IN THE SUPREME COURT OF FLORIDA

OCALA BREEDERS' SALES COMPANY, INC.,	**No. 95,561**
Appellant,	**1st DCA No. 97-4783**
v.	
FLORIDA GAMING CENTERS, INC., d/b/a OCALA JAI ALAI, et al.,	
Appellees.	

On Appeal from the District Court of Appeal,
First District

ANSWER BRIEF OF APPELLEE JAI ALAI INCLUDING APPENDIX

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CERTIFICATION AS TO TYPE STYLE

We hereby certify that this brief has been produced using non-proportionately spaced 12-point Courier font.

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Preliminary Statement

The need for a new **Statement of the Case**, Fla.R.App.P. 9.210(c), arises from appellant's **Statement** having obscured the salient legislative facts on which two well-considered decisions below held that § 550.615(9), Fla. Stat., qualifies nobody but Ocala Breeders' Sales, Inc., for special dispensation from Florida's stringency against off-track betting parlors, so the statute is a prohibited special law, enacted without due notice, and it violates equal protection by its arbitrary classification.

First we must address a preliminary matter. Without briefing any claimed waiver, appellant's **Statement** (at p. 4) attempts to make something of our (Jai-Alai's counsel) having briefly acquiesced in appellant's mootness claim in the First District. It is true that our client was at first inclined to take any avenue of escape from this hydra-headed litigation, and so instructed us. But when the First District did not cancel oral argument, and we as advocates and officers of the court pondered whether the new statute repealed the old (it did not) or replaced it (it did not), whether Breeders' Sales Inc. still maintains access to the old statute (it does), whether similar issues are now in administrative litigation over licensure under the 1998 law (they are), and whether a decision in this mature case would be precedent in that renewed litigation - when, in short, the liveliness of the case and the inevitability of future judicial labor on the same issues became evident - we with clear

conscience responded that the case is far from moot, and far from dismissible, and the First District agreed. (Appt. App. G.)

STATEMENT OF THE CASE AND OF THE FACTS

All of the pertinent session laws and the 1997 codification of § 550.615(9), nee 550.61(8), are reproduced chronologically in the appendix, together with First District's decision on the merits as reported in 731 So.2d 21 (Fla. 1st DCA 1999).

1. The 1990 legislation: a special gambling dispensation to fund public interest "breeders awards"

Felony prosecution has long been a vocational risk for Florida bookmakers and other private entrepreneurs who would sell gambling on games and animal contests. Secs. 550.3615, 849.25, Fla. Stat. By Ch. 90-352, § 3, Laws of Fla., the legislature disavowed off-track betting categorically even as it authorized inter-track wagering where live pari-mutuel events, such as jai-alai and quarter horse racing, are held. The new law authorized quarter horse racing permitholders, for example, to accept off-track betting on horse or greyhound racing or jai-alai matches, § 3, provided the holder fulfills its permit by actually racing quarter horses. § 17, amending § 550.33(2)(a), Fla. Stat. (1990 Supp.). [1] Several such permits were confiscated when the

[1] Ch. 90-352, § 17 added the following language to Sec. 550.33(2)(a), Fla. Stat. (1990 Supp.): "The division shall revoke any quarter horse permit under which no live racing has ever been conducted prior to the effective date of this act for failure to conduct a horse meet pursuant to the license issued when a full

holders failed to conduct timely quarter horse races as required. 3R 315-16, 339.

The general prohibition still prevails: No off-track gambling parlors in Florida. Speaking of the bill that became Ch. 90-352, the House Committee took pains to emphasize: "It does not authorize off-track wagering." 3R 412. The Committee added that quarter horse racing permit holders, in order to keep their permits with intertrack wagering privileges, must regularly race quarter horses, i.e., must "use it or lose it." 3R 413, 416.

The same 1990 Act also created one additional intertrack wagering license, good for 21 days only, for a "thoroughbred sales" entity whose wagering profits would be used exclusively "for additional breeders' awards" through "the Florida Thoroughbred Breeders Association," which would also designate the licensee. Ch. 90-352 § 3 enacting § 550.61(8), Fla. Stat. (1990 Supp.). These "additional breeders' awards" constituted the "public purpose" of the 1990 legislation. Circuit court Judgment, Appt. App. B p. 5; First Dist. Op., 731 So.2d at 27.

Actually, the nominal recipient - Ocala Breeders' Sales, Inc. - had already been hand-picked, as appears in the Final Staff Analysis & Economic Impact Statement of the House Committee

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schedule of horse racing has not been conducted for a period of 18 months commencing on October 1, 1990 unless the permitholder has commenced construction on a facility at which a full schedule of live racing could be conducted . . . ."

on Regulated Industries, 3R 412. That "fiscal analysis & economic impact statement" identified "Ocala Breeders' Sales" as the licensee and estimated its off-track wagering revenues over three years at $ 75,000. 3R 421. Net of expenses, that gambling revenue was "to be used," according to the statute, "for additional breeders' awards" through the Association. Ch. 90-352, Sec. 3, Laws of Fla., § 550.61(8), Fla. Stat. (1990 Supp.).

