navegante executives Rick Stevens and Larry Woolf entitled, "Carl Andrews is Here," provided, "Sampson confirmed last night to Carl the Governor is on Board." Contrary to DeRosa's e-mail, Governor Paterson testified, and Senator Sampson confirmed, that the Governor neither held nor shared preference among the bidders at this point. As Andrews has taken legal action in an effort to prevent his information from being obtained by the Inspector General, the Inspector General was unable to ask Andrews what he meant in his reference to the Governor.

Although vague, these internal AEG e-mails are buttressed by internal Senate e-mails which also evince Senator Sampson's favoritism of AEG from the outset of his entry into the selection process. In an August 19, 2009 e-mail exchange between David Evan Markus, Special Counsel to the Senate and currently Counsel to Senator Sampson, and Christopher Higgins of the office of Senate Majority Counsel, Markus observed,

> Meanwhile do *you* want to call Adams and say that Sampson had asked that we rope him in on the mtg [sic] today specifically compare AEG to SL Green? Fwiw, [for what it's worth] when I gave Sampson my comparison (e.g. AEG gives less cash upfront, takes longer to build out, needs financing, etc.), Sampson sounded like he was resisting and shifted focus to long-term revenue. I replied that long-term projections are very speculative even within the four corners of AEG's proposal, to which Sampson replied that I should talk to Adams.

While this e-mail was generated prior to Sampson's hospital bedside meeting with Wynn which Sampson claimed propelled Wynn as his choice, it is at least indicative of a perceived predilection for AEG on Sampson's part as early as mid-August.

The circumstances leading into the first leaders' meeting also raise questions which, at a minimum, demonstrate the lack of preparation or urgency of the leaders

entering the caucus. Namely, Senator Sampson's reported "strong" preference for Wynn at this time coupled with Speaker Silver's and the Governor's apathy, and the support of DOB and Lottery for Wynn's proposal should have engendered at least a preliminary decision to award the contract to Wynn and further explore the maximum financial gain the state could expect from this universally favored vendor. Instead, the leaders were not prepared to render even a presumptive decision and prolonged the process. As discussed in detail below, this delay ultimately led to Wynn's removal of himself from consideration.

Counsel to the Governor Peter Kiernan testified that, after having been asked to stand outside this leaders' meeting, he was summoned inside and asked to explain AEG's licensing status (about which he had apparently previously neglected to inform the Governor), and then instructed to provide AEG more time to repair it:

Question: The meeting was in progress when you were called in?

Kiernan: Yes. It was in the Governor's Office.

Question: What happened?

Kiernan: I was asked to stand by, and I don't remember everything that happened while I was there. I wasn't there long, but the question of AEG's licensability was a question that was raised.

Question: Do you know by whom it was raised?

Kiernan: I think it had been under discussion, which implies that the Governor knew about it, and Senator Sampson asked specifically that AEG be given more time to demonstrate its licensability.

Question: Did he give you a reason as to why he took that position?

Kiernan: No. It wasn't for me to say yes or no. Basically he raised it to the Governor and the Speaker agreed, and I was told

by them to give AEG more time. I forget – I don't remember exactly how that was going to be manifested.

Question: There was another group that had licensability issues. Was there discussion about giving them more time as well?

Kiernan: There was, and I can't remember specifically who that was right now.

Question: Peebles?

Kiernan: It might have been. I don't remember.

Question: What else happened while you were there?

Kiernan: That was pretty much all.

Question: So you were just called into the meeting to suggest to you that AEG be given more time?

Kiernan: I believe I was asked what the status of AEG was.

Question: And what did you say?

Kiernan: I don't remember precisely, but I think I probably described the process I was describing earlier, and then Sampson said I want them to have more time, or can we give them more time, because I think they were all aware of the fact that AEG was trying to demonstrate its licensability.

Question: Was anything else said at the meeting?

Kiernan: You mentioned this other group, but I can't remember specifically, but there was discussion about another group. I probably commented on that, and then it was agreed that group would be given more time as well.

Question: When you left the meeting what did you do to make sure that AEG was given more time?

Kiernan: I don't remember precisely. I might have told David Rose to alert them or to alert Lottery, whomever, but whatever the case was they were given more time.

As was noted earlier in the report, Lottery was then in the process of corresponding with AEG regarding its efforts to expel Karl O'Farrell. While Lottery was doing so at the behest of the Governor's Counsel's Office, two curious events occurred immediately following the leaders' meeting: AEG submitted new financial projections that catapulted it from last to first place regarding the net present value calculation for revenue for education in New York State; and the Governor, through his counsel, solicited Dormitory Authority of the State of New York Executive Director Paul Williams, without providing any guidelines for the assessment, to engage in an analysis of three of the six potential vendors' proposals.

IX. FALL 2009: REVISIONS AND DELAYS

A. AEG Inflates It's Win-Per-Day Projections

On September 23, 2009, the same date as the initial leaders' meeting, AEG submitted new financial projections based on a win-per-day of $450, having initially submitted projections based on a win-per-day of $350. The Inspector General queried several member of AEG, including principals and lobbyists, in an effort to determine the genesis of this new submission, particularly given the abundance of leaked information and internal Senate memoranda which AEG obtained through its lobbyists.

AEG members questioned about the newly submitted higher win-per-day projections attributed them to a consensus among them that the original submission had been far too conservative and a poor tactical choice which required remedying in order for AEG to continue to compete for the franchise. Each member also disputed that the change was driven by the leaked memoranda. In fact, the May 12, 2009 internal Senate memorandum which AEG members obtained from Matthew Rey, an assistant of Secretary to the Senate Angelo Aponte, did not include each vendor's win-per-day projections, and the remaining leaked internal Senate memoranda were obtained by AEG after this new submission. Nonetheless, Andrew Frank, AEG's public relations consultant, testified that after the July presentations by all the vendors to executive and legislative representatives, the win-per-day projections of each vendor were generally known as was the PFM projected benchmark win-per-day for Aqueduct of approximately $350.

In an e-mail from Frank to AEG lobbyist DeRosa, dated September 23, 2009, at 12:19 p.m., coincidently immediately following the leaders' meeting, Frank sent DeRosa

the new win-per-day projections with the following explanation: "Our previous WPU [win-per-unit] numbers were very conservative and were baseline for budgeting purposes. We believe these numbers more accurately reflect the market conditions and revenue potential that our group can bring to the State." DeRosa forwarded the new projections to DOB Director Robert Megna and Frank sent them to DOB Chief Budget Examiner David English on September 23. When queried by the Inspector General about the basis for this submission, Frank, AEG principal Michael Wagman, and John Cordo, an AEG lobbyist, all provided essentially the same explanation that Frank had provided in his e-mail to DeRosa which accompanied the new projections.

The following chart reveals the present value of the monies the state would realize for education over a 14-year period based on each vendor's proposal. Tellingly, AEG was positioned last based on its original financial projections but propelled to first based on the newly submitted ones:[99]

Pre-September 23 modification		Post-September 23 modification	
Present Value in millions (cash flow for SFY 2009-10 to 2022-23)		**Present Value in millions** (cash flow for SFY 2009-10 to 2022-23)	
AEG	**2,900.8**	**AEG**	**3,614.3**
Peebles	3,078.5	Peebles	3,078.5
Delaware North	3,288.6	Delaware North	3,288.6
Penn National	3,285.6	Penn National	3,285.6
SL Green	3,295.3	SL Green	3,295.3
Average	3,169.8	Average	3,312.5

[99] Wynn is not included in these projections because they were taken from a DOB e-mail produced after Wynn had withdrawn from the selection process. Furthermore, these net present value numbers differ from those earlier in the report because the upfront licensing fees had increased, thus causing the numbers to change.

When he received this unsolicited late submission, English inquired of Assistant Counsel to the Governor David Rose, "This e-mail arrived earlier today. We have not looked at the material attached but wanted to forward it to you since it is not clear what we should do with it." Rose then questioned DOB Principal Fiscal Policy Analyst James Sherman regarding the significance of the new projections, and he expounded as follows:

> Yes it was a single sheet of paper with higher NMIs [Net Machine Incomes] and splits on it. I[t] seems as though someone told them we were using their old numbers for 4,500 machines and they were near the bottom of the list with respect [to] the present value calculations. I was hoping that since they now believe that they will make far more money, they would also be willing to increase their upfront payment. No such luck I guess. Giving us a piece of paper costs them nothing but increasing the up front payment would be real money. Also remember that PFM considers anything much over $350 per machine to be too high. AEG's $450 per machine would put them up just below SL Greens $467 per machine. So both of them would probably be considered way too high.

Sherman's explanation highlights generally the speculative nature of the win-per-day estimates as compared to the upfront payments on which the state could depend and particularly the insignificance of AEG's increased win-per-day projection on the soundness of its proposal. That AEG members deemed it possible to submit new projections in late September further exemplifies the haphazard nature of this process.

Counsel to the Governor Kiernan testified that because the new projections were submitted after his announced deadline of August 18, 2009, he did not consider them nor did he present them to the Governor, and, indeed, the Governor did not recall considering those revised numbers.

With regard to the Legislature, in an e-mail dated November 13, 2009, following a meeting among executive and legislative staff and apparently at the request of Louanne Ciccone, the Assembly's Assistant Secretary on Program and Policy, DOB prepared

updated present value calculations as reflected in the above chart with the following caveat:

> As requested, we have redone the Net Present Value analysis we have provided to the Legislature. Two things need to be re-emphasized. First, we have used the NMI values given to us by the various bidders without modification. DOB does not mean to imply that we endorse any of these estimates. Rather, we refer people to the results of the PFM analysis and encourage them to make their own determination as to the reasonableness of each bidders [sic] estimates.

Ciccone and Higgins of the Senate both received the updated present value calculations. Nevertheless, Ciccone did not modify the chart she prepared for the Speaker to include the new win-per-day or present value. Therefore, the Speaker was not informed of them via Ciccone's chart, and indeed, so testified. Higgins's November chart also reflected only the initial projections and Sampson testified that he was "not sure" if AEG's numbers had changed.

Although AEG revised its financial projections in an attempt to secure the contract, it appears that modification was discounted by the analysts who received it and who then did not inform their respective leaders about the change.

B. Analysis by DASNY Executive Director Paul Williams

On September 24, 2009, at a reception for recently confirmed U.S. Supreme Court Justice Sonia Sotomayor, Governor Paterson, perceiving, after the leaders' meeting, "a sense that there were some questions about . . . the influences in the process," proposed to Counsel to the Governor Kiernan to informally commission Paul Williams, Executive Director of the Dormitory Authority of the State of New York (DASNY) and an experienced financier, to perform an independent analysis of the Aqueduct racino

bidders. By all accounts, Williams undertook the assignment in his individual capacity and not in his role as the head of DASNY. In his testimony to the Inspector General, the Governor recalled that he wanted to "let a fresh set of eyes take a look at it" to see "if . . . the process was being conducted properly," and asked Williams because he deemed Williams "impervious to outside influence."

The Governor did not engage in any substantive discussions with Williams, instead leaving such for Kiernan. Kiernan, in turn, attested to discussing the request with Williams and instructing Assistant Counsel Rose to forward Williams certain materials. Williams testified that "one of the lawyers . . . working on this for the Governor . . .said just do your best, look at it, give us a smell test, kind of seat-of-the-pants, what do you think type of review. That's how I took it anyway."

Although Williams's analysis, as will be discussed further, did not ultimately affect the selection of the VLT operator in any meaningful way, it serves to further highlight the ad hoc nature of the executive vetting of the bidders and the lack of communication which affected the process.

Notably, Kiernan had testified to the Inspector General that he rejected the recommendation of Budget Director Megna and Lottery to limit consideration of bidders under review and, accordingly, did not inform the Governor of the preferences stemming from the agencies' analyses explaining that "obviously, in my discussions with the Governor, he may have asked me questions, but, you know, it's like trying to be the honest broker. I wasn't making the decision; he was. And the other two leaders were going to make it. My job was to give him the basis upon which to make that decision." Specifically in regard to Penn National and Delaware North, Kiernan had testified: "And

notwithstanding the fact that no one was very happy with Delaware North, I think we believed it had a credible bid, or it certainly had a bid that was worthy of consideration. And I thought the same was true of Penn National Gaming, although others did not."

Notwithstanding his posture as a neutral "honest broker" and his decision to not provide the Governor with Megna's and Lottery's recommendation to eliminate Delaware North, AEG, Penn National and Peebles from consideration, Kiernan functionally eliminated three of the bidders from consideration by Williams by directing that he solely be provided materials regarding Wynn, SL Green, and AEG.

David Rose testified that, as per Kiernan's direction, Williams was only provided information relating to Wynn, SL Green, and AEG, and was not provided any information regarding Delaware North, Penn National or Peebles. Although Kiernan could not recall specifically instructing Rose to provide only information pertaining to the three bidders, Williams confirmed to having received only three sets of materials.[100] Kiernan attributed the limited information provided to Williams to their discussion at the Sotomayor reception:

> I think I told him that Penn National, because of its anti-labor position, was not going to get considered, or probably wouldn't be considered. I don't know if I said definitively not. I think I told him that MGM Peebles had been deemed non-licensable at that point. I may have mentioned to him that Delaware North was still toxic. I know people in the Senate told me on several occasions that they would never consider Delaware North. The expression they always used was they bounced the check with us.

[100] In an October 16, 2009 e-mail, Rose informed Williams that he forwarded the Wynn and SL Green documents to him; no mention was made of AEG documents. Furthermore, a UPS invoice dated October 8, 2009, reflects a package sent from the executive chamber to Williams. The executive chamber was unable to uncover any other invoice reflecting a package to Williams. Rose posited that the AEG documents, which Williams clearly received, must have been sent to the Albany DASNY office via intergovernmental mail, records of which are maintained only for three months.

Although inconsistent with his professed role and actions in regard to DOB's and Lottery's recommendations, Kiernan's effective removal of these three vendors for true consideration appears consistent with the actual views of the executive and legislative leaders. In describing a meeting with Kiernan after AEG had been selected, AEG lobbyist DeRosa expounded:

> So we went in, and we thanked Peter for having worked with us throughout the process. He was always an honest broker. And at that point, he said something that really startled me, which was, "I just want you to know that we never considered Delaware North or Penn National." And I just sat back in my chair and was really stunned because my assumption was no one in their right mind would have gone back after Delaware North made them look like complete fools and selected them. But here was the guy in the middle of the process saying Delaware North had a credibility problem with us, and Penn National had huge problems with labor that they could not overcome.
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> He said those two things. Yeah. He said that they – that Delaware North – I think he said if they came up – if they pulled up in front of the Capitol with a truckload of money, that he would assume that by the time the money got there and the promise was to get to the second floor, that half of it would have disappeared. Because that was the game that they played.

In regard to Peebles and Penn National, Senator Sampson similarly testified:

> Let me just tell you from what I recall, was during one of our meetings, we had all spoke about – the Speaker, myself, the Governor, who we thought were viable in this whole process, and it had to be before Wynn dropped out, because it was Wynn; it was AEG; it was S&L [sic] Green and Delaware North. Penn was a slot in the box, and we all kind of agreed to that. They had labor problems, so that was a big thing. New York is very labor controlled. Don Peebles, you know, just didn't pass our muster.

Sampson further reported, however, that Delaware North was also eliminated quite early: "[W]hen we had the discussion about the four: Wynn, AEG, S&L Green and Delaware North, they were the four viable ones. One, we wasn't [sic] going to pick anybody that

wasn't licensable, and that's one thing we agreed upon. The next thing we agreed upon was that it couldn't be Delaware North." This tacit universal rejection of Delaware North sprung from its failure to pay the upfront monies after it had been selected in the prior round and the perception, as expressed by the Senate, that the company had "bounced a check" with the state. Indeed, the Governor expounded: "It was kind of agreed between the three leaders that if Delaware North were to get a contract the second time and failed that this would really be embarrassing, and would draw an unnecessary attention to why we picked them two times in a row. The difference was that Senator Sampson felt that would eliminate them. Speaker Silver felt that did not eliminate them, but we definitely took his point." Therefore, although no selection arose from the first leaders' meeting, it appears that three of the six vendors were effectively summarily disregarded then or shortly thereafter.

Williams met with Kiernan and Rose on November 4, 2009, and presented his analysis which included a two-page memorandum and chart. Williams's review had its positive and negative aspects. One initial constructive recommendation that went unheeded was to inform the effectively rejected bidders (Penn National, Delaware North, and Peebles) of their de facto disqualifications: "Given the duration of the bid process, and the fact that there is likely a high level of anxiety among the proposers, I would immediately officially notify all bidders that the field has been narrowed to three finalists (if in fact that is the case)." Indeed, although it was readily apparent that Peebles, Penn National and Delaware North were never truly considered viable options, these bidders, uninformed of their impotent status, continued to supplement their submissions upon

request and incur further expense to participate in a selection process from which they had already been eliminated.

Williams' resulting report ranked AEG, SL Green, and Wynn on a scale of 1 through 5 (5 being best) on five criteria: Operator Quality, Compensation to State, Diversity/Inclusion, Fit (the "fit of the vision for the site with the surrounding community"), and Financial Soundness. Having been provided no guidance in his analysis, Williams, however, weighed each criterion equally; therefore, "compensation to the State" received no greater credence or weight than "fit." Williams noted that none of the three vendors "ranked consistently high across the five criteria" and admonished:

> It does appear that the process was imperfect. From the paperwork reviewed, it is not apparent that the [vendors] had a uniform understanding of the relative importance of various criteria, such as Diversity/Inclusiveness or Fit. Nor is it clear whether all [vendors] had equal opportunity to present their team or their vision for Aqueduct in regard to the criteria to be evaluated or to modify their proposals in light of various concerns, such as diversity of equity participation.

Notwithstanding his insight into the flawed, standardless process, Williams continued his analysis, totaled the points for each criterion, and scored AEG and Wynn an aggregate of 14, and SL Green an aggregate of 12. Williams explained the bases for his conclusions:

> AEG and Wynn rated the highest with identical scores but with decidedly different strengths. Wynn rated highest among all proposers in its strength as an operator, in regard to the compensation package proposed to the State and in regard to its financial soundness . . . However, Wynn rated lowest of all [vendors] in two categories: Diversity/Inclusiveness and Fit. . . . I did not see in Wynn's proposal its view of how to address the very diverse and very middle class community which would be the immediate catchment area for the site, where I would expect most of the repeat visitor to the site to come from. Wynn was also very circumspect about plans to insure maximum Diversity/Inclusiveness in ownership, operation and construction.

This critique highlights a substantial defect in Kiernan's instructions and presentation of materials to Williams which undermined the value of his analysis: Williams was not privy to the July oral presentations or the subsequent October 20, 2009 submissions by which each vendor, as discussed below, detailed its minority participation record and/or plans. Therefore, while Wynn had clearly demonstrated his commitment to minority participation, Williams was not in possession of all the relevant information.

With regard to AEG, Williams recognized the significance of its major shortcoming:

> AEG rated consistently well across all criteria (except Financial Soundness) but not at the highest levels. Its operation team seemed to be cumbersome and clearly a "one off" situation, so continuity could be a problem down the line. But Navegante clearly has a veritable track record for establishing independently run gaming operations. Their approach to operations left me feeling comfortable in the belief that they would be able to attract locals to the site in the largest numbers. AEG's weak point was in Financial Soundness. They are clearly wedded to one primary source of debt (Deutsche Bank) and their ability to sustain the level of equity commitment to the project is not certain from what I had to look at.

Despite grave concerns regarding AEG's financial soundness, purportedly the key criteria for the executive chamber, Williams's non-weighted evaluation placed AEG equal to Wynn, who possessed undeniably stellar financial soundness.

Indeed, Kiernan testified to the Inspector General that he disagreed with Williams's conclusion because it ranked AEG and Wynn equally: "And with respect to Wynn, to me, the most important criteria was the ability to pay and the ability to pay right away. Wynn clearly was superior because AEG needed financing, so that's why I was a little surprised at his analysis." Kiernan also reiterated his concern regarding the large number of members in AEG's consortium, calling it a "hodgepodge of people." Yet,

Kiernan, consistent with his outwardly detached posture, qualified his testimony by noting that this was only his "personal opinion."

Further reflecting the haphazard, unguided nature of the process, the Governor testified that Kiernan did not inform him of the details of Williams's findings; rather, in direct contravention of Williams's memorandum in which Williams denounced the "imperfect" process, Kiernan merely "indicated that Mr. Williams had raised a few issues, but that he did not see the process as being in any way out of line or tainted or anything like that."[101] Given Kiernan's disagreement with Williams's findings, substantially attributable to the limited information and lack of direction provided to him, and Kiernan's resulting scant briefing of the Governor, Williams's report had little to no impact on the selection process.[102] Indeed, Rose averred that while Williams's report was "interesting," and Williams was known for his comprehension of large financial transactions, the report did not augment the process in any way. Therefore, while Williams attested to having spent 10 to 15 hours evaluating the three vendors at the direction of the Governor, his efforts appear to have been in vain.

Of note, while Williams briefed Rose and Kiernan on November 4, 2009, and Kiernan, at some point afterwards, provided the aforementioned scant briefing to the Governor, a November 19, 2009 e-mail from Williams to Rose, entitled "Follow Up," announced: "GDAP [Governor Paterson] asked me to look at Delaware North. Could you overnight that to me to my NYC Office? Thanks." Nonetheless, Williams reported

[101] Kiernan testified, however, that he was "pretty certain that [he] told the Governor what Paul Williams had told [him]."
[102] Both Senator Sampson and Speaker Silver indicated that they had no knowledge of any memorandum prepared by Williams.

that he never received any Delaware North documents and no invoice record exists indicating a mailing on or after that date. This e-mail is curious given the testimony regarding the consensus among the leaders that Delaware North was not a viable option due to its previous failure and Kiernan's winnowing of materials provided to Williams. The failure to actually provide these documents to Williams, despite the fact that the request was apparently made at the behest of the Governor, further highlights the unsystematic and confused nature of the executive evaluation of the bidders.

C. AEG's Continued Licensing Problems and Lottery's E-mail Regarding AEG's Licensability

Prior to the September 23, 2009 leaders' meeting, AEG members were in the process of attempting to provide Lottery with sufficient evidence that Aqueduct Community Enterprise (ACE), Karl O'Farrell and Andrew Goodell would not maintain any financial interest in AEG. As noted earlier in this report, AEG members had retained Robert Reilert as new compliance counsel to replace Goodell. On September 23, 2009, Counsel to the Lottery William Murray established a deadline of September 30, 2009, for the production of all outstanding licensing applications and documentation in support of AEG's assertion that it did not intend to make any payments to ACE, O'Farrell or Goodell if selected as the Aqueduct VLT operator. In response, on September 24, 2009, Reilert submitted a letter from AEG Chairman Richard Mays to Lottery which stated, in pertinent part:

> We hereby confirm that AEG (which has no payment obligations under the [Withdrawal] Agreement) does not intend to make any payments to Karl O'Farrell, Andrew Goodell, or Aqueduct Community Enterprise. We understand that Clairvest believes the Agreement is not enforceable for various reasons, including because of its belief that it was induced to enter into the Agreement by material misrepresentations, and it therefore does

> not intend to make any payments to such persons unless required by court order or pursuant to a settlement agreement entered into by Clairvest and approved by the Lottery.

