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**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:

NEW YORK CITY OFF-TRACK BETTING  
CORPORATION,

Debtor.

Chapter 9  
Case No. 09-17121-mg

**MOTION OF EMPIRE RESORTS, INC. TO COMPEL THE DEBTOR TO COMPLY  
WITH THE REQUIREMENTS OF THE NEW YORK RACING,  
PARI-MUTUEL WAGERING AND BREEDING LAW AND  
MAKE CERTAIN STATUTORY DISTRIBUTIONS**

Empire Resorts, Inc. (“Empire”), by and through its undersigned counsel, hereby moves (the “Motion”) this Court for entry of an order compelling New York City Off-Track Betting Corporation, the above-captioned debtor (the “Debtor” or “NYCOTB”), to comply with the statutory requirements of the New York Racing, Pari-Mutuel Wagering and Breeding Law (the “NY Racing Law”) to fulfill the post-petition statutory distributions currently owed and all future

post-petition distributions to Empire, through its wholly-owned subsidiary, Monticello Raceway Management, Inc., pursuant to NY Racing Law §§ 532, 1015 and 1017, 11 U.S.C. §§ 105(a) and 503(b) and 28 U.S.C. § 959(b). In support of the Motion, Empire states as follows:

**PRELIMINARY STATEMENT**

1. Over the course of NYCOTB's Chapter 9 proceeding, the Debtor has failed to meet its promises and has slowly and steadily lost credibility with its creditor body and parties in interest, including the New York State legislature, the race tracks, and the horsemen. At the outset of the case, and in open Court, the Debtor made the conclusive assurance and pledge that it had every intention of paying its post-petition obligations. The Debtor has now gone back on this promise and announced a unilateral decision to defer payments of monies to the racing industry - monies that represent the lifeblood of the racetracks. As discussed in detail herein, payment of "dailies", "dark day", "out-of-state" and "maintenance of effort" monies to the race tracks are statutorily mandated. These are not discretionary payments, but payments and obligations that require NYCOTB to pay money to the tracks. As set forth in detail below, this statutory framework has been in place for decades and was designed to compensate the racetracks which provide live racing for the loss of revenue which they incurred by reason of the OTBs being authorized to take bets on out of state races, which additional betting opportunities took away patrons as well as betting handle from the racetracks. If this Court is to allow the Debtor to reap the benefits of Chapter 9, actions that contradict themselves must bear some of the burdens of same. Certainly, Chapter 9 cannot be sanctioned by this Court when those actions threaten the survival of the horseracing industry and Monticello Raceway in particular, is in peril.

2. Time and time again, the Debtor has used the press and is desperately seeking help from the legislature as a vehicle to promulgate its shifting agenda without regard to its

creditor body and the Chapter 9 court process. Initially, in an attempt to put pressure on the legislature, the Debtor manufactured a crisis in which the future of approximately 1,400 NYCOTB employees and union members were forced to be weighed against the long-term health and well-being of a racing industry. *See* Matt Hegarty, *New York OTB Threatens to Close on March 30*, Racing Daily Form, Jan. 25, 2010 (attached hereto as Exhibit A). The Debtor then retracted its decision for a hasty shut down and instead decided to give its unionized workers two 4% raises as well as cover the costs of a severance buyout program. *See* Richard Steier, *OTB Will Cover Costs of 8% Raises, Buyout Plan Minus State Help*, The Chief, Apr. 30, 2010 (attached hereto as Exhibit B); Ariel Kaminer, *The OTB Parlors, Limping Along*, N.Y. Times, Apr. 23, 2010 (attached hereto as Exhibit C). At the same time that it chose to raise the wages of its employees, the Debtor announced - contrary to its earlier promise - to simply defer maintenance of efforts, dark day and out-of-state payments to the tracks. *See* Victor Whitman, *NYC OTB Lost its Credibility with Shutdown Threat, Assemblywoman Gunther Says*, Times-Herald Record, Apr. 21, 2010 (attached hereto as Exhibit D).