2. The 1991 legislation: converting the public purpose dispensation into Breeders' Sales Inc. profit

Lobbying by Ocala Breeders' Sales, Inc. (hereafter "Breeders Sales Inc.") persuaded the 1991 legislature to convert those "additional breeders' awards" to unencumbered off-track gambling profits for Breeders' Sales Inc. Ch. 91-197, § 18, accomplished that transformation simply by striking from § 550.61(8) (1990 Supp.) the public purpose destination that the law had specified for those profits, which left all revenues with Breeders' Sales Inc.:

> ~~"All receipts due the guest track shall, after deducting the expenses of conducting intertrack wagering, be paid to the Florida Thoroughbred Breeders' Association, Inc., to be used for additional breeders' awards.~~"

The 1991 House Committee on Regulated Industries, ministered to by the lobbyist for Breeders' Sales Inc., 3R 432, recognized that these extraordinary off-track betting profits, now projected to be $ 82,830 over three years, would inure without restriction

to "Ocala Breeder Sales." 3R 430. The 1991 Act also enlarged the off-track betting privilege of that licensee, which in 1990 had been confined to 21 days and only at thoroughbred sales events, by granting Breeders' Sales Inc. another 100 days of off-track betting, disassociated from horse sales events. Ch. 91-197, § 18, § 550.61(8)(a), Fla. Stat. (1991).

By a complex screen of selection criteria, the 1991 Act made Breeders' Sales Inc. the exclusive qualifier for these off-track gambling profits. Ch. 91-197 amended § 550.61(8)(a) to renew that solitary license each year for the "quarter horse [racing] permit holder" which had also "conducted at least 15 days of thoroughbred horse sales at a permanent sales facility for at least 3 consecutive years," and had run one specific thoroughbred race for two consecutive years. [2]

Those rearward-looking criteria in subs. (8)(a) of § 550.61 (1991) described nobody but Breeders' Sales Inc. No other

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[2] § 550.61(8)(a), Fla. Stat. (1991), renumbered with 1992 amendments as § 550.615(8)(a), and in 1996 as § 550.615(9)(a): "Upon application to the division on or before January 4 of each year, any quarter horse permitholder that has conducted at least 15 days of thoroughbred horse sales at a permanent sales facility for at least 3 consecutive years, and conducted at least one day of thoroughbred racing pursuant to s. 550.50, with a purse structure of at least $250,000 per year for 2 consecutive years prior to such application, shall be issued a license to conduct intertrack wagering for thoroughbred racing for up to 21 days in connection with thoroughbred sales and an additional 100 days to conduct intertrack wagering at such permanent sales facility between November 1 and May 8 of the following year, subject to conditions set forth in this subsection, provided that no more than one such license shall be issued."

quarter horse racing permit holder was expected to apply; and, had any such applied, the "tiebreaker" provisions of subs. (8)(b) would have compared "the length" in years of that quarter horse racer's history, if any, of selling thoroughbred horses, to the indubitable history in that line of Breeders' Sales Inc.[3] The inevitable and intended result: an award to Breeders' Sales Inc., whose history in thoroughbred sales began long before any statute was conceived to give it's long history decisive effect in any hypothetical competition for this unprecedented gambling license. For obvious reasons, no other quarter horse racing permit holder ever attempted to initiate such a history in thoroughbred sales, so to compete with Breeders' Sales Inc. for that license. Nor was there any reason for a quarter horse racing permit holder to go to such trouble: the 1990 Act already awarded unlimited days of intertrack wagering to those who really race quarter horses, compared to only 121 days under the solitary license of § 550.61(8). §§ 550.61(1) and (8), Fla. Stat. (1991); §§ 550.615(1) and (9), Fla. Stat. (1977).

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[3] § 550.61(8)(b), Fla. Stat. (1991), now § 550.615 (9)(b): "If more than one [quarter horse racing] permitholder applies, the Florida Pari-mutuel commission shall determine which permitholder shall be granted the license. In making its determination, the commission shall consider the length of time the permitholder has been conducting thoroughbred horse sales in this state, the length of time the applicant has had a permanent location in this state, and the volume of sales of thoroughbred horses in this state, giving the greater weight to the applicant that meets these criteria."

The First District assessed the § 550.61(8)(b) "tiebreaker" thus: "It follows that, as long as Ocala Breeders remains in business . . . , it will always prevail on the first two of the three statutory tiebreaker criteria." 731 So.2d at 26.

Ch. 91-197 did not disturb the "use it or lose it" provision of the 1990 act, as applicable to quarter horse permit holders generally. See § 550.33(2)(a), Fla. Stat. (1990 Supp.) and (1991). Those licensees who genuinely used their quarter horse permits had nothing to fear from "use it or lose it"; by actually racing quarter horses, those licensees preserved both their pari-mutuel racing permits and the inter-track wagering privileges that the 1990 legislation attached to those permits.

Breeders' Sales Inc., on the other hand, had held a quarter horse racing permit for some years, but had never run a single quarter horse race. To this date, Breeders' Sales Inc. has never run a quarter horse race. 3R 303-04, 309, 328. Therefore, if Breeders' Sales Inc. were subject to the "use it or lose it" mandate of § 550.33(2)(a), its quarter horse racing permit would long ago have been forfeited, along with the off-track betting permit and ensuing profits that Ch. 91-197 had created for Breeders' Sales Inc. in § 550.61(8)(a) and (b).

The 1991 legislature rescued Breeders' Sales Inc. from that forfeiture. At the same time that Ch. 91-197 cordoned off from the rewards of § 550.61(8) all other quarter horse racing permit holders - disqualifying them because they had not regularly sold and raced <u>thoroughbreds</u> at a permanent sales site for the years specified - Ch. 91-197 relieved Breeders' Sales Inc. from any jeopardy under the "use it or lose it" mandate imposed on all other quarter horse racing permit holders. Ch. 91-l97, § 18 added only to § 550.61(8), for Breeders' Sales Inc., and not to § 550.61(1) through (7), affecting other quarter horse permit holders), a new subsection (f), providing:

> "<u>(f) For each year such quarter horse permitholder must obtain the license set forth in paragraph (d), any provisions relating to suspension or revocation of a quarter horse permit for failure to conduct life quarter horse racing shall not be applicable.</u>"

In other words, the 1991 legislature qualified Breeders'

Sales Inc. only for this one-of-a-kind off-track gambling franchise, by requiring the applicant hold a quarter horse racing permit and to have sold and raced thoroughbreds for requisite years, and then accommodated the only qualifier, Breeders' Sales Inc., being utterly without a history of racing quarter horses, by dissolving its duty to race quarter horses regularly - a duty that all genuine quarter horse racing permit holders were required to observe, on pain of forfeiting their permits. §§ 550.61(8)(f) and 550.33(2)(a), Fla. Stat. (1991).

In summary, the 1991 House Committee stated in its fiscal materials (3R 430) that "Ocala Breeders Sales" was the intended franchisee, and the Breeders' Sales Inc. lobbyist, Mr. Meffert, assured the Subcommittee on Pari-Mutuels that Breeders' Sales Inc. intended to be "that" applicant and "that concessionaire" or licensee. Meffert testimony Mar. 19, 1991, 3R 437:

> "So the bill limits itself to a bona fide thoroughbred horse sales operation which also holds a quarter horse permit and it further limits it to only one license, so we're speaking only of one location. And obviously Ocala Breeders' Sales would intend to be that applicant and that concessionaire."

Breeders' Sales Inc. was indeed the only contender and the only licensee in subsequent years to date. 3R 304, 309.

3. The 1992 legislation: further enrichment of the Breeders' Sales Inc. off-track gambling license

In a wholesale updating of Ch. 550 "the Florida Pari-Mutuel Wagering Act," the 1992 legislature repealed § 550.61 and re-

enacted virtually the same text as § 550.615, Fla. Stat. Ch. 92-348 § 47, Laws of Fla. The only significant change in subsection (8) of § 550.615, the continuing source of Breeders' Sales Inc.'s special license, was to enlarge its off-track betting business from 121 days annually, as before, to unlimited gambling between November 1 and May 8 (189 days) and many more days from May 9 to October 31. As before, the licensee was required to have Breeders' Sales Inc.'s unique prior history as a seller and once-a-year racer of thoroughbreds, and was still required to hold a dummy quarter horse racing permit (being excused from actually racing quarter horses). The "tiebreaker" provisions designating Breeders' Sales Inc., in case of any other applicant, were re-enacted without substantive change. Ch. 92-348, § 47, §§ 550.615(8)(a), (b) and (e), Fla. Stat.

4. 1995-1997: The circuit court litigation and judgment; appeals by Breeders' Sales Inc. and the Division of Pari-Mutuel Wagering.

The issues made by appellee Jai Alai's July 1995 complaint for declaratory and other relief (1R 1) and answers by Breeders' Sales Inc. (1R 129) and the Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation (1R 123) were resolved by summary judgment in the Leon County Circuit Court in December 1997 (5R 758). That judgment reaffirmed (at 5R 759, 760) the court's interlocutory finding that Jai Alai had standing

to sue in consequence of competitive injury in Marion County by Breeders' Sales Inc.'s activity under the licensing scheme (1R 122); and on legislative facts as we have recited them in this **Statement of the Case** the court held that the licensing scheme "unconstitutionally grants exclusive privileges to Breeders' Sales without a rational basis for doing so"; it "constitutes a 'special act' that was not enacted with applicable procedural requirements"; and it "also contravenes constitutional principles of equal protection under the law." 5R 764.

The circuit court judgment enjoined the Department from issuing inter-track wagering permits to Breeders' Sales Inc. and enjoined the latter from conducting inter-track wagering at its Marion County facility. 5R 764.

Both then appealed. By virtue of the Department's appeal, an automatic stay of the injunction, Appt. App. C, protected continued off-track gambling operations by Breeders' Sales Inc. during the entire appeal to the First District, and extended to six years the exclusive franchise Breeders' Sales Inc. had enjoyed under § 550.61(8).

5. The 1998 legislation and the First District decision

During the First District appeal, Breeders' Sales Inc. secured a new statute from the 1998 legislature, § 550.6308, Fla. Stat. (1998 Supp.), which Breeders' Sales Inc. claimed in the First District would independently ground its off-track gambling

permit in 1999, thereby mooting the dispute over § 550.615(9), nee 550.61(8), and Breeders' continuing licensure.

The new statute does not purport to repeal § 550.615(9), but it similarly screens away other contenders for this off-track gambling concession. The unconstitutionality of that statute is the central issue in circuit court litigation pending at this moment. The extent of Breeders' Sales Inc.'s entitlement to licensure under § 550.6308, if it is constitutional, is the subject of administrative litigation that Jai-Alai initiated under Ch. 120, the Administrative Procedures Act, when without a hearing the Pari-mutuel Division issued Breeders' Sales Inc. a purported license under the new statute. A recent order by the Division in that matter, dismissing Jai Alai's contest (for want of *standing*!), will be reviewed on appeal by the First District in the months to come.

The constitutional validity of the 1998 statute, § 550.6308, and its effectiveness to ground licensing in off-track gambling in Breeders' Sales Inc., was not addressed by the First District.

The First District denied Breeders' Sales' mootness claim, arising from the enactment of § 550.6308, stating in its Order of March 9, 1999 (Appellant's App. G):

1. "Because section 550.615(9) Florida Statutes, (1997), is still in force, the trial court's order declaring this statute unconstitutional remains in controversy."

2. Even if the dispute over Breeders' Sales' license were to be concluded by final licensure under the 1998 statute - an issue that "[w]e need not resolve" - "[t]he issue is one of great public importance and, given the number of times the statute has been revised, it is an issue that is likely to recur."

3. If Breeders' Sales' appeal and the underlying litigation were dismissed, "this entire process could repeat itself with respect to the latest version of the statute," and the court itself would have promoted the repetition of that process, by which Breeders enjoyed interim years of profit from a statute already declared unconstitutional, by withholding a merits decision that might well be precedent in the eventual decision upon the effect and constitutionality of the new statute.

On the merits, the First District agreed with the circuit court that § 550.615(9), Fla. Stat. (1997) was a constitutionally prohibited attempt to enact a special law in guise of a general law, and that the statute also creates an arbitrary classification in violation of equal protection principles. Summarizing its holding on the first issue, the court held:

> "We need not defer to the trial court . . . to conclude that section 550.615(9) is a special law enacted in the guise of a general law. The criteria for awarding the one state license that is available under the law are drawn so narrowly that they could only be applied, now or in the future, to Ocala Breeders. Because the statutory class of potential licensees is effectively closed to only one thoroughbred horse breeder, the statute should have been enacted as a special law." 731 So.2d at 24.

* * *

> "Section 550.615(9) presently applies only to Ocala Breeders but, by the precedents we have cited, that alone does not make it a special law. The critical problem with the statute is that it could never be applied to any other potential licensee. Although it is possible that another horse breeder could meet the general qualifications for a license to conduct intertrack wagering, no other horse breeder could ever obtain the single license available, because Ocala Breeders would always prevail on the application of the tiebreaker provisions of the statute." *Id*.

Summarizing its holding on the equal protection issue, the First District stated, 731 So.2d at 27, "we are unable to find any rational relationship between the detailed requirements of section 550.615(9)(a)," as currently enacted, and the apparent "public purpose" of the *original* 1990 enactment, "benefitting thoroughbred horse breeding sales and related economic activities,'" through raising money for additional breeders' awards. (quoting trial court, 731 So.2d at 27). Specifically, the First District found these disparities between any alleged surviving purpose in the 1991 enactment and the licensure qualifications imposed to that presumed end:

1. "Given the purpose of the law, there is no reason to narrow the field of applicants by requiring the prospective licensee to hold a permit to race quarter horses." 731 So. 2d at 27.

2. "Likewise, there is no apparent basis for the requirement . . . that a prospective licensee must conduct 'at

least one day of nonwagering thoroughbred racing, with a purse structure of at least $ 250,000 per year for 2 consecutive years.' We have not been presented with any rational justification for this rather detailed requirement and we cannot ascribe one to the statute on our own. Ocala Breeders is the only business entity that has ever obtained a nonwagering thoroughbred racing permit." 731 So.2d at 27.

3. "[T]here is no rational basis for the exemption . . . which provides that the holder of a quarter horse permit is qualified for an intertrack wagering license even if the quarter horse permit is otherwise subject to revocation. . . . [T]he court found that the Division of Pari-Mutuel Wagering has revoked the quarter horse permits of other entities for failure to conduct live racing, but that the division has never initiated a revocation proceeding against Ocala Breeders on this ground. . . ." 731 So.2d at 27.

4. "[W]e think it is plain that there is no rational basis for . . . qualifying a quarter horse permit holder for an intertrack wagering license even if grounds exist to revoke the permit. This cannot be said to further the objective of the law. On the contrary, the exemption . . . merely enables Ocala Breeders to avoid one other potential challenge to the unique privilege it has been granted under the law." 731 So.2d at 27-28.

5. "The absence of justification for these criteria is

underscored by the fact that the statute, on its face, authorizes but one thoroughbred horse breeder to engage in intertrack wagering. The statute was ostensibly enacted to shore up the thoroughbred horse breeding industry, yet it seeks to accomplish that purpose by awarding an exclusive franchise to one horse breeder. . . . [T]he fact that only one license is offered makes the attempt to establish the criteria for the license all the more suspect." 731 So.2d at 28.

Breeders' Sales Inc. thereupon appealed to this Court. The Department of Business and Professional Regulation did not join in that appeal and has not briefed the case as an appellee. See Fla.R.App.P. 9.020(g)(2).

SUMMARY OF THE ARGUMENT

I. The case is not moot. Although a 1998 statute performs the same function as § 550.615(9), which is to secure Breeders' Sales Inc.'s protected status as Florida's exclusive off-track betting parlor, § 550.6308 did not repeal, expressly or impliedly, the statute that the First District has declared to be unconstitutional. Thus, Breeders' Sales remains free to utilize § 550.615(9) as a licensing mechanism to legalize its off-track betting, and the trial court's injunction, prohibiting such a result, continues to have full force and effect. The fact that Breeders' Sales now has two alternative sources of (illegal) licensure does not end the ongoing controversy as to either of

those sources.

II. The First District decision is correct: the statute in question, now § 550.615(9), Fla. Stat. (1997), is both a prohibited special act, enacted without notice, and an arbitrary classification violating equal protection of the laws.

This Court has confirmed that a statute that has the effect of securing special privileges for a specific entity is invalid. Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 245 So.2d 625 (Fla. 1971); West Flagler Kennel Club, Inc. v. Florida State Racing Comm'n, 153 So.2d 5 (Fla. 1963). This proscription applies to statutes that employ a "descriptive technique" to secure benefits for one recipient under the guise of a classification. West Flagler, 153 So.2d at 8. It is not decisive that some more inclusive application of the challenged statute may be theoretically or hypothetically possible. The decisive question is whether more than one entity may "reasonably be expected" to qualify under the challenged provision. Hialeah

Race Course, 245 So.2d at 629.Section 550.615(9) runs afoul of these established principles.

This statute, like those in Hialeah Race Course and West Flagler, secures special benefits for only one entity: Breeders' Sales Inc. The combination of initial qualifications and tiebreaker provisions insures that no other company can ever "reasonably be expected to qualify" for the single § 550.615(9) license available.

For the reasons elaborated in West Flagler, the statute is a prohibited special act, enacted without the constitutional protections of due notice. And for the reasons elaborated in Hialeah Race Course, the statute violates equal protection of the laws by its arbitrary classification.

III. Jai Alai has standing in this lawsuit. If appellant Breeders' Sales Inc. preserved a "standing" issue in circuit court, which is doubtful considering its argument against the summary judgment which that court granted, that contention is without merit. The competitive injury inflicted on Jai Alai by the licensing scheme complained of is well documented in this record; indeed, the legislature itself recognized that injury.

ARGUMENT

I. THE CASE IS NOT DISMISSIBLE AS MOOT

A. Since § 550.615(9), formerly § 550.61(8), is neither repealed nor replaced, and its only beneficiary is

striving to preserve it from unconstitutionality, the case cannot be moot.

In enacting § 550.6308, which Breeders' Sales Inc. contends moots the case, the 1998 legislature neither repealed nor amended § 550.615(9), and it did not declare, in the common verbiage, that inconsistent legislation was repealed. Ch. 98-190, Laws of Fla.

Section § 550.615(9) is not in fact inconsistent with the new statute, § 550.6308. Rather, the two are parallel or alternative licensing schemes. Nothing in the text of the new statutory scheme suggests that Breeders' Sales Inc. licensure under the old and subsisting scheme is no longer tenable.

The idea of implied repeal is supported only by the prediction of Breeders' Sales Inc. that § 550.615(9), Fla. Stat. (1998) will be expressly repealed in the future by "a routine reviser's bill." Init. Br. p. 16, n. 2. This prediction of future legislation is impressive as a display of appellant's confidence in its lobbying prowess, but the prediction does not moot the case.

It seems reasonable to ask why, if Breeders' Sales Inc. did not wish to preserve § 550.615(9) for alternative future use, or as insurance against defeat or delay in § 550.6308 licensing, Breeders' Sales Inc. did not ask the 1998 legislature simply to repeal § 550.615(9). No one else had an interest in preserving

it. Breeders' Sales Inc. certainly has shown its presence on the legislative record since 1990, and its invariable effectiveness. We repeat: Why, if § 550.615(9) is of no further value to Breeders' Sales Inc., was it not repealed? Why indeed, if that statute is destined for inevitable repeal, is this Court asked to preserve the statute from the First District's judgment?

Repeal by implication is generally disfavored. Debolt v. Department of HRS, 427 So.2d 221, 224 (Fla. 1st DCA 1983). A court "should not presume that new law was designed to render existing law meaningless"; rather it should "favor a construction that gives effect to both statutes." Chiles v. Division of Elections, 711 So.2d 151, 156 (Fla. 1st DCA 1998).

> [T]he mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute. If the two may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears.

State ex. rel. Myers v. Cone, 190 So. 698, 701 (Fla. 1939) (e.a.), accord Caloosa Prop. Owners Ass'n v. Palm Beach County, 429 So.2d 1260, 1265 (Fla. 1st DCA 1983).

Breeders' Sales Inc. misreads Debolt as supporting its argument that § 550.6308 has "in effect" been repealed. (Appt. Init. Br. p. 15 n. 10). That decision held a statute granting absolute tort immunity for a specific government agency was repealed by a new statute broadly waiving governmental tort

immunity for all agencies Debolt, 427 So.2d at 224. There was no logical way to reconcile the former statute with the newer one. No similar situation is presented here.

The circuit court judgment prohibits Breeders' Sales Inc. from operating under and prohibits the Department from licensing Breeders' Sales Inc. by virtue of § 550.615(9). 5R 758, 764. Since enforcing that judgment and the First District affirmance cannot be characterized as "merely . . . voiding legislation that had already been voided by repeal," Glisson v. Alachua County, 558 So.2d 1030, 1037 (Fla. 1st DCA 1990), there is no plausible argument that the judgments here under review should be vacated as moot. On the contrary, vacating those judgments would only invite Breeders' Sales Inc. to initiate, again, the entire licensure and litigation process that brought us to this Court.

B. Even if licensure under § 550.615(9) were no longer possible, the adjudication below must be preserved, unless reversed on the merits, as precedent for judging the similar effect of § 550.6308, which the parties are now litigating.

"A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." Godwin v. State, 593 So.2d 211, 212 (Fla. 1992). The broad issue on which the courts below have spoken - the efficacy of legislation that hand-picks Breeders' Sales Inc. and screens off other contenders from the

license - has now been reborn by Breeders' Sales Inc.'s success in lobbying § 550.6308 through the 1998 legislature. Circuit court litigation challenging that statute constitutionally and administrative litigation contesting other aspects of its application have now been joined between the parties.

The circuit court and district court of appeal judgments that Breeders' Sales Inc. would have the Court vacate are of enormous significance as precedent in the pending litigation in other forums. (For their prophylactic effect, one would hope that those decisions will also command respectful attention in the legislature, where political influence otherwise holds sway.) The value of those judgments as precedent precludes any finding of mootness. In Godwin v. State, 593 So.2d 211, 214 (Fla. 1992), this Court found that an appeal from an order of involuntary commitment under the Baker Act was not rendered moot by the release of the person so confined, because the result of the appeal still had potential consequences, i.e., unless the confinement was held improper, the state retained the right to recover the costs of the confinement. Godwin, 593 So.2d at 214. It was not necessary, in order to prevent mootness, that this potential consequence be certain to occur; the state had not indicated that it would seek a cost recovery. Id. The existence of a legal right to such a recovery was sufficient to preserve the appeal from mootness.

Similarly, the potential of Breeders' Sales Inc. being issued a § 550.615(9) license without regard for the judgments below precludes a finding of mootness. This is evident from examination of the very cases cited by Breeders' Sales: Santa Rosa County v. Admin. Comm'n, 661 So.2d 1190 (Fla. 1995) and Dehoff v. Imeson, 15 So.2d 258 (1943). Both Santa Rosa and Dehoff involved an intervening event that deprived the lower court judgment of all practical effect. In Santa Rosa County, the intervening event was a stipulated agreement that fully resolved the parties' dispute. 661 So.2d at 1193. In Dehoff, it was the natural expiration of the term of an elected office that was the subject of the litigation. In both cases the intervening event resolved all issues in the case and deprived a judgment below of any effect. No analogous situation is presented here.

It is understandable that Breeders' Sales would wish to restore a regime in which, undeterred by the precedents created below, Breeders' could toggle back and forth between parallel licensing mechanisms, § 550.615(9) and § 550.6308, and preserve indefinitely its special dispensation for off-track betting. The waste of judicial effort in this and ensuing litigations is a possibility that cannot be countenanced. See Martinez v. Scanlan, 582 So.2d 1167, 1173 (Fla. 1991).

C. Even if Breeders' Sales Inc.'s appeal were otherwise moot, the proper remedy would be to dismiss the appeal

without effect on the circuit court's final judgment.

The supposed mooting event is Breeders' Sales Inc.'s application for licensure under the 1998 statute. But where the claimed mooting event is the act of the very appellant who cries "my appeal is moot!," the correct practice is to dismiss the appeal without effect to the lower court judgment. U.S. Bancorp Mortgage Corp. v. Bonner Mall Partnership, 513 U.S. 18, 24-25 (1994); Dilley v. Gunn, 64 F.3d 1365, 1370 (9th Cir. 1995).

Breeders' Sales Inc.'s argument (Init. Br. p. 17) misconstrues U.S. v. Munsingwear and ignores later U.S. Supreme Court precedent when it argues that this Court should vacate the trial court's judgment. In U.S. Bancorp., the Supreme Court limited Munsingwear and held that automatic vacatur occurs only in narrow circumstances: (1) where the case "becomes moot due to circumstances that are not attributable to any of the parties"; or (2) "mootness results from the unilateral action of the party who prevailed in the lower court." 513 U.S. at 23. In all other circumstances the vacatur decision is made "in view of the nature and character of the conditions which have caused the case to become moot." Id. at 24; see also Jones v. Temmer, 57 F.3d 921, 923 (10th Cir. 1995); Dilley, 64 F.3d 1365, 1370 (vacatur is improper where mootness is not due to "happenstance . . ., but when the appellant by his own act caused the dismissal of the appeal"); accord, In re United States, 927 F.2d 626, 628 (D.C.

Cir. 1991); Clarendon Ltd. v. Nu-West Indus, Inc., 936 F.2d 127 (3d Cir. 1991); see also, Westmoreland v. National Transportation Safety Board, 833 F.2d 1461 (11th Cir. 1987) (vacatur should not be granted automatically, but by application of judicial policy considerations).

It is obvious that during the First District appeal, Breeders' Sales Inc. lobbied the legislature to provide, in the bill that became § 550.6308, what Breeders' Sales Inc. hoped would be a more defensible statute. When the bill passed, Breeders' Sales Inc. voluntarily chose to seek a renewed license under § 550.6308 rather than 550.615(9). The "mootness" that Breeders' Sales Inc. perceives in this case, therefore, is attributable not to "happenstance" but to actions of Breeders' Sales Inc., itself. "To allow a party who steps off the statutory track [of appellate review] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would - quite apart from any consideration of fairness to the parties - disturb the orderly operation of the . . . judicial system." U.S. Bancorp, 513 U.S. at 27.

There is no merit in the contention that the judgments below should be vacated as moot.

II. SECTION 550.615(9) INDEED IS A SPECIAL ACT, ENACTED WITHOUT REGARD FOR CONSTITUTIONAL NOTICE PROCEDURES; AND ITS ARBITRARY CLASSIFICATION ALSO

VIOLATES EQUAL PROTECTION STANDARDS IN THE STATE AND FEDERAL CONSTITUTIONS.

A. Section 550.615(9), Florida Statutes, creates an exclusive off-track betting franchise and qualifies Breeders' Sales Inc. as the only potential licensee.

In a wonderfully earnest effort, Breeders' Sales Inc. argues that it simply wasn't successful in its assiduous efforts, 1990 to date, to get a law enacted whereby Breeders' Sales Inc. alone can garner off-track betting profits on terms granted to no one else in the state. It's possible, so the argument goes, for someone else to have beaten us at this annual licensing game. Granted, no one ever did. Granted, no one ever tried. Granted, beating us would have been tough, given that the statute rewards our unique history, unrelated to quarter horse racing, and the statute honors our shell permit for quarter horse racing by

attaching to it our franchise for off-track betting. But it was mathematically, theoretically *possible* - says Breeders Sales Inc.

The argument does not wash.

Perhaps the statute as enacted in 1990 might have deserved sympathetic constitutional scrutiny due to its "public purpose" of using Breeders' Sales Inc. only as a conduit of funds for "additional breeders' awards." But the statute has had no such cover since its conversion to a private profit-getting enterprise in 1992. The 1992 legislation "eclipsed" that public purpose, as the circuit judge aptly observed. Final Judgment, 5R 762.

As we have previously detailed, *supra* pp. 3, 4, the legislative committee records confirm what is plain from the statutory text as enacted in 1990 and 1991: the statute was intended to and it does restrict this otherwise illegal off-track betting license to a single entity: Breeders' Sales Inc. 3R 421 (1990), 3R 430 (1992). We doubt that so clear a case of "legislative intent" has ever been presented to this Honorable Court: the transcript of deliberations by the House subcommittee on parimutuels on March 19, 1991, plainly records one member voicing his concerns that passing this bill would surely encourage others, no less deserving than Breeders Sales Inc., to lobby for a proliferation of legislative franchises of this sort. "Because the way they've drawn this bill," he declared, "it's so tightly drawn to be just them"; but "we know good and well what's

next and that's somebody else asking for the same thing." 3R 447.

Our argument cannot improve upon this cold committee transcript. The sponsoring committee, itself, voiced recognition that the licensing criteria were "so tightly drawn to be just them," Breeders' Sales Inc.

In sum, the delimiting criteria were and are:

- the necessity that the licensee hold a quarter horse racing permit, which Breeders Sales Inc. and others held, but which all others used for genuine quarter horse racing programs ("use it or lose it") and thereby earned unlimited inter-track wagering privileges ("at any time") under § 550.61(1) and (2). Subs. (8) was designed so that only Breeders' Sales Inc. would have any interest in the more restricted inter-track wagering privileges that subs.(8) awarded to the holder of a shell or dormant quarter horse racing permit [now § 550.615(9)(a), (b) and (e), Fla. Stat. (1997)].
- If some perversely-thinking quarter horse racing permitholder nevertheless felt some attraction to the Breeders' Sales Inc. license, it would be necessary for that potential applicant to spend millions of dollars to enter another field entirely: thoroughbred horse sales, with adjunct thoroughbred horse racing. To be minimally qualified to compete for the Breeders' Sales Inc. license, the applicant would have to match the

minimum qualification of § 550.61(8)(a), by (1) conducting 15 days of thoroughbred horse sales from a permanent facility for three consecutive years and (2) running for two consecutive years, before applying, one day of thoroughbred horse racing with a $ 250,000 purse. Since Breeders' Sales Inc. already possessed this thoroughbred sales-and-racing history in 1991, and no other quarter horse racing permit holder had such a history, Breeders' Sales Inc. was exclusively destined to receive the license in 1992 and thereafter until other qualifiers created a like history.

- If potential competition from other sources was not entirely suppressed by § 550.61(8)(a), then the “tiebreaker” provisions in subs. (b) made the scheme competition-proof: thereby, should any genuine quarter horse permit holder be so bent on self-flagellation as to qualify under subs. (8)(a), it would lose to Breeders' Sales Inc. anyway, whose pre- and post-1991 history in thoroughbred horse sales would be decisive, due to (1) the “length of time” each applicant has been conducting thoroughbred sales in Florida, (2) the “length of time” each has had a permanent horse sales facility in Florida, and (3) each applicant’s volume of Florida thoroughbred sales. § 550.615(8)(b), Fla. Stat.

As the First DCA aptly noted, "as long as Ocala Breeders [Sales] remains in business . . . it will always prevail on the first two of the three statutory tiebreaker criteria." 731 So.2d at 25.

B. A compelling line of legal authority extending from 1963 to the present establishes the constitutional infirmity in § 550.615(9), nee 550.61(8).

Both equal protection and special act[4] principles have, on numerous occasions, been employed to void laws that single out a specific entity for special privileges.

For instance, in West Flagler Kennel Club, Inc. v. Florida State Racing Comm'n, 153 So.2d 5 (Fla. 1963), this Court struck down a pari-mutuel statute because it employed arbitrary criteria, such as time of permit issuance and length of operations, that had no relationship to the asserted statutory purpose. Id. at 8. Although the statute was drawn in general terms, the court held it invalid because its practical effect was to convey a special license "to certain permitholders, designated in terms not susceptible to generic application now or in the

[4] This Court has defined a "special act" as one which is "designed to operate upon particular persons or . . . purports to operate upon classified persons . . . when . . . the classification employed is illegal." Department of Business and Prof. Reg v. Classic Mile, 541 So.2d 1155, 1157 (Fla. 1989). Art III, § 10 of the state constitution provides procedural requirements for passage of special acts that were not followed in the enactment of § 550.615(9).

future . . .” Id. In other words, the invalid law went beyond creating a class of applicants “of like kind, differing from others in some material respect,” and instead amounted to a “descriptive technique . . . employed mainly for identification rather than classification,” which “in reality . . . identified a specific entity, not a class.” Id.

Similarly, in Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass’n, 245 So.2d 625 (Fla. 1971), the Court invalidated a statute because it locked in a specific entity to a special business advantage. The statute at issue there allocated horse racing dates annually among three local horse tracks using three separate 40-day seasons, giving first choice of season to the track with the highest gross wagering in the prior year. Id. at 627. For over 20 years one track (Hialeah) continued to hold the most desirable season, its allocation of those dates in one year guaranteeing that it would receive first choice the next. Id. at 627, 629. Passing on the constitutionality of this statute, this Court noted that although it was theoretically possible that any of the three tracks could receive the prime season, the “equality” was “more apparent than real.” Id. at 629. Theoretical possibilities aside, it was clear that only Hialeah could “reasonably be expected” to qualify for the most desirable season because the statute itself perpetuated Hialeah’s advantage. Id. Accordingly, the court struck down the statute

based on the lack of any real possibility of competition for Hialeah's racing dates.

Yet again in Department of Business and Prof. Reg. v. Classic Mile, 541 So.2d 1155 (Fla. 1989), this Court invalidated another pari-mutuel statute because it too employed a "descriptive technique" classification. The Court once again confirmed that a statute that employs a sham classification to identify a particular entity for special privileges is invalid, even if worded in generic terms. As in Hialeah and West Flagler, the key consideration in Classic Mile was that arbitrary factors lacking any relationship to a statutory purpose were strung together to create a closed class of one. 541 So.2d at 1158-59, 1158 n. 4.

As in Hialeah Race Course, the statute at issue here perpetuates Breeders' Sales Inc.'s licensure by requiring the applicant to hold a quarter horse permit, and by excepting that applicant from the statutory mandate that such permitholders fulfill the public purpose of licensure by actually racing quarter horses. The licensure scheme of subs. (8) therefore singles out for gambling profits only that quarter horse permitholder who never runs live races - i.e., Breeders' Sales Inc.[5]

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[5] Breeders' Sales Inc. argues that because it built a race track suitable for quarterhorse racing before the "use it or lose it" mandate was enacted, its quarterhorse permit did not

These arbitrary licensing criteria bear no relation any legitimate purpose, such as furthering the Florida horse breeding and sales industry. No public purpose is served by requiring a company to duplicate the operational history of another, even if that were practically possible. There is no public purpose in shunting off gambling profits from a plausible public purpose, which alone justified the 1990 Act, to the private purse of a single for-profit corporation. What possible public benefit can there be in requiring the applicant to hold a quarter horse permit, while excusing a chosen candidate from complying with the otherwise uniform mandate, "use it or lose it"? [6] Certainly the fact that a dummy permit is sitting in a file cabinet at Breeders' Sales Inc. does not benefit either Florida quarter horse racing or thoroughbred breeding. The licensing provisions of § 550.615(9) simply serve no purpose except to name Breeders' Sales Inc. as Florida's only off-track gambling parlor.

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require protection under § 550.615(9)(e). (Note how Breeders' Sales Inc. would advance its cause by disparaging the special protection that it sought and got from the legislature.) This implausible argument ignores the fact that, regardless of what protections its permit may have, no other quarterhorse permit-holder can now go back to 1990 and build a track - so will always be subject to "use it or lose it."

[6] Breeders' Sales Inc. rationalizes that "[f]or the purposes of the statute at issue [§ 550.615(9)] it is irrelevant whether the applicant actually holds quarter horse races and thus the statute suspends the requirement to hold such races." Appt Init. Br. at 46. Breeders' Sales Inc. fails to explain how the holding of a quarter horse racing permit can be relevant if actually running quarter horse races is "irrelevant."

Breeders' Sales Inc. relies heavily on Biscayne Kennel Club v. Florida State Racing Comm'n, 165 So.2d 72 (Fla. 1964) and Department of Legal Affairs v. Sanford-Orlando Kennel Club, both of which involved statutes that were upheld because they were "potentially applicable to others" in the future. However, Hialeah Race Course represents an important qualification to those decisions: that the "potentially applicable to others" test is subject to a reality check. The potential applicability of a classification to others must be more than a mere theoretical possibility.

Even a cursory examination of Biscayne Kennel and Sanford-Orlando reveals that in both those cases there was a very real possibility of generic applicability, thus meeting the reasonableness standard set forth in Hialeah Race Course. For example, the classification in Sanford-Orlando merely required that the applicant (to convert a harness racing permit to dog racing) have had poor financial performance 10 consecutive years, as judged by objective statutory criteria. At the time of the litigation, this hardship provision applied to both of the two harness racing permits in the state (i.e., it applied to every harness racing permit that existed). The classification also served a clear purpose, to allow failing businesses to adjust their operations and thereby increase state tax revenue. And, if any other harness permits were ever to be issued in the future,

it was certainly possible, given the sport's prior financial performance record, that one of those permittees would do poorly and thereby qualify for a permit transfer.

By contrast it cannot be concluded that the statute challenged here will ever apply to anyone but Breeders' