Court File No. 177/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

SEELSTER FARMS INC., WINBAK FARM OF CANADA, INC,
STONEBRIDGE FARM, 774440 ONTARIO INC., NORTHFIELDS FARM INC.,
JOHN MCKNIGHT, TARA HILLS STUD LTD., TWINBROOK LTD.,
EMERALD RIDGE FARM, CENTURY SPRING FARMS,
HARRY RUTHERFORD, DIANE INGHAM,
BURGESS FARMS INC., ROBERT BURGESS,
453997 ONTARIO LTD., TERRY DEVOS, SONIA DEVOS,
GLENN BECHTEL, GARTH BECHTEL,
496268 NEW YORK INC., HAMSTAN FARM INC.,
ROBERT HAMATHER, JAMES CARR,
GUY POLILLO, DAVID GOODROW, TIMPANO GAMING INC., CRAIG TURNER,
ROBERT MCINTOSH STABLES INC., GLENGATE HOLDINGS INC.,
KENDAL HILLS STUD FARM LTD.,
ANDY KLEMENCIC, TIM KLEMENCIC, STAN KLEMENCIC,
JEFF RUCH, BRETT ANDERSON,
DR. BRETT C. ANDERSON PROFESSIONAL VETERINARY CORPORATION,
KILLEAN ACRES INC., DECISION THEORY INC., 296268 ONTARIO LTD.,
DOUGLAS MURRAY MCCONNELL, QUINTET FARMS INC.,
KARIN BURGESS, BLAIR BURGESS,
ST. LAD'S LTD., WINDSUN FARM INC., SKYHAVEN FARMS
AND HIGH STAKES INC.

Plaintiffs

- and -

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant

STATEMENT OF DEFENCE

1. The defendant, Ontario Lottery and Gaming Corporation (**"OLG"**), has no knowledge or insufficient knowledge of the identities of the plaintiffs, as alleged in paragraphs 2 to 37 of the Statement of Claim.

2. The defendant expressly denies each and every other allegation contained in the Statement of Claim and puts the plaintiffs to the strict proof thereof.

3. Save for the paragraphs herein relating to Her Majesty the Queen in Right of Ontario (the **"Crown"**), OLG adopts and incorporates herein the facts and defences in relation to the Crown as they are pleaded in the Statement of Defence of the Crown in Court File #272/14, a companion action commenced by the same Plaintiffs.

The Parties

The Defendant

4. OLG is a non-share capital Crown corporation that conducts and manages lottery and gaming activities in Province of Ontario. OLG has been in operation since 1975, and was previously known as the Ontario Lottery Corporation. OLG works to ensure that gaming is provided in an efficient and socially responsible manner that maximizes the economic benefit to the people of Ontario, related economic sectors, and host communities.

5. OLG is established pursuant to the *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12, Sch. L (the **"OLG Act"**). The purposes of the OLG Act are:

(a) to enhance the economic development of the Province of Ontario;

(b) to generate revenues for the Province of Ontario;

(c) to promote responsible gaming; and

(d) to ensure that anything done for a purpose set out in clause (a), (b) or (c) is also done for the public good and in the best interests of the Province of Ontario.

6. The OLG Act defines the objects of OLG as follows:

(a) To develop, undertake, organize, conduct and manage lottery schemes on behalf of the Crown.

(b) To provide for the operation of gaming sites.

(c) To ensure that lottery schemes and gaming sites are conducted, managed and operated in accordance with the *Criminal Code (Canada)*, R.S.C. 1985, c. C-46, the OLG Act and the *Gaming Control Act, 1992*, S.O. 1992, c. 24, and the regulations made under them.

(d) To provide for the operation of any business that OLG considers to be reasonably related to operating a gaming site or lottery scheme, including any business that offers goods and services to persons who play lottery schemes in a gaming site.

(e) If authorized by the Lieutenant Governor in Council, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of, or in conjunction with, the government of one or more provinces of Canada.

(f) To do such other things as the Lieutenant Governor in Council may by order direct.

7. Section 3 of the OLG Act designates OLG as a Crown agent for all purposes, and paragraph 75 of the Statement of Claim admits that OLG was a Crown agent at all material times.

8. Further, OLG pleads and relies upon Section 8 of the OLG Act, which grants immunity to OLG members and agents for any alleged neglect or default in the execution in good faith of the person's duty.