On September 25, 2009, Murray responded to Reilert:

> Thank you for the 09/24/2009 letter from Richard Mays.
> Based on that letter, the Lottery concludes that AEG, Clairvest, and any other person or entity action by or on behalf of AEG or Clairvest (i) do not intend to make any payment directly or indirectly to Karl O'Farrell, Andrew Goodell, or Aqueduct Community Enterprise, (ii) will, in any legal proceeding by or on behalf of such persons seeking payments by or on behalf of AEG or Clairvest, raise a defense based on material misrepresentations made to AEG and Clairvest, and (iii) will not make any payments directly or indirectly to such persons pursuant to a settlement agreement unless approved by the Lottery.
> If that conclusion is incorrect, please let me know.
> Assuming that is correct, the only remaining requirements are . . . [the completion of licensing applications by members of Greenstar and the review of those applications (and a previously submitted application by Levine)]. If those requirements are satisfied, the Lottery will conclude that AEG has a suitable background to be granted a license for the operation of a video lottery facility at Aqueduct racetrack.

This response was circulated to David Rose.

Notably, on September 30, 2009, Murray informed Reilert in writing that AEG's licensing issues had been resolved:

> As of 9:00 am on 09/30/09, the Lottery considers the license applications submitted on behalf of AEG to be virtually complete, including the entity applications recently submitted on behalf of Levine and Greenstar and the individual applications on behalf of Greenstar principals and key employees received on 09/28/09 and 09/29/09. There are minor issues . . . with some of those individual applications that should be addressed as soon as possible, and the Lottery's review will not be complete until the Lottery receives reports from DCJS and the FBI and other licensing jurisdictions concerning those individuals. Pending the outcome of those reports, the Lottery concludes that no additional information . . . is required from AEG and that there are, as of this date, no reasons for the Lottery to conclude that AEG is not eligible for a video lottery license in New York State.

Reilert, AEG's compliance counsel retained specifically to attend to Lottery's licensing concerns, interpreted the e-mail as AEG having attained pre-licensability and attested to having no further contact with Lottery until after the selection of AEG in January, 2010.

This e-mail was forwarded to Rose and Kiernan who, in turn, sent it to Ciccone of the Assembly and Higgins of the Senate. Unsurprisingly, Lottery's e-mail was interpreted by those who received it as an unequivocal declaration by Lottery that AEG had overcome its pre-licensing hurdle and that the major licensing problem that had been identified, Karl O'Farrell's involvement in the consortium, had been remedied.

In regard to the executive chamber, Kiernan testified (and Rose agreed): "I know there came a time when Aqueduct Entertainment Group was considered licensable." Governor Paterson similarly testified that after this assurance from Lottery he understood that, "Peebles was still not in compliance. I don't even believe that they met the deadline, but that AEG now was in compliance." In fact, the Governor further elaborated that he did not contact Lottery regarding AEG's licensing status on the eve of its selection on January 29, 2010, because, "that had been established, at that point, for nearly three months. And I know, speaking to my staff, they had assured me that all three could get a license." Similarly, in the Senate, based upon Lottery's e-mail, Higgins's chart was updated to include AEG's licensability and Senator Adams recalled reading in one of Higgins's charts that AEG had resolved its licensing issues. In the Assembly, based upon receipt of this September 30, 2009 e-mail forwarded by Rose, Ciccone testified that she was "told that there were no more licensing issues with AEG," and the chart she prepared for Speaker Silver reflected this conclusion.

Despite the unambiguous language of their e-mail, Lottery officials attempted to minimize the conclusion reached. When confronted with Higgins's memorandum informing the Senate that "all applicants passed licensing after review, and were eligible to receive a license to operate a VLT facility at Aqueduct, including Penn National," Lottery Director Medenica characterized Higgins's report as "an overstatement." Indeed, Medenica affirmed that despite this e-mail there never came "a point in time" where "Lottery was totally satisfied that AEG was licensable." For his part, Murray testified that he did not believe that Higgins's conclusion was "at all accurate" and that although AEG had addressed the issues raised at that time, "as the fall went on into the winter, the Lottery received additional information from our confidential informant that led us to believe that the representations we had been given about AEG were not being fulfilled, and that O'Farrell was still either involved or hoping to become re-involved."

When Medenica was specifically asked whether he expressed his ongoing concerns with AEG to anyone in the executive chamber between the time of this September 30 e-mail and the selection of AEG, Medenica replied: "I think there were casual conversations and that we continued to be concerned and – but I also don't think we were that focused on it because we thought the likelihood of them being chosen was almost nil. So I think we . . . sort of in the back of our mind, all of this stuff was somewhat unresolved, but we didn't think it was that important." When further queried whether he would have informed the Governor or the Legislature of his opinion if asked, Medenica replied, "I would have indicated that they would have been a poor choice for the selection."

Murray similarly averred that this communication should be read in the context of the September 17, 2009 memorandum to the Governor which placed AEG fifth of six on the list of contending vendors:

> We were not – the Lottery was not given any indication by the Governor or Legislature that AEG was a serious competitor for the selection. After that September 21 memo from David Rose and others to the Governor, the Lottery's understanding was that AEG and Peebles were just not in the running. And those e-mails that we just looked at, at the end of September, from the Lottery's point of view, we just wanted to put AEG aside and say, okay, you've given us representations that, if we believe them, would show that you've severed your ties with the people who are objectionable. Now go sit on the sidelines because you're not really in the running. And I don't recall that the Lottery ever heard anything from anybody in the Legislature or the Governor's Office about AEG being seriously considered until January 29, when AEG was announced as the selected video lottery developer and operator.

Medenica expressed this same sentiment to the Inspector General regarding his view of AEG throughout the process: "No one had ever spoken up in favor of them. We just didn't think they were a serious bidder, and none of the parties in any of the meetings that we had had seemed to think that they were a serious candidate." Accordingly, in Lottery's March 9, 2010 memorandum to Secretary to the Governor Lawrence Schwartz and Counsel to the Governor Peter Kiernan in which it recommended the deselection of AEG, Medenica couched Lottery's putative pre-licensing approval of AEG as "having barely met minimum qualifying standards last fall."[103]

When Murray was asked whether he informed the executive chamber of his views of AEG's proposal, the following colloquy ensued;

[103] An internal Lottery e-mail of October 22, 2009, expressed incredulousness regarding odds that had been posted regarding the potential vendors for Aqueduct which listed SL Green, AEG and Wynn, in that order, about which Kent VanderWal of Lottery's counsel's office exclaimed, "AEG is second ????"

Question: Had Lottery considered AEG a serious bidder, would you have communicated with the Governor or the Legislature after September to inform them of the information you were receiving about this continued involvement of what you deemed to be unlicensable people?

Murray: Yes. I think it came up at least once, maybe more than once during that period from September through January, when, in passing, in just checking with David Rose on the status of the Aqueduct selection process, my question more than once would have been, "What's happening with Aqueduct, anything?" And his answer was, "Not much." And if I made any comment about any of the competitors, it was probably about the two, AEG and MGM. And on – on Peebles, the Peebles and MGM partnership, I would have updated him on the fact that the New Jersey investigation was still pending and that was still an issue with us. And on AEG back in or trying to get back in. But again, at that point during the time line, the Lottery did not believe that either AEG or Peebles were seriously in the competition and nothing that David Rose or anybody else told me made me think that they were seriously in the competition.

Question: So prior to the announcement of AEG being selected, if someone from the Governor's Office or from the Legislature had contacted you or the appropriate people at Lottery to say, "We're considering AEG as the selectee," would you have indicated that there was a problem with them ultimately attaining a license?

Murray: Yes.

When queried as to why Lottery did not simply affirmatively exclude AEG, Medenica averred:

> Because we couldn't. We had to be fair to all the bidders. They . . . did have the right to exclude individuals that we found unlicensable. And we never concluded the licensing process. There were still a lot of incompletes. And the new people that they were bringing in, we demanded the documents. We got some, and whenever we raised a question, they would withdraw someone, and it was just an ongoing shell game. But we didn't have – in other words, if they had said, "Well, we're going to keep Karl O'Farrell," then we would have had the ability to just say, "Well then, you're not licensable." But as long as they kept saying, "We will

> change the composition of the group in order to comply with licensing requirements," then we had to stay open and couldn't just exclude them.

To the extent that Lottery can be assessed responsibility for the selection and eventual deselection of AEG, it substantially rests in its September 30, 2009 communication and its apparent subsequent failure to actively advise the Governor or the Legislature of its continuing concerns with AEG's licensability. This failing, however, must be examined within the backdrop of Lottery's relegation within the selection process as explained earlier in this report. Pointedly, Murray testified that in contrast to the prior round resulting in the selection of Delaware North, "in the AEG round, no one from the Governor's Office seemed at all interested in receiving a report from the Lottery. In fact, when . . . the Lottery was volunteering information, it seemed unwelcome." Murray elaborated that, "we wanted to make it clear that we were available, we were interested, we were eager to support making a good selection. But the Lottery got very little feedback from the Governor's Office, very little interest. We heard no interest in asking Lottery to play a decisive role."

Accordingly, while the Governor and legislative leaders reasonably read the plain language of Lottery's September 30, 2009, e-mail as resolving AEG's licensing status and Lottery must be faulted for failing to inform the Governor of its serious continuing questions regarding a potential vendor (most notably new information it had gathered from a confidential source), Lottery's reticence to disseminate this information also reflects the myriad problems with the procedure employed as compared to an objective procurement. Instead of facilitating the free flow of pertinent information and objective assessment of the vendors by individuals with expertise in the field, the executive

Chamber intentionally rejected the rankings and scoring of candidates and limited the roles of the affected agencies in the selection process.

Subsequent to Lottery's September 30 e-mail, of the decision makers, only the Assembly appears to have harbored continued suspicion of AEG's licensability. Interestingly, when the Inspector General asked Assembly staffer Ciccone whether she would have been surprised that Medenica never considered AEG licensable, she responded:

Ciccone: It would not surprise me that he said that.

Question: Why wouldn't it surprise you?

Ciccone: There was ongoing questionable involvement by Karl O'Farrell[104] and others. But I know of Karl O'Farrell. It turns out there were others.

* * *

Question: In terms of your internal discussions with your colleagues and potentially the Speaker, was there a credibility gap that had arisen with respect to AEG?

Ciccone: Yes.

Question: And what was that credibility gap?

Ciccone: It was still unclear who was involved, most importantly, Karl O'Farrell, with this entity; whether he had an existing contract – you know, a contract that would – that he would – you know, was involved or not, you know.

Question: And how late in the process was this?

Ciccone: It was during the whole process.

Question: Throughout the process.

[104] Indeed, Ciccone related to the Inspector General that Assemblywoman Audrey Pheffer had informed her that O'Farrell had continued to contact her even after he was purportedly removed from AEG. Pheffer testified, however, that she hadn't spoken to O'Farrell since the "beginning" of the 2009-2010 selection process.

Ciccone: Yes.

Question: And you had communicated that to your boss and the Speaker?

Ciccone: Yes.

Question: And did they share your concerns?

Ciccone: Yes.

Question: And what did they say specifically?

Ciccone: That's one of the reasons why I was asking for every single person who had any invested or substantial managerial, you know, position or who was going to be directly involved with the entity.

As a result of Speaker Silver's concerns as expressed by Ciccone, as discussed below, on October 16, 2009, the Governor requested at the behest of the Assembly an expanded investor list from each vendor.

D. Vendors are Required to Provide Expanded Investor Lists and Information on Minority Participation,

As noted above, in mid-August, Governor's Counsel Kiernan informed bidders that no additional submissions would be accepted after August 18, 2009. Despite this admonition, and further reflecting the ad hoc, directionless nature of the selection process, on October 16, 2009, at the request of Speaker Silver, the Governor's Counsel's office itself solicited additional submissions.

Initially, as directed by Speaker Silver, on October 16, 2009, Rose disseminated a request to the bidders for a list of all investors regardless of their percentage of ownership. This request expanded the information usually required of companies seeking a lottery license who under Lottery's regulations must only supply information regarding

investors with at least 10 percent equity in the organization. Additionally, vendors were required to provide an explanation of their Minority and Women-Owed Business Enterprise (MWBE) plans. On October 20, 2009, each vendor responded.[105]

1. Comparison of MWBE Proposals

An evaluation of each vendor's MWBE proposal is essential because Senator Sampson had announced that MWBE benefits were his most important criteria for selection and that he, according to Governor Paterson, "thought AEG had the best diversity in their plan." Contrary to Senator Sampson's claim, as reported by the Governor, that AEG proffered the most expansive MWBE proposal, the Inspector General determined that AEG's proposal was similar to, if not less expansive, than, the proposals of other potential vendors.

The proposed MOU supplied to all potential vendors at the inception of the selection process required a commitment that the VLT facility operator would use best efforts to achieve

> (i) not less than twenty percent (20%) minority/women-owned business enterprise contractor and/or subcontractor participation for the development of the VLT facility, which includes the design, pre-construction, construction and operation/maintenance phases; and (ii) an overall goal of twenty-five percent (25%) minority and female workforce participation for the construction of the VLT facility.

The Inspector General reviewed the submissions of all six potential vendors and found them to be comprehensive and well-documented. An examination of the vendors'

[105] Because some of the vendors submitted what were considered incomplete responses to the request for a list of all investors, on October 26, 2009, a second request for a detailed list of investors was disseminated. The vendors responded on October 28 and 29, 2009.

October 20, 2009 submissions reveals that although AEG promised to meet or exceed the MWBE goals set forth in the MOU, a number of other vendors not only also agreed to meet this commitment, but, in fact, committed to more concrete higher projections. For instance, Delaware North promised 27 percent MWBE participation during the construction phase and 33 percent minority/women hiring goal to be overseen by its minority partner, Cheryl McKissack, who had successfully supervised similar projects. Peebles promised a target of 40 percent minority participation, the highest among the vendors. Like AEG, SL Green, Wynn and Penn National all committed to meet and attempt to exceed the benchmarks delineated in the MOU.

AEG indicated it would engage in extensive community liaison activity including forming an interactive Web site, fostering community employment through a Community Labor Exchange, and creating a Labor Force Training Initiative to help combat unemployment. Delaware North, too, would have created an employment and small business center for the same purposes. In addition, however, Delaware North would have established a neighborhood charitable foundation, the board of which would be comprised of members of Delaware North and leaders of the Queens and Brooklyn communities, and pledged at least $1 million yearly to provide financial support to charitable organizations.[106] In a similar vein, both SL Green and Wynn would have established lending platforms to assist minority businesses with start-up costs and training, and SL Green committed to improving the local community surrounding Aqueduct. Many of the vendors engaged minority partners to oversee its diversity

[106] Notably, Delaware North included the Brooklyn community in its MWBE proposal, a clear nod to Senator Sampson who represents an area of Brooklyn.

participation and all of the vendors planned to create or hire some monitoring agency to oversee its implementation and maximization.

Although the differences among the vendors with regard to promised minority participation goals are not remarkable, when considered in conjunction with the far more reliable gauge of past performance, AEG's proposal is diminished. Specifically, AEG was a consortium formed solely for the purposes of bidding for the Aqueduct VLT project and cannot be assessed on the basis of prior actual performance. Meanwhile, SL Green and Hard Rock both possessed established track records regarding minority participation; Peebles, itself a minority business, and MGM, also had implemented exemplary diversity participation; and Wynn reported that minorities and women comprised 60 percent of his existing workforce in two of his facilities.

In fact, these expansive MWBE submissions also serve to further call into question Sampson's professed "strong preference" for Wynn. Given Sampson's declaration that MWBE considerations were the preeminent factors for him, Wynn's well- established MWBE record, and its impressive submission regarding Aqueduct, should have further cemented the choice in his mind and would have only served to strengthen his conviction for Wynn with Speaker Silver and Governor Paterson. Nevertheless, Governor Paterson testified that he, Speaker Silver, and Senator Sampson met on October 29, 2009, and discussed Aqueduct; yet neither Speaker Silver nor Governor Paterson recalled Senator Sampson advocating for Wynn.

In sum, while AEG's MWBE proposal was impressive, it in no way distinguished itself among the vendors and, if anything, fell short of others. The question thus remains as to why Senator Sampson argued to his fellow leaders that AEG's

diversity program was superlative. Indeed, lack of support for Senator Sampson's extolling of AEG's MWBE proposal may also evince Sampson's ignorance of the actual facts of the submissions of the potential vendors and the analysis performed by his Senate staff and, as discussed below, instead evince his reliance on lobbyists such as AEG's Carl Andrews and AEG's Senate-targeted strategy for garnering the franchise.

AEG (and Capital Play) lobbyist Giorgio DeRosa posited a theory that AEG was successful in its selection because of the savvy of its lobbyists in listening and presenting its plans to the community:

> The other teams did not comprehend the importance of going into the community where this track is located and talking to people about what it was they were doing. We were always very open and honest. We shared the designs with them. We made sure there was a comfort level with what we were attempting to do. We sought input. I think what happened in the case of the other groups was they didn't see the value in that relationship, which I think was a tactical mistake on all their parts. And as a result, there was no push from the community for any of them. And in both of the bids – all three of the previous bids, our team received significant community support.

E. Demand for an Upfront Licensing Fee of $200 Million

On October 30, 2009, as a result of the "unprecedented revenue crisis confronting New York State," which apparently heretofore had failed to sufficiently motivate the three leaders to prepare to make a selection at their initial leaders meeting, Counsel to the Governor Kiernan disseminated a request for a commitment from the vendors of an upfront licensing fee of $200 million or more.[107] In turn, AEG committed to "at least

[107] Prior to this demand, the vendors had offered the following upfront licensing fees: AEG – $151 million with the possible addition of $150 million if Lottery permitted additional VLT machines; Delaware North – $100 million and another $200 million within 27 months of the opening of the permanent facility; Peebles – $100 million at the closing, $25 million upon commencement of the construction, and $25 million during the first year of operation; Penn National – $250 million; SL Green – $125 million and a possible $150 million over a 10-year period to be reduced pro rata if construction costs exceeded the $250 million capital

$200 million"; Delaware North committed to $200 million within 30 days after the execution of the MOU and an additional $100 million from gross gaming revenue after the opening of the permanent VLT facility; Peebles promised at least $200 million; Penn National committed to $301 million; and SL Green promised the $200 million and a total of $300 million over time. Wynn, however, did not respond, and instead withdrew from the process altogether.

Penn National Senior Vice President of Corporate Development Steven Snyder viewed this late demand for a $200 million upfront licensing fee as yet another example of the illegitimacy and ambiguity which plagued this process:

> We put forth in the summer of 2009 what to this day I still believe . . . a proposal that appears on the surface to have more merit than any others, and clearly had more dollars upfront for the State of New York than any others at that time; and it appears, as an outsider, that, because the results were not what some in the process – again there's no transparency so it's hard to know – but we never anticipated a request in November for another bid. And it just appeared to us that that other bid, which had a stipulation that everybody match what we had put on the table, $200 million, it just appeared that request for another round of bids, which was unanticipated, was meant solely to bring others in the party up to the level that Penn National had been at.

Indeed, Wynn's self-removal evinces the chaotic, ad hoc nature of the process which engendered frustration on the part of all the vendors.

F. Wynn's Withdrawal from the Selection Process

On November 2, 2009, Wynn advised the Governor's Counsel's Office that it was withdrawing from the selection process. In response to a request from the Inspector

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construction grant; and Wynn – $100 million upon award, $100 million at the closing, and $100 million yearly equal installments over the 30-year lease.

General's Office, Wynn Senior Vice President and General Counsel Kim Sinatra provided a letter with the following explanation as to Wynn's sudden departure:

> You have requested a letter delineating our reasons for terminating our participation in the Aqueduct bid process . . . It's actually quite simple, we participated in that process in good faith with the original understanding that a decision would be rendered by August 1, 2009. The rules continued to change and the timing remained uncertain for several months after that deadline.
>
> Wynn Resorts withdrew from the bidding process regarding Aqueduct raceway in October 2009 because of many delays and indecision in announcing a winner. When bids were submitted in May 2009, the decision was clearly slated for August 1st. This deadline was not met, nor was there an announced real deadline. The process was uncertain and expensive. We decided to deploy our corporate attention and resources to other projects. This was an extremely frustrating process.

Indeed, even Senator Sampson noted the chaotic nature of the process and attributed Wynn's departure to such:

> I think the problem with this whole process was there was no certainty. That's why I think Steve Wynn dropped out. It kept changing over and over and over again. The process was just too long. If we say we're going to do it in 90 days, it should be done in 90 days. I think this process was almost two years in the making, more than that. So to encapsulate everything, it needed o be more structured and standard, so there's uniformity, which I don't think there was.

Wynn's decision to remove himself from the process at this juncture despite the lucrative nature of the franchise is revealing. After the deselection of Delaware North and prior to the commencement of the 2009-2010 selection process under investigation, Steve Wynn requisitioned a meeting with Secretary to the Governor Schwartz to assess, according to Schwartz, "whether or not the State was serious – after what happened under phase one with Delaware North, he wanted to know before he invested any of his time or money whether or not the State was serious about putting VLTs at Aqueduct Racetrack."

Schwartz assured him that the State in fact was serious. Based upon Schwartz's assurances Wynn proffered a bid; yet, after actually interacting with the state officials entrusted with making the selection and confronting firsthand the seemingly random and unguided nature of the process, determined that the potential reward was not worth further investment. Therefore, the vendor who was purportedly the first choice of the executive branch and Senator Sampson was driven out of the process due to the state's inability to conduct an ordered, timely, and objective process for selecting a franchisee. Indeed, Wynn's withdrawal based upon Kiernan's $200 million demand is even more remarkable in light of the fact that Wynn had already essentially pledged $200 million by the closing.

This dissatisfaction and frustration affected all potential vendors. Reporting on the pervasiveness of this sentiment shortly after Kiernan requested the increased upfront licensing fee, a November 23, 2009 *New York Times* article entitled, "Aqueduct Racetrack Still Awaits a Decision," described the consensus of opinion among those involved that the process was chaotic and lacked guidelines, and placed blame for such on Kiernan:

> Some legislators and many of the bidders say the chaotic situation has been compounded by the failure of the governor's chief counsel, Peter J. Kiernan, to establish criteria for bids and a formal selection process. As a result, some bidders have been allowed to change their offers midstream to be more competitive, while the state has twice asked for their final and best offers.[108]

This sentiment was further echoed to the Inspector General by numerous other bidders and their representatives in this process. For instance, William Bissett of Delaware North remonstrated: "[T]he process from day one was one without rules, without structure,

[108]Article by Charles Bagli and Danny Hakim, November 23, 2009.

without a procurement to live by, and it was very difficult to work your way through that. Many changes in the scope of it throughout without rules, without deadlines that you – people had to live by. It was very difficult to bid on something of this magnitude without rules. And I'll leave it at that." SL Green CEO Marc Holliday declared: "I think the fact that we are sitting here . . . after so many years of extraordinary effort and expenditure of capital and human resources and everything, the State still doesn't have an up-and-running VLT with so many different options that it had before, I think it's commentary on the process itself." Penn National Senior Vice President of Corporate Development Steven Snyder similarly denounced the process and compared it to processes in other states which were far more formal and orderly:

> We found it to be a very frustrating, very dark process, and one that seemed to entail the rules of the game changing if parties didn't like the way the game was progressing.
>
> * * *
>
> Over the course of the last twelve or twenty-four months we have participated in competitive processes in states like Kansas, in Maryland, and those are just in the last year, and in each of those processes there were public hearings, public presentations. There were public deliberations of those commissions with whom the responsibility rested to make a selection. And it just, from my personal experience, was a process that was understandable and certainly transparent in that those selected and those not selected were able to at least understand why, or why not, depending on which case.