3. Again, Chapter 9 cannot be used as both a sword and a shield. Indeed, no debtor, whether in chapter 7, 11 or 9 should be allowed to conduct itself and run its operations in this manner. Be current or be dismissed. It appears that NYCOTB would like the benefits of chapter 9 without the attendant burdens; it does not want to pay its obligations retrospectively or prospectively. However, the Court should not condone these actions or allow NYCOTB to remain a debtor under these circumstances.

4. NYCOTB appears to have selective amnesia, as it conveniently forgets that it is a “debtor” with the same post-petition obligations as any other debtor, particularly the obligation to pay its bills as they become due and owing. As this Court is aware, Monticello and other

creditors including Yonkers Racing Corporation, supported the Chapter 9 filing on the premise that the Debtor would pay all postpetition obligations as such obligations become due or in certain circumstances on a reasonable thirty day delay. In addition, Monticello supported the Debtor's Chapter 9 petition on the grounds that NYCOTB would benefit from the advantages afforded by the Bankruptcy Code to address its financial troubles and take the steps necessary for NYCOTB to become a profitable and viable business. The last few months have demonstrated otherwise and the Debtor has been less than forthright with respect to its true motives and intentions. Indeed, under the current circumstances, Chapter 9 may no longer be appropriate.

5. If NYCOTB wishes to remain a debtor in Chapter 9 - or any bankruptcy chapter - the Debtor needs to be able to remain current in its obligations and pay those going forward as well. Until NYCOTB obtains court approval to defer post-petition payments and obtains relief from the legislature, it cannot unilaterally decide to avoid obligations and to reward others. Chapter 9 is not a "feel good" chapter. Otherwise, despite its need to reorganize, the best solution may be to have NYCOTB's Chapter 9 proceeding dismissed.

#### **JURISDICTION, VENUE, AND STATUTORY PREDICATES**

6. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334.

7. This Motion is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) & (G).

Venue is proper pursuant to 28 U.S.C. § 1409.

8. The statutory predicates for the relief sought herein are section 11 U.S.C. §§ 101 *et seq.*, (the "Bankruptcy Code") and 28 U.S.C. § 959(b).

#### **FACTUAL BACKGROUND**

9. On December 3, 2009 (the "Petition Date"), the Debtor filed with this Court a voluntary petition for relief commencing this case under chapter 9 of title 11 of the Bankruptcy Code.

10. The Debtor is a public benefit corporation created by statute, to wit, NY Racing Law § 518. The Debtor operates an off-track pari-mutuel betting system through the OTB parlors, internet wagering and television racing channels. The Debtor takes bets on live horse racing events taking place at New York State tracks as well as tracks all over the country.

11. The enabling statute which created the OTB system in New York, NY Racing Law § 518, specifically sets forth the mission statement and the intent of creating the OTB system for New York State and states as follows, in applicable part:

It is also the intention of this article to ensure that off-track betting is conducted in a manner compatible with the well-being of the horse racing and breeding industries in this state, which industries are and should continue to be major sources of revenue to state and local government and sources of employment for thousands of state residents.

12. Thus, it is the public policy of the State of New York that the OTB corporations in New York State foster and contribute to the well-being of the horse racing industry in New York State.

13. Through Empire's wholly owned subsidiary, Monticello Raceway Management, Inc., Empire owns and operates Monticello Casino and Raceway ("Monticello Raceway"). Monticello Raceway has been conducting live harness racing for over 50 years and conducts over 200 racing programs every year, thereby providing racing opportunities for horsemen, including owners, trainers and drivers in New York as well as thousands of ancillary and related jobs which support the harness racing and breeding industry, including but not limited to the agricultural industry, in New York State.

#### **RELIEF REQUESTED AND BASES THEREFOR**

14. Empire, on behalf of its wholly-owned subsidiary Monticello Raceway, respectfully requests that this Court compel the Debtor to comply with the requirements of the

NY Racing Law to make the postpetition statutory distributions currently owed and all future postpetition statutory distributions, pursuant to 28 U.S.C. § 959(b), and 11 U.S.C. §§ 105(a) and 503(b).