The plaintiffs

9. Three of the named plaintiffs do not have capacity to bring suit. Stonebridge Farm is not a registered name, contrary to section 2(2) of the *Business Names Act*, R.S.O. 1990, c. B. 17 (the **"BNA"**). Emerald Ridge Farm and Skyhaven Farms are not names registered by their respective partners, contrary to section 2(3) of the BNA. None of these parties has sought leave to maintain a proceeding in court. Pursuant to section

7(1) of the BNA, these three named plaintiffs lack capacity to bring suit. The claims on behalf of these named plaintiffs are a accordingly nullity and must be struck.

10. The Statement of Claim alleges that the remainder of the named plaintiffs are breeders of standardbred horses in the Province of Ontario. OLG has insufficient information to admit or deny this allegation. As a matter of convenience, OLG will use the term "Standardbred Breeders" to refer to those plaintiffs whose claims are not a nullity.

11. The use of this "Standardbred Breeders" nomenclature is not an admission by OLG that liability to any of the plaintiffs may be determined in the aggregate. Each of these plaintiffs is bringing its own individual lawsuit, albeit under one style of cause and represented by the same counsel. This is not a class action pursuant to the *Class Proceedings Act*. Each plaintiff must individually advance and prove all the necessary elements of its own alleged causes of action, OLG's alleged liability to it, and the consequential damages to each. OLG does not admit any element of commonality that would permit the plaintiffs' claims to be determined on a collective basis.

12. For the sake of greater clarity, OLG puts each and every one of the plaintiffs to the strict proof of its allegations and the resulting damages, which are denied.

Standardbred breeding and racing in Ontario

13. Broadly speaking, there were four (4) groups that collectively comprised the horse racing industry in Ontario between 1998 and 2012.

14. ***First***, there were 17 racetracks in Ontario throughout most of the relevant time period from 1998 to 2012, of which 15 racetracks ran standardbred races.

15. ***Second***, there were the "Respective Horsepeople", as they were called in the site holder agreements between OLG and the racetracks (hereinafter "Horsepeople" or "racehorse owners"), those Horsepeople being the group that owned and/or managed and raced the horses.

16. ***Third***, there were the breeders, of whom the plaintiffs herein purport to be a part.

17. ***Fourth,*** there were suppliers of products to the other three groups including blacksmiths, veterinarians, farmers and others. This group is more fully described in paragraphs 42, 47 and 144 of the Statement of Claim.

18. The market for the Standardbred Breeders' products is North America. Standardbred horses are sold throughout North America, in a myriad of venues, through auctions, brokers, and direct sales. The plaintiff Standardbred Breeders do not represent all persons selling their products or services with a view toward racing standardbred horses in Ontario.

The Slots at Racetracks Program

19. OLG implemented the Slots at Racetracks Program (**"SARP"**) in 1998 at the direction of Cabinet, acting on behalf of the Crown. OLG entered into individual contracts called Site Holder Agreements (hereinafter **"Site Holder Agreements"** or **"Agreements"**) with each of the 17 racetracks in Ontario. By the Site Holder Agreements, OLG licensed part of the respective racetrack premises to house OLG's slots business (**"OLG slots business"** or **"Prescribed Lottery Scheme"**).

20. Contrary to paragraph 49 of the Statement of Claim, SARP was never a "revenue-sharing partnership" with the Standardbred Breeders or with anyone else. The Standardbred Breeders were not parties to any Site Holder Agreement with OLG, and there was nothing in any of those Agreements obliging anyone to pay any money to the Standardbred Breeders, or indeed any breeders.

21. The Site Holder Agreements provided that OLG would pay the racetrack operator 20% of the on-site "net win" (the revenue earned from a slot machine minus the payout from each slot machine) in return for the use of the racetrack's facilities to house and support slot machines and ancillary services for the slot machine lottery scheme, including the racetrack's commitment to continue live horse-racing. The portion of the net win paid by OLG to the racetrack operator was referred to as the **"Site Holder Payment"**.

22. The Site Holder Agreements permitted the racetrack operators to keep half of the Site Holder Payments, or 10% of the net win, and obliged the racetrack operator to distribute the other half of the Site Holder Payment in the form of racing "purses" (the **"Purse Enhancement Payment"**). The purse is the prize money payable to the owner of the winning horse or horses of each race.