Indeed, the New York State Aqueduct VLT operator selection process was rife with disorder. More troubling, this lack of structure and known rules created an environment which fostered questionable dealings, exemplified by the disclosure of documents by Senator Sampson to an AEG lobbyist, financial benefits directed to Senator Sampson's constituents to curry his favor, and the inclusion of Donald Cogsville on the AEG team apparently at the "insistence" of Senator Sampson.

X. SENATOR SAMPSON DISCLOSES INTERNAL SENATE MATERIALS TO AEG LOBBYIST CARL ANDREWS

As detailed earlier, the Inspector General discovered a troubling relationship between the Senate and AEG including various disclosures of internal information from Senate officials to AEG lobbyists. This unwarranted and improper disclosure reached its overt pinnacle when on or about November 24, 2009, Senator Sampson himself disclosed one or more confidential internal senate analyses of the competing bids to AEG lobbyist Carl Andrews.

On October 5, 2009, AEG lobbyist Giorgio DeRosa e-mailed AEG public relations consultant Andrew Frank asking: "Do we have a comparison chart for Frank [Sanzillo] on each of the bids? I know we got our hands on the one done by Senate staff for the first proposals. Do we have anything done on the updated proposals?" Thereafter, in November 2009, Senator Sampson met with AEG lobbyist Carl Andrews. Senator Sampson admitted to the Inspector General that, during this meeting, he disclosed to Andrews one or more internal senate memoranda analyzing the various bids and containing all the relevant bid information. Senator Sampson offered an innocent explanation for his disclosure: "We were having a little argument, and I think he was – he was a little pissed off 'cause I guess he heard – this process was so open, notorious, and everybody talking, that we were, you know, not considering AEG, so we had a little confrontation." The colloquy continued between the Inspector General and Senator Sampson regarding the alleged circumstances of this conversation with Andrews:

> **Question**: Before we move on, Senator, if you could describe to us, you indicated that you had – I forget the exact word, but an argument of sorts with Mr. Andrews. Could you tell us what you recall about what you said and what he said?

Sampson: You know, we had an argument, meaning that, as I indicated he said he heard, that, you know, we were not, you know, considering them. And you know, and I guess he challenged me on that. And I said, you know, yeah, right. I mean, you know, we're looking for revenue. We're looking for money. I think at that point in time the numbers had changed again. The Governor was looking for 300 million, and I said, you know, if you don't have 300 million, you're not in the game.

Question: Do you remember what he said after that, if anything?

Sampson: No, no, no, John. Nobody bid 300. I said, man, I said, you're wrong. He said, no, man, you're lying. I said, I'm not lying. At that point I stopped him and said, hold on. I got these documents. And I said, here, see for yourself. You didn't propose it. You can't be considered if you're not in the game.

Question: Do you recall if he said anything in response?

Sampson: I don't specifically recall what he said in response.

Question: Do you recall in sum and substance what he said in response?

Sampson: Just a back and forth, you know, look at this; look at that. I said, it is what it is.

Question: Do you recall how that conversation or argument or meeting ended?

Sampson: I think he asked to look at the document. And if I recall, he said, can I look at it. I said, fine. And I think, you know, I gave him a copy of the document. You know, it was nothing to me, because as I indicated before, this whole process, it was – the numbers one day changed the other day. It really made no difference, because there was really no finalization with respect to this process at all.

Andrews's relationship with Sampson is a wellspring of ethical issues in this investigation. In addition to this disclosure of information, communication among AEG lobbyists and principals cast further shadow on the nature of his influence. For example,

AEG principal Michael Wagman reported that Andrews served as the conduit of messages from Sampson and the Senate to AEG including the Senate's urging that AEG increase its bid. On November 20, 2009, Wagman sent an e-mail to fellow AEG member Lawrence Roman memorializing the flow of information from the Senate as well as confirming Andrews's pre-Thanksgiving meeting with Senator Sampson:

> I'm being told that the Senate is still with us despite what the article[109] said. The Senate has been saying that we have to increase our bid to $285 million, but I've been pushing back. I'm tired of negotiating with ourselves. If it comes formally we can deal with it but otherwise the backroom rhetoric is tiring. I don't think anyone really knows what is going on. It's clear that Shelly is not with us but I think the Gov will advocate [sic] us. Carl is meeting Sampson this weekend, I think.

Further confirming the fact that AEG was receiving direction regarding how to raise its bid, on November 23, 2009, Adam Gruber, an official with AEG affiliate EOS Partners, e-mailed Roman: "What is Penn's bid? How are we justifying increasing our bid $110 million in three weeks?" Roman responded that, "Penns [sic] bid is 301 million upfront at signing of MOU," and proceeded to inform Gurber to speak with Wagman "the $$ man". Gruber responded by asking Roman, "Thanks. How was the message delivered from the State?" To which Roman replied, "I didn't ask".

Even after receiving the award, Andrews's influence in the Senate continued to be noted by AEG. On February 11, 2010, after Senate Republicans had called for a hearing on AEG's selection as the VLT vendor, AEG lobbyist John Cordo suggested to members of the AEG team, "This is where sampson [sic] can be very strong." Responding,

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[109] Wagman apparently was referring to an article in the November 20, 2009 issue of *BloodHorse* entitled, "NY Officials Discuss Aqueduct Casino Operator," which reported that Governor Paterson was favoring SL Green and also reported Senator Skelos's revelation that Penn National's upfront fee bid was $301 million.

Andrews asked, "What do you want him to do?" Cordo replied, "Shut it down and call it hysterical politics . . . He needs to rule it out or have eric adams do so in a strongly worded release." [sic] Andrews, in turn, responded to Cordo, "Draft it."

As stated numerous times throughout this report, Andrews refused to comply with the Inspector General's subpoena for information and instead filed a lawsuit in an effort to avoid providing relevant information.

Sampson contended to the Inspector General, and later, to the media,[110] that the internal Senate documents prepared for its leaders were somehow not confidential. Specifically, in the wake of the revelation that Andrews had received an internal Senate memorandum analyzing the various bids directly from Senator Sampson, Sampson issued a statement to the press claiming that his release of this information was not improper as "[t]he document was not confidential," because, purportedly, "[i]t contained all the information, public information, that was constantly going back and forth." As discussed below, Sampson put forth this rationalization even after moving to quash the Inspector General's subpoena in order to shield the Senate from releasing these same memoranda (and other requested documents) to a governmental investigative body. Indeed, the *New York Times* reported during the pendency of the Senate's motion that "[T]he inspector general's office is seeking many kinds of documents that the Senate has long been unwilling to make public, including internal e-mail messages and memorandums." Of

[110] *See, e.g.*, Brendan Scott, "Dem defends legal leak in the Aqueduct," *New York Post,* June 19, 2010, available at http://www.nypost.com/p/news/local/dem_defends_legal_leak_in_the_aqueduct_oW53D2AvlrGdtiZUbd6sXN.

note, Counsel to the Senate Majority Shelley Mayer informed the press that "many such documents were unlikely to be released."[111]

Remarkably, Sampson went so far as to testify to the Inspector General that he was unaware of the existence of any confidential memorandum in the entire Senate:

> **Question**: Are there, in fact, confidential memos that are prepared either for individual senators or for the Senate, as a whole?
>
> **Sampson**: Not that I'm aware of.

Sampson further testified to the Inspector General that he felt his disclosure was appropriate because the facts and figures contained in the materials he revealed were constantly changing.

Sampson's denial ignores the simple fact that the information contained in the items he leaked was not publicly available and in fact, was not actually in the possession of competing vendors. Indeed, even the author of the memoranda in question, Assistant Counsel to the Senate Majority Christopher Higgins, considered them to be confidential: "I don't put 'Confidential' on them. Maybe in e-mails I should put, 'Keep them confidential.' I don't think this is information that, you know, should be given out. A lot of this is public. Some of it's not." Bradley Fischer, Counsel to the Senate Racing and Wagering Committee, averred that he considered the memoranda prepared by Higgins and forwarded to him to be "confidential and not for public consumption." He explicitly stated, "I was not going to share them with other bidders."

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[111] *See* Danny Hakim, "Albany Senate to Release Some Files on Aqueduct," *New York Times*, March 24, 2010, available at http://www.nytimes.com/2010/03/25/nyregion/25aqueduct.html?_r=1

With regard to the comparable Assembly chart prepared by Louann Ciccone, while Speaker Silver would not go so far as to label it "confidential," when queried as to whether he ever authorized its release to any of the bidders, he replied, "Certainly not explicitly or even indirectly." Counsel to the Governor Kiernan announced more definitively that the information itself should not be revealed to any bidders due to "ethical considerations." Concurring with Kiernan, Secretary to the Governor Schwartz opined that it would be "inappropriate" to release memoranda addressed to him and the Governor to the vendors or their lobbyists.

Senator Sampson's retroactive justifications for his actions lack merit. Initially, his assertion to the Inspector General that the information was allegedly useless because the numbers changed over time and was provided after the vendors had been formally informed that they could not submit further unsolicited information strains logic as the information he leaked included the actual final numbers and the various contingencies submitted by the competing vendors prior to the selection of AEG. Moreover, Sampson's claim to the media that this information was somehow public is not only contradicted by his own staffers, Fischer and Higgins, who testified that at least some of the materials were not publicly available, but also by AEG's competitors who informed the Inspector General that they did not possess this information, much less analysis, and instead were forced to rely on rumors and hearsay.

In fact, Delaware North President William Bissett testified that "the only information I had about people's bids are what I read in the press. I never saw an analysis, if there was one done, that either Lottery or PFM may have done on the bidders. If they did one we never saw it . . . So there wasn't any sharing of information from the

second floor [the executive chamber] or from any legislative staffers as to the analyses or who is bidding what." Bissett added that Delaware North's lobbyists were similarly unsuccessful in obtaining such information and that "there wasn't a lot of information about what people were doing." Fellow Delaware North principal James Featherstonhaugh testified that he understood the details of the bids to be "confidential" and had been informed as such during the process. The Governor's Director of Communications Peter Kauffmann confirmed for the Inspector General his understanding "is having told the bidders up front that those documents would not be released publicly." SL Green Chief Executive Officer Marc Holliday similarly testified in response to whether he had learned "the other bidders' parameters or offers": "Never specifically, but there were – it was so widely reported that if you took the reporting as accurate, then you had a sense of what the other bids were, but never, you know, never with certainty. Always just hearsay." Holliday added that he had never seen the Senate memoranda and that "I would have remembered something like this."

Additionally, similar to its treatment of the internal Senate memorandum leaked to it in May 2009 via Secretary to the Senate Angelo Aponte's office, AEG's treatment of the material disclosed by Senator Sampson contradicts his fallacious claims. Specifically, on November 24, 2009, after the materials were "e-faxed" to various AEG team members to be read and forwarded electronically, Andrew Frank forwarded them to Michael Wagman, commenting, "take a read. don't pass around." When questioned about the propriety of receiving these internal Senate memoranda, John Cordo, one of AEG's lobbyists, succinctly summarized the lobbyists' view and why their involvement was antithetical to an objective procurement: "This was lobbying. We are not in the

procurement world, which I know quite well. This is lobbying. All I care about is the information, not where it came from." While Cordo asserted that AEG did not change its financial offer based upon other vendors' financial data, and contended that the impact of having received the Senate memoranda was "fairly limited," he did not, and could not, argue that possessing information unavailable to its competitors was anything but useful to AEG.

Indeed, although some bid information was reported in the media, this information was not only unverified, but, where not simply erroneous, was significantly incomplete, as exemplified in an exposition of the bids reported in an August 23, 2009 *Crains New York* article entitled "Rival groups bid up offers for Aqueduct Racetrack, Plenty of buzz, but no obvious front-runner."[112] However, in addition to being unconfirmed, while this article correctly stated some modifications to the bidders' upfront licensing fees, it did not contain the notable conditions and contingencies related to the payment. For instance, while the article noted that SL Green now proposed $275 million upfront, the author did not report that this amount was to be reduced by any monies SL Green spent above the $250 million capital construction grant. Similarly, while Wynn technically did propose $300 million, the final $100 million was to be paid in equal installments over the course of 30 years and was not truly "upfront." Confirmation of the actual bid details and these important nuances were available to AEG, and only AEG, because of the leaked Senate documents. AEG's Wagman confirmed that prior to receiving the memoranda disclosed by Senator Sampson in November 2009, he was not

[112] http://www.crainsnewyork.com/article/20090823/SUB/308239985

aware of the actual contents of the competing bids but solely relied upon media reports of questionable reliability.

More than solely containing accurate, verified bid details, the memoranda leaked by Senator Sampson also contained extensive analysis of the bids by the Senate and the comments and concerns of those involved in the decision from the executive branch. In addition to being self-evident, the value and competitive advantage of possessing not only actual bid details of competing bidders, but the analyses, thoughts and opinions of the decision makers, is made patently clear in the actual use of these internal Senate memoranda by AEG lobbyists in the immediate aftermath of being conditionally awarded the franchise. On February 3, 2010, Frank e-mailed a group of AEG lobbyists attaching and forwarding the internal Senate memoranda Senator Sampson had disclosed to Carl Andrews. In his lengthy e-mail, Frank used the memoranda to chart AEG's strategy to undermine Penn National's and SL Green's bids and accentuate AEG's own. The internal Senate memoranda obtained from Sampson serve as Frank's reference guide complete with actual citations. For example, in regard to fending off Penn National, under the heading "Memo from September 30, 2009," Frank informed the lobbyists:

> The reality is the only pro that Penn offers is their $301 million payment which Chairman Sabini comments [page 18 of fax] that based upon their public bid to purchase the Fountain Blue in Las Vegas would significantly deplete their cash resources. This does not even mention their intentions for two new facilities in Ohio as well as Maryland and Kansas. Their $301 million bid has conditions which are onerous — we should be able to make this point clear.

In regard to SL Green, Frank noted:

> Their biggest weakness is the Seminole partnership. Page 19 raises concerns about dealing with a tribe and how it is not good to add this to the mix. We need to exploit the fact that the Seminoles are operating illegally in Florida without a compact. We need to make it clear that the

> Hard Rock is the wrong image for this casino and as a brand will be detrimental to performance. They believe that Hard Rock will improve slot performance but the facts in Las Vegas completely prove the opposite result.

Further revealing, under the heading "Other Overall Impressions," Frank advised, based upon the memoranda, among other things, "Let's not talk about discrepancies in numbers as on two occasions it was clear they believe all bidders are in the same ballpark." Frank further advised the group that they should be "able to kill the Hard Rock Brand along with the Seminoles" and continue to de-emphasize the importance of brand in general. Similarly, under his "Key Factors" Frank advised "Brand — we need to get them off this – it just is not true."

The most compelling evidence that Sampson's claim that these materials were not confidential is fallacious comes from his own unambiguous actions. At the onset of the Inspector General's investigation, the Inspector General requested that the Senate voluntarily provide relevant materials in its possession. Notably, this request specifically encompassed any internal Senate memorandum analyzing the various bids. To the contrary of freely providing this information which Senator Sampson would later claim to reside in the public domain in defense of his dissemination of such to a select bidder, the Senate, at Sampson's direction, categorically refused to provide any materials to the Inspector General. The Inspector General was therefore compelled to issue subpoenas for the materials to the Senate and Senator Sampson individually for relevant items including these memorandum he had freely provided to the AEG lobbyist. Instead of complying with the Inspector General's subpoena in whole or in part, Senator Sampson filed a lawsuit to quash the Inspector General's subpoenas in State Supreme Court.

Pointedly, in papers filed with the court, Sampson and the Senate not only maintained that the items were not subject to disclosure, much less publicly available, but declared that such disclosure would violate the State Constitution claiming: "[t]he process by which the Senate as an institution, or members thereof, deliberated, evaluated or communicated regarding the selection of the VLT vendor constituted legislative actions by any interpretation of the term" and, therefore, was constitutionally protected from public review or examination. In fact, Sampson and the Senate explicitly claimed that their acts in choosing AEG were utterly beyond public review: "[t]he subpoenas seek documents and testimony that directly relates to the 'performance of their legislative functions' as members of the Senate and the Senate as an institution. [The Senate and individual Senators] should not, and cannot, be subject to the 'burden of defending themselves' for these legislative actions."

Although this specious argument was summarily rejected by the court, Senator Sampson cannot consistently hold that the information he provided to Andrews was publicly available and properly given to a partisan lobbyist when he refused to supply these exact same items to the Inspector General and, in fact, argued that these very same materials were privileged under the State Constitution. Indeed, the inconsistency and defensiveness of Sampson's arguments are highlighted by the conduct of his attorney at his interview with the Inspector General wherein Sampson, via counsel, claimed that under the constitution he did not have to inform the Inspector General of whether he voted for Tax Law § 1612.

Remarkably, Senator Sampson, via counsel, objected to the Inspector General's questioning, claiming: "The bottom line is you don't have a right to ask him how he

voted on something. That's protected. That's legislative immunity. You don't have the right to pull him in here and ask questions about that." Contrary to Senator Sampson's understanding of the public's limited access to information concerning its elected representatives, not only is information of the votes of legislators' public information, but under unambiguous New York law, it is unlawful for either house of the Legislature to withhold this information. Public Officers Law § 88(2) and (3) entitled, "Access to state legislative records" provides that the Legislature must "make available for public inspection and copying," among other items, "a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes," and "transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken." Indeed, pursuant to this statute, voting information is available on the Senate's own Web site: http://open.nysenate.gov/legislation/votes.

Sampson's selective assertion of privilege coupled with actions, described below, cast serious doubt on his version of events surrounding the dissemination of the memoranda. In sum, despite Sampson's sporadic contention that the memoranda were publicly available, these memoranda apparently have only been provided by Senator Sampson to two entities: (1) the Office of the Inspector General by subpoena after an unsuccessful lawsuit to block access; and (2) Carl Andrews and AEG through political access.

XI. THE "BROOKLYN BUY-IN" AND DONALD COGSVILLE

Although Senator Sampson's version of events – an impulsive disclosure of the internal Senate memorandum to Andrews - cannot conclusively be disproved, other apparent actions by Senator Sampson are disquieting and cast doubt on the professed sincerity of his ill-advised disclosure. In fact, the evidence demonstrates that near-simultaneously with his interaction with Andrews on November 24, 2009, Sampson took advantage of his position as Senate leader and actual decision-maker to obtain financial benefits for favored groups and ensure that a favored developer was included in AEG's plans.

A. "Sounds Like We Don't Have a Choice But to Do It"

As discussed above, the Reverend Floyd Flake, a Queens pastor, former congressman and owner of the Empowerment Development Corporation, joined forces with Darryl Greene, a principal of the Darman Group Inc. and a former business partner of Senator Smith, to create an equally owned special purpose entity known as Darman-Aqueduct Joint Venture to facilitate involvement in AEG. This arrangement was memorialized in two "Side Letter Agreements" between the group and AEG setting forth the conditions under which the special purpose entity would receive an option to purchase a membership or other equity interest in AEG, conditioned upon AEG being selected for the franchise at Aqueduct. One of the agreements provided that as a result of participating in AEG's bid for the development of a VLT facility at Aqueduct, an investment in AEG may be made in an amount up to $1,250,000 to be paid by delivery of a promissory note, with the repayment terms to be agreed upon at a later date. The

second agreement provided for the development of a mixed use facility (housing and/or retail development), and the special purpose entity would receive an option to purchase up to $10,000,000, also to be paid by delivery of a promissory note. Both agreements had lucrative potential for Flake and Greene. Additionally, unbeknownst to the Reverend Flake, Greene was also providing consulting services to AEG for which he billed $30,000 and would be receiving $25,000 a month should AEG win the bid.

As previously detailed, Senator Smith had longstanding business and personal relationships with both the Reverend Flake and Darryl Greene and a direct business relationship with Greene's Darman Group. Unsurprisingly, after the June 2009 coup and the eventual emergence of the new power structure in the Senate, AEG switched its focus to Senator Sampson. Although this re-direction of attention from Smith to Sampson is a reasonable business strategy in the politically charged universe of the Aqueduct VLT selection procedure, instead of obviating ethical issues resulting from Smith's conflicts of interest in regard to AEG, AEG's focus on Sampson created even more troubling ethical implications, namely, Sampson's apparent use of his influence to compel AEG to include a favored developer in their project to his potential financial benefit. At a minimum, AEG's tactics and Sampson's actions, create the appearance of an ulterior motive for AEG's selection unrelated to its merits as a vendor – its responsiveness to the Senate leadership and willingness to heighten Smith's or Sampson's political profile through patronage and influence.

On September 12, 2009, 11 days prior to the initial leader's meeting relevant to the Aqueduct VLT award, AEG public relations consultant Andrew Frank e-mailed Navegante executive Rick Stevens. Under the subject "Brooklyn-Queens politics," Frank

continued "Are a major component of our bid. There are some things going on behind the scenes that you should be aware of, as it could affect us AFTER we win. I will explain when we talk, but its not for the big call [referring to an AEG conference call involving a large group of stakeholders and associates]." (Emphasis in original). Stevens then e-mailed Frank and AEG principals Michael Wagman and Larry Woolf several hours later: "I discussed this with Andrew [Frank] today. It sounds as if the matter is somewhat handled, but you should be briefed to understand the dynamic. Darryl and the reverend need to share their incentives to get the Brooklyn buy-in." Wagman coyly responded, "Well now I'm getting curious." Several hours thereafter, Stevens detailed in an e-mail to Wagman the nature of the "Brooklyn buy-in":

> In a nutshell, Sen. Sampson has seen the LOI [AEG's letter of intent with the Reverend Flake and Greene]. Darryl and the reverend represent Queens. The lame duck majority leader, Smith is giving way to Sampson who is from Brooklyn. Sampson wants some of his constituents from Brooklyn to share in the benefits the Queens contingency is receiving. This is the short version.

