

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
LEE BORDELEAU, et al.,

Plaintiffs,

-against-

Index No. 6582-08
(Lynch, J.S.C.)

The STATE OF NEW YORK, The NEW YORK STATE
ASSEMBLY, The NEW YORK STATE SENATE, DAVID
PATTERSON(sic), et al.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS MOTION TO DISMISS THE
COMPLAINT**

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Table of Contents

Preliminary Statement 1

Standard of Reviews 4

FACTS

A. Aid To Localities Appropriations For The Urban Development Corporation 5

B. Appropriations For The Payment For Services And Contracts For The Department Of Agriculture and Markets 7

 1. **NEW YORK WINE AND GRAPE FOUNDATION** 8

 2. **THE NEW YORK STATE APPLE GROWERS ASSOCIATION** ... 9

 3. **THE LONG ISLAND WINE COUNCIL** 10

ARGUMENT

POINT I

THE APPROPRIATIONS CHALLENGED IN THE COMPLAINT DO NOT VIOLATE ARTICLE VII, § 8 OF THE STATE CONSTITUTION 11

A. Appropriations for the Urban Development Corporation d/b/a Empire State Development Corporation Do Not Violate Article VII § 8 11

B. Appropriations In The Aid To Localities Budget For Payment For Services And Contracts With Non-profit Organizations By The Department of Agriculture and Markets 14

POINT II

PLAINTIFFS’ ARTICLE VII § 7 CLAIM THAT CERTAIN BUDGET APPROPRIATIONS LACK SPECIFICITY IS A NON-JUSTICIABLE POLITICAL QUESTION 16

POINT III

THE CHALLENGED STATE BUDGET PROVISIONS DO NOT UNLAWFULLY DELEGATE LEGISLATIVE AUTHORITY TO THE GOVERNOR IN VIOLATION OF NY CONSTITUTION ARTICLE III 20

POINT IV

**THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN
NECESSARY PARTIES 21**

CONCLUSION 23

Preliminary Statement

This declaratory judgment action was commenced by forty-six individual plaintiffs and a purported limited liability corporation by Order to Show Cause, signed by the Hon. John Egan, J.S.C. on August 4, 2008. The matter is currently returnable before this Court on October 13, 2008, or as soon thereafter as counsel may be heard. The plaintiffs contend: (1) that in certain identified appropriations in the state budgets for 2007-08 and 2008-09, the Governor, Legislature and Legislative leaders violated New York Constitution article VII § 8's prohibition against gifts of state money or credit to private organizations (Compl. ¶¶ 25-56, Plaintiffs Memorandum at pp. 1-7.); (2) that defendants violated New York Constitution, article VII, § 7 because certain budget provisions allegedly do not specifically identify the sums appropriated, and the object or purpose to which the funds are to be applied (Compl. ¶¶ 57-68, Plaintiffs' Memorandum of Law at pp. 7-9.); and (3) the Legislature has improperly delegated legislative power to the Governor in violation of New York Constitution, article III, because the language used by the Legislature in enacting certain budget appropriations states that the amounts appropriated will be spent according to agreement(s) between the Governor, Assembly Speaker, and Senate Majority Leader. (Compl. ¶¶ 58, 60, 61, 64, 76, Plaintiffs' Memorandum of Law pp 7-9). The plaintiffs seek a declaration that the challenged appropriations violate New York Constitution, article VII §§ 7 and 8, and article III. In addition, plaintiffs seek an injunction against the State defendants barring disbursement of funds that have not already been disbursed, and an injunction against the private defendants directing the return of funds already disbursed pursuant to the challenged appropriations.

State defendants move to dismiss the complaint for failure to state a claim with respect to the article VII § 8 and article III claims; for failure to join as necessary parties, the entities identified

in the complaint but not named as parties by the plaintiffs, who have received State funds; and for lack of a justiciable controversy with respect to plaintiffs' article VII § 7 claim.

Fundamentally, plaintiffs have erroneously asserted that the Legislative appropriations cited in the complaint are direct State grants to private corporations or undertakings for private purposes prohibited by article VII § 8 of the State Constitution. A review of the affidavits and affirmations of Douglas Wehrle, Senior Vice President of the Loans and Grants Department at the Empire State Development Corporation, Exhibit "A", and Diane Smith, Associate Attorney, of the Department of Agriculture and Markets, Exhibit "B", and Kathy Bennett, Counsel to the Director of the Budget, Exhibit "C", and the exhibits annexed thereto, and incorporated by reference herein, shows that the appropriations at issue were (1) either for payment for services, costs or contracts to not-for-profit entities made by the State Department of Agriculture and Markets for services provided for public purposes, which are clearly not gifts of state funds to private corporations; or were, (2) permissible appropriations enacted in the State Budget for the Urban Development Corporation, d/b/a Empire State Development Corporation (hereinafter, "ESDC"), a public benefit corporation, created pursuant to the Urban Development Corporation Act, charged with carrying out well recognized public purposes such as urban renewal, economic development, and retention and expansion of businesses and jobs in the State. Contrary to plaintiffs' assertions, in their Memorandum of Law, the Courts have long upheld the authority of the State to appropriate money and provide it to public benefit corporations, so long as the appropriations are for a public purpose. Comerski v. City of Elmira, 308 NY 348 (1955); Schulz v. State of New York, 84 NY 2d 231, 246 (1994); Wein v. State of New York, 39 NY 2d 136, 144 (1976).

In addition, plaintiffs' article VII, § 7 claim that the budget allegedly lacks specificity because the amount of the appropriations and their purposes are not specifically identified should be dismissed as a non-justiciable political question. Article VII § 7 provides in relevant part that: "No money shall ever be paid out of the state treasury or any of its funds, or any funds under its management except in pursuance of an appropriation by law . . . and every such law making a new appropriation . . . shall distinctly specify the sum appropriated and the object or purpose to which it is to be applied." The Court of Appeals has expressly held that the question of the necessary degree of specificity in the Budget is a non-justiciable political question left to the Legislature and the Executive branches that the courts may not review. Saxton v. Carey, 44 NY 2d 545, 549-551 (1978); Urban Justice Center v. Pataki, 38 AD 3rd 20 (1st Dept 2006); Schulz v. State of New York et al, 160 Misc 2d 741, 747 (Sup Ct Albany Co 1994).

Further, plaintiffs' article III claims should be dismissed as the fact that the final details of the disbursements of the enacted appropriations in some cases are left to the Governor and legislative leaders by agreement does not create an unlawful delegation of legislative authority to the Governor. The Legislature as a whole enacted those provisions leaving the final details to the Governor and the legislative leaders of the respective houses of the Legislature. Implementation of the Budget generally falls within the powers of the executive branch, and inclusion of the Governor in the final determination of how a particular appropriation is to be disbursed is in accord with the Governor's constitutional powers. (NY Const. article VII §§ 2,3) and does not create an unlawful delegation of legislative power in violation of article III.

STANDARD OF REVIEW

As the Court of Appeals recently reiterated in Campaign for Fiscal Equity, Inc. v. State of New York, 8 NY3d 14, 28-29(2006), the function of the Judiciary is not to usurp the budgetary prerogatives of the legislative and executive branches, as the policy branches are in a far better position to determine funding needs throughout the State and to set priorities for the allocation of the State's resources. See Id. The standard of review for a motion to dismiss requires that the Court afford the plaintiffs' pleading a liberal construction, accept as true the allegations therein, accord the plaintiffs the benefit of every favorable inference, and determine whether the facts fit within any cognizable legal theory. See 1455 Washington Ave. Assoc. v. Rose & Kiernan, Inc., 260 AD2d 770, 771 (3rd Dept.1999). The Court, of course, need not accept as true legal conclusions or factual allegations that are inherently incredible or flatly contradicted by documentary evidence. Id. Similarly, the Court should not consider inadmissible and unsworn evidence in deciding a motion to dismiss. Curry v. D'Onofrio, 29 AD3d 727 (2d Dept. 2006). In weighing whether plaintiffs have stated a claim sufficient as a matter of law, the Court must be mindful that plaintiffs' burden is to come forward with factual allegations which will overcome the settled rule that a presumption of constitutionality attaches to these budgetary enactments, just as it does to every legislative enactment. See, e.g., Wolpoff v. Cuomo, 80 NY2d 70, 78 (1992); In re Fay, 291 NY 198, 207 (1943).

Plaintiffs' heavy burden on such a claim is to establish that the statutory scheme is unconstitutional beyond reasonable doubt. Maresca v. Cuomo, 64 NY 2d 242, 250 (1984); Schulz v. New York State Legislature, 244 AD 2d 126, 131-32 (3rd Dept 1998). Further, when reviewing appropriations for public financing or for public expenditures designed to be in the public interest,

judicial restraint is critical as the court may not substitute its judgment for that of the legislative and executive branches. People ex rel Hotel Dorset Co. v. Trust for Cultural Resources, 46 NY 2d 358, 369-370 (1978).

FACTS

A. Aid To Localities Appropriations For The Urban Development Corporation.

The Urban Development Corporation Act, enacted in 1968 by the Legislature, created the Urban Development Corporation as a public benefit corporation. see(Chapter 174 of the Laws of 1968, as amended [UDC Act] NY CLS Unconsol. Ch. 252 § 4 (2007). UDC has been doing business as the Empire State Development Corporation. The Legislature gave UDC broad and unique powers with which to improve job opportunities, housing, blighted areas, community facilities and industry. Among the exceptional powers is the ability to execute contracts, and all other instruments necessary or convenient to carry out the goals listed above. NY CLS Unconsol. Ch. 252 § 16-m. These include all manner of agreements in furtherance of UDC’s public purposes with private parties. Ex. “A”Wehrle aff.¶ 4. ESDC is authorized to create subsidiaries to carry out the goals and purposes of the agency. NY CLS Unconsol. Ch. 252 § 12. The Erie Canal Harbor Development Corporation (“ECHDC”), is such a subsidiary and was created to assist in the redevelopment of blighted areas in the City of Buffalo. Ex. A. Wehrle aff. ¶ 3.

Funds that are appropriated to ESDC in the New York State Budget are not appropriated directly to any private parties. While a private party may be the ultimate recipient of such funds, the private party must still submit an application for the funding to ESDC. The application is rigorously examined by multiple layer of ESDC staff to determine the applicants eligibility for funding. The

project must then be approved by the ESDC Board of Directors. If the application passes this stage, public hearings on the projects are held. Ex, “A” Wehrle aff ¶ 7.

The Loans and Grants Department of ESDC is responsible for implementing projects that are funded by several core economic development programs that provide financial assistance to the businesses and communities in New York State. These grant and loan programs serve an important public purpose by assisting communities and businesses meet gaps in financing economic development initiatives, facility improvements or expansions, entice new companies to choose New York State as a location for a new business, or induce existing businesses to retain current New York State jobs that are at risk of flight. The economic benefit to the State and the public far exceeds the amount of the grants or loans. Loans and Grants also administers appropriations which originate from the Legislature and Executive to support public purpose economic development initiatives such as those challenged in the instant matter. Ex. “ A” Wehrle aff. ¶ 5.

Subsequent to ESDC Board approval, additional fiscal oversight is implemented by the Public Authorities Control Board (“PACB” for approval of the acquisition, construction or financing of any capital project. PACB consists of representatives of the Governor through the Division of the Budget, the Senate and the Assembly. Public Authorities Law § 50. Both the ESDC Board and PACB meetings are subject to the Open Meetings Law. Ex “A” Wehrle aff. ¶ 8. Even after the completion of this rigorous approval process, the disbursement of the ESDC funds is not necessarily final. ESDC funds are loaned and granted based upon Grant Disbursement Agreements (“GDA”) in which the grantees or borrowers agree to meet public purpose goals, (e.g., retention or creation of jobs) prescribed by ESDC. A failure by the grantee or borrower to meet such goals will result in the denial

of undisbursed funds and/or the full or partial recapture of previously disbursed ESDC funds depending on the degree of variation from the prescribed goals. Ex. “A” Wehrle aff. ¶ 9.

A review of the projects associated with the appropriations challenged in the complaint shows that these appropriation to ESDC were for the well recognized public purposes of economic development such as urban renewal, job creation, and expansion or retention of businesses in New York . See, Ex “A” Wehrle aff. ¶¶ 11-48. For example as shown in paragraph 40 of the Wehrle Aff., the State’s investment of \$140 million will leverage a \$1.54 billion investment by IBM, and result in the creation of at least 675 jobs at a wafer packaging facility and 325 jobs at Albany Nanotech; and retention of 1400 jobs at IBM's East Fishkill facility.

B. Appropriations For The Payment For Services And Contracts For The Department Of Agriculture and Markets.

At ¶37 of the Complaint, plaintiffs allege that three appropriations made within the Budget for the New York State Department of Agriculture and Markets (“Department”) in Chapter 55 of the Laws of 2008 and 2007 are unlawful. Plaintiffs, however, are under the misimpression that these monies are gifts to private organizations. In particular, plaintiffs complain of an appropriation of \$750,000 for goods and services of the New York State Apple Growers Association set forth at Chapter 55 of the Laws of 2008 at p. 11, lines 15-17; an appropriation of \$980,000 for goods and services of the New York Wine and Grape Foundation set forth at Chapter 55 of the Laws of 2008 at p. 9 line 9; and an appropriation for goods and services of the Long Island Wine Council set forth at Chapter 55 of the Laws of 2007 at p. 24 line 50. Copies of the relevant portions of the budget bills are attached to Exhibit. “B” Smith Aff. ¶ 2 and Ex “A”.

Each of the three appropriations of which plaintiffs complain involve appropriations to be administered by the Department for goods and services to be provided by each of the entities identified by the Legislature in the Budget as set forth below. None of those three entities has been named or is a party hereto and each has an interest in fulfilling their contractual obligations related to the appropriations and the receipt of the appropriated funds and each would be adversely affected should plaintiffs prevent these parties from going forward with their contracts and prevent them from providing the State the products and services which they have agreed to provide.

The Legislature has expressly declared the public policy in New York recognizing that the agricultural industry affects the welfare, health, economic well-being and productive and industrial capabilities of all the State's peoples and that it is the duty of the State to promote that industry. Agricultural and Markets Law, § 3. To that end, the Department has a statutory obligation to aid in the promotion and development of the agricultural industry and to cooperate with associations and corporations which have that goal. Agriculture and Markets Law, §16. As more fully set forth below, the appropriations at issue are clearly payment for services and contracts for services provided to the State for a public purpose and are not gifts of State funds to private groups for private purposes.

1. NEW YORK WINE AND GRAPE FOUNDATION

The New York Wine and Grape Foundation is a corporate creature of statute, having been established by the Legislature in Chapter 80 of the Laws of 1985 for the purpose of "providing for an effective and continuous program of research, promotion and education to strengthen the New York wine and grape industry's position in the marketplace." See Exhibit "B" Smith Aff. ¶¶ 9-11. As expressly provided in §10 of Chapter 80 of the Laws of 1980, the Department, in turn, was

directed to use appropriated funds to enter into a contract or contracts with the New York wine/grape foundation created by section two of this act for:

- (a) a research study or studies into new or improved methods of production . . . ;
- (b) a demonstration projection or projects to reduce agricultural unemployment and increase state and local revenues . . . ;
- (c) advertising and promotion of the sale of wine and other grape products in areas that will reach the greatest number of potential consumers;
- (d) publication and distribution [of] . . . information relating to the grape, wine and grape products industries;
- (e) the facilitating of educational and promotional activities . . . ;
- (f) the carrying out in any other way the declared policy of this act to promote wine and other grape products and the grape industry of this state.

As directed by law, therefore, the Department has applied the appropriation of which plaintiffs complains, a \$1,000,000 appropriation set forth at Chapter 55 of the Laws of 2008 at p. 9, lines 6-10, for a contract encompassing the scope of work precisely within the confines of Chapter 80 of the Laws of 1985, and solely aimed at all the public purposes which the Legislature clearly proclaims in Agriculture and Markets Law § 3 and within the agency’s mission as provided in §16(2). See Ex B, Smith Aff. ¶ 9-11 .

2. THE NEW YORK STATE APPLE GROWERS ASSOCIATION

Plaintiffs reference the appropriation for the goods and services to be provided by the New York State Apple Growers Association for \$750,000 which is set forth at p. 11 of Chapter 55 of the Laws of 2008 at lines 15- 17. As provided in the New York Apple Growers Association, Inc., plan of work for the 2008-2009 contract year, this appropriation is to be applied to support new initiatives to increase consumption of New York State apples in a variety of ways, including multimedia advertising to consumers and a variety of interactions with retailers. See Exhibit B, Smith Aff, ¶¶6-8. This appropriation therefore directly fulfills the public purposes expressly recognized by the Legislature in section 3 of the Agricultural and Markets Law and is accomplished by the Department

in the exercise of its power to aid in the promotion and development of the agricultural resources of the State as set forth in §16(2) of that law.

Indeed, the Commissioner is expressly authorized in 1 NYCRR 201.7 to contract with the New York Apple Growers Association, Inc., among others, to conduct such advertising, promotion, and publicity programs as the Commissioner may believe will create new markets for apples and/or apple products or maintain present markets therefor.

3. THE LONG ISLAND WINE COUNCIL

Similarly, the appropriation of \$25,000 set forth at line 50 on page 24 of Chapter 55 of the Laws of 2007, apparently referenced in ¶ 37 of the Complaint, is an appropriation for the Department to fulfill its mission to aid in the export promotion, marketing and sale of New York State labeled wines, grapes and grape products, in this case by contracting with the Long Island Wine Council to promote regional wine making. To this end, the Department entered into the contractual agreement set forth as Exhibit E of the Smith Affirmation. Among other things, it provides that the Long Island Wine Council will update promotional materials with respect to regional wineries, advertise in a variety of media, and participate in outreach to broad categories of media to share information concerning regional wine making. As noted above, the Legislature has expressly authorized the Department to aid in the promotion of New York State labeled wines (see, e.g., Agriculture and Markets Law, §16[2-b]) and thus fulfills the public purposes set forth in §3 of the Agriculture and Markets Law.

ARGUMENT

POINT I

THE APPROPRIATIONS CHALLENGED IN THE COMPLAINT DO NOT VIOLATE ARTICLE VII, § 8 OF THE STATE CONSTITUTION

The plaintiffs challenge the above referenced appropriations in the complaint on the ground that they are direct grants by the State to private corporations or businesses for a private purpose in violation of article VII, § 8 . Article VII § 8 prohibits the gift or loan of state money or credit to any private corporation, or private undertaking. The purpose of this section is to prevent the State from incurring obligations either through gifts or loans that it cannot meet in the current budget and thereby placing the burden of such obligations on future taxpayers. Wein v. State of New York et al., 39 NY 2d 136, 142-144 (1976); Schulz v. State of New York et al., 84 NY 2d 231, 245-246 (1994); Schulz v. State of New York, 86 NY2d 225, 233 (1995). Plaintiffs attack economic development appropriations made for the Urban Development Corporation d/b/a ESDC and ECHDC, a subsidiary corporation of ESDC, as well as, appropriations in the Aid to Localities budget for the Department of Agriculture and Markets for services, expenses and contracts to various not for profit groups for research and promotion of New York wine and apples .

A. Appropriations for the Urban Development Corporation d/b/a Empire State Development Corporation Do Not Violate Article VII § 8.

Plaintiffs erroneously assert that the challenged appropriations are direct grants to private corporations by the Legislature. The New York courts have consistently rejected challenges to appropriations to public benefit corporations for public purposes. Since People v. Westchester County Natl. Bank, 231 NY 465 (1921), the Court of Appeals has established that the constitutional line with respect to article VII § 8 is between permissible gifts and loans to public corporations for public

purposes, and impermissible gifts and loans to private entities for private purposes. It is undisputed that the State may give or lend money, as distinguished from its credit, to assist a public benefit corporation or authority in a public purpose. Westchester County Natl. Bank, 231 NY at 472-474; Schulz v. State of New York et al., 84 NY2d 231, 246 (1994); Wein v. State of New York et al., 39 NY 2d 136, 139, 145-46 (1976) Comereski v. City of Elmira, 308 NY 248 (1955); Schulz v. State of New York et al., 198 AD2d 554, 556 (3rd Dept. 1993); Schulz v. State of New York, 244 AD 2d 126, 131(3rd Dept. 1998); Schulz v. New York State, 160 Misc 2d 741 748-749 (1994).

As the Budget documents reveal, the appropriations at issue were for the Urban Development Corporations/d/b/a/ ESDC, a public benefit corporation, for the public purpose of economic development, which includes job retention as well as expansion of business and jobs in the State. See Exhibit A Douglas G. Wehrle Affidavit and annexed attachments. As noted in the Wehrle Affidavit, these appropriations were made to the ESDC a public benefit corporations for various economic development purposes some of which are carried out by its subsidiary corporation ECHDC. NY CLS Unconsol. Ch. 252 §§ 4, 12. Neither ESDC nor the ECHDC are agencies of the State for article VII purposes. See, Mtr. Of Smith v. Arthur Levitt, 30 NY 2d 934 (1972); Schulz v. State of New York, 84 NY 2d 231 (1994); Mtr. Of Plumbing Heating, Piping & Air Conditioning Contrs. Assn. v. NYS Thruway Authority, 5 NY 2d 420, 423, 424 (1959). Although created by the State, public benefit corporations are independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission. Mtr. of Plumbing Heating, Piping & Air Conditioning Assn., 5 N.Y. 2d at 423; Schulz v. State of New York et al., 84 NY 2d at 245-246.

Moreover, the applicants to ESDC for grants are not receiving a “gift” in order to receive the grant or loan from ESDC, the applicant must enter into a Grant Disbursement Agreement to carry out the public goals at issue for a particular project. If the applicant fails to meet those goals there can be partial or total recoupment of the funds. Ex. A Wehrle Aff. ¶ 9.

The court in Schulz v. State of New York, 160 Misc 2d 741 (Sup Ct Albany Co1994) addressed the question of whether lump sum payments to private not for profit corporations for services to various state agencies were gifts to private corporations for private purposes in violation of article VII § 8. The court found that the determination of public purpose must be made by the courts and the courts must have a basis upon which to do so. Id. at 748-749. Yonkers Community Dev. Agency v. Morris 37 NY 2d 478, 483 (1975). The New York Courts have determined that appropriations of public funds for a variety of purposes served a public interest, for example, athletic facilities, urban development projects, and infrastructure expansion which benefits business all have been upheld as legitimate public purposes. Schulz, 160 Misc 2d at 749, fn. 6; Wein v. State of New York et al. 39 NY 2d at 145-146; Waybro et al. v. Board of Estimate et al., 67 N.Y. 2d 349, 357-58 (1986) In Yonkers Community Dev. Agency, the Court of Appeals found that underdevelopment and stagnation . . . are threats to the public sufficient to make their removal cognizable as a public purpose. 37 NY 2d at 481. The mere fact that a profit would be realized by an infusion of public funds for job growth is not critical to the determination of public purpose. Yonkers Community Dev. Agency v. Morris, 37 NY 2d at 482 ; Metropolitan Transportation Auth. v. Village of Tuckahoe, 67 Misc. 2d 895, aff'd 38 AD2d 570 (2d Dept. 1972); NYS Urban Development Corporation v. Vanderlex, 98 Misc. 2d 264, 269, 272-274 (Sup Ct NY Co1979). Rather, the dominant benefit to the general public is the key to the determination. Waldo's v. Village of Johnson City, 74 NY 2d 718 (1989); Mtr. Of

41st Street Realty LLC et al. v NYS Urban Development Corp. d/b/a Empire State Development Corp., 98 AD 2d 1, 6-7 (1st Dept 2002).

In the instant matter, the appropriations for the ESDC are unquestionably for public purposes. A review of the Wehrle affidavit ¶¶ 11-46, shows that the projects to be funded by the appropriations serve a number of public purposes including job retention, retention of business in the State, expansion of businesses and jobs, renewal of blighted areas particularly in Buffalo and the creation of new industry such as the development of high tech facilities in New York which will also increase jobs. For example, the State's investment of \$140 million in the IBM grant will leverage a \$1.54 billion investment by IBM, and result in the creation of at least 675 jobs at a wafer packaging facility and 325 jobs at Albany Nanotech; and retention of 1400 jobs at IBM's East Fishkill facility. Clearly, the programs advanced by the appropriations to ESDC are for well recognized public purposes and do not violate Article VII § 8.

B. Appropriations In The Aid To Localities Budget For Payment For Services And Contracts With Non-profit Organizations By The Department of Agriculture and Markets.

The plaintiffs challenge appropriations for contracts and services provided by the New York Apple Growers Association, the New York State Grape and Wine Foundation, and the Long Island Wine Council. As noted above, the New York Apple Growers Association, Inc., pursuant to their contract with the Department of Agriculture and Markets ("Department") is to conduct such advertising, promotion, and publicity programs as the Commissioner may believe will create new markets for apples and/or apple products or maintain present markets therefore. Ex. B Smith Aff. at ¶¶6-8.. The New York Wine and Grape Foundation is a corporate creature of statute, having been established by the Legislature in Chapter 80 of the Laws of 1985 for the purpose of "providing for an

effective and continuous program of research, promotion and education to strengthen the New York wine and grape industry's position in the marketplace." As directed by law, the Department has applied the challenged \$1,000,000 appropriation set forth at Chapter 55 of the Laws of 2008 at p. 9, lines 6-10, for a contract encompassing the scope of work precisely within the confines of Chapter 80 of the Laws of 1985. Similarly, the appropriation of \$25,000 set forth at line 50 on page 24 of Chapter 55 of the Laws of 2007, apparently referenced in ¶ 37 of the Complaint, is an appropriation for the Department to fulfill its mission to aid in the export promotion, marketing and sale of New York State labeled wines, grapes and grape products, in this case by contracting with the Long Island Wine Council to promote regional wine making. The Department has entered into such a contractual agreement with the Long Island Wine Council. Ex B, Smith Aff. at ¶¶ 12-14.

The Legislature has stated in the Agriculture and Markets Law that it is the express public policy of the State to assist the agriculture industry in the State "... as it directly affects the welfare, health and economic well-being and productive and industrial capabilities of the people of the state."

§ 3. Declaration of policy and purposes, NY CLS Agr & M § 3 (2007). In addition, § 3 provides in relevant part:

It is the policy and duty of the state to promote, foster, and encourage the agricultural industry, with proper standards of living for those engaged therein; to design and establish long-range programs for its stabilization and profitable operation; to increase through education, research, regulation, and scientific means, the quantity, quality, and efficiency of its production; to improve its marketing system; to encourage adequate and skilled assistance for agricultural enterprises;

The Legislature has further granted the Department the power to aid in the promotion and development of agricultural resources of the State by section 16 of the Agriculture and Markets law.

Section 16 (2-b) provides:

- 2-b. Aid in the promotion, marketing , and sale of New York state labeled wines, grapes and grape products in cooperation with the department of economic development both within and outside the state and to provide promotion and marketing advisement to wineries, farm wineries, micro-wineries, grape and other fruit growers and processors, and related trade organizations located within this state. . . .

NY CLS Agr & M §16, (2-b).

The appropriations for the contracts at issue are solely aimed at all the public purposes which the Legislature clearly sets forth in Agriculture and Markets Law § 3 and within the agency’s mission as provided in §16(2). It is clear that the appropriations for such contracts are permissible under Article VII § 8 as they have been made to a State agency that has been authorized by statute to enter into such contracts with not-for-profit entities to fulfill the public purposes set forth in the Agriculture and Markets Law. Schulz v. State of New York, 160 Misc 2d at 749; Schulz v. Warren County Bd. of Supervisors, 179 AD2d 118 (3rd Dept 1992); Piro v. Bowen, 76 AD2d 392 (2d Dept 1980).

The Court should dismiss the plaintiffs’ Article VII § 8 claims as the appropriations at issue are not gifts of public funds to a private corporation or private undertaking, and the complaint therefore fails to state a cause of action in this regard.

POINT II

PLAINTIFFS’ ARTICLE VII § 7 CLAIM THAT CERTAIN BUDGET APPROPRIATIONS LACK SPECIFICITY IS A NON-JUSTICIABLE POLITICAL QUESTION

Plaintiffs contend that certain appropriations violate the State Constitution Article VII § 7. See Kathy Bennett affirmation ¶ 2 and attachments annexed thereto. Plaintiffs’ challenge is to language contained in a number of appropriations which provide for the appropriations to be spent according to memoranda of understanding (“MOU”) between the Governor and the Legislative Leaders of both houses of the Legislature. The Court of Appeals has held that while the New York Constitution

requires that the State budget be itemized, it is not the proper function of the courts to police the degree of itemization nor the manner in which the funds are to be disbursed once the budget has been enacted by the Legislature. Saxton v. Carey, 44 NY 2d 545, 550-551 (1978); Urban Justice Center v. Pataki, 38 AD 3rd 20 (1st Dept 2006); Schulz v. State of New York, 160 Misc 2d at 746-748.

In Saxton the plaintiffs claimed that the budget was insufficiently itemized to provide the Legislature with the information necessary for that body to properly perform its constitutional role as the ultimate guardian of the public fisc. Id. at 547. Analogous to the plaintiffs' challenge to the MOU's between the Governor and the Legislative leaders in the instant matter, the plaintiffs in Saxton also challenged as unconstitutional provisions in the State budget that allowed transfer of funds within particular programs and departments following passages of the budget by the Legislature, thereby allegedly precluding effective legislative control over the expenditure of public funds required by article VII §. 7. Id. at 548. The Court found that the dispositive question presented by the case was the extent to which courts of this State may intervene in the budgetary process in order to ensure that the methodology prescribed by the Constitution is properly utilized. Id. The Court found that under our system of government, the creation and the enactment of the State budget is a matter delegated essentially to the Governor and the Legislature. Id. at 549.

The Court noted that it is the Governor, as chief executive officer, that has the responsibility and the obligation to determine the financial needs of the various departments and projects of the State government, and to submit to the Legislature for its consideration a budget and various appropriation bills incorporating those needs. NY Const. article VII §§ 2, 3. It is the Legislature's role to review the proposed budget and to approve or disapprove of the various expenditures proposed by the Governor. NY Const. article VII § 4. Saxton v. Carey, 44 NY 2d at 549. There is no dispute that

itemization is required by the Constitution. However, the Court of Appeals held that the Constitution does not prescribe any particular degree of itemization. Id. The Court opined that there is no constitutional definition of itemization, no judicial definition of itemization, and no inflexible definition is possible. Id. at 550. The Court held:

[T]he degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget. This is a decision which is best left to the Legislature for it is not something which can be accurately delineated by a court. It is rather a function of the political process, and that interplay between the various elected representative of the people which was certainly envisioned by the draftsmen of the Constitution. . . . If however, as here the Legislature is satisfied with the budget as submitted by the Governor, then it is not for the courts to intervene and declare such budget invalid because of a failure to measure up to some mythical budget specifically delineating the exact fate of every penny of the public funds. ‘Direct concern with the degree of particularization or subdivision of items lies exclusively with the executive and legislative branches of government simply because they are the sole participants in the negotiations and adoption of an executive budget.’

Id. citing Judge Breitel in dissent in Hidley v. Rockefeller, 28 NY 2d 439, 445 (1971). The Court also held that “Should a Legislature fail in its responsibility to require a sufficiently itemized budget, the remedy lies not in the courtroom, but in the voting booth.” Id. at 551.

The Saxton Court reached a similar conclusion with respect to the provisions for intra-program transfers of funds after the budget had been approved. Id. The Court held that:

Transfer provisions are really strings attached to the appropriated items and to that extent ‘de-itemize’ them depending how restricted or unconditioned are the transfer provisions. Consequently, transfer provisions are valid because the Legislature has enacted them, and thereby approved flexibility in the appropriated items. If the Legislature is or should be concerned that the transfer provisions give the executive too much leeway and deprives them of the supervisory power they have and wish to exercise, the remedy is in their hands. . . .

Today we simply refuse to extend the power of the robe into an arena in which it was never intended to play a role. We hold only that the degree of itemization and the extent of transfer allowable are matters which are to be determined by the Governor and the Legislature and, not by judicial fiat.

Id. at 735-736. Likewise, in Schulz v. State of New York, 160 Misc 2d at 746-748, the court dismissed an article VII § 4 challenge to a Legislative addition to the Governor’s budget. In that case the alleged illegality perceived by the plaintiffs was that the additional appropriation was made as a large lump sum without specifying the agencies included, in other words, not identifying specifically how the money was to be spent. The court, citing Saxton, found that since the Constitution does not define the degree of itemization it is not “the proper function of the courts to police the degree of itemization necessary in the State budget.” Id. at 747.

Plaintiffs complain in the instant matter that the disbursements for certain appropriations are left to post enactment determinations by the Governor and the Legislative leaders which in their view improperly delegates Legislative power to the Executive and diminishes the role of the Legislature. (Plaintiffs’ Memorandum of Law at pp.7-9). The purpose of Article VII § 7 was to provide for Legislative control over expenditures. Here, as in Saxton and Schulz, the Legislature passed the budget which contained the allegedly offending provisions, and the court is precluded from reaching this issue. As both the Court of Appeals in Saxton and the Supreme Court in Schulz noted the plaintiffs’ remedy is in the voting booth not the courts. Saxton, 44 NY 2d at 551; Schulz, 160 Misc 2d at 746, fn 3.

POINT III

THE CHALLENGED STATE BUDGET PROVISIONS DO NOT UNLAWFULLY DELEGATE LEGISLATIVE AUTHORITY TO THE GOVERNOR IN VIOLATION OF NY CONSTITUTION ARTICLE III

Plaintiffs allege that the challenged provisions providing for payment of certain appropriations according to agreements between the Governor and the Legislative Leaders violate separation of powers contained in article III of the State Constitution. Article III § 1, entitled Legislative Power, provides that: “The legislative power of this state shall be vested in the senate and assembly.” As the Court of Appeals noted in Pataki v. Silver, 4 NY 3d 75, 80 (2004), since 1927, the New York Constitution has provided for executive budgeting. Until 1927, all budgeting like other legislation, originated with the legislature. Id. The Governor’s only power over the budget legislation was the veto. Id. “The original purpose of the executive budgeting system was to change the roles of the Governor and the Legislature in the process—to make the Governor ‘constructor’ and the Legislature the ‘critic’ . . . the newly proposed system ‘did not deprive the Legislature of any of its prerogatives’; nor, did it in a fundamental way, ‘add to the Governor’s powers. Id. at 83-84.

Under the current system, article VII, §§ 1-7 govern the budget process and vest certain legislative powers in the Governor, “creating a limited exception to the rule stated in article III, § 1 of the Constitution”. Id. at 83. As the Pataki court noted, “[T]he classic ‘separation of powers’ between the executive and legislative branches is modified to some degree by our Constitution . . .” Id. In the process set forth in the Constitution, the Governor receives estimates from department heads of their financial needs. NY Const, art VII § 1. The Governor submits a budget to the Legislature along with bills containing all proposed appropriations and re-appropriations included in

the budget and the proposed legislation, if any, recommended. NY Const, article VII §§ 2, 3. The manner in which the Legislature may act on these bills is governed by article VII, § 4. The idea of executive budgeting is that the Governor must produce an economical and systematic plan for the annual budget which includes not only the amount of the appropriations but also how the appropriations are to be spent. As the Court of Appeals found, “That ‘systematic’ plan must be based upon the Governor’s judgment not only on how much to spend, but on which specific expenditures are prudent, and what preconditions should be imposed on them.”*Id.* at 89. Plaintiffs argue that the challenged provisions diminish the role of the legislature as a whole and result in an unlawful delegation of legislative authority to the Governor. See, Memorandum of Law at pp. 8-9. This claim is clearly without merit as segregation of funds is clearly within the power of the Governor. Further, it is eminently clear that the Constitution neither deprives the Governor of any role in the implementation of the expenditure amounts appropriated nor precludes him or her from the benefit of accord with other government officials concerning the most effective and appropriate use of such appropriations within the express purposes of such appropriations. Schulz v. State of New York et al., 160 Misc 2d at 746 and n. 3.

POINT IV

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN NECESSARY PARTIES

The complaint should be dismissed for failure to join as necessary parties those entities identified in the complaint at paragraph 37 and 46 who have not been named as parties to this action. CPLR 1001 requires joinder of persons “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action” Matter of Martin v. Ronan, 47 N.Y.2d 486, 490 (1979). The fundamental purpose of

joinder is to implement one of the requisites of due process; the opportunity to be heard before one's rights or interests are adversely affected. Failure to join necessary parties in and of itself is a basis for dismissal under CPLR 3211(a)(10); moreover, if the statute of limitations expires before necessary respondents have been served, the matter must be dismissed against all respondents Ogbunugafor v. New York State Education Dept., 279 AD 2d 738 (3rd Dept 2001); see also O'Connell, et al v. Zoning Board of Appeals of the Town of New Scotland, et al, 267 AD 2d 742 (3rd Dept 1999); Matter of Mount Pleasant Cottage School Union Free School District v. Sobol, 162 AD 2d 715 (3rd Dept 1990).

In determining whether a nonparty is necessary to an action, the question is whether the nonparty may be inequitably affected by a judgment rendered in its absence, or if the nonparty's presence is necessary if complete relief is to be accorded to the parties already in the action Town of Brookhaven v Marian Chun Enterprises, Inc., 71 NY 2d 953 (1988); Matter of Dawn Joy Fashions, Inc. v Commissioner of Labor, 181 AD2d 968, 969 (3rd Dept 1992). Obviously, a determination by the Court that an entity named in the complaint but not made a party to the action directing that entity to disgorge funds owed for goods and services rendered could inequitably affect those entities and their operations. Here, for example, plaintiffs seek to enjoin appropriations for the payment of contracts providing services to the Department of Agriculture and Markets by the New York State Apple Growers Association, the New York Wine and Grape Foundation, and the Long Island Wind Council. See Exhibit B, Smith Affirmation These contracts provide a colorable claim to entitlement to the appropriated funds. Likewise, those nonparty entities identified in paragraphs 37 and 46 who have entered into Grant Disbursement Agreements ("GDA") with ESDC to receive funds, or are anticipated to receive funds, must be joined as parties as the GDAs are agreements that require the applicants to meet certain goals in order to receive the funds, and to the extent that plaintiffs are

seeking to annul the relevant appropriations these entities clearly have an interest in this case, and would be inequitably affected if plaintiffs were to be granted the relief requested. See Exhibit A, Wehrle Aff at ¶¶ 11-48. It is well-settled that, “a declaratory judgment serves a legitimate purpose only when all persons who may be affected thereby and who may question in a court the existence and scope of the rights declared are parties to the action and have opportunity to be heard” Cadman Mem. Cong. Soc. v. Kenyon, 279 A D 1015, 1016 (2d Dept. 1952). Where rights to property are in issue, it is clear that the plaintiffs must be required to put those interested in the property on notice see e.g., J-T Assoc. v. Hudson River--Black River Regulating Dist., 175 AD 2d 438, 440 (3rd Dept 1991);(Upholding a refusal to declare the parties’ rights, noting “[if petitioner were to obtain the declaration that it seeks, the property rights of other property owners, many of whom are not parties here, could and would be adversely affected without affording them the opportunity to be heard on the issue”’). Non-joinder of a necessary party is a ground for dismissal of an action (CLR 1003; Matter of Vasquez v Smith, 224 AD 2d 822 (3rd Dept 1996). Plaintiffs’ failure to join the necessary parties participating in the contracts which were adopted in reference to the appropriated funds requires that the complaint be dismissed.

CONCLUSION

**IN VIEW OF THE FOREGOING THE COMPLAINT
SHOULD BE DISMISSED AS PLAINTIFFS HAVE FAILED
TO MEET THEIR HEAVY BURDEN OF SHOWING
THAT THE CHALLENGED APPROPRIATIONS
ARE UNCONSTITUTIONAL BEYOND A REASONABLE
DOUBT AND THE COURT SHOULD DECLARE THAT THE
CHALLENGED APPROPRIATIONS DO NOT VIOLATE
THE CONSTITUTION**

Dated: Albany, New York
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