23. The Standardbred Breeders were never parties to the Site Holder Agreements, as the racetrack owners were, or even potential third-party beneficiaries of Site Holder Payments, as the racehorse owners were (through purses).

24. Contrary to paragraphs 46, 47 and 51 of the Statement of Claim, OLG denies that SARP, through the entry of the racetrack owners into Site Holder Agreements with OLG, had the effect of diverting horse racing customers, and in particular standardbred horse racing customers, to the OLG slots business. To the contrary, the introduction of slot machines into racetrack premises had the effect of increasing attendance at horse races. The Purse Enhancement Payment was not compensation to any aggrieved party, but rather a subsidy intended to support the horse racing industry in Ontario through enhanced purses.

SARP Generated Unsustainable Growth in Ontario's Horse Racing Industry

25. In Ontario, a pari-mutuel model is used for gambling on horse races. All amounts bet on a race are combined in a pool. Pay-off odds are calculated by sharing the pool among winning bettors after deductions for taxes and fees, operating expenses and purses. Each racetrack operator takes approximately 20% of the pool of gross wagers. Approximately half of this amount is generally retained by the racetrack operator, while the other half generally funds purses. A small percentage of the pool pays federal and provincial levies. The remaining three-quarters of the pool is returned to winning bettors as payouts.

26. Prior to the introduction of SARP and the execution of the Site Holder Agreements, the revenues available to Ontario's horse racing industry were largely determined by the scale of pari-mutuel betting, with purses funded by the pool of

wagers, as described above. However, Purse Enhancement Payments from the Site Holder Agreements funded artificial growth in the purses awarded to winning horses. This growth in purses from the infusion of 10% of the net win from slots was tied to slot machine revenues, and was divorced from both horse racing and the size of its client base.

27. Following the introduction of the Site Holder Agreements, Ontario's horse racing industry, and in particular, standardbred racing, experienced an unexpected, unplanned, and ultimately unsustainable expansion. As a result of the enhanced purses from the OLG slot revenue, Ontario quickly came to have the most standardbred races and the highest gross purse of any jurisdiction in North America.

28. More than two-thirds of Ontario's racetracks came to rely on the Site Holder Payment for more than two-thirds of their purse money. Some racetracks relied on Site Holder Payments for more than 90% of purse money. Purse Enhancement Payments represented a subsidy to the owners of winning horses, and total purses for standardbred racing more than doubled during the first four years of SARP.

29. The net win from OLG's slot business is public money that belongs to the people of Ontario, and OLG was free to redirect these funds to further its mandate. It was not obliged under the Site Holder Agreements to maintain this slot revenue subsidy to racetracks. No group had a legal right to an indefinite subsidy.

30. Further, OLG had the contractual right in Article 18.3 of its Site Holder Agreements to terminate said Agreements on 270 days' notice "at any time" at OLG's "sole discretion".

OLG's New Strategic Plan

31. In recent years, there have been a number of challenges to OLG's mandate to generate gaming revenue for Ontario. These challenges have included increased competition from American gaming facilities near the Canadian border, an aging gaming model, and a limited online presence, all of which left OLG struggling to keep up with consumer demands.

32. In 2010, OLG was directed by the Crown to conduct a strategic business review to find ways to modernize gaming in the Province of Ontario. As part of its efforts, OLG requested that racetrack operators account for the Site Holder Payments they had received since 1998. The responses gave no clear indication whether or how the funding had been used to improve the Ontario horseracing industry.

33. In March 2011, the Crown established the Commission on the Reform of Ontario's Public Services, known colloquially as the Drummond Commission, to advise the Crown on the elimination of the $14 billion provincial deficit. This mandate included a review of OLG's gaming model.

34. In February 2012, the Drummond Commission released its report, outlining several ways to improve OLG's efficiency and increase its revenue.

35. The findings and recommendations of the Drummond Commission, together with OLG's own strategic review, culminated in OLG's release of a report titled Modernizing Lottery and Gaming in Ontario on March 12, 2012 (the "**Modernization Report**"). The Modernization Report called for three overarching pillars of change: (i) OLG had to become more customer-focused, (ii) OLG had to expand its regulated private sector delivery of services, and (iii) OLG had to renew its role in oversight of lottery and gaming. Together, these three pillars served to underpin OLG's new "**Strategic Plan**".