Frank testified to the Inspector General that the "incentives" referred to in his e-mail pertained to Darryl Greene being paid for work on AEG's Minority and Women Business Enterprise Program. Greene, who, along with the Reverend Flake, was spearheading the minority benefits program for AEG, explained to the Inspector General that he had heard that upon his assumption of leadership of the Senate, Senator Sampson expressed concern that Brooklyn-based firms and employees be included in the minority benefits plan. In explaining AEG's purported desire to make known to Senator Sampson that if selected, AEG would take pains to include minority workers from Brooklyn as well as Queens, Greene expounded:

> [T]here was never a quid pro quo so to speak. Any time you worked in this area, you are going to run into that dynamic. Whoever is the elected official is going to be concerned about what is in it for my constituency. If you are wise, you going to try to make sure they understand and you are going to be true to that if you are wise. You are going to make sure that their constituencies, the residents of the areas, are included among the beneficiaries of the project.

Consistent with this description of the "Brooklyn Buy-in," on September 22, 2009, an official from Greene's company, the Darman Group, e-mailed Frank regarding a fundraising event for a Brooklyn-based minority contracting organization, the New York State Chapter of the National Association of Minority Contractors (NYSAMC), with tickets costing $150.00 per person, "sponsorships" ranging from $3,000 to $10,000, and further soliciting advertisements from $75 to $1,500. Frank immediately forwarded the e-mail to Wagman, Stevens and Woolf, stating:

> This is the kind of stuff we have to make decisions about from a financial perspective . . . this is the Brooklyn group that is important to Sen. Sampson.
>
> He is also having a fundraiser NEXT TUESDAY night. I encourage the same participation from our team as we did for Sen. Adams.
>
> (Emphasis in original).

Tellingly, Wagman replied: "Sounds like we don't have a choice but to do it."

After some correspondence regarding who was available to attend, on September 29, 2009, Stevens e-mailed Frank, "Larry will not be able to make the game [the September 29, 2009 Yankee Stadium fundraiser for Senator Sampson]. Larry has committed to the $2,500 fee discussed. You or someone else should go to this fundraiser." At least three AEG representatives, Lawrence Roman, Jeffrey Levine and Steven Acevedo, attended the Yankee stadium fundraiser for Senator Sampson.

Internal AEG e-mails obtained by the Inspector General demonstrate that the consortium paid $1,500 to NYSAMC to satisfy this part of the "Brooklyn Buy-in" and took efforts to conceal the source of the monies. On October 1, 2009, Frank e-mailed Levine, Roman and Wagman:

> We have a few things that need to be decided very quickly-TODAY. Some of this was previously mentioned and they require a financial commitment, therefore I am addressing this to you:
>
> 1. There is a fundraiser tomorrow night for Cong. Meeks. It is his annual big event. Table-$750
>
> 2. NYSAMC-Table and BW ad $1800 in their journal – OR Sponsorship and Table with Silver page ad (color) $3000 (Ad is due this morning)
>
> We need to know both today and I need to know which organization(s) will write the check, as this can not come directly from AEG at the moment.

After Roman responded by asking, "Please explain what if any benefit. Not sure how these gentlemen are involved," Frank advised him:

> 1. Meeks is the Congressman from Aqueduct. Close to the Governor. Close to Senate leadership
> 2. NYSAMC – this is the MBE organization from Brooklyn who we must support….

Days later, Levine's assistant e-mailed a member of the Darman Group that "the $1500 NYSAMC check" has been sent via Federal Express.

The Inspector General questioned Senator Sampson about the "Brooklyn buy-in" but, not atypical of Senator Sampson's responses, received an equivocal answer and lack of recall:

Question: With respect to people involved with AEG, primarily the people who were representing them as lobbyists, did you ever indicate to them that they should support any groups in Brooklyn?

Sampson: Not that I recall. What do you mean?

Question: Financial support. Specifically I'll ask you concerning a group that's NYSAMC. I think that's the Association of Minority Contractors?

Sampson: No; not that I recall.

In regard to the September 29, 2009 Yankee Stadium fundraiser, Sampson similarly claimed to not be "certain" whether representatives for bidders attended except for a representative from the Wynn group who "may have been there." When inquired as to his lack of memory regarding this event held in a suite in the stadium, Sampson conceded that attendance was of a "limited size" but stated it was "evolving."

In addition to apparently directing funding to a Brooklyn-based organization of his choosing, the Inspector General also discovered evidence indicating that Senator Sampson used his influence to include a favored (non-Brooklyn resident) developer in the AEG project, an indication of his ability to further influence the project and racino if AEG were selected – a decision substantially in his own hands.

B. Senator Sampson "Insists" AEG Include Developer Donald Cogsville

On December 1, 2009, AEG principal Michael Wagman sent an e-mail to fellow AEG member Lawrence Roman regarding the recent addition to AEG of a developer, Donald Cogsville, founder of The Cogsville Group, LLC, described as a "New York

based minority-owned investment firm" which invests "in urban real estate, debt instruments and securities":[113]

> [We] worked over the weekend to craft a very loose agreement with Don Cogsville. **This has come at the insistence of a certain senator.** We have given him the ability to work on later developments on the property and to co-invest in a minority role (not to exceed 30% of the equity) unless both parties agree otherwise. Again, this is a very loose relationship as defined today but one we believe is important. I am happy to add some color if you want more info. [Emphasis added]

When queried regarding which "certain senator" insisted that he and other AEG members work the entire Thanksgiving weekend, Wagman initially balked:

Question: Who was the certain senator?

Wagman: I don't recall.

Question: How did it come to your attention that it was at the insistence of a certain senator?

Wagman: Anything like this would have come from one of our lobbyists or someone like Andrew Frank.[114] I just can't recall in particular which one it was.

Question: It appears that the information regarding the insistence of a certain senator had been taken seriously. However loose, there was an agreement entered into. Is that correct?

Wagman: There was an agreement entered into, yes, there was.

Question: And was there any suggestion that the insistence of a certain senator was something important for AEG to comply with?

Wagman: I assume so, because we entered into the agreement, yes.

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[113] http://sevarapartners.com/?page_id=905

[114] Andrew Frank testified that he could not recall if it was Senator Sampson or some other senator with whom Carl Andrews had a relationship.

Wagman later asked to readdress the identity of the senator who "insisted" upon Cogsville's inclusion in AEG and revealed that he believed it to be Senator Sampson:

> I'm trying to piece together the whole Cogsville thing. I can't be certain, but I'm trying to piece together some of your questions with memory. I can't be certain. I believe the certain senator was Sampson, and I believe it did relate back to what we're talking about earlier in relation to the Queens-Brooklyn dynamic, and that is what Sampson was looking out for his constituents in playing a role. I can't be certain of this, but I'm trying to piece together my memory. That's what I can kind of recall.

Senator Sampson acknowledged knowing Cogsville: "Don Cogsville was involved with my church with respect when they were looking to purchase Starrett City [a Brooklyn apartment complex]." When Sampson was queried by the Inspector General as to whether he had referred Cogsville to AEG or suggested that AEG utilize Cogsville's services, Sampson replied, "Not that I recall."

Cogsville testified that he was originally part of the Wynn proposal to operate the VLT facility and subsequent to Wynn's withdrawal he eventually entered into a contractual relationship with AEG. Cogsville confirmed his relationship with Senator Sampson: "I got to know him sort of when I got involved in the Starrett City transaction and he's the local state senator. And because it's his district and because it was such a large deal, I talked to him. But he was really peripherally involved, but that's how I got to know him." Despite Sampson's claimed lack of memory, Cogsville admitted to at least some discussions with Senator Sampson regarding Aqueduct during a more general meeting:

> There was a conversation, not specifically about the racino project, but in the context of larger scale developments. I had a conversation with him where it probably did come up in a very general sense, which is, you know, here's a large scale project, you know, I'm interested or something

> to that effect, but very briefly and that wasn't the focus of the conversation.

The Inspector General confirmed through e-mails acquired from Cogsville that this meeting with Sampson occurred on September 28, 2009. Notably, at the time of this meeting, Cogsville was actually in the process of solidifying an agreement with Wynn to be involved in future development at Aqueduct. The plans were consummated shortly before Wynn withdrew from the selection process.

Disappointed after the withdrawal of Wynn and the resulting termination of his agreement which could secure his company substantial financial benefits, Cogsville related that he believed in the value of his development plans and thought they would "be portable to another team." He expressed intentions of attempting to prevail upon the eventual selectee to include him in the non-gaming development plans. Cogsville claimed that in the "middle of November," AEG lobbyist Carl Andrews contacted him to join AEG. Frank confirmed to the Inspector General that Andrews brought Cogsville to AEG for immediate inclusion in the project.

When confronted with the internal AEG e-mail and its reference to the "certain senator" who insisted that he be included in the project, Cogsville expressed that he was "shocked" by the e-mail and posited that the "certain senator" was either Senator Smith or Senator Sampson but posited, "if I were guessing, it would probably be Sampson." When questioned by the Inspector General, Smith attested to recognizing Cogsville's name but testified that he had never met him. Senator Adams, who was also very involved in Sampson's decision-making process, testified that he did not even recognize Cogsville's name. Senator Addabbo stated that he knew only that Cogsville was associated with one of the vendors.

The evidence strongly supports Wagman's statement and Cogsville's reasoning that it was Senator Sampson who "insisted" that AEG include Cogsville in its plans. In addition to Wagman's testimony, the confirmed relationship between Sampson and Cogsville, and the fact that Cogsville averred to having discussed Aqueduct with Sampson, the involvement of Andrews and the timing of the "insistence" further compel this conclusion.

As discussed previously, on or about November 24, 2009, Andrews and Senator Sampson met, at which time Senator Sampson disclosed internal Senate memoranda to Andrews. The close proximity in time of Sampson's meeting and disclosure to Andrews with the AEG members' efforts at the behest of the "certain senator" causing them to work over Thanksgiving weekend to shore up an agreement with Cogsville, not only corroborates Wagman's belief that Sampson was the senator who insisted that AEG utilize Cogsville, but renders it likely that this message was conveyed by Sampson to Andrews at or about the time of his November 24 meeting with Sampson. As noted several times in this report, Andrews has refused to testify or provide records to the Inspector General as to this conversation and all his communications with the Senate to secure AEG the award.

C. Carl Andrews Is Financially Rewarded For His "Direct Line to Sampson"

Carl Andrews's ability to gain access to the Senate leadership did not go unnoticed or unrewarded by AEG. Andrews, a former state senator, was hired specifically to lobby the Senate leadership. AEG public relations consultant Frank testified that when Andrews was hired by the consortium, Andrews had requested a

salary of $7,500 a month, but over the summer of 2009 or later, approached AEG to raise his fee to that of the other lobbyists who were earning $10,000 monthly. According to an October 2, 2009 e-mail from Frank to Wagman, Andrews was still seeking to enhance his salary in the early fall. In the midst of reference to the fact that AEG was "struggling with the financial commitments currently," Wagman advised AEG's Woolf in this e-mail that "Carl Andrews gave me a paper last night which I will scan and send to you requesting to be upped from 7500 to 10K per month (he deserves it)." Wagman forwarded this e-mail to Woolf.

On November 25, 2009, a day or so after Andrews obtained the internal Senate memoranda from Senator Sampson and also most likely received "insistence" from Sampson to add Donald Cogsville to AEG's package, Andrews achieved success in obtaining increased payment from AEG. On that date, Wagman e-mailed several other AEG officials (subject "Carl Andrews") that Andrews was two months in arrears in payment from AEG and that "I believe Carl is our most important lobbyist and clearly has a direct line to Sampson, but I am struggling. My thought was to offer him $10k. Thoughts?" AEG principal Rick Stevens replied:

> Do we still have $20,000 in the account?
>
> Certainly the $10K. **Carl has held the senate**. They appear to be our only firm ally. If we have $20 in the account, I would suggest paying $10 and delaying the next $10. Possibly give him a date Dec. 15th. If Carl knows for some reason that the politics are turning against us, he could be trying to get his money before it all falls apart. **By delaying payment #2, he can't release the senate.**
>
> I have no basis for this remark, but prefer to have him remain with some vested interest.

> I have real concerns that after multiple months of leadership meetings, they can't move SS [Speaker Silver], if the executive is truly on board with us.

(Emphases added).

Wagman authorized the remittance of $10,000 to Andrews towards his invoices and noted that the payment had "bought us a lot of good will with him."

When confronted with these e-mails, Wagman testified that "Carl was, according to reports back to us, was able to have direct discussions with Senator Sampson," and added that Andrews personally informed him of his discussions with Senator Sampson. While Wagman claimed that he was not informed "specifically" that Senator Sampson was supporting AEG, as a result of Andrews's discussions with Sampson, he admitted, "I will say that we had confidence that the Senate supported AEG in general."

The substance of these e-mails, particularly in light of their timing, further highlights not only the Senate's longstanding support for AEG, but Andrews's ability to gain access and wield influence with it, including the apparent ability to hold or "release" its support.

XII. CAMPAIGN CONTRIBUTIONS BY COMPETING BIDDERS

A. Analysis of Campaign Contributions

As discussed above, the "three men in a room" method devised to select a VLT facility operator at Aqueduct (codified in Tax Law § 1612) resulted in the politicizing of the procurement process. A critical by-product of the substitution of political considerations for objective assessment of competing bids was the emergence of campaign contributions as a perceived prerequisite to securing the franchise. In contrast with established procurement procedures wherein the decision makers tasked with awarding a contract would be legally prohibited from receiving monetary contributions from the competing bidders under threat of sanctions, if not prosecution, each of the three decision makers in the racino award process was permitted to receive campaign contributions at the same time they were assessing which bidder would be selected to win this multi-billion dollar state contract. As would be expected in any such politically-oriented process, competitors seeking to earn the favor of the three elected decision makers felt obligated to make campaign contributions to the three leaders and their political allies in order to curry favor and increase the likelihood of being awarded the racino contract.

The Inspector General found that, of the four competing vendors viable at the conclusion of the process in early 2010 (SL Green, AEG, Delaware North, and Penn National)[115] all but Penn National contributed tens of thousands of dollars directly to the

[115] The Inspector General notes that, based upon Board of Elections records, Penn National appears not to have contributed directly or indirectly to the Governor's campaign or that of legislative candidates. The two vendors not included in this analysis are Wynn and Peebles. Wynn dropped out of the process in the fall of 2009 and Peebles failed to make filings necessary to remain a contender in the process.

campaign funds of relevant individual legislators and Governor Paterson. In total, the Inspector General determined that the competing vendors and their associates contributed over $100,000 to relevant officials during the bidding process. The Inspector General also found that lobbyists retained by the vendors contributed to these political campaigns. Notably, the Inspector General determined that AEG coordinated its contributions with the Democratic Senate Campaign Committee and one of its component entities even instructed a subcontractor apparently unconnected to the Aqueduct project to make a contribution in order for the monies to be pooled with contributions from other AEG members.

As these bidders, in particular AEG, were conglomerates and contributions were apparently rendered by various components and the affiliates of these component entities, many of whom regularly conduct other business with New York State, in some instances it is difficult to conclusively distinguish campaign contributions directly related to the Aqueduct process from contributions in general. The difficulty of this task is even more pronounced in regard to an analysis of contributions by lobbyists associated with the vendors, many of whom regularly make campaign contributions to further the interests of other clients or based on their own political affiliation.

While, based on available data, the Inspector General cannot conclude that AEG prevailed as a result of contributing the most identifiable money to political campaigns in furtherance of its bid, the Inspector General did find that AEG's contributions were dispensed as per the specific direction of the State Democratic Campaign Committee with the clear intent to curry favor with the Senate. These strategic contributions underscore

the predominance of politics divorced from the public interest which permeated every aspect of the selection.

B. AEG Targets Contributions at Direction of Senate Democratic Campaign Committee

Based upon New York State Board of Elections data, the Inspector General determined that members of the AEG consortium contributed less than $5,000 to the Governor's campaign and made no contributions to Assembly campaigns,[116] but contributed over $40,000 to Democratic Senate campaigns. While AEG as a corporate entity made no contributions itself, members of the consortium did. These members included WDF and related companies; Darryl Greene; companies operated by Jeffrey Levine, including Douglaston Development and Levine Builders; Larwrence Woolf (Chairman of AEG member Navegante), and Andrew Frank.

Although the amount in contributions made to any single elected official unearthed by the Inspector General is not staggering, the genesis of the manner in which campaign contributions were dispensed to senators by AEG evinces the direct link between these contributions and efforts to obtain the VLT franchise by courting the Senate. In fact, Board of Elections records reveal that AEG not only contributed to the actual and apparent key Senate decision makers, Senators Sampson, Smith and Espada, but also contributed to the campaigns of several other democratic senators not remotely involved in the decision. In regard to how the consortium determined to contribute to these additional senators, Frank testified, "I think that Carl Andrews had given [the

[116] The Inspector General could not confirm through documentation but did discover that AEG official Lawrence Roman attended a golf outing for the benefit of Speaker Silver. The fact this apparent donation

Democratic Senate Campaign Committee] my name or someone in their office gave them my name and they contacted me and said we would be appreciative if you could help raise money for Aqueduct Entertainment Group, your partners, for these five individuals." The "five individuals" were five senators identified by the Democratic Senate Campaign Committee: Ruth Hassel-Thompson (Bronx), Shirley Huntley (Queens), Eric Adams (Brooklyn), Andrea Stewart-Cousins (Yonkers), and Antoine Thompson (Buffalo).

According to Frank, the Democratic Senate Campaign Committee solicited AEG to raise $5,000 for each of the enumerated senators, but AEG only "ended up raising somewhere around 3-plus [thousand dollars] for each of them . . . ." Once Frank had collected contribution checks gathered from AEG consortium members and others it had solicited, AEG dispensed the funds to the five senators selected by the Democratic Senate Committee, one of whom, Antoine Thompson, represents a district in western New York, far from the vicinity of Aqueduct Racetrack. Frank explained that Senator Adams, the ranking member of the Senate Racing and Wagering Committee, would be instrumental in the decision making process and thus an obvious target of contributions; however, in regard to the other four senators who benefitted from AEG's largesse, Frank testified that, "We looked at this as a fundraising effort on behalf of the Senate." Frank's response reveals the purely political nature of the process and AEG's focus on the Senate as its lever to win the award.

The Inspector General's analysis of Board of Elections materials revealed that AEG component entities donated a combined $23,700 to the five targeted senators in two

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was not reported and could not be confirmed with documentation, demonstrates the difficulty in assuring that all contributions have been catalogued.

installments between December 14, 2009, and January 4-6, 2010. For example, WDF contributed $2,000 to Buffalo-area Senator Antoine Thompson on December 14, 2009. From January 4-6, 2010, three other AEG components contributed an additional $6,600 to Thompson's campaign fund for a total of $8,600 in monies from AEG. Similarly, Westchester/Bronx-based Senator Ruth Hassell-Thompson received a $1,000 donation from WDF on September 14, 2009 and an additional $2,800 from AEG groups from January 4-6, 2010. Likewise Senator Huntley received a $1,000 donation from WDF on December 14, 2009 and an additional $2,500 contribution from AEG entities on January 4-6, 2010. Further confirming this pattern, Westchester-based Senator Andrea Stewart-Cousins received $1,000 from WDF on December 14, 2009 and $3,000 from other AEG entities on Januiary 4-6, and January 11, 2010. Senator Adams received $3,500 from AEG groups on January 8 and January 11, 2010.

Nor were these directed campaign contributions the only manner in which AEG sought to influence the Senate through monetary contributions. As stated above, a number of AEG members including Levine and Roman attended the fundraiser for Senator Sampson at Yankee Stadium on September 29, 2009, contributing $2,500 per person. Similarly, Woolf, Chairman of AEG's Nevada-based gambling component, Navegante, who as a resident of Nevada had not historically contributed to New York campaigns, contributed $3,000 to Senator Adams's campaign on September 10, 2009.

In gathering money to donate to the decision makers and others chosen by the Senate Democratic Committee, AEG members not only donated themselves, but also importuned others with who they had business relations. For example, the Inspector General determined that John Thomann, Vice President and General Manager for Turner

Construction (a member of the AEG team), solicited contributions from New England Construction, a subcontractor who often works for Turner. According to Christopher Black of New England Construction, Thomann called to seek contributions to particular state senators involved in the selection process without ever providing an explanation; Black delivered the funds to AEG without questioning the basis of Turner's request. Ultimately, all of the checks from AEG consortium members and those from whom the members solicited additional contributions were sent as a collection to the Democratic Senate Campaign Committee.

The Inspector General notes AEG members and those whom AEG solicited to contribute directed their contributions to particular members of the Senate.[117] The fact that AEG's contributions to the Senate could be seen as undermining the objectivity of their review did not escape notice. Once the public concern over the selection of AEG arose in January/February 2010, a member of the office of the Senate Counsel to the Majority requested that the Director of the Senate Policy Group, James H. Watson, review contributions by the Aqueduct bidders. Watson could not recall who from counsel's office made the request. Watson only examined contributions made directly by members of AEG. On February 17, 2010, Watson e-mailed his analysis and an accompanying spreadsheet to members of counsel's office and others detailing the contributions by AEG:

> Attached you'll find an analysis of contributions from AEG shareholders to members of the Legislature. Older dates are included to show a history of donations. Those coming in 2009 or later are highlighted. This is what an inquisitive and ambitious journalist (e.g. Jim Odato) would find if they are looking for links between Senate Dems and AEG. Particularly troubling is Greenstar affiliate WFD [sic], which gave

[117] Interestingly, while AEG-related entities donated $2,000 to Governor Paterson's campaign, the Inspector General did not uncover any contributions to members of the Assembly.

> a total of $14,500 to our members between 7/13/2009 and 1/11/2010. Greenstar holds a 8.79% interest in AEG as a principal investor. Equally troubling will be the attention paid to Senator Adams, who received $7,500 from shareholders, including $1,000 from Andrew Frank, who is the Managing Partner of the law firm [sic] that put together the MOU for AEG.
>
> Affiliates also made a total of $10,000 to Sens. Sampson ($3,000) and Adams ($7,000) on 9/8/2009 and 9/10/2009. This will appear to be coordinated to anyone looking at the data. We're looking for something significant about the date, but someone else might know immediately.
>
> We can look at the losing bidders to see if similar contributions were made, which would give some cover by showing a sense of objective judgment. We haven't gone that far yet. In any event, we should be prepared for questions.

Watson's trepidation over the fact that the contributions "will appear to be coordinated" is particularly noteworthy in light of the fact that, as discussed above, donations made by AEG were actually coordinated with the campaign committee.

C. Contributions to the National Action Network

In addition to these direct contributions, AEG members and a lobbyist also attempted to curry favor with the Reverend Al Sharpton by making contributions totaling almost $100,000 to the National Action Network, a group founded by him.[118] Donations to National Action Network in 2009 included: $11,000 from AEG Chairman Richard Mays and his law firm; $13,500 from AEG member WDF; $12,500 from AEG member Levine Builders; and $25,000 from HW Funds Group, an entity associated with Joseph Logan, a member of AEG at the time. AEG lobbyist Carl Andrews, the key lobbyist who had arranged for the contributions pooled from AEG to flow to the Democratic Committee, also contributed $35,000 individually or through his firm. In testimony before the Inspector General, Reverend Sharpton recalled speaking Andrews, and that "I

think he wanted the board [of the Network] if we were to come out with some kind of public statement, to be supportive of AEG . . . and I think he talked to several board members about it." According to Reverend Sharpton, however, this donation did not gain his or the Network's advocacy. When asked by the Inspector General why a member of AEG would e-mail another member on September 29, 2009, that "Sharpton lobbied the Governor hard over the weekend on our behalf[,]" Sharpton testified, "If he said that I don't know where he got that from." He added that "National Action Network never did decide on a group, so that wouldn't be true. I don't know where this gentleman got that impression, but that would not be true."

Governor Paterson similarly attested that Sharpton did not lobby on AEG's behalf and even added that such an occurrence would be surprising given the known enmity between Sharpton and AEG member Reverend Floyd Flake:

Question: With respect to Reverend Sharpton, did there come a point in time that Reverend Sharpton had discussions with you about any of the particular bidders?

Paterson: Reverend Sharpton and I may have discussed that there was an Aqueduct situation. I don't recall anything other than him asking me what I thought I was going to do.

Question: Did he indicate to you that he had become a consultant for AEG?

Paterson: I don't recall him ever indicating that to me.

Question: Did he at any point promote AEG's bid?

Paterson: I don't recall him promoting AEG's bid. Frankly, I got the impression he was interested in another bidder.

Question: Which bidder was that?

Paterson: I really don't remember. I just did not get the impression that he was an AEG fan. I have a reason, if you really want to know.

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[118] Records also reflect a $25,000 donation to National Action Network by Delaware North.

Question: Sure.

Paterson: If Flake is on any side, you can be assured Sharpton will be on another.

Indeed, Sharpton testified that AEG Chairman Mays met with him and recalled Mays attempting to convince him " I want the black leadership here to know we're not just with Reverend Flake, because it was pretty well known that Reverend Flake and I were on different sides politically on several things."

D. Campaign Contributions - Delaware North and SL Green

To place AEG's campaign contribution efforts as targeted by the Senate Democratic Campaign Committee in context, the Inspector General examined the campaign contributions of the other viable vendors after Wynn's withdrawal from the process. Based upon Board of Elections data, the Inspector General determined that Delaware North and members of its vendor team in the racino process during 2009 and early 2010 contributed over $20,000 to Senate campaigns, but less than $5,000 total to the Governor's campaign and to that of Assembly member.

The Inspector General recognizes that compared with AEG – created solely to be awarded the Aqueduct VLT contract – Delaware North regularly conducts business in New York State, and therefore, reasonably might contribute to candidates other than to garner the Aqueduct award. Indeed, an examination of contribution data from prior years evinces a history of donations to a wide swath of political campaigns and both parties. For example, in 2006, in addition to contributions to various individual campaigns, Delaware North donated over $15,000 to the Senate Republican Campaign Committee and in 2007 donated at least $8,000 to the Democratic Assembly Campaign Committee

and $5,000 to the State Democratic Committee. Nevertheless, it can be inferred that Delaware North intended that these contributions would at least enhance its opportunity to secure the franchise including its $4,000 in donations to the Democratic Senate Campaign Committee and $1,500 contributed to Senator Adams during the pendency of the 2009 bid reviews.

Based upon Board of Elections data, the Inspector General calculated that members of the SL Green bidding group made contributions totaling over $10,000 to the Governor's campaign and over $10,000 to Senate campaigns, but less than $1,000 to campaigns for Assembly members during 2009 and early 2010. The Inspector General notes that SL Green, like Delaware North (but unlike AEG), routinely conducts business in New York State, and would conceivably have unrelated reasons to contribute to candidates other than to win the racino award. Indeed, given the fact that principals, investors and business partners of SL Green such as Jeffrey Gural and Daniel Tishman, have contributed large sums to various political campaigns over the preceding years, it is rendered even more difficult to segregate Aqueduct-related donations from contributions aimed at fostering their other business endeavors or political inclinations. For example, Tishman, whose company was to construct the racino for SL Green, donated $45,000 to Eliot Spitzer's campaign for Governor, $20,000 to Governor Paterson's campaign in June of 2008, and $5,000 to the Democratic Senate Campaign Committee in October 2008, prior to SL Green's entry into the Aqueduct competition. Gural made over 180 donations across the political spectrum from January 2005 to September 2010 including a September 2009 $1,500 contribution to Governor Paterson's campaign which would

appear notable except for the fact that Gural contributed $20,000 to the Paterson campaign in July 2008.

E. Campaign Contributions - Lobbyists

The Inspector General reviewed campaign contributions to the Governor's campaign and those of members of the Legislature by lobbyists for the companies seeking the Aqueduct VLT award during the approximately one-year period before AEG was awarded the contract in late January 2010. Paying particular attention to those legislators who had a connection to the Aqueduct process, either through a connection to a relevant committee or by geographic connection, the Inspector General found over $200,000 in lobbyist campaign contributions.

Given that all of the lobbyists involved in the Aqueduct process were regularly involved with various aspects of Albany politics, however, and therefore may have made political contributions in order to gain favor with politicians for other reasons, it is impossible to segregate or identify portions of these contributions intended to assist their clients regarding the racino. However, as was noted above, common sense dictates that the contributions were made at least partially to address the perceived need to please the relevant Aqueduct decision makers. For example, AEG lobbyist John Cordo contributed $9,000 to Senator Sampson's campaign on or about October 8, 2009, immediately after corresponding with a member of his office staff about contributing "the max" to that campaign. In the nine months prior, Cordo had only contributed $500 to that campaign.

XIII. AEG SELECTED FOR THE AWARD OF MULTI-BILLION DOLLAR STATE CONTRACT AS "CONSOLATION PRIZE"

Embodying the dubious nature of every aspect of the selection process which culminated in the tentative selection of AEG on January 29, 2010, the circumstances surrounding AEG's ultimate selection are murky and fraught with political considerations predominating over the public interest in expeditiously awarding the franchise to the vendor who would maximize the benefit to the state. Indeed, the Inspector General was provided with contradictory accounts of the climax of the process by the "three men in a room" and Senator Adams.

A. Governor Paterson: Senators Sampson and Adams Demanded Selection of AEG

According to Governor Paterson, at a January dinner[119] at a Manhattan restaurant, Senators Sampson and Adams categorically declared their resolve to solely support AEG leading to the Governor's acquiescence:

> [S]ometime in January I had dinner with Senator Sampson and Senator Adams, whereupon they formally asked me to join them in proposing AEG, so as to convince the Speaker and get this process over with. And this is the first affirmative step that anyone has taken. And I invited them to alert the Speaker to the fact that they felt this way and see what his view was. And I have some recollection of talking to the Speaker about the Sampson plan after this meeting.

When queried as to whether, during this January dinner, he had committed to AEG, Governor Paterson contended:

> I wouldn't describe it that way. What I was willing to do was to take this argument to the Speaker. I basically said that this sounded fine to me, if you would try to persuade the Speaker, and then I will try to persuade the Speaker. So, you know, maybe it's semantics, but I certainly committed

[119] The Governor recalled that this dinner occurred on January 8, 2010, but neither his schedule nor those of Senators Adams and Sampson reflected a dinner among the three on that date.

> to the idea that this would address my concerns and that if they were as unalterably opposed to the other groups as they were, that I would help them try to convince the Speaker, which I did later in the month.

Governor Paterson specifically testified regarding Senator Adam's advocacy for AEG at that dinner meeting: "[M]y understanding was that Senator Adams was asked by Senator Sampson to conduct an evaluation of all the groups, that they had some kind of a process, and at the end of the process that Adams became convinced that AEG was the best alternative."

When asked why he acquiesced to Senators Sampson and Adams, Governor Paterson averred that by late 2009 the state was in dire need of the infusion of money from the upfront fee as part of the deficit reduction: "What was in my mind was the budget. I just wanted to get this over with." Governor Paterson added that while attempting to address this financial need, Sampson "seemed wed to AEG" and "Silver . . . would not indicate a preference for any group" and "Silver has now had no opinion for a year and a half," he "had to get these two opposite but equally immovable objects to some sort of conclusion" in order to "unlock this treasure which is $200 million to the state, if I can just figure out a way to get them to figure out how to work with me."

The Governor elaborated that by this time he believed that Delaware North, SL Green, or AEG "would have been satisfactory" for award of the franchise, therefore:

> When Sampson and Adams had dinner with me, and they made it clear that, you know, I could wait all year, they weren't coming off of AEG; they didn't like Delaware North, they didn't think they should get a second chance at the apple; the didn't like S&L [sic] Green for a variety of reasons. I got the feeling that I could support AEG if I could get the Speaker to do it.

Counsel to the Governor Peter Kiernan attested to his knowledge of the dinner and the unyielding position of Senators Adams and Sampson:

Question: In January of 2010 did the Governor or anyone else ever indicate to you that there was a leaders meeting at a restaurant in Manhattan?

Kiernan: Well, I became aware of that, yes.

Question: How did you become aware of it, by some communication you received?

Kiernan: Yes.

Question: Were you then aware that the Senate had basically said they were stuck on one entity and unless that entity was selected the process wasn't going forward?

Kiernan: That's the impression I had based on things I had been told.

Governor Paterson thereafter telephoned Speaker Silver on January 27, 2010:

> I believe it was two days before [the award] . . . that Speaker Silver, I made him aware that I was satisfied that he was now aware either that he had a conversation with Senator Sampson or that I was now relaying him Senator Sampson's feelings, that he wasn't going to change his mind, and certainly enough time had gone by that already convinced me that it wasn't going to change his mind, that I felt we should just go with AEG.

As discussed below, Speaker Silver corroborated the substance of the Governor's January 27, 2010 telephone call including his response to the Governor that he required additional time, two days, to consider the Governor's proposal.

In contrast to Governor Paterson's testimony, Senator Sampson admitted to having dinner with the Governor and Senator Adams, but claimed to not recall advocating for AEG at this meeting or that this meeting prompted a selection:

Question: Do you recall attending a dinner, and I believe the date is January the 8th, 2010, in Manhattan, with Senator Adams and the Governor?

Sampson: What was that?

Question: I believe it's January the 8th.

Sampson: Where was it at?

Question: It was in Manhattan. I'm not sure what restaurant it was. Do you recall having a dinner with the Governor during January?

Sampson: Yes, I do.

Question: Was Senator Adams in attendance?

Sampson: Yes, yes. Now it brings it back.

Question: And did you discuss the Aqueduct racino project?

Sampson: We discussed a whole host of issues. We could have discussed that.

Question: Did you or Senator Adams or both of you encourage the Governor to approach Speaker Silver about coming to a conclusion in this matter?

Sampson: Not that I recall. Not that I recall.

Question: Did the Governor indicate that either you or Senator Adams should approach the Speaker relative to the conclusion of this matter?

Sampson: Not that I recall.

Question: Do you remember what you discussed with respect to Aqueduct?

Sampson: Not that I recall.

Question: Did you indicate to him that you had a preference for one of the bidders at that point?

Sampson: Not that I recall.

Senator Adams, the third purported guest at this dinner, provided yet another recollection of an "early 2010" dinner with Governor Paterson, and contradicted both the Governor's and Senator Sampson's accounts:

> One night on 57th Street the Governor was at a restaurant when I stopped by and Senator Sampson was there and I believe someone was there from AEG. I just said hello to them and I moved on. So I don't know if that's considered a meeting . . . They were chatting. I don't know if people were meeting there, if they met there, but I believe they identified the person. They stated they were with AEG, and I said hello and kept on going . . .I went to another part of the restaurant.

For his part, although not reportedly present at any such dinner, Speaker Silver confirmed that while he could not recall Senator Adams ever contacting him directly in support of AEG, Senator Sampson had informed him that Senators Adams and Addabbo supported AEG. Speaker Silver further related that given the Senate's expressed uniform support for AEG in contrast with Assemblywoman Audrey Pheffer's preference for SL Green which was unopposed by Assembly Racing and Wagering Committee Chair J. Gary Pretlow, Silver had suggested to Senator Sampson that the relevant members of both the Assembly and Senate meet to try to reach a consensus. However, such a meeting never materialized.

Although it is impossible to conclusively determine exactly what transpired at this dinner meeting, Adams's version of events strains credulity as it would require a belief in a happenstance intrusion on a dinner between the Governor and Senator Sampson which both testified he fully attended.[120] By contrast, the Governor's account is consistent with Speaker Silver's testimony

that Sampson had indicated that the Senate was "for AEG on many occasions"; the Governor's statements to Kiernan; the substantial evidence amassed by the Inspector General of Senators Sampson's and Adams's long-held support of AEG, including Adams's admission of supporting AEG since the withdrawal of Wynn; and Governor Paterson's assertion that Sampson seemed "irrevocably wed to AEG" from at least September, 2009. Based upon the evidence, it is reasonable to conclude that were the Governor and Senators Sampson and Adams to meet to discuss Aqueduct on January 8, 2009, Adams and Sampson would have, at a minimum, expressed support for AEG.

The Inspector General discovered no evidence corroborating Adams's claim that an AEG representative was present at this dinner.

B. Senator Sampson: AEG Chosen as the "Consolation Prize" Jointly by Himself and Speaker Silver

Senator Sampson provided a version of events diametrically opposed to the Governor's account. When asked how a decision was reached between himself, the Speaker, and the Governor, Senator Sampson eliminated the Governor and replied that "the decision was made between myself and the Speaker." Sampson proceeded to testify that he and Speaker Silver collaboratively agreed that the only viable selection was AEG:

> I was in the Speaker's office, and we were talking about some other stuff. You know, we usually have a meeting. We were talking about it. And then, you know, I think we were talking about Aqueduct. And we had three left. We all agreed that we couldn't do Delaware North, because we were concerned about being embarrassed. So it was S&L Green or AEG. We knew we already had booked the money for the deficit reduction so, you know, not only we needed the money, but we wanted to make sure that we were not embarrassed. So the way AEG came about, was we

[120] Senator Sampson's claimed lack of any memory of even the most general nature of this dinner conversation is also suspect.

> found out when we were talking – and I remember the Speaker made a phone call that S&L Green hired Bill Lynch, who is the consultant for the Governor. The Speaker made a phone call to confirm that, and it was confirmed. And it was at that point in time that there was a decision – I said, you know, we can't do S&L Green. That's a direct conflict. The Governor's consultant is hired by S&L Green. You want to be embarrassed? We'll be embarrassed. And that's how we came about going with AEG. [sic]

Sampson elaborated:

> And I just want to reiterate the way it came down to AEG was, it was the consolation prize. You know, we had four. It was Wynn, Delaware North, S&L Green and AEG. It all turned when S&L hired Bill Lynch as their lobbyist. That's when everything turned, because Wynn dropped out. We were left with three: AEG, S&L Green and Delaware North. We all agreed we couldn't do Delaware North. Any of us could have gone with S&L Green or AEG. What turned it was when Bill Lynch was hired by S&L Green. [sic]

Speaker Silver entirely discounted Sampson's account. Although Silver "knew [Sampson] was for AEG " and Sampson had expressed that "his conference and his members were all for AEG," Speaker Silver denied that he and Senator Sampson rendered the ultimate determination in AEG's favor or that Bill Lynch's involvement with SL Green was the decisive factor. Specifically, in regard to Lynch's involvement, Silver testified that he and Sampson "may have discussed it, but I don't think that that was in the decision making process." In regard to placing a telephone call to confirm Lynch's involvement, Silver related:

> I don't recall making a phone call, but I could have. I could have asked Louann [Ciccone] – called Louann and asked her. You know, it's possible. I just don't have independent recollection now that I did such a thing. I do know that the issue with Bill Lynch came up eventually, but I don't think I made a determination that, therefore, we can't go with SL Green.

In fact, in regard to a meeting with Senator Sampson in which these issues were discussed, Silver testified, "I don't have a recollection of sitting with him and making a decision at that point at all."

The Governor testified that Sampson did mention at one of the several leaders' meetings the issue that SL Green's lobbyist, Bill Lynch, was simultaneously a political advisor to the Governor. The Governor later, via counsel, advised the Inspector General by letter that: "Although the issue may have been discussed, the Governor does not believe that the Senate leadership viewed the Governor's relationship with Bill Lynch as an impediment to the selection of SL Green for the Aqueduct project. Prior to AEG's selection, the Governor does not recall being told that his relationship with Bill Lynch was a factor in the Senate's support for AEG."

C. Speaker Silver: Acceptance of AEG Conditional

Speaker Silver confirmed that Governor Paterson telephoned him on January 27, 2010, to proclaim his choice of AEG. Further corroborating the Governor's testimony, Silver averred that as the basis for his selection, the Governor related to him that, "the Senate's there and that's where he wanted to go." Both the Speaker and the Governor consistently testified that Speaker Silver then requested 48 hours to consider the Governor's proposal.

During that period, Speaker Silver discussed the Governor's choice of AEG with Assembly staffer Ciccone and others and the consensus was reached to accede to the Governor's selection while placing conditions on it. Ciccone reported, "I just wanted to make sure that we were making the right choice based on the best person for the project. And on paper, [AEG was] not the right choice." Therefore, Ciccone related that "the

conversation was, we could say yes, we could say no, or we could make sure that this entity is basically just as good as all the others, so we put the standards in." The Speaker informed the Governor of his conditions by telephone on January 29, 2010, and then Ciccone forwarded them via e-mail to Kiernan at 2:51 p.m. that same day. The Speaker imposed the following four conditions on the selection of AEG:

- Increase up-front licensing fee to from at least $200M to $300M.
- Required use of existing MGM footprint for "timely" SEQRA [environmental] approval. Any future development would be subject to normal SEQRA process. No waiver requests or requests for expedited approval.
- All investors at any level, partners, directors, managers, contract holders, principal employees, etc., must obtain a license from Lottery. Prohibit anyone who has been denied a gaming license in any jurisdiction in the world or convicted within the past 15 years of a felony or any other crime or offense involving fraud, larceny of any sort, theft, misappropriation or conversion of funds, or tax evasion from obtaining a license.
- All or any changes in the proposal related to partners, investors at any level, management, development or principal employees, contracts, etc., must be vetted by Lottery and approved by the three leaders prior to the closing of the approval process.

Senator Sampson attested to not knowing of the conditions until after the selection and questioned their propriety:

Question: Do you recall when you got official notification that the Governor, indeed, was going to announce the selection?

Sampson: I think when the Governor made the announcement.

Question: You had no pre-warning, so to speak?

Sampson: No.

Question: It just happened?

Sampson: From the Governor? No pre-warning. It just happened.

Question: Did Speaker Silver indicate that he was willing to go along with AEG, but he had certain conditions?

Sampson: Yes, he did. He did not indicate the conditions to me. I found out about the conditions after he issued the letter, because if I had known about it before, we wouldn't be in this predicament.

Question: And what do you mean by that?

Sampson: To me, I think with respect to those conditions we should have conveyed it, you know, to the parties, so they knew they had to agree with these conditions.

Question: Meaning AEG?

Sampson: AEG, whoever it was. And this is what I was talking about. There was no standards. There was no procedure, and there was no structure in this whole process. So at any point in time I could have came up with my own standards that they had to be considered before I made a selection. [sic]

Question: Did you concur with the Speaker on these conditions?

Sampson: After the fact.

Question: In other words, after the selection had been announced?

Sampson: No. After he issued his conditions.

Question: When did he issue them?

Sampson: Some time thereafter.

Question: After the selection or before the selection?

Sampson: After the selection.

Question: After the selection was made?

Sampson: I think so.

Question: He said, "there are conditions that I have"?

Sampson: Yes; I think so.

Governor Paterson testified that he informed Sampson of the conditions and that Sampson assented to them:

> The protocols were transmitted to us. We looked at them. I believe that I notified Senator Sampson about this change. He agreed to it. And the protocols were now coming after it was known who the winning bidder was, but everyone else agreed, and, again, this gets this done.

Speaker Silver revealed that he was fully aware that the imposition of these conditions was tantamount to a denial of the Governor's request that he accept AEG and acquiesce to the Senate. The Inspector General inquired of Speaker Silver, given his knowledge of AEG's lower upfront fee, licensing problems, and inevitable environmental review delays, if he considered simply withholding his support of AEG rather than imposing conditions he knew or should have known it could not meet. Silver responded: "I considered it, and then I determined that putting those conditions on it would probably have the same effect and would be better in terms of being consistent with what I had been saying all along," that he had "no horse in this race." The Inspector General further pressed Speaker Silver on his intent:

> **Question**: But you said in your testimony that you thought AEG would not be able to meet these terms (the conditions) which was sort of a yes/no answer?
>
> **Silver**: Correct.

Indeed, Lottery Director Medenica immediately recognized Speaker Silver's conditions as a "poison pill" which were "unattainable and designed to frag the process." Medenica further averred that Speaker Silver's tactics placed Lottery in an untenable position as "we felt we were being thrown under the bus and were very leery about that."

On their face, Silver's four conditions directly undermine Sampson's version of events. Had Silver chosen AEG in conjunction with Sampson, he would not have required 48 hours to consider the Governor's proposal only to furnish a conditioned acquiescence undermining the very choice he had made. As Speaker Silver testified, "And that's why I would be surprised if some time before that I sat with Senator Sampson and said, 'Oh, okay, let's go with AEG. I don't believe I ever had that conversation." Similarly, Governor Paterson related that he inquired of Speaker Silver on several occasions as to whether Senator Sampson had broached the subject of supporting AEG for the VLT franchise, but, according to Governor Paterson, Silver repeatedly contemporaneously replied that he had not.

While the imposition of these conditions, in lieu of an outright rejection of AEG, might have been more consistent with the Speaker's consistently stated neutral position, this stratagem delayed the disqualification of AEG and caused Lottery, the Governor's Office, and numerous members of AEG to endeavor futilely to determine whether the conditions could somehow be fulfilled, and cost New York State even more millions of dollars. While the Speaker and his staff, specifically Ciccone, should be lauded for recognizing AEG's deficiencies and communicating them to the Speaker, and the Speaker can be credited for refusing to agree with the selection as it stood, the more responsible act, as representatives of the people of New York State statutorily mandated to choose a vendor, would have been to simply say no, or even actively rebut the Senate's support of AEG with factual evidence of its deficiencies, and then select a more qualified vendor.

Indeed, Sampson's support of AEG rested on flawed conclusions, as revealed in Governor Paterson's testimony:

> He had problems with the other groups. He indicated AEG, he felt, had the best long-term value. He thought AEG had the best community relationships. He thought AEG conformed to the environmental quality review process. He thought AEG had the best diversity in their plan and seemed unequivocal about changing to anything else

As discussed above, in fact, AEG most likely had the least long-term value especially as it was financially less stable due to its reliance on debt acquisition and its dependence on the financial stability of its various component parts; offered the lowest upfront payment; possessed a troubling environmental review proposal in that its selection would have required a new review which would have delayed the project for at least a year; and it presented an MWBE plan that, at best, was indistinguishable from the other vendors and, more likely, was less vibrant than the other bidders.

Governor Paterson can also not escape responsibility for acquiescing to the Senate's choice of AEG. Indeed, as Silver had repeatedly agreed to follow the Governor so long as the choice was palatable (which ultimately he found AEG not to be), the Governor should have possessed at least some leverage in the negotiations with the Senate. Moreover, the Governor's own executive chamber staff and executive agency officials had analyzed the data and, like Ciccone, had determined and memorialized the flaws in AEG's proposal including the delay connected with the environmental review and AEG's suspect financial viability. To the extent that this information was not sufficiently relayed to the Governor, fault lay in his choice of advisors and the directionless manner in which he acted to make his selection.

Ultimately, no matter which, if any, of these accounts is substantially accurate and who carries the highest degree of responsibility for the selection, what is clear is that the three decision makers did not weigh the relative strengths of the competing vendors based upon objective criteria and then deliberate on a selection based upon these factors. Rather, the focus was on avoiding political risk and, particularly in the case of Senator Sampson, ensuring his choice was realized despite objective deficiencies in that bidder's proposal.

XIV. JANUARY 29, 2010 ANNOUNCEMENT OF SELECTION OF AEG

A. Selection Eve at the Havana Club

AEG lobbyist Carl Andrews arranged a get-together on January 28, 2010, the night before the selection was announced by the Governor, with the Reverend Al Sharpton and members of AEG at the Havana Club, a Manhattan cigar bar. In his testimony, Sharpton referred to Andrews as a long-term "supporter" and noted he had supported Andrews in his unsuccessful run for Congress. AEG principals Michael Wagman, Lawrence Roman, Andrew Frank and Larry Woolf, as well as Clairvest attorney Heather Crawford, were all in attendance.

Wagman related that the sole purpose of the meeting with Reverend Sharpton was because "it was understood that Al Sharpton was a notable figure and important in the community aspect of our bid." Notwithstanding, at this meeting, Andrews introduced Wagman and Roman to the Chief Executive Officer of an advertising agency that Sharpton apparently "had an interest in, providing advertising, as they had experience providing advertising for the MGM property in Detroit, Michigan." Roman believed "they were friends of Sharpton's. I think I was introduced in that way. They were associates, I don't know, but they were somehow related to Sharpton." Wagman reported that Andrews introduced him to Sharpton, and then Sharpton left and Andrews brought over the members of the advertising agency. Wagman believed that, although "Carl Andrews came and went from the table [and] Reverend Sharpton was never at the table" while he spoke to the advertising executive, the course of events was not "happenstance." Wagman attested:

Question: Was there any connection with Reverend Sharpton in connection with the advertising agency?

Wagman: Again, I believe there was, and at the Havana Club that night, when I was introduced to Al Sharpton, and my entire conversation began with "hello," and ended with "nice to meet you," I did sit down with – I don't recall his name, but I did sit down with the CEO of that agency and we talked generally, and I remember specifically not making promises and just understanding the work he had done and how he understands the casino industry and it was nice to meet you . . . talking to you about potentially you pitching for one part of the business in the future, but I don't make those decision, that's usually made by the operator.

Roman similarly noted that the company wanted to acquire some business and was told they could be "helpful" if AEG were awarded the VLT franchise; however, Roman denied that any suggestion was made that were this company to receive work should AEG be awarded the VLT franchise, that such would garner support from Sharpton. As discussed earlier, the Inspector General found no evidence that the Sharpton advocated or otherwise actively assisted AEG.

Interestingly, on this same evening at the Havana Club, Andrews informed Wagman that he had donated to a "charity that was affiliated with Al Sharpton" and asked if AEG would reimburse him. Wagman related that he was noncommittal at the time and attested to never having done so.

Notably, despite testimony from AEG members that their discussions were merely speculative, e-mails between Andrews and Roman during the day of January 28 discussing Roman's attendance at the Havana Club suggest that AEG had foreknowledge of the award to AEG by Andrews:

Roman: Tonight I just come at 930 [sic] and ask for Reverend Sharpton? Will you be there?

Andrews: Yes.

Roman: Since ur [sic] saying yes a lot, are we going to win this?

Andrews: Yes.

While this e-mail could be interpreted as mere confidence in its bid, on that same day, Frank sent an e-mail, subject "Shelley," to fellow AEG members Wagman, Levine, Woolf, and Roman detailing the specifics of the announcement: "Still holding up . . . wanted 36 hours because of apparent NYT article coming out on Gov . . . and wants to see where chips fall. Gov said no, but . . . then Shelley went to Buffalo for a meeting and back later . . . our guys have calls in to various contacts trying to push the Gov to put out release . . ." [Ellipses in original]. Wagman testified that Roman had informed him at the Havana Club that he had heard the award would be announced the following day. Roman, however, in his testimony, asserted that he did not recall hearing that a decision would be made the next day. Regardless, Wagman claimed that he did not place much importance on this revelation as there had been "indications that an announcement was forthcoming literally on a weekly basis between August and February."

B. Executive Chamber's Knowledge of the Selection of AEG

The Inspector General inquired of Counsel to the Governor Kiernan and Secretary to the Governor Schwartz as to the timing of their knowledge of the selection of AEG in order to determine their involvement in the ultimate decision and their reaction to Speaker Silver's conditions.

Kiernan related that he learned "that the selection had at least been tentatively agreed to" approximately one to two hours before the Governor's Office issued a press release on January 29, 2010. He also reported that he was informed of the Speaker's

conditions and instructed to contact Ciccone, who then forwarded the conditions to him. A January 29, 2010 e-mail, sent at 2:51 p.m., from Ciccone to Kiernan delineated the four conditions. Kiernan recounted that his examination of the Speaker's conditions prompted conversations with various people in which he noted that the "conditions would be unattainable by AEG."

Schwartz attested to a lack of memory as to any foreknowledge of the announcement of AEG's selection:

> **Question:** Prior to the announcement that AEG was to be awarded the franchise on January 29, 2010, were you given advanced notice that this selection had been made?
>
> **Schwartz**: I don't recall.
>
> **Question:** Do you remember the announcement itself?
>
> **Schwartz:** An announcement was made. I recall that.
>
> **Question:** Prior to that announcement being made you had no knowledge that it was going to occur?
>
> **Schwartz**: I don't recall knowing in advance that the announcement was going to be made and what the Governor's decision was.
>
> **Question:** So the first time that you understood that AEG was to be selected as the franchise awardee was when the announcement was made?
>
> **Schwartz:** I don't recall. I might have been made aware the day before or the day of.

Internal executive chamber e-mails dated January 27, 2010, the date the Governor called the Speaker to ask him to support AEG, demonstrate that Schwartz actually was provided with advance notice of the selection. In fact, not only did he receive e-mails, but Schwartz engaged in a colloquy with members of the Governor's Communications Office regarding the press release announcing the selection of AEG in that the original

draft included only the title "Senate Conference Leader," and Schwartz instructed Marissa Shorenstein, the Governor's press secretary, that Sampson's name should be inserted. In addition, when Shorenstein inquired whether the release would be issued on January 27, 2010, Schwartz responded, "Just get ready so it can go out in a moment's notice. GDAP will give green light, but will want to go out immediately once he does." The e-mail exchanges also reveal that Kiernan was provided a copy of the release.

Schwartz also denied knowledge of the Speaker's four conditions and claimed only of learning of them from the press:

> **Question**: Were you aware prior to the announcement that Speaker Silver had placed some conditions on his tentative approval of AEG?
>
> **Schwartz:** I wasn't aware of those conditions until I read about them in the press.
>
> **Question:** Do you know if anyone else in the administration was aware of the speaker's conditions?
>
> **Schwartz:** I am unaware.

That Schwartz, the Secretary to the Governor, was purportedly completely unaware of the imposition of these conditions is emblematic of either the lack of communication that plagued this process or Schwartz's efforts to distance himself from the decision.

Notably, although Kiernan and Schwartz were unclear regarding their involvement in and knowledge of the ultimate selection of AEG, the representative from the Governor's Office who called to inform Wagman of the award was David Johnson, whose official duties primarily included chauffeuring the Governor. In fact, Johnson called not only to inform Wagman of the award but also, surprisingly, to note the particulars of the Speaker's four conditions. Wagman testified, "[W]hen it was awarded,

[David Johnson] called on behalf of the Governor's Office to explain to us that the three leaders had selected AEG and to articulate the conditions that the Speaker was coming out with." As Johnson invoked his Fifth Amendment right against self-incrimination, it could not be determined who, if anyone, asked him to do so.

C. Responses to the Selection of AEG

The prevalent reaction to the selection of AEG by those involved in the process in all applicable branches of government was shock and surprise. Lottery Director Medenica testified that he was not informed of the decision prior to AEG's selection, and when asked his response to learning of the choice of AEG, testified that he was "absolutely shocked" and, as to his reaction, "It's unprintable. I couldn't believe it." Lottery Deputy Director and Counsel Murray echoed Medenica that he was "shocked" as the selection was "incomprehensible": "We have no idea how the Governor and the Legislature could settle on AEG. We thought, we, the Lottery, thought they were nowhere near the top, certainly not in the top three, probably not in the top four." Assistant Counsel to the Governor Rose and Budget Director Megna further testified as to being "surprised" by the award. Kiernan similarly testified: "Well, I was very happy we had made a selection, but I was surprised it ended up being AEG."

In the Senate, Counsel to the Racing and Wagering Committee Bradley Fischer testified that, "I still had my – my reservations were the same. I thought personally, I felt they had a lot of people involved in their financing which made it a little bit tricky. And the Floyd Flake/Malcolm Smith connection was still there. I said this may be trouble for us. Lo and behold." Similarly, Assistant Counsel to the Majority Christopher Higgins testified, when asked whether AEG merited the award, that he felt some remorse:

> The factors that I would have considered in this are clearly different than the factors that the leadership of the Senate were interested in. You know, it's – I feel like I didn't do my job in flagging all those factors, quite frankly. I didn't do a thorough enough job putting all this information together for them. So, in part, I feel like I should have done a better job with this, but, you know, I'm not an elected official. It's not my role. The statute doesn't say it's my role. My job was to give them this information, and assist them in any way on how they could arrive at a decision.

In the Assembly, Ciccone testified that "[t]he concern was that – I can't say that I was concerned. I just wanted to make sure that we were making the right choice based on the best person for the project. And on paper, they were not the right choice." More emphatically, Assemblyman Pretlow testified that he "was kind of shocked when AEG was picked":

> Because I didn't think they had the best plan at all for the state. They offered the least amount of money. I mean they were on the back half of everything, and they subsequently changed their dollar amount. But you know if at the time we were looking at it, we were trying to increase the revenues of the state or the dollars in the state, this was the organization that offered the least amount of money. And that just didn't sit right with me, especially in light of the first time we picked them solely because they offered the most money. Meaning Delaware North. And now to pick someone on the lower half, something wasn't right.

D. Senators Sampson, Smith and Adams and Several Assembly Members Attend Victory Celebration at Carl Andrews's House

On February 2, 2010, four days after AEG was selected as VLT operator for the multi-billion dollar generating Aqueduct racino and before a completed memorandum of understanding had even been submitted for approval to the Attorney General or State Comptroller, a number of AEG principals and lobbyists gathered for a celebration at AEG lobbyist Carl Andrews's home. While AEG member Jeffrey Levine was reticent to categorize the event as a "celebration," instead claiming it was merely a "dinner because

we had meetings the following day," AEG lobbyist Georgio DeRosa unambiguously described the event as a "victory" celebration. Further confirming the celebratory purpose of the affair, a March 3, 2010 invoice for $1,562,93 submitted by Andrews to AEG Chairman Mays for reimbursement for the dinner was expressly labeled "For: Victory Celebration."

While such a "victory" party is understandable upon a group winning such a lucrative award, what is remarkable is that included in this celebration were several key legislative officials who participated in the choice of AEG in this yet to be consummated deal. Various witnesses confirmed for the Inspector General that this victory party was attended by key decision makers Senators Sampson, Adams, and Smith. Other witnesses also reported that Senator Ruth Hassel-Thompson and Assemblymen Jeffrion Aubrey, J. Gary Pretlow, and Keith Wright were in attendance

Particularly disturbing is the presence of Senators Adams and Sampson, who had maneuvered the Governor to support AEG, and Smith, who, despite his purported recusal apparently continued to assist AEG. It reflects, at a minimum, exceedingly poor judgment for these senators who were actively involved in the selection of AEG to cast aside any pretense of preserving the appearance of objectivity and celebrate with AEG principals and lobbyists at the home of an AEG lobbyist paid to influence them in regard to a contract which had yet to be finalized.

E. Governor Paterson Meets with AEG Principal The Reverend Floyd Flake

On Sunday, January 24, 2010, a *New York Times* article appeared under the headline "Still Preparing, Cuomo Courts Black Support." The article discussed Attorney General Andrew Cuomo's courting of black civic leaders and clergy members in order to

forestall criticism of his intended challenge to New York's first African-American governor. Among those who met with Cuomo to discuss his potential candidacy was the Reverend Floyd H. Flake, one of New York's most influential African-American pastors. According to the article, Reverend Flake said of Cuomo: "He'd be a great governor . . . I'm not locked into the incumbent," adding that he believed that that party's candidate was "probably going to be Andrew Cuomo, and if he's out there, I will probably be with him." Reverend Flake confirmed to the Inspector General the accuracy of the statement ascribed to him in the article.

According to Governor Paterson, on the following Saturday, January 30 (the day after the announcement that AEG was to be awarded the VLT license), he held a campaign meeting at a church in Harlem with approximately 30 supporters, consisting of elected officials, clergy members and other civic leaders. During the meeting, there was much discussion about the hesitancy of would-be Paterson supporters occasioned by the perceived equivocation about whether the Governor would run for re-election. Governor Paterson was advised to clearly declare that he was going to be a candidate for Governor, since doubt about his candidacy was inhibiting campaign donations. At the meeting, or shortly thereafter, there was also discussion of the need for the Governor to talk to leaders around the state. Among those mentioned was Reverend Flake.

The following day, on Sunday morning, the Governor began his "outreach" to Reverend Flake, whom he knew was affiliated with AEG. He did so by contacting political consultant Bill Lynch, as Lynch had Flake's telephone number. During their conversation, Lynch either volunteered to contact Reverend Flake, or was asked to do so.

Later that day, Lynch contacted the Governor to advise him of Flake's availability for a meeting the following morning.

The meeting took place at the Governor's Harlem office on the morning of Monday, February 1 and lasted between 30 and 45 minutes. According to the Governor, he sought to make his candidacy clear to Reverend Flake and also to take the opportunity to talk to him about charter schools, but, according to Reverend Flake, the sole topic discussed was the Governor's re-election. In response to the Governor's inquiry, Reverend Flake advised him that he was not certain that the African-American community would support him, because there seemed to be a feeling in the community that he could not prevail. They also discussed the Governor's dealings with the Legislature and Reverend Flake advised the Governor that if he could not resolve his differences with the Senate and the Assembly, then he would have no record on which to run.

The Governor testified that he had no recollection of their having discussed an endorsement, although they did discuss a newspaper article that appeared that morning in the *New York Post* which associated the AEG award with the Governor having a political motive concerning Reverend Flake. He stated that he mentioned to the Reverend during the meeting that the same article could have been written with respect to any of the groups receiving the award, as he knew individuals associated with other bidders as well. Governor Paterson denied that he had assented to the selection of AEG because of Reverend Flake's participation in the group.

Although newspapers repeatedly mentioned Reverend Flake's name when reporting on AEG, evidence demonstrates that Reverend Flake was a minor actor in the

consortium who had very little knowledge of the process and contributed little to AEG. Succinctly, according to AEG lobbyist Giorgio DeRosa, Reverend Flake's "view was: You got my name. That's it." As attested to by DeRosa:

> Floyd Flake, who was never on a phone call with me, I never attended a meeting with, he was a guy who you wanted in the deal because of his past experience in that part of Queens. He's a developer. He's a serious guy. People like him. They respect him. But Floyd wasn't out there, you know, calling people and attending meetings and being, you know, the real advocate in this thing. It was a sexy story to sell newspapers. It was very frustrating because the guy had nothing to do with it.

Indeed, the Inspector General determined that Reverend Flake had one conversation with Senator Malcolm Smith in the summer of 2009 during which Senator Smith allegedly informed the Reverend that he might be part of the Aqueduct decision and that, therefore, they could not have any conversations about it. Reverend Flake testified that he had no conversations related to AEG and/or Aqueduct with Senators Sampson, Adams or Addabbo, Congressman Gregory Meeks,[121] Assemblywoman Audrey Pheffer,[122] Speaker Silver, or Governor Paterson. Reverend Flake attended very few meetings of AEG principals and lobbyists and few presentations.

The meeting sought by Governor Paterson with Reverend Flake two days after the announcement of the VLT award to AEG, was, at a minimum, in the words of former Press Secretary to the Governor Peter Kauffmann, "unfortunate timing." Although the Inspector General's investigation adduced no nexus between the award to AEG and the

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[121] In his testimony to the Inspector General, Congressman Meeks seemed to indicate that his communication with Flake was limited to Flake's involvement with home development and community, and affirmed that Flake never asked him to support AEG.

[122] Pheffer attested to seeing Reverend Flake because they "represent the same area." She related one conversation some time after the submission of the MOU during which Flake expressed his frustration and regretted having gotten involved in the process.

Governor's attempt to garner the support of Reverend Flake, meeting with a principal of an entity in the process of receiving a lucrative bid at your behest in order to court political support undermined the perceived integrity of the selection of AEG.

Following the January 29, 2010 award to AEG and the imposition of Speaker Silver's four conditions, as reported in the *New York Post* on March 9, 2010, Reverend Flake announced that he would no longer participate in AEG claiming it was a distraction from his community projects.[123]

[123] "Flake, Jay-Z drop out of AEG as gov threatens to kill Aqueduct deal," by Carl Camponile *New York Post*, dated March 9, 2010, available at http://www.nypost.com/p/blogs/knickerbocker/exclusive_in_reveral_paterson_threatens_tCbz58tXeaRINjnDi7avxO.

XV. GOVERNOR PATERSON DEFENDS AEG SELECTION

A. Speaker Silver Publicizes Conditions

On January 29, 2010, Governor Paterson issued a press release announcing that "he and Legislative Leaders have selected Aqueduct Entertainment Group (AEG) to operate the video lottery terminals at Aqueduct Racetrack."[124] Speaker Silver immediately responded by informing the press of the conditions he had imposed upon AEG's selection which were not mentioned in the Governor's statement.[125]

On February 3, 2010, Speaker Silver sent a letter to Governor Paterson (which he also publicly released) stating, "As you know, last week you called me to personally and strongly recommend the selection of Aqueduct Entertainment Group (AEG) for the video lottery terminal franchise at the Aqueduct Raceway. I agreed to support the selection of AEG contingent on four conditions to be expressed in a memorandum of understanding. You agreed to these conditions, which I then forwarded in writing to your Counsel on January 29, and released in a public statement." The Speaker proceed to express his concern regarding press reports indicating that his conditions were subject to "negotiation" with AEG and declared, "Let me reiterate – in case the event of our conversation and my letter were not absolutely clear – the following four conditions are not negotiable." The Speaker then reiterated his four conditions.

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[124] *See* Statement of Governor David A. Paterson (1/29/10) available at http://www.state.ny.us/governor/press/press_01291002.html

[125] See Capitol, Confidential (1/29/10) "Governor has Big A pick, Silver has reservations."

A duel ensued in the press between the Governor and the Speaker with Governor Paterson stating that AEG was not his first choice and that he broke a "stalemate" or "deadlock" and, in response to the Speaker's letter, "I honestly don't know what the problem is . . . Why he would write me a letter on Wednesday about terms we all agreed to on Friday might be something that's in his head." On February 4, 2010, the Governor issued a press release noting that the VLT selection required unanimous consent and that:

> AEG has both the financial viability and ability to pay the required upfront licensing fee. AEG complied with every request made during the review process and addressed satisfactorily all matters related to licensability. AEG's compensation to the State, both in the short term and the long term put it near the top or at the top compared to other bidders. Further, AEG's gaming operator, Navegante, has a verifiable record for establishing successful gaming operations. AEG's plan fits well within the very diverse and middle class community that exists around Aqueduct and its approach to operations will attract local community members to the site in the largest numbers and create local jobs for people in the surrounding area. AEG's commitment to diversity and inclusion was also an important consideration in choosing it to operate at Aqueduct.

The next week, by letter dated February 11, 2010, Speaker Silver requested that the Inspector General commence an investigation of the process by which Lottery and other executive agencies analyzed the bidders for the Aqueduct Racetrack stating:

> Serious questions have been raised regarding the selection process for an operator of the video lottery terminal (VLT) facility at the Aqueduct Racetrack. Accordingly, I am respectfully requesting that the Office of the State Inspector General take the following actions:
>
> 1. Conduct a review of the process and procedures used by the NYS Division of the Lottery and other relevant state agencies involved in the evaluation of bids and in the making of recommendations for the selection of such operator, and determine which bidders were recommended pursuant to such process.
>
> 2. Determine whether the Division of the Lottery and relevant state agencies followed all applicable statutory provisions such as those governing the procurement of revenue contracts under the State Finance

Law and the procurement of a VLT operator and the development of real estate at Aqueduct in accordance with section 1612 of the Tax Law.[126]

3. Inquire how the Division of the Lottery will assure that the conditions I conveyed to the Governor on January 29, and restated in my February 3rd letter to him, are met.

B. The Governor Attempts to Stem Criticism in the Press

Notwithstanding, the Governor's frustration in bearing sole responsibility in the press for the selection of AEG when in fact AEG was supported by the Senate leadership, the Governor's post-award press release pronouncements that AEG "has both the financial viability and ability to pay the required upfront licensing fee," and "has complied with every request made during the review process and addressed satisfactorily all matters related to licensability," are contradicted by the facts.

Initially, at the time of this press statement Lottery was involved in a stringent licensing review based on the Speaker's conditions and its own ongoing concerns regarding Karl O'Farrell's continued involvement which would conclude when several AEG members were forced to withdraw and others were determined to have failed to file the required materials. More pointedly, the statements that "AEG has both the financial viability and ability to pay the required upfront licensing fee" and that "AEG's compensation to the State, both in the short term and the long term put it near the top or at the top compared to other bidders" are not only undermined by the evaluation conducted by the Governor's own executive agency staff including DOB but by internal executive chamber e-mails authored that day.

[126] As noted above, the Speaker could not identify any particular aspect of the State Finance Law which he believed to be applicable and, to the contrary, testified that the procurement rules were not intended to apply to the selection.

When reviewing a draft release on the morning of its issuance, Kiernan informed Kauffmann that although he agreed with the assertions regarding AEG's licensability, he declared that he would need to verify AEG's ranking and further noted that, "[i]n terms of funds bid it was high and the only question relates to its ability to perform because the money commitment requires financing and was not from its balance sheet." Upon reviewing the more finalized release approximately one hour prior to its publication, Kiernan suggested to Kauffmann to include the qualifier that AEG "represents that it has both "the financial viability and ability to pay." When Kauffmann objected to Kiernan's suggested qualification "because it makes it seem like we don't believe AEG," Kiernan responded, "I understand your discomfort. I just had a meeting with AEG's lobbyists and it doesn't have the money."

Based upon the facts in its possession including Kiernan's own longstanding reservations about AEG's financial viability compounded by his near-contemporaneous knowledge that AEG likely could not meet the Speaker's condition of an additional $100 million toward its upfront licensing fee, the Governor's Office's press release was misleading, at best. Indeed, within a month it would become evident that AEG could not finance the project.

Although Governor Paterson could be expected to defend the virtues of a choice he effectuated, the Governor's irritation at being solely subject to scrutiny for the choice of AEG manifested itself in even more strident discussions with the press. In an exchange of e-mails on February 16, 2010, Schwartz and Kauffmann discussed a conversation which had occurred between the Governor and a *New York Timse* reporter Danny Hakim on February 9, 2010. Kauffmann informed Schwartz:

> GDAP [Governor Paterson] to Hakim . . . they are discussing Aqueduct, GDAP defendining [sic] his position, questioning why Shelly would change the terms of the deal publicly and not in coordination with Sampson and the Governor. . . the Governor is telling Danny – off the record – what "really went on". . .

Kauffmann then quoted from a portion of the transcript of the Governor's conversation with the *Times*:

> GDAP: What he does is he releases it to the media. Why does he do that? There's a reason why he does that. The three of us changed the terms in October and we release it. Why does he release it by himself? Because he wants the people he wanted to know that he's being dragged into it. And he's been trying to sabotage it ever since. So then he re-releases it to me. Let me ask you something. This is just, not Shelly, not anyone, just you and me talking. Suppose the bid is $200 million. And I think I know whose getting the bid and they have $200 million but I don't think they have $300 million. So I write into it, it should be $300 million. And then the group that wins the bid can't pay it. And my group's sitting there and has $300 million. What is the legal term that describes that act? Collusion.
>
> So all I'm trying to say is that there's so much attention paid to what I did, like I selected them. Now we were off the record on that, right? Now, I'm just telling you. There just isn't enough attention being paid to what's really going on here.

Schwartz responded within three minutes to Kauffmann's e-mail: "Is this the only thing that is explosive or embarrassing." Kauffmann replied that there was "[n]othing "explosive" and that "[t]his one is the most 'troubling.' He outright accuses the assembly speaker of collusion. Tabs will jump on this." [127]

When the Inspector General questioned Governor Paterson about this conversation with Hakim, the Governor responded:

> It's a hypothetical. I'm referring to my frustration at all these news articles that have come up – what is the date of this, February 16th or

[127] In this e-mail, Kauffmann added that "[t]here are some embarrassing places where he lies." According to Kauffmann, the "lies" he refers to concern another area of the Governor's discussion with Hakim that day regarding the termination of an employee.

> whatever . . . all these news articles that come out right away, that the Governor picked AEG, that the Governor is in cahoots with AEG and that kind of thing. And I wasn't doing that. I was just trying to find a group that was suitable. I had a relationship with Bill Lynch from S&L [sic] Green. We could be sitting here talking about right now. I had a relationship with the equity partner in Delaware North, Cheryl McKissack. She is married to my personal doctor, Sam Daniel. We could be sitting here talking about. And I was frustrated that whatever decision was being made, it was being blamed on the Governor. In that three-week period nobody comes forward to say that they actually liked AEG, even though, as I have outlined here, that was actually the case. So when Danny Hakim continues to bother, I got frustrated and I went off the record. And my intent was to look at anything other than what I did. So I offer him this supposition. Suppose somebody actually wants to advocate for a group but doesn't want to do it out front? So they wait until somebody wins. And if it's not the one they wanted, they find a way to torpedo. I don't know it to be the case, but I did mention earlier in this testimony that the Speaker knew the winning bidder at the time he came out with the new protocols. If we needed new protocols, why didn't we come up with them sooner? Why did we bring them out after there was a winner? It was a question, I raised it with Sampson that day, and it didn't seem to bother him. So we went with it. And it really didn't bother me as long as it just got done. But another question was why he sent the protocols to the media. So it was clear that he wrote them. Whereas he had written the ones in October and we all sent them out jointly so nobody knows who wrote them. Which is the standard way that leaders operate there. In other words, I saw that as being in variance with the standard. So I was just saying that if you did some research and looked, there were a lot of ways that different people could be implicated. Not that anybody did anything wrong, but you could look at it in a different way, based on some facts that was there. I was trying to get Danny Hakim and the New York Times off of my back, because I was an advocate for whoever could close the deal between the three remaining groups that were eligible. And I became frustrated that I'm now being characterized in a way that I think is totally unfair to me. Because never in the process does it reflect that I have a preference for AEG. Because I actually don't. I don't have anything against them, but they were the group that seemed to be eligible to close the bid.

When asked if his statement about possible "collusion" was accurate, the Governor replied: "I wouldn't say it's inaccurate. I would say that in the beginning of the statement, which seems to be left out, is that I offer him this kind of supposition . . . I'm not implicating the Speaker, I'm just saying let's suppose that that was the case. You

could make a case that there's something very unusual about bringing in new protocols after the bid has been finalized. And you could make a case that there was something a little different about sending the press release to the media rather than releasing it jointly with the two other leaders. That was all."

Unsubstantiated accusations of collusion by the Speaker and other comments by the Governor aside, his remarks only serve to highlight the standardless and highly politicized nature of the selection; a process the Governor or the legislative leaders were free to impose standards upon at any time, as evidenced by the 2010 process. Moreover, at a minimum, this conversation demonstrates that the administration swiftly recognized that the Speaker's conditions effectively negated the award to AEG; yet allowed the process to continue for another month costing the State significant lost revenue.

C. Governor Paterson's Recusal

Governor Paterson retained private legal counsel to address this and other investigations into his conduct while in office. Thirty-five days after the selection of AEG as the entity to operate Aqueduct VLT facility, Governor Paterson sent a letter to Speaker Silver and Senate President Smith stating, "On the advice of counsel, I hereby recuse myself from any discussions and negotiations with Aqueduct Entertainment Group (AEG). I delegate responsibility for discussions and negotiations with AEG to Secretary to the Governor Larry Schwartz and Counsel to the Governor Peter Kiernan." A copy of the letter was sent to Senator Sampson.

Kiernan recalled clearly this unique gubernatorial event testifying that he spoke to Schwartz several times on the topic. Schwartz, incredibly, testified when asked if the Governor recused himself from the process, "He might have, I don't recall." When

confronted with the Governor's letter quoted above, Schwartz testified, "Yes, I recall this. I don't recall the reason why he recused himself, but I believe that shortly after he recused himself and delegated his authority to Peter Kiernan or myself, we rejected AEG's bid, I believe." Schwartz's testimony occurred only four months after Paterson's recusal letter.

Notably, in stark contrast to Senator Smith's purported recusal, the Governor did so in writing and sent it to all affected parties.

XVI. THE DESELECTION OF AEG

On January 29, 2010, after the announcement of AEG's selection and the imposition of Speaker Silver's four conditions, AEG principals, lobbyists and attorneys scurried to satisfy these prerequisites toward finalizing the award. As noted earlier, Silver had no genuine expectation that AEG could in fact do so; nevertheless, Governor's Counsel's Office, Lottery, OGS, and AEG members continued to work to accomplish the improbable. An analysis of the parties' futile efforts to satisfy the Speaker's four conditions leading to AEG's ultimate deselection by Lottery on March 9, 2010, substantiates not only Silver's presumption but also the fact that AEG should never have been chosen in the first instance.

A. Fulfillment of Speaker Silver's Four Conditions

1. Increase Upfront Licensing Fee To From At Least $200M To $300M

Governor's Counsel Kiernan attested to his immediate skepticism that AEG, the vendor which had required significant debt financing, could garner an additional $100 million to add to its promised upfront licensing fee. Indeed, as noted above, immediately following the award, Kiernan met with AEG lobbyists and reported to Communications Director Kauffmann, "I just had a meeting with AEG's lobbyists and it doesn't have the money." And, in fact, Lottery Director Medenica reported in a March 9, 2010 letter to Schwartz and Kiernan recommending AEG's deselection, that as of that date, AEG had failed to present "any detailed evidence of its ability to pay $300 million to the State no later than March 31, 2010." Kiernan recalled the series of events culminating in Lottery's March 9, 2010 letter, including negotiations in meetings with representatives of

AEG over the company's payment of $300 million. As he testified to the Inspector General, ultimately,

> We had decided to give AEG a deadline to come up with the money or we were going to – or to finish – I think it was to – I think Lottery told us there were some – because of the drill down that Silver's conditions required, that Lottery was requiring additional applications, and that applications had not been received. I had also concluded on my own that they weren't going to meet the financial requirements, and so [Secretary to the Governor] Larry [Schwartz] and I had agreed to give them a drop-dead date, so that required checking with Lottery.

AEG's inability to readily produce the upfront fee is telling. Indeed, although Senators Sampson and Adams, Governor Paterson, and Counsel Kiernan all stated that Delaware North was eliminated from real consideration because of its failure to meet the upfront fee promised in the previous round, the Senate championed and the Governor acquiesced in the selection of a conglomerate with the most questionable cash on hand and the need for significant debt financing.

2. Required Use Of Existing MGM Footprint For "Timely" SEQRA Approval

As noted earlier, OGS had reported at a September 21, 2009 executive/legislative staff meeting that AEG, because its submitted plans included a hotel and expanded number of VLT machines, would require an entirely new environmental review prior to beginning construction thereby delaying commencement of the project for at least one year. Despite OGS's unequivocal report, which was contemporaneously memorialized in Ciccone's memorandum to Speaker Silver and likely formed the basis of this condition, upon learning of the Speaker's condition, Counsel to the Governor Kiernan contacted OGS to determine whether AEG's plans conformed to the previously approved environmental review. OGS officials informed the Inspector General that they were a

"little surprised by the question" because OGS "thought we had made it clear that from our vantage point [AEG's plan] was outside the footprint but perhaps there were more subsequent drawings that we were unaware of." After inquiring of Rose, OGS learned that no other plans had been submitted by AEG.

In fact, not only had no additional conforming plans been submitted by AEG, but OGS officials testified that, after the imposition of Speaker Silver's condition, AEG members requisitioned a meeting with OGS where, rather than discussing the conformity of its plans to the previously approved environmental review, AEG requested OGS's assistance in re-fashioning its plans to conform with the previously approved environmental review. OGS officials rebuffed AEG's efforts to have a state agency assist in modifying its plans and admonished AEG that it was the consortium's responsibility to design plans with a negative environmental impact and that OGS had the duty to render a decision regarding actual submitted plans. No new plans were ever submitted by AEG.

The executive chamber's surprise to learn that AEG's plans would require at least a year's delay as they required a new environmental impact review further reveals that lack of communication and directionless manner of the selection process in the executive branch. As reflected in Ciccone's memorandum and OGS's notes of the meeting, OGS clearly informed legislative and executive staff early in the process that AEG's plans exceeded the previously approved footprint and would necessarily engender delay; yet, while Speaker Silver was aware of this substantial hurdle, the Governor was not made aware of this finding by his own executive agency. Additionally, although Senate staff attended this same meeting, Senator Adams testified that one of the supposed reasons he favored AEG was its speed to market while, in reality, it was always known and readily

available to him that AEG's plans required a new environmental review which would engender at least a year's delay. AEG's inability to produce plans conforming with the previously approved review and beseeching of OGS for assistance in remedying its deficiencies not only reveals a sense of entitlement but a lack of expertise in a critical arena.

3. All investors at any level, partners, directors, managers, contract holders, principal employees, etc., must obtain a license from Lottery. Prohibit anyone who has been denied a gaming license in any jurisdiction in the world or convicted within the past 15 years of a felony or any other crime or offense involving fraud, larceny of any sort, theft, misappropriation or conversion of funds, or tax evasion from obtaining a license; and,

4. All or any changes in the proposal related to partners, investors at any level, management, development or principal employees, contracts, etc., must be vetted by Lottery and approved by the three leaders prior to the closing of the approval process.

Initially, it is clear that the part of the condition proscribing the issuance of a license to "anyone who has been denied a gaming license in any jurisdiction in the world" was specifically addressing Ciccone's and Speaker Silver's concern that, regardless of AEG's assurances to the contrary, O'Farrell was still involved with AEG. In addition, the exclusion of "anyone convicted within the past 15 years of a felony" was specifically directed at Darryl Greene and Shawn Carter, more commonly known as Jay-Z, two members of AEG with criminal records.[128] Almost immediately after the announcement of the conditions, AEG removed Greene from it membership. Jay-Z, withdrew several weeks later after the initiation of the instant investigation and service of

[128] Greene had been convicted of a criminal offense during the previous 15 years involving "a theft of public funds," and Jay-Z had been convicted of misdemeanor and received a sentence of three years' probation. .

a subpoena on him.[129] Testimony before the Inspector General by Jay-Z revealed, contrary to numerous media reports, no financial investment in AEG on his part, scant knowledge of AEG's proposal and its composition, no finalized agreement with AEG, and no lobbying by him whatsoever. Regardless, his notoriety caused his name to be mentioned in most news articles discussing AEG which brought his name, and well-known conviction, to the forefront.

Notwithstanding, if Jay-Z and Greene had been the only controversial AEG figures, AEG could probably have withstood licensure scrutiny. However, the inclusion of the prerequisite that specifically mandated Lottery to qualify every investor of AEG, regardless of percentage investment – essentially everyone involved in this populous amorphous consortium – doomed it from a licensing perspective. Indeed, Medenica's March 9, 2010, letter to Schwartz and Kiernan informed them that, "the Lottery has concluded that it cannot issue a gaming license to AEG and its associated entities and individuals." In the memorandum, Medenica noted prior concerns about AEG including AEG's "significant changes to the composition of its investor and management groups[,]" and AEG's having "failed to submit sufficient qualifying documentation through two recent missed deadlines, which raises concerns that AEG continues to have associations with unqualified entities and individuals."

Medenica's memorandum included a detailed timeline of Lottery's licensing review of AEG, which included many of the concerns previously explored in this report:

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[129] On March 8, 2010, claiming that Lottery could not prevent the disclosure of Jay-Z's confidential information as a result of the Inspector General's request, Jay-Z's attorney informed the Lottery that Jay-Z had decided not to invest. AEG asserted that the corporate vehicle for Jay-Z's investment would remain an investor with others taking Jay-Z's place.

Karl O'Farrel's involvement, his Australian licensing issues, his adjudication as unreliable and untruthful in court proceedings in Australia, and his pending bankruptcy proceedings; AEG's attempt to minimize O'Farrell's role and its continual denial of O'Farrell's past; the formation of ACE, a blind trust to maintain O'Farrell's interest by Andrew Goodell and the repeated exchanges to satisfy Lottery that O'Farrell, ACE and Goodell would no be paid any monies; Joseph Logan's association with AEG; and, AEG Chairman Judge Mays's representation of convicted felon Eric Wynn, father of Jason Wynn, incorporator of AEG.

According to Medenica's memorandum, Lottery received reports from various sources between October 2009 and February 2010 "indicating that O'Farrell and Logan continued to be active in AEG's affairs," and that AEG was "modifying its organization." On October 20, 2009, AEG submitted a list of "passive investors" in response to a request from the Governor's Counsel, but submitted no applications or background information to Lottery concerning the additional investors. Upon announcement of AEG's selection, Lottery directed AEG to submit an updated listing of those involved with AEG, as required by Speaker Silver, and to submit applications for all who had not previously done so, including fingerprints.

According to Medenica's memorandum, on February 12, 2010, Lottery "reminded" AEG of its responsibility to submit completed applications and noted that none had been submitted. Over the course of the next several weeks, despite numerous reminders and meetings, AEG failed to submit all of the license applications that the State required. During that time, AEG and Lottery were in contact, and additional information surfaced regarding some of the investors whose applications were

outstanding: on March 4, 2010, AEG informed Lottery that the Reverend Floyd Flake's licensing application was delayed because he was responding to a subpoena from the Inspector General instead of Lottery's application; and, on March 5, 2010, Lottery informed AEG that consultants Jon Ellwood and Mark Halley, whose only connection to AEG was Karl O'Farrell, could not be approved without further information. As of noon on the date of the memorandum, Medenica counted "more than 50 license applications the lottery ha[d] not received."

Medenica then sent his seven-page memorandum to Secretary Schwartz and Counsel Kiernan to inform them of Lottery's determination that AEG was not licenseable in New York State. Kiernan related:

> We were going to throw them over the side almost regardless of what Lottery said, and then it was like a gift from Heaven when Lottery told us these two guys surfaced from Australia that had a very minor interest and they were associates of O'Farrell[130] . . . and that gave us more cover than we thought we had, and I remember telling Larry, let's give them one more day, so he agreed, and then that day came, the time came, they hadn't finished all the applications and we said they were no longer the selection.

After Medenica sent the memorandum to Kiernan and Schwartz, they called him shortly afterward. According to Medenica, Schwartz "played devil's advocate, and [asked], what about this point? Are you really sure about this? He seemed very concerned that AEG would now sue the state. And we said, 'so what? We're absolutely confident.'" When asked about his role in AEG's deselection, Secretary Lawrence Schwartz recalled that

[130] Marcus Halley and Jon Ellwood, the two Australians, were listed in AEG's October 20, 2009 investor list submitted to the state and indicated that both had a .13% interest in AEG. That submission, however, preceded Speaker Silver's condition that all investors be vetted regardless of percentage. Therefore, at the time of that submission, they did not meet the established threshold for completion of a licensing application. Murray testified that, just prior to the issuance of the memorandum deselecting AEG, Halley and Ellwood called Lottery to inquire of their payments upon the selection of AEG, noting that O'Farrell had promised them their consulting fees if AEG were selected.

subsequent to the Governor's March 5, 2010 recusal, he and Kiernan "rejected AEG's bid."[131] Medenica also testified that, after Senate counsel Higgins threatened to throw a "shit fit" at an upcoming meeting if the memorandum were not provided to him, Kiernan directed Medenica to send it to the Senate and Assembly, and he did so. According to Medenica, the Lottery also sent a very brief note to AEG saying, in substance, "You're not licenseable."

AEG's ultimate unlicensability should have come as no shock to the decision makers and requires no further exposition as questions in this regard had arisen since the commencement of the bidding process. What is remarkable is that Kiernan, Counsel to the Governor, who portrayed himself as an "honest broker" throughout the process, and who was purportedly unwilling to convey his preferences to the Governor, filtered the executive agencies' reports to denude them of recommendations prior to reaching the Governor, and who, according to the Governor, may not have fully informed him of AEG's licensing problems, now saw Lottery's analysis detailing these very factors as a "gift from heaven."

B. AEG Sues New York State

As noted earlier in this report, a March 11, 2010 e-mail between AEG lobbyist Georgio DeRosa and other AEG lobbyists immediately following the Governor's

[131] Nonetheless, when queried regarding the Governor's recusal, Schwartz initially (and incredibly) claimed he did not recall this unique event of the Governor's tenure which occurred a mere four months prior to his testimony before the Inspector General. Upon presentation of the formal recusal letter, he recalled it and his and Kiernan's decision to reject AEG.

withdrawal of the award to AEG, discusses a suggestion by Senator Sampson that AEG sue the State:

> I just spoke to [Senator Sampson]. He said we should tell everyone we'll tie this thing up in court if they bounce us without cause. He was not happy with our handling of this issue since being selected. We gave him no cover for the selection. He said that there are people still questioning our ability to pay the $300 million. Bottom line – he selected us and we have not closed the deal.

DeRosa testified that this e-mail was the result of a brief conversation he had with Senator Sampson when the two encountered each other while walking through the concourse of Empire State Plaza in Albany. DeRosa testified that Sampson, as one of the decision makers who selected AEG, was unhappy that AEG had failed to meet public criticism and publicly demonstrate its ability to fulfill Speaker Silver's conditions. DeRosa further averred that actually it was he who raised the possibility of a lawsuit against the State to Sampson to which Sampson responded that AEG "should tell people that."

AEG followed Senator Sampson's advice and on July 9, 2010, filed a lawsuit against the state over its deselection. AEG, now reconfigured and renamed Aqueduct Entertainment Company (AEC), claimed, among other things, that Lottery had acted arbitrarily and unlawfully in finding the group not eligible for a Lottery license.

On July 29, 2010, State Supreme Court Justice Barry D. Kramer dismissed AEC's lawsuit, ruling that Lottery's deadlines for information from AEG were lawful and appropriate. Notably, Justice Kramer held that it was "clear from the record that throughout the licensing process there were material and frequent changes occurring in the complex membership and corporate structure of [AEG]. It is also clear from the

record that [Lottery] had legitimate concerns about some of the affiliations and that [AEG] was allowed by [Lottery] to terminate or drop members as the licensing process continued as long as the terminations were explained to the satisfaction of [Lottery]. . . .I'm convinced that [Lottery] . . . had a reasonable and legitimate interest in assuring that questionable affiliations were, in fact, severed."

AEG has filed a notice of appeal of Justice Kramer's ruling.

XVI. THE SEPTEMBER 2010 SELECTION OF GENTING, LLC

A. Selection by Lottery Under Standard Procurement Practices

The deselection of AEG coupled with the myriad deficiencies in the process necessitated an entirely new bidding phase. Although this process, culminating in the selection of Genting New York to operate the facility, is beyond the scope of the current investigation and the Inspector General offers no opinion on these efforts, the 2010 process, at a minimum, demonstrates that Tax Law § 1612 does not prohibit the use of professional procurement procedures.

In order to select a bidder in the most recent phase, Governor Paterson requested that the Lottery, the agency most familiar with and qualified to select a vendor to operate the VLT facility but whose advice had been summarily dismissed by Governor's Counsel Kiernan in the AEG process, issue a traditional request for proposals ("RFP") to operate the complex. Indeed, when queried as to whether a procurement-like process should be run by Lottery, DOB Director Megna averred: "I think that's probably the right decision. I think (a) Gordon has put in an enormous amount of work in this; (b) I have a tremendous amount of respect for his integrity. I really do think he's the person to do this, given the circumstances."

On May 11, 2010, the Lottery issued the RFP, which, by contrast to the prior solicitations, was a more comprehensive and sensible solicitation. The RFP provided for the Lottery to manage the bidding process and recommend a vendor to the Governor. According to the RFP, the governor would accept Lottery's recommendation and present the recommendation to the president pro tempore and speaker of the assembly. Upon

unanimous decision, the vendor would be approved and the selection would be finalized through an MOU.

The RFP went into greater detail regarding the structure of the bidding process. It including deadlines for submissions and decisions, it delineated the criteria by which the bidders would be evaluated and it assigned percentage weights to each criterion. Significantly, the RFP applied the procurement lobbying restrictions, whereby it imposed the "restricted period" requiring that none of the bidders make impermissible contacts with any employees from Lottery from the time the RFP was issued until the time Lottery selected a vendor. The RFP listed designated contacts from Lottery to whom the bidders could direct their written inquiries. Also of import is that the RFP prohibited vendors from altering the provisions of the MOU, thereby making a side-by-side comparison of the bidders more feasible and eliminating the ever-changing landscape engendered by the earlier 2009 ad hoc process.

B. The Bidders and Disqualifications

The 2010 RFP required that, by June 1, 2010, all potential bidders submit a $1 million entry fee to secure the opportunity to bid for the VLT facility. The entry fee would be refundable if the bidder failed to submit a proposal or if the bidder was not selected. Six bidders submitted the $1 million entry fee: Penn National, Delaware North, Genting New York, Clairvest, Empire City Gaming, and SL Green. After submitting its entry fee, Clairvest withdrew its intent to bid individually and chose to team with SL Green. On June 29, 2010, the day the proposals were due, Delaware North and Empire City Gaming, withdrew their bids reportedly due to Lottery's heightened financial

demands.[132] As a result, three bidders remained in response to the RFP: Genting, Penn National Gaming, and a consortium consisting of SL Green, Hard Rock and Clairvest ("SL Green").

On July 6, 2010, Lottery disqualified Penn National and SL Green, citing that "they did not include signed copies of the MOU and other transaction documents in the forms required by the RFP [and that] [b]oth Proposals included alternative versions of the required agreements that included numerous material deviations from the RFP requirements." Penn National and SL Green each formally protested its disqualification; however, Lottery denied the protests and the disqualifications were upheld. Although these disqualifications left Genting as the only viable bidder, Lottery stated that it would examine Genting's proposal with the same level of scrutiny it would have used were there other contending bidders.

C. Genting Awarded the Franchise and Remits $380 Million to State

On August 3, 2010 – the deadline designated in the RFP to announce the winning proposal –Lottery declared Genting to be the winning bidder. In its announcement, Lottery stated, "Genting New York was not the only bidder for this project; it was the best bidder for this project." The Lottery outlined its reasons for its choice: Genting offered $380 million as its upfront licensing fee; Genting survived the exhaustive vetting process of its investors and key personnel; KPMG, contracted to scrutinize Genting's financial capability, found that it was "uniquely qualified and highly capable of

[132] News reports stated that Delaware North expressed frustration that Lottery demanded a minimum bid of $300 million without giving assurances that an agreement would result. Similarly, Empire City Gaming stated that the MOU's conditions put the financial commitment "out of our reach."

delivering the substantial financial results [expected] from this project"; and it scored highly or perfectly in each of the six evaluation criterion.[133]

Governor Paterson immediately accepted Lottery's recommendation and, shortly thereafter Speaker Silver and Senator Sampson also agreed to select Genting for the award. On September 14, 2010, State Comptroller Thomas DiNapoli approved the state's MOU with Genting including its promise of a $380 million upfront licensing fee. Therefore, in four months from solicitation to Comptroller's approval, the State was able through a more normal procurement process to select a vendor and obtain a substantial and desperately needed upfront licensing fee, in a tortured process which had previously undergone three rounds and years of delay when political considerations predominated. As the Governor stated on September 27, 2010, when announcing that Genting had remitted the promised $380 million to New York State, in implicit comparison to the previous two rounds of bidding, selection, and deselection, the 2010 process "applied standard State procurement rules to the bidding process. This led to an efficient, timely, and highly successful bidding process which produced the highest upfront payment ever offered to the State, with enhanced MWBE participation, community involvement, and an accelerated construction schedule."

[133] Genting scored as follows in each of the categories: Management/Experience 25/25, Marketing Plan 19/20, Speed to Market 13/16; Capital Plan 12/12, Financing Plan/Access to Capital 12/12, MWBE Plan/Experience 4/5.

XVII. FINDINGS AND RECOMMENDATIONS

A. Tax Law § 1612

The Inspector General finds that the selection of a VLT operator at Aqueduct Racetrack by the Governor, the Speaker of the Assembly, and the President of the Senate (the "three men in a room") mandated by Tax Law § 1612, as implemented resulting in the January 29, 2010 selection of Aqueduct Entertainment Group (AEG), created a politically dominated process antithetical to the public interest and contrary to acceptable procurement practices. Virtually every individual involved in the selection from the decision makers to the bidders to the retained lobbyists described the process as devoid of discernable rules and "chaotic." The statute provided no objective criteria for the selection and permitted the decision makers to employ their own ever-changing, subjective factors, causing confusion thereby delaying a selection of a vendor costing the state hundreds of millions of dollars. Compounding the inefficiencies of the process, the predominance of unrestrained political considerations led to the proliferation of lobbying, targeted campaign contributions, and political maneuvering in the best interest of the individual officials rather than an impartial assessment of the bids to determine which was in the best interest of the state. The prominence of political motivations also engendered delay by instilling hesitation in each of the three leaders to select a bidder for fear of political embarrassment. Notably, this inordinate delay had tangible consequences as it cost the state millions of dollars in revenue to be used to fund educational programs across the state.

The Inspector General determined that lobbying activity pervaded the selection process transforming a public procurement into what one witness aptly characterized as a

"political free-for-all." Particularly in regard to the Senate, this rampant, unbridled lobbying emphasized the benefits of political access to the detriment of analysis of relevant criteria and produced an environment which fostered the ethically problematic conduct found by the Inspector General in regard to several Senate officials enumerated below.

The Inspector General determined that at least three of the competing bidders and their associates and affiliates made campaign contributions totaling over $100,000 to the politicians involved in the selection process and other elected officials perceived to have influence. Although the amount of money identified as having been contributed to any individual is not staggering, the fact that public officials in the midst of selecting a winning vendor in a lucrative public procurement received thousands of dollars from competing vendors further undermines public confidence in the process and adds to the perception of a "pay to play" culture in Albany. Although all four of these competing vendors made significant contributions designed to curry favor with perceived decision makers, the Inspector General determined that AEG, in particular, marshaled funds at the behest of the Democratic Senate Campaign Committee to be dispensed to senators across the state at the direction of the Committee. This coordination, which one AEG official characterized as a "fund raising effort" for the Senate, casts a taint on the motives behind the Senate leadership's support of AEG as such activities are completely divorced from proper considerations toward selecting the most qualified bidder and are only intended to further individual political interests.

As a result of this flawed statute and the patent failure of the state's leaders to subordinate their political and personal agendas for the good of the state, at a time of

extraordinary financial need, New York State government failed miserably in advancing a contract that would have provided hundreds of millions of dollars to fund education and alleviate the State's budget crisis. Each of the three leaders bears responsibility for the time and substantial money expended in a process that is a veritable case study in dysfunctional and politically driven government. Moreover, in addition to the financial costs to the state, the manner in which this selection was conducted only further erodes public confidence in the integrity of state government and the legitimacy of its decisions.

The Inspector General finds that significant public procurements should be made though a fair, transparent and competitive process with objective criteria applied by individuals with expertise in the field, knowledge of the substance of the bids, and free of personal interest or potential benefit in the selection. Procurement lobbying restrictions should apply in full force to all individuals involved in the selection of a vendor and any lobbying efforts appropriately reported.

Notably, on March 4, 2009, a bill sponsored by state Senator Craig Johnson to permit a VLT facility at Belmont Park was referred to the Senate Racing, Gaming and Wagering Committee. As originally introduced, this bill provided for the same political selection mechanism as Tax law § 1612. On March 8, 2010, after the public outcry over the choice of AEG and the commencement of the Inspector General's investigation, an amended bill was submitted to the Senate Finance Committee requiring that "the video lottery gaming operator selected to operate a video lottery terminal facility at Belmont shall be selected by the division of the lottery pursuant to a public request for proposals" and not a selection by the three men in a room.

B. Executive Chamber

Although Governor Paterson and his administration were not involved in the drafting or enactment of Tax Law § 1612, the root of the issues addressed in this report, the statute they inherited did not preclude the use of objective procurement procedures. In fact, normal procurement practices were ultimately employed by the executive branch in the succeeding 2010 selection process implemented after the deselection of AEG, facilitating a vendor, Genting New York, LLC., to be selected and pay $380 million to the state in a mere four months. Rather than attempt to redress or mitigate the flaws in the statute, the executive chamber exacerbated the problems by engaging in a disorganized, ad hoc process which inhibited communication among executive agency officials.

Counsel to the Governor Peter Kiernan was directed by Governor Paterson to spearhead the selection process for the executive branch. Kiernan was given no guidance by the Governor regarding the procedure to employ which was left to his discretion. Although Kiernan initially involved the relevant agencies with expertise in the applicable fields of financing (DOB), lottery gaming (Lottery) and environmental impact review (OGS), he intentionally rejected any efforts to rank or score bidders — a fundamental component of examining competing bids in any normal procurement, much less a multi-billion dollar public award — and discouraged communication and consultation between these agencies and the executive chamber. Furthermore, at the only formal briefing the Governor received throughout the entire process, Kiernan, despite being personally aware of the issue, apparently failed to inform the Governor that AEG was unlicensable at this crucial time, immediately prior to the Governor's first meeting with the other leaders. In

doing so, Kiernan deprived the Governor of important information which may have aided him in his discussions with the other leaders.

The Inspector General further finds Kiernan's dissuading of consultation with executive branch agencies contributed to wasted time devoted to the selection and deselection of AEG which could have readily been avoided. For example, unlike Speaker Silver who was well-informed by his staff, the Governor was apparently not advised that one of his own executive agencies, OGS, had clearly informed executive and legislative staff early in the process that AEG's proposed plans would require a new environmental impact review engendering a year's delay. Had the Governor been informed of this highly relevant information, time and money wasted regarding possible satisfaction of the Speaker's conditions might have been avoided. Similarly, if Kiernan, or someone at his direction, had actively consulted with Lottery upon imposition of the Speaker's conditions, the executive chamber would have been aware of Lottery's ongoing concerns regarding AEG's ability to obtain a necessary license.

Secretary to the Governor Lawrence Schwartz, the self proclaimed "Chief Operating Officer" of the state, claimed to have served in the role of remedying the mistakes of the prior procurement effort and expediting the process, yet failed to take any action to accomplish these aims. Schwartz testified that he was "outside" the selection process, yet he organized and attended many key meetings with executive staff and various vendors. Schwartz further engaged in communications with the Governor regarding the selection despite his ignorance of the salient facts. Schwartz failed to communicate with any of the agencies under his supervision regarding their analyses or otherwise conduct an individual examination of the financial aspect of the proposals. In

lieu of seeking information from his subordinates who had conducted exhaustive examinations and rendered assessments, Schwartz instead claimed to have contacted so-called "stakeholders," apparently consisting of union officials and two members of the Legislature who did not have a prominent role in the process. Schwartz further incredulously claimed to not recall myriad meetings he organized and attended, various e-mail correspondence between himself and other individuals, and numerous conversations in which he engaged, and claimed unawareness of the Governor's selection of AEG despite personally engaging the Governor's press office in a colloquy about the very subject.

Governor Paterson eventually acquiesced to the Senate's insistence on the choice of AEG. The Governor made this decision without knowledge that Lottery had continuing reservations about AEG's ability to secure a license, a prerequisite for the award, and that his own executive agencies tasked with analyzing the copious submissions of the competing vendors ranked AEG fifth out of the six vendors and had recommended that AEG's bid be disregarded. The Governor exacerbated the ad hoc nature of the process by involving additional officials irrelevant to the selection process, Racing and Wagering Board Chairman John Sabini and Dormitory Authority Executive Director Paul Williams, who acted with no discernable duties, served no useful function, and only further confused the process. Speaker Silver's repeated profession of willingness to join the Governor in his selection, so long as it was reasonable, should have provided the Governor leverage to at least channel the process toward an objective assessment of the bids, but partly due to the lack of structure and communication within the executive branch regarding analysis of the bids, the Governor held the belief that

AEG's offer was commensurate with the other two viable bidders, SL Green and Delaware North, and failed to immediately recognize that the conditions imposed by Speaker Silver on AEG's selection effectively nullified the selection of AEG.

The Inspector General determined that David Johnson, who held various titles within Governor Paterson's administration but primarily served as the Governor's chauffer, was lobbied by AEG and attempted to advocate in its favor. Johnson further was the executive branch official who informed AEG principal Michael Wagman of its selection and attended a post-award meeting with Senator Sampson and AEG regarding finalizing its bid ostensibly as the representative of the Governor's Office. In addition to the troubling nature of his involvement, the fact that Johnson, who lacked any procurement or gaming expertise and had no role in the selection process, was the subject of lobbying and communicated with bidders and lobbyists further highlights the need for lobbying restrictions in public procurements and reflects the directionless manner in which the selection was implemented within the executive chamber.

While the Inspector General found no evidence of a quid pro quo relationship linking it with the selection of AEG, Governor Paterson engaged in an ill-advised meeting with the Reverend Floyd Flake, a well-known member of AEG, within days of its conditional selection in an effort to garner political support. This meeting, held at a time when AEG's selection was subject to ongoing negotiation of financial terms and efforts to fulfill Speaker Silver's conditions, further diminished public confidence in the integrity of the selection.

To the extent that the Governor was ignorant of AEG's deficiencies, fault substantially lies with his staff; however, as head of the executive branch, it was the

Governor's duty to ensure that, from the executive perspective, the selection was made in the public benefit. Therefore, the Governor ultimately bears responsibility for the actions of his chosen advisors and the lack of structure in the process in the executive branch.

C. Executive Agencies

The executive branch officials from DOB and OGS competently and professionally performed the tasks allotted to them. These agencies and officials cannot be faulted for the lack of weight afforded their findings and recommendations.

Lottery and its officials conducted comprehensive and thorough licensing examinations and appropriately pursued issues which arose through the conclusion of process. Moreover, Lottery, of its own volition, attempted to impose order on a chaotic process by scoring vendors according to enumerated criteria, only to have its efforts rejected by the executive chamber. Lottery further professionally and efficiently examined AEG's compliance with Speaker Silver's conditions despite knowledge that such were intended to undercut the choice. Notwithstanding these efforts and with the understanding that Lottery's insight was not generally welcomed, the Inspector General finds that Lottery failed to proactively inform the executive chamber of its continuing concerns regarding the ability of AEG to secure a license due to the continued involvement of AEG founder Karl O'Farrell and others, thus rendering the executive chamber ignorant of this highly relevant information. This systemic failure of meaningful communication between Lottery and the executive chamber prior to the Governor's selection of AEG contributed to further costly delay in the award and a selection and deselection which may have been avoided.

Racing and Wagering Board Chairman John Sabini inserted himself into the process reportedly due to his agency's interest in the operation of the racetrack facility and his personal expertise. Although his involvement is not inherently unreasonable, Sabini's relationship with O'Farrell only contributed to the atmosphere of political favoritism which imbued every facet of this selection. Therefore, while the Inspector General determined that Sabini did not factor in the Governor's choice of AEG, his involvement was unwise in light of his contacts with O'Farrell.

D. Senate

Under Executive Law Article 4-A, the statute granting the Inspector General authority to conduct investigations and issue findings, the Inspector General does not possess jurisdiction over the state Legislature or legislative employees. Therefore, although this investigation necessarily involved examination of the activities of these officials as such were inextricably intertwined with executive officials in the selection, the Inspector General lacks the authority to render binding recommendations. Regardless, the Inspector General would be remiss to not report his conclusions regarding the conduct of these state officials.

The Inspector General determined that the Senate leadership favored AEG nearly from the outset of the process, particularly after the voluntary withdrawal of Wynn. Although there is nothing fundamentally improper about a decision maker believing that a bid is superior, this opinion should be derived from objective factors based in the public interest, not the potential personal benefits for that official. Moreover, public officials should not act to aid their preferred bidder by providing it with information, advice or other assistance to the competitive disadvantage of competing vendors.

Public Officers Law § 74(3), the ethics guidelines for public officials, provides, in relevant part:

> c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
>
> d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.
>
> e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.
>
> f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.
>
> h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

In regard to the prohibition on legislators and legislative employees from disclosing confidential information acquired in the course of their official duties, the Inspector General determined that members and employees of the Senate disclosed internal memoranda detailing not only the proposals of the various bidders but containing an analysis of such to several AEG lobbyists. This information was not in the possession

of AEG's competitors and provided AEG with a competitive advantage in charting its strategy. The Inspector General finds that, in order to protect the fairness and the integrity of the selection, in any legitimate pending procurement process, this information would have been treated as confidential by the decision makers and not disclosed to a single selected vendor.

The evidence supports a finding that Secretary to the Senate Angelo Aponte directed the release of such an internal memorandum in May 2009 to AEG "political operative" Hank Sheinkopf. Aponte further provided testimony to the Inspector General regarding his involvement in the disclosure that is not credible including denying any recall of the events surrounding the disclosure and attempting to shift responsibility to a subordinate despite contemporaneous evidence naming him as the person who directed the release of the materials.

Senate Majority Conference Leader Sampson also disclosed internal Senate materials to AEG lobbyist and former Senator Carl Andrews in late November 2009. Although Senator Sampson claimed that this disclosure was impulsive and that, at least at the time of his interview with the Inspector General, he believed the materials not to be confidential, this information was not actually in the possession of the other vendors. Furthermore, Senator Sampson's own actions, including filing a lawsuit to prevent the Inspector General from obtaining these very same items, belie this claim. Andrews also filed a lawsuit seeking to prevent the Inspector General from inquiring into the facts of this meeting, among other matters, stemming from his ties with the Senate leadership. This lawsuit was dismissed by the State Supreme Court but has been appealed by Andrews.

Evidence obtained by the Inspector General strongly suggests that Senator Sampson importuned AEG to support favored groups and alter its composition to ensure that members of his constituency were financially rewarded upon its selection. The evidence further supports the finding that Sampson "insisted" that AEG, a bidder for a multi-billion award under consideration by him in his official capacity, include a specific developer of his choosing. When questioned, Senator Sampson claimed not to recall recommending contributions or "insisting" upon this developer. Sampson's inability or unwillingness to categorically deny these actions further casts doubt on his reasons for supporting AEG.

Further evidence demonstrates the continued involvement of Senate President Malcolm Smith as an advocate for AEG after he purportedly recused himself from the process based upon his longstanding business and professional relationships with several AEG officials. Contrary to his claims, the Inspector General determined that Smith was briefed on several occasions regarding the Senate's analyses of the Aqueduct bidders, spoke to lobbyists from AEG on numerous occasions, and advocated on AEG's behalf to the Governor. The Inspector General finds Senator Smith's testimony to be misleading, at best, and designed to conceal his efforts on behalf of AEG which were laden with the appearance of conflicts of interest.

Senators Sampson, Smith and Adams, and several other legislators also attended a victory celebration at AEG lobbyist Carl Andrews's house on the eve of AEG's selection despite the fact that AEG was in ongoing negotiations with the state regarding financial terms and satisfaction of Speaker Silver's conditions. Their attendance at this victory party impairs public confidence in their actions, heightens the appearance of impropriety

in AEG's selection, and further reveals the relationship between these senators and Andrews which afforded him access and influence beyond that of other bidders.

These actions by Senators Sampson and Smith potentially implicate the Public Officers Law's prohibitions of unduly conferring benefits or favoritism and acting in violation of their public trust Under state law, alleged violations of these provisions by members of the Legislature and legislative employees are addresses by the Legislative Ethics Commission (Legislative Law § 80). The Inspector General therefore refers this matter to the Legislative Ethics Commission which has the duty to investigate complaints received as "a referral from another state oversight body."

The Inspector General further finds that the Senate, under the leadership of Senator Sampson, took efforts to impede the Inspector General's investigation which were inconsistent with the public's right to know the manner in which its properties and funds are being dispensed and inimical to transparency in government. Unlike the officials from the executive branch and Assembly who voluntarily cooperated with the Inspector General's investigation, the Senate quickly reneged on its pledge to cooperate and, after the Inspector General was forced to serve a subpoena, filed a lawsuit in State Supreme Court to prevent its activities from becoming public. The Senate and Senator Sampson exacerbated their conduct by even attempting to keep the fact of their lawsuit secret from their constituents by seeking an inappropriate sealing order from the court. Although the Senate's and Senator Sampson's efforts to prevent scrutiny of their actions proved futile as the State Supreme Court dismissed their lawsuit as lacking merit, the Senate's actions added further delay and cost to the process and increased public suspicion regarding the integrity of their actions.

Despite ample evidence of the Senate leadership's championing of AEG, the Inspector General found a trend of witnesses from the Senate attempting to distance them from the selection. In addition to Senators Smith's and Sampson's and Senate Secretary Angelo Aponte's testimonies described above, Senator Sampson further testified that the selection of AEG was made jointly by himself and Speaker Silver; however, Senator Sampson's testimony is directly contradicted by Speaker Silver and Governor Paterson and is contrary to the weight of the evidence accumulated by the Inspector General.

The Inspector General further finds that Senator Adams provided incredible testimony to the Inspector General regarding a pivotal dinner with the Governor and Senator Sampson which was contradicted by both Governor Paterson and Senator Sampson, in an apparent effort to limit his involvement and responsibility in the choice of AEG.

E. Assembly

Although Speaker Silver was clearly the best informed of the decision makers and took various actions to avoid the selection of an unqualified vendor, he also contributed to the costly delay in the process. Louann Ciccone, the Assembly's Assistant Secretary on Program and Policy who was tasked with evaluating racing and wagering issues for the Assembly, not only professionally and comprehensively accumulated and evaluated relevant information, but appropriately recognized the strengths and deficiencies in various proposals and ensured that Speaker Silver was adequately informed. However, despite being the most knowledgeable of the leaders due to Ciccone's efforts, Speaker Silver refused to voice an opinion as to a vendor except to require an enhanced upfront licensing fee and request expanded investor lists in October 2009. Once the Governor

acquiesced to the Senate's choice of AEG, and having been informed of potential weaknesses in its proposal and structure, Speaker Silver declined to reject AEG; instead he imposed conditions which effectively accomplished the same end. Despite the urgency of approving this franchise so that revenues would begin flowing to the state, the Speaker permitted the process to continue knowing that it was a doomed selection that would further delay a much needed revenue stream. This tactic caused the state to engage in several months of unnecessary examination regarding whether AEG could meet the conditions he imposed.

Although the Inspector General found no credible or persuasive evidence contradicting the Speaker's claim that he had "no horse in the race" and that he was willing to agree to any acceptable vendor, the terms of Tax Law § 1612, a statute passed during his time as Speaker of the Assembly, required him to act in the selection of a vendor along with the Governor and the President Pro Tempore of the Senate. As such, Speaker Silver was obliged to assert an active role to at least overtly eliminate vendors he found unacceptable and use his statutory authority to ensure that the most qualified bidder was awarded the franchise. Such action would have prevented the loss of much time, and expedited the infusion of urgently needed revenue.

F. Referrals to the United States Attorney for the Southern District of New York, the New York County District Attorney, and the New York State Commission on Public Integrity

The Inspector General is forwarding his findings to the United States Attorney for the Southern District of New York, the New York County District Attorney, and the New York State Commission on Public Integrity for review and any action they deem appropriate.