15. The establishment and operation of off-track wagering in New York is governed by a comprehensive regulatory scheme set forth in the NY Racing Law and as described above. Under the NY Racing Law, the distributions to the Monticello Raceway are mandatory.

16. Section 959(b) of title 28 of the United States Code provides that  
a trustee, receiver or manager appointed in any case pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof

28 U.S.C. § 959(b).<sup>1</sup> A debtor “must comply with all applicable state laws that regulate any aspect of ‘carrying on’ a business.” 1 Collier on Bankruptcy ¶ 10.03 (15<sup>th</sup> ed. 2009). The Bankruptcy Code does not relieve the debtor from complying with state regulatory law. *Id.*

17. Moreover, the Bankruptcy Court is a “court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code.” *In re Beaty*, 306 F.3d 915, 922 (9th Cir. 2002). Section 105(a) of the Bankruptcy Code is the basis for such power, and provides that:

the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by an party in interest shall be construed to preclude the court from, sua sponte, taking any action or making an determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

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<sup>1</sup> In a Chapter 9 case, the terms “trustee,” “debtor” and “debtor-in possession” are interchangeable. *See* 11 U.S.C. § 902(5); *See In re Ranasinghe*, 341 B.R. 556, n. 8 (Bankr. E.D. Va. 2006) (“Chapter 9 does not use the term “debtor in possession” but does define “trustee” for most purposes as meaning the debtor.”).

In practice, section 105(a) of the Bankruptcy Code grants bankruptcy courts broad statutory authority to enforce the Bankruptcy Code's provisions either under the specific statutory language of the Bankruptcy Code or under equitable common law doctrines. *See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (“[i]t is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process”); *In re Interpictures Inc.*, 210 F.3d 354, 2000 WL 232149, at \*2 (2d Cir. 2000). Section 105 is often characterized as "an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." 2 L. King, *Collier on Bankruptcy* § 105.01, at 105-3 (1996). Principles of equity dictate that if a debtor is utilizing the services of a non-debtor party post-petition, such services should be compensated.

18. Finally, the statutory payments should be treated as an administrative claim pursuant to 11 U.S.C. § 503(b). Section 503(b) of the Bankruptcy Code provides for the allowance of administrative expenses, so long as such expenses are “actual, necessary costs and expenses of preserving the estate.” The statutory payments herein, which the Debtor is required to make under the provisions of the NY Racing Law, are necessary to the business operation of Monticello Raceway and other similarly situated racetracks, which in turn support the Debtor's organization. Without receipt of the statutory funds, the in-state racetracks, and thus the entire New York racing industry would collapse, thereby having a detrimental effect on the Debtor's business. Consequently, the Debtor's very existence is dependent upon making the statutory payments the Debtor is trying to avoid through its Chapter 9 filing.

### **Dark Day and Out of State Payments**

19. When the OTB system was created in 1973, the OTBs only took bets on New York State racetracks. In the early 1980's, the OTBs, including the Debtor herein, lobbied the State Legislature to permit them to take bets on out-of-state thoroughbred tracks in order to increase their betting handle. The New York State Legislature passed enabling legislation known in the industry as "dark day legislation" and embodied in NY Racing Law § 1017 which permitted the OTBs to take bets on thoroughbred races outside of New York State. By permitting additional wagering to patrons of the OTBs on out-of-state races, the amount of wagering on New York State racetracks, including Monticello Raceway, would be diminished since there were additional products being offered by the OTBs to their patrons. NY Racing Law § 1017 provided that on days when the New York State thoroughbred tracks were "dark" (not open), the OTBs were permitted to take out-of-state thoroughbred bets on out-of-state thoroughbred races which were simulcast into the OTB parlors. To compensate the New York State regional harness tracks for the loss of betting dollars at OTBs on the New York State harness product, statutory formulas were enacted which provided that if a harness track was open on a day when the New York State thoroughbred tracks were closed, and the harness tracks did not take simulcast bets on the out-of-state thoroughbred races, the OTBs would then pay a portion of their commissions, which they earned on their betting handle on out-of-state thoroughbreds, to the harness tracks. In the industry those monies became to be known as "dark day payments".