36. The changes proposed in the Modernization Report are expected to increase OLG's annual net profits. Upon realizing these increased profits, OLG will contribute even more to health care, education, and other essential services and programs for Ontarians.

The Termination of SARP

37. By way of a mandate letter from the Minister of Finance, the Crown directed OLG to terminate SARP pursuant to OLG's contractual termination rights. This was a core policy decision.

38. Accordingly, in the weeks following the release of the Modernization Report, OLG proceeded to terminate all of the Site Holder Agreements.

39. On March 29, 2012, OLG gave notice to fourteen (14) racetracks that their respective Site Holder Agreements would terminate in 367 days, on March 31, 2013, after which time slot machines would no longer be operated at those venues. In so doing, OLG provided significantly more notice than the 270 days that its Site Holder Agreements required.

40. As to the remaining three racetracks, namely Windsor Raceway, Fort Erie Race Track, and Hiawatha Horse Park, OLG provided notice on March 14, 2012 of its intention to terminate the agreements on April 30, 2012. OLG offered to continue making payments until March 31, 2013, i.e. for 382 days, on the condition that these three racetracks continue regularly scheduled live horseracing. Windsor Raceway rejected the OLG offer and launched a lawsuit that is currently before the court; Hiawatha Horse Park accepted the OLG offer, received payment, including funds for purses, and nevertheless launched a lawsuit, which is currently before the court; and Fort Erie Race Track accepted the OLG offer, including funds for purses, and received payment.

41. On April 27, 2012, OLG terminated its Site Holder Agreement with respect to the Quinte Raceway, which was not yet operational.

42. Regularly scheduled live horse racing continued at all Ontario racetracks except Windsor Raceway through March 31, 2013, and Purse Enhancement Payments continued to be made until that time.

43. Thus the entire racing industry, including the Standardbred Breeders, had in excess of one (1) year's notice of the cancellation of SARP and the Site Holder Agreements.

44. The March 27, 2012 Ontario Budget described the changes to SARP as follows:

> "Since 1998, $3.7 billion has been provided to the horseracing industry in Ontario, including $345 million in 2011/12. As part of OLG's modernization process, the government reviewed this support for the horseracing industry, as outlined in the previous government's 1998 letter of intent. In doing so, the government determined that the industry needs to move towards greater self-sufficiency without government support. This will allow the industry to respond competitively to market demands for its racing product."

45. That same Budget noted that the Crown would continue to support the horse racing industry by reducing the province's tax on pari-mutuel wagering.

OLG Did Not Owe the Standardbred Breeders a Duty of Care

46. OLG is required by the OLG Act to act for the public good and in the best interest of the province, not in the interests of the Standardbred Breeders or any other particular stakeholder group.

47. OLG denies that it had any relationship or proximity to the Standardbred Breeders or that it owed the Standardbred Breeders a *prima facie* duty of care. In any event, policy considerations negative any duty of care alleged by the Standardbred Breeders.

There was no relationship of proximity between OLG and the Standardbred Breeders

48. SARP itself, as a government policy of which the Site Holder Agreements were a part, was intended to benefit the people of Ontario and the agricultural sector in particular. It provided a general, non-justiciable subsidy that was expected to support to a diverse range of persons. OLG participated in SARP through its Site Holder Agreements with the racetracks, through which it operated the Prescribed Lottery Scheme at racetrack premises. These were private contracts between OLG and the racetracks with obligations on the part of the racetrack owners to use part of the Site Holder Payment to enhance purses for winning horse owners.

49. The Standardbred Breeders were never parties to the Site Holder Agreements, or even mentioned in those Agreements. The Standardbred Breeders did not receive any direct payments pursuant to the Site Holder Agreements or SARP.

50. Indeed, there were several intervening actors standing between OLG and the Standardbred Breeders. Each one of these actors had the ability, in the ordinary course of their respective businesses, to prevent the Standardbred Breeders from realizing any indirect benefit from SARP and the Site Holder Agreements by simply deciding not to do business with any or all of them.

51. The extent to which any of the Standardbred Breeders received a trickle down benefit as a commercial supplier of horses or breeding services is unknown to OLG and, in any event, beyond the scope of its involvement in SARP.

52. Further, any reliance on the alleged representations of OLG, which representations and reliance are denied, with respect to the continuation of SARP was unreasonable.

53. Stated at its highest, the Standardbred Breeders allege that they raised horses that were sold, directly or indirectly, to Horsepeople, and that pursuant to commercial agreements between the Horsepeople and the racetracks (not the Standardbred Breeders), those racehorse owners had the possibility of sharing in Purse Enhancement Payments (if their horses won purses), which were *ex gratia* payments made under the respective Site Holder Agreements between the racetracks and OLG. Accordingly, any harm suffered by the Standardbred Breeders, which harm is denied, is too remote to create liability on the part of OLG.

The alleged representations were not made by OLG

54. At paragraph 67 of the Statement of Claim, the plaintiffs allege a number of statements by the Crown. OLG is not responsible for the alleged representations of the Crown, either at law or in equity, if indeed they were made and/or properly described.

55. At paragraph 68 of the Statement of Claim, the plaintiffs allege statements by the Ontario Racing Commission (**"ORC"**). ORC is not an agent of OLG, nor is it controlled by OLG. OLG is not responsible for the alleged representations of another agent of the Crown, and in particular, for the alleged representations of ORC.

56. ORC is a without share capital corporation and Crown agent established under the *Racing Commission Act, 2000*, S.O., 2000, c. 20. This legislation provides that the ORC has the statutory authority to govern, direct, control and regulate horseracing in the Province of Ontario.

57. Pursuant to orders in council under the *Executive Council Act,* R.S.O. 1990, c. E.25, the Minister of Finance was responsible for the administration of the *Racing Commission Act, 2000,* and the OLG Act from July 2009 to July 2012. The Minister of Agriculture and Food is currently responsible for the administration of the *Racing Commission Act.* The Minister of Finance remains responsible for the administration of the OLG Act.

58. OLG denies the allegation at paragraph 53 of the Statement of Claim that it agreed to communicate with any of the Standardbred Breeders through ORC and puts each one of the Standardbred Breeders to the strict proof of this bald allegation.

59. Likewise, with respect to paragraphs 69 to 71 of the Statement of Claim, OLG denies that it is responsible at law or in equity for representations allegedly made by ORC's Horse Improvement Program (**"HIP"**). HIP has no legal personality distinct from ORC, and the former is merely a program administered by the latter. OLG denies that it made any representations "through" HIP.

The alleged representations were not made to the Standardbred Breeders

60. Furthermore, to the extent that the Standardbred Breeders rely on alleged representations by OLG, these representations were not made to the Standardbred Breeders. Contrary to paragraph 64 of the Statement of Claim, OLG denies that it participated in a "sustained course of conduct, directed at the Standardbred Breeders across the province".

61. First, OLG's role was to operate its gaming business and, to that end, it entered into the Site Holder Agreements to obtain premises for its slots.

62. Second, the Site Holder Agreements were with racetracks, and they required racetracks to pay Horsepeople a portion of the Site Holder Payment in the form of the Purse Enhancement Payment. The Standardbred Breeders were not part of this scheme.

63. Third, OLG specifically denies that it made any representations to any person that it "remained committed to SARP" and that the Standardbred Breeders "should continue to make long-term investments in their farms and animals". To the contrary, OLG never advised any of the racetracks who were parties to the Site Holder Agreements, or the racehorse owners, much less the breeders, that it would not exercise its early termination rights in the Site Holder Agreements.

64. Fourth, the Standardbred Breeders are not a cohesive group for the purpose of transmitting or receiving representations. Rather, as is pleaded at paragraph 53 of the Statement of Claim, the Standardbred Breeders "were dispersed across the Province in isolated rural communities". Each Standardbred Breeder communicated with OLG, if at all, in a highly individualized manner.

65. OLG denies the allegation, at paragraph 54 of the Statement of Claim, that it agreed to communicate with the Standardbred Breeders through industry associations. OLG was never advised by the Standardbred Breeders that they had retained or instructed any industry association to act as their agent in receiving any communications from OLG.

66. Additionally, contrary to paragraph 95, OLG denies that any of the plaintiffs held out Jim Bullock as their agent for the purposes of giving or receiving communications or creating legal relations, and further denies that (i) Mr. Bullock was a representative of the Standardbred Breeders, or (ii) Mr. Bullock would likely communicate any information to the Standardbred Breeders.

67. OLG also denies the allegation at paragraph 55 of the Statement of Claim that it agreed to communicate with the Standardbred Breeders through Ontario Budget

statements, government reports and studies. These are public policy documents of Ontario, not OLG, and in any event cannot ground legal liability.

68. OLG pleads that the statements alleged at paragraphs 67, 68, 71 and 72 of the Statement of Claim are directed toward one or more of (i) the general public, (ii) third parties that do not include the Standardbred Breeders, or (iii) particular Standardbred Breeders, none of whom was authorized to act as an agent for the others. Additionally, some of the alleged statements are not, in fact, representations at all.

69. OLG's Site Holder Agreements with racetrack operators, referenced at paragraph 72(a) of the Statement of Claim, are private commercial agreements concluded with racetracks. Standardbred Breeders plead that they have not seen any Site Holder Agreement, and that they do not know the terms of these Agreements, including the terms upon which OLG was entitled to terminate said Agreements.

70. OLG further pleads that it is normal commercial practice for many contracts to have early termination clauses, which the Standardbred Breeders knew or ought to have known.

71. The alleged November 2009 statement of the Standing Committee on Government Agencies, referenced at paragraph 72(b) of the Statement of Claim, was not a statement by OLG. Moreover, the comments attributed to OLG were made to the Standing Committee on Government Agencies and not the Standardbred Breeders, and OLG did not have either knowledge or reason to expect that any comments to the Standing Committee on Government Agencies would be transmitted to the Standardbred Breeders.

72. The OLG Annual Reports and corporate news releases, referenced at paragraphs 55 and 72(c) and (d) of the Statement of Claim were statements to the general public, and they were not directed at the Standardbred Breeders.

73. Contrary to paragraph 72(f)(ii) through (v), OLG denies that its alleged silence could constitute a representation or an actionable omission.

74. OLG pleads that the alleged statements did not bind it by way of a contract or a promissory estoppel, and further, that it did not misstate the facts available to it at any time.

Policy considerations negative the duty of care alleged by the Standardbred Breeders

75. In any event, the decision to initiate SARP, continue it, and ultimately terminate it are all matters of core public policy directed by Cabinet after a thorough review by both the Drummond Commission and OLG. The political nature of these decisions is admitted at paragraphs 115 to 124 of the Statement of Claim. Accordingly, these issues are non-justiciable and, in any event, no duty of care arises in respect of these decisions or the manner in which they were communicated on the part of OLG.

76. In particular, OLG denies that it owed the Standardbred Breeders the duty of care described in paragraph 78 of the Statement of Claim. There was no duty to consult with the Standardbred Breeders about changes to the Site Holder Agreements and their attendant Purse Enhancement Payments because the Standardbred Breeders were not parties to these Agreements. For this same reason, there was no duty of good faith, as the Standardbred Breeders were strangers to the contracts.

There was no detrimental reliance

77. OLG denies that the Standardbred Breeders relied on the representations alleged in the Statement of Claim to their detriment. Contrary to paragraph 63 of the Statement of Claim, OLG's alleged representations did not secure the Standardbred Breeders' participation in SARP. The Standardbred Breeders were not participants in SARP or parties to the Site Holder Agreements that implemented SARP.

78. Rather, the Standardbred Breeders simply carried on business in the normal course, in a market made more attractive by SARP slot subsidy. Had the Standardbred Breeders been unable or unwilling to breed standardbred horses, or indeed if racehorse owners were simply not satisfied with the Standardbred Breeders' commercial offerings, it was always open to racehorse owners to purchase stock in other jurisdictions.

79. Additionally, OLG denies that it made any representations to the Standardbred Breeders that it would not terminate the Site Holder Agreements early or that it took any steps to induce the Standardbred Breeders to rely on the proposition that it would not do so.

The alleged representations were true at the time they were made

80. The Drummond Report initiated a period of rapid change as Ontario adjusted its fiscal policy to address a substantial deficit. The result was that some programs that had been maintained over a number of years, such as SARP, were deemed unsustainable expenses. Difficult decisions were made to terminate these programs in the interest of Ontario as a whole.

The Omissions alleged by the Standardbred Breeders Are Not Actionable

81. OLG denies that it wrongfully withheld the decision to terminate SARP from the Standardbred Breeders. OLG denies that it was under any duty to communicate this decision to the Standardbred Breeders at the earliest possible opportunity.

There Was No Contract Between OLG and the Standardbred Breeders

82. The Standardbred Breeders plead, at paragraph 79, that the Letter of Intent, which they plead as a representation at paragraphs 67(a)(i) to (ii), gave rise to contractual duties by OLG to each of them. OLG denies this. The Letter of Intent is not a contract and did not create any legal obligations as between the signatories, let alone the Standardbred Breeders. The Letter of Intent specifically states that it "does not commit individual racetracks or the Ontario Government through the Ontario Lottery Corporation to enter into contracts." It also states that the horse racing industry's "participation is subject to individual racetrack's contractual agreement with the OLC".

83. The Standardbred Breeders also plead that the other representations alleged at paragraphs 67 to 72 of the Statement of Claim gave rise to a contract between OLG and each one of them. OLG denies that it had any such contract with any of the Standardbred Breeders.

84. First, OLG denies that the alleged representations constitute an offer that was capable of acceptance by the Standardbred Breeders. At most, the Standardbred Breeders were suppliers to the Horsepeople, and only the Horsepeople had any prospect of sharing in Purse Enhancement Payments or HIP payments. OLG never offered the Standardbred Breeders any right to any of the Site Holder Payment.

85. OLG further denies that any alleged offer was sufficiently certain to form a contract. The Standardbred Breeders rely only on vague language in alleged representations. There are no contractual terms respecting price, the respective obligations of OLG and the Standardbred Breeders, performance metrics by which to measure contractual compliance, duration of the alleged contract, etc.

86. Indeed, several of the plaintiffs were not yet in existence at the time of some of the representations upon which the Standardbred Breeders rely for the alleged contract.

87. Second, OLG denies that there was any intention to create legal relations between it and any of the Standardbred Breeders. Rather, OLG concluded Site Holder Agreements that required racetrack operators to "establish a separate interest-bearing joint bank account (the "Distribution Account") in trust for the Respective Horsepeople into which the Site Holder shall automatically, immediately deposit the Respective Horsepeople's Entitlement concurrently with the payment to Site Holder by OLGC" (Article 5.2).

88. While the Standardbred Breeders may have hoped to benefit indirectly from the Site Holder Agreements, they knew or ought to have known that they had no legal entitlement to do so. The Standardbred Breeders did not undertake investments in the production of horses because they believed they were fulfilling a contractual obligation. Indeed, the alleged contract contains no particulars of the Standardbred Breeders' alleged obligations, and there is no basis for the claim that any one of them incurred any expense to perform its alleged contract.

89. Third, OLG denies that any one of the Standardbred Breeders communicated acceptance of the alleged contract to OLG. Rather, the Standardbred Breeders claimed

they had a contract with OLG for the first time in their Notice of Action delivered in March 2014.

90. Fourth, OLG denies that the Standardbred Breeders gave consideration for the alleged contract. To the extent that the Standardbred Breeders made any long-term investments in their respective businesses, those investments were made in the ordinary course of their businesses, and not to fulfill any obligation to OLG. OLG puts the Standardbred Breeders to the strict proof that they made any investments as consideration for a legal entitlement to the continuation of SARP or compensation in lieu of notice of its termination.

91. OLG further denies that it received any benefit, direct or indirect, from the Standardbred Breeders. At paragraph 85, the Standardbred Breeders plead that SARP "created billions of dollars of profit for Ontario and OLG". However, OLG's profits were derived from its own operation of its own slot machine business, not from horse racing. OLG denies the allegation at paragraph 86 of the Statement of Claim that it was "substantially enriched" by its access to the horse racing industry's customer base, or its participation in the industry more generally.

92. Rather, as discussed above, the Site Holder Payments were a subsidy to support the horseracing industry through enhanced purses.

OLG Has Not Been Unjustly Enriched

93. OLG has not been enriched by the Standardbred Breeders' breeding of horses for horse races. Rather, the converse is true. As the Standardbred Breeders acknowledge, OLG has provided substantial support for the horse racing industry as a whole by directing a portion of its slot machine net win to racetrack operators, the owners of winning horses, and the HIP.

94. OLG denies that the Standardbred Breeders have suffered any deprivation as a result of OLG's actions, and further, that any deprivation suffered by the Standardbred Breeders corresponds to any enrichment of OLG.

95. Additionally, the Standardbred Breeders cannot recover for an allegedly indirect enrichment that caused an allegedly indirect deprivation. There can be no pass-through claims in unjust enrichment.

96. Furthermore, there were juristic reasons for OLG's alleged enrichment, including: (i) its Site Holder Agreements with the various racetracks; and (ii) the OLG Act. There was likewise a juristic reason for the alleged deprivation suffered by the Standardbred Breeders, namely the termination provisions in the Site Holder Agreements.

97. The Standardbred Breeders cannot maintain a claim in waiver of tort. The termination of OLG's site holder agreements pursuant to their terms is not a wrong that may found a claim in restitution. Furthermore, as discussed above, OLG has not profited from this alleged wrong. Additionally, the claim in waiver of tort is parasitic on proof of a proprietary tort, and the Standardbred Breeders cannot establish that OLG committed a tort of any kind.

OLG Did Not Owe Fiduciary Duties to the Standardbred Breeders

98. Contrary to paragraph 76 of the Statement of Claim, OLG denies that it owed any fiduciary duties to the Standardbred Breeders. Indeed, OLG did not form any private law relationship with the Standardbred Breeders. The Standardbred Breeders have not even pleaded that OLG gave an explicit undertaking to forsake all other interests in favour of their own. OLG denies that any of the alleged interactions between OLG and the Standardbred Breeders gives rise to such an undertaking by implication.

99. OLG further denies that the Standardbred Breeders were dependant on, or vulnerable to, OLG. As discussed above, the Standardbred Breeders were not in any direct relationship with OLG. Rather, they may have received indirect benefits in the ordinary course of their business through a series of intermediaries, including racetrack operators, ORC-administered programs, racehorse owners, brokers, and auctioneers, among others. Each one of these intermediaries controlled the flow of funds to the Standardbred Breeders, independent of any involvement by OLG.

There Was No Promissory Estoppel that Bound OLG

100. OLG denies there was any promissory estoppel that bound OLG.

The Alleged Damages Claimed by the Standardbred Breeders Are Unsubstantiated, Speculative, Remote, and Not Compensable

101. The Standardbred Breeders claim damages for harm to the market for their products and services.

102. OLG denies that the Standardbred Breeders suffered any actionable damages from the termination of SARP or the Site Holder Agreements. Indeed, prior to the termination of the site holder agreements, several Standardbred Breeders complained to Ontario and OLG that they were not benefiting from SARP because enhanced purses had not induced racehorse owners to pay higher prices for their products and services. These Standardbred Breeders alleged that they were not receiving any "trickle down" benefit from the continuation of SARP.

103. The impact of the cancellation of SARP is further diminished in light of the broader market for standardbred horses, which is admitted at paragraph 141 of the Statement of Claim. Standardbred horses are raced and sold throughout North America. The Standardbred Breeders are in a continental market for their products and services. Just as the prospect of winning enhanced purses did not materially increase the market clearing price for Ontario standardbred horses and horse services, the converse is true with the end of enhanced purses.

104. To the extent that there has been any decline in the price of the Standardbred Breeders' products and services, OLG denies that this decline can be attributed to the cancellation of the Site Holder Agreements. Rather, it is attributable to the horse racing industry's failure to adapt to the demands of consumers, develop markets, and improve its products and services. Faced with competition for the entertainment and gambling dollar, standardbred racing has been in a long period of decline. This decline was temporarily arrested by OLG subsidies, but any harm they suffered was caused by their own failure to adapt to a changing marketplace.

105. In any event, the damages claimed by the Standardbred Breeders are both speculative and too remote. The market clearing price received by the Standardbred Breeders is the result of decisions by a multitude of independent third parties.

106. Furthermore, as there was no direct relationship between OLG and the Standardbred Breeders, the harm alleged by the Standardbred Breeders is pure economic loss of a kind that is not compensable at law or in equity.

107. OLG pleads that all or part of the Standardbred Breeders' claims for damages, which are denied, are statute-barred, as the action was commenced beyond the limitation period prescribed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

108. OLG pleads and relies upon the *Negligence Act*, RSO 1990, c. N.1.

109. OLG pleads that neither the Crown nor ORC is a defendant to this action. Accordingly, the pleadings against these parties are scandalous and must be struck.

110. OLG asks that the action be dismissed as against it with costs on a substantial indemnity basis.

May 15, 2014

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