20. Dark day payments became a staple of the harness racing industry in New York State and particularly for the movant, Monticello Raceway. Monticello Raceway altered its racing schedule so that it was open almost every Monday and Tuesday which were the usual days when the New York State thoroughbred tracks were closed, i.e. dark, and dark day

payments to Monticello Raceway became an integral, indeed major part of the purse structure which Monticello Raceway paid to its horsemen for creating the live harness racing product at the raceway.

21. Dark day payments are a statutory obligation of the Debtor and have been paid to Monticello Raceway for the past approximate 30 years. Fifty percent (50%) of the statutory dark day monies received by Monticello Raceway from the OTBs is directly used to pay horsemen's purses at Monticello Raceway, thus keeping the harness racing industry alive in New York State.

22. In addition to the statutory mandate to pay dark day money by the Debtor to their regional tracks such as Monticello Raceway, the New York State Court of Appeals has upheld that obligation in a recent case. In *Suffolk Regional OTB v New York State Racing and Wagering Board*, 11 N.Y.3d 559, 900 N.E.2d 970 (2008) the Court of Appeals rejected a challenge brought by several regional OTBs, including the Debtor, contesting their obligations to pay dark day commissions to their regional tracks and confirmed that obligation.

23. Payments from the Debtor to Monticello Raceway by reason of dark day money and a related income stream known as out-of-state harness<sup>2</sup>, account for over 50% of the racing revenue earned by Monticello Raceway, and are vital to the survival of the business and to maintaining the purse structure.

24. The purse structure of Monticello Raceway, i.e. the amount of money paid in purses for the various live races conducted over 200 days a year at Monticello Raceway, needs to be maintained at a competitive level so that horsemen do not leave Monticello Raceway to go to other states where higher purses are offered. A substantial reduction in the amount of money available for purses which is directly tied to the payments which the Debtor is statutorily

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<sup>2</sup> Out-of-state harness is a further statutory obligation created by the Legislature when the OTBs were allowed to expand their product base by offering out of state night time harness simulcasting in direct competition with the New York State live harness tracks.

obligated to make to Monticello Raceway, will necessarily result in a large exodus of horsemen and horses from the State of New York, thereby frustrating and defeating one of the main purposes for which the OTB system was created.

25. Prior to the filing of the Debtor's Chapter 9 petition, while the Debtor was behind in its timely dark day and out of state payments to Monticello Raceway, it was paying on a monthly basis. Shortly after the filing of the Chapter 9 petition, and upon Movant advising the Debtor that it would bring a motion to compel regular statutory payments, the Debtor made representations and assurances that it would pay the statutory commissions on a one month lag basis. Thus, the postpetition statutory commissions were paid on a one month lag basis for the months of December 2009 and January and February 2010. However, directly after the Debtor's public statements that it was "deferring the statutory commissions", the Debtor failed to pay Monticello Raceway the March dark day and out of state commissions which were due on April 30, 2010. The last payment received by Monticello Raceway for dark day and out of state commissions was at the end of March 2010 which was for the month of February 2010.

26. It is critical to the continued viability to Monticello Raceway and the well being of the harness racing industry in New York that monthly dark day payments continue to be made for all post-petition dark day payments from the wagering funds earned by the Debtor. While the Debtor had paid dark-day commissions for December 2009, January 2010 and February 2010, the Debtor has not paid for March 2010 (which was due some time ago) and has made the bold statement that it intends to defer payments going forward. While movant realizes that the pre-petition statutory debt to Monticello Raceway will be dealt with by the Court in determining the Chapter 9 plan, post-petition dark day monies out-of-state monies must be paid on a regular monthly basis in order to prevent a shutdown of racing at Monticello Raceway and the attendant

harm to the New York State harness racing industry. As of the date hereof, the dark day monies and out-of-state monies which will have been earned pursuant to statute for the month of March, totaling \$197,601.12, should be ordered to be paid at this time and every month thereafter the payments should be made no later than thirty days after same have accrued.

27. As stated above, the monies owed by the Debtor to the movant post-petition are not contractual, they are statutory. It would be a violation of public policy if the Debtor were permitted to violate state law by failing to make regular periodic dark day payments to Monticello Raceway during the pendency of this Chapter 9 proceeding.

### **Dailies**

28. In addition to dark day payments, the OTBs, including the Debtor, are under a statutory obligation to pay to their regional tracks, such as Monticello Raceway, monies known in the industry as “dailies”. “Dailies” are commissions earned by the Debtor from taking bets on races run at Monticello Raceway in their parlors or through their internet betting systems. Historically, the dailies have been paid on a “daily” basis, i.e. after a day of live racing, the monies are sent to the track that had the live racing from which the OTB profited by taking bets upon it.

29. Like the dark day payments, the dailies are also another substantial component of the flow of racing revenue to Monticello Raceway which funds the operation of the track as well as the purse payments to the horsemen. Over recent months, the payment of the dailies by Debtor to Movant had been paid on a one month lag basis in light of the professed financial difficulties of the Debtor.<sup>3</sup>

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<sup>3</sup> Prior to the Petition Date, the Debtors did not pay any dailies to Monticello Raceway for October and November and thus the dailies for these months are among the pre-petition debt which the Debtor seeks to reorganize under its Chapter 9 plan.

30. While the Debtor has been paying dailies since the Petition date, it is critical that payment of the dailies continue on the 30 day lag that the Debtor has been paying and not be deferred further. Monticello Raceway continues to race each week on a four to five day per week race program and thus it is essential that the dailies be received in a timely fashion during the pendency of this Chapter 9 proceeding. Since the dailies are also statutorily mandated to be paid, it would be a violation of public policy and a violation of the Debtor's obligation not to continue to pay the dailies on a regular timely basis to the movant during the Chapter 9 proceeding. The dailies amount to approximately \$80,000.00 to \$100,000.00 a month, depending on the amount of wagering handled during any particular month.

31. The fact that the Debtor is in arrears on its statutory obligations to Monticello Raceway in an amount of approximately \$1.4 million dollars in pre-petition racing commissions, together with the fact that since the Petition Date the Debtor has not paid one cent to Monticello Raceway either for dark day or out-of-state monies -- all the while continuing to earn money from the Monticello Raceway product -- has placed Monticello Raceway in an untenable position whereby it has no choice but to respectfully request that this Court order the Debtor to make regular periodic statutory payments to Monticello Raceway, as required by New York law.

32. The hardship which the Debtor has placed upon Monticello Raceway through its failure to pay dark day commissions and its delinquency in paying dailies has placed a great strain on the viability of the operation of Monticello Raceway. Indeed, in April 2009, Monticello Raceway was forced to commence an action for collection of the unpaid dark day and out-of-state commissions against Debtor, which action seeks the approximate sum of \$1.4 million in unpaid pre-petition commissions. That action, which is pending in the Supreme Court State of New York, New York County and in which a summary judgment motion was briefed at the time

of the Debtor's filing, is now subject to the automatic stay attendant with the Chapter 9 proceeding. While these pre-petition statutory debts will necessarily be dealt with by this Court in the course of the Chapter 9 case, the Supreme Court action was necessitated by the abject failure of the Debtor to live up to its statutory obligations and the severe economic prejudice that the loss of that substantial income, necessary to operate Monticello Raceway, caused the Movant. It is that severe economic prejudice which has made the instant motion of paramount importance to the economic well-being and survival of Monticello Raceway.

WHEREFORE, for all the foregoing reasons, Empire respectfully requests that the Court compel the Debtor to comply with the requirements of the NY Racing Law and immediately make the postpetition statutory distributions currently owed as well as all future postpetition statutory distributions, pursuant to 28 U.S.C. § 959(b), 11 U.S.C. §§ 105(a) and 503(b), by entry of an order substantially in the form of the proposed order attached hereto.

Dated: May 7, 2010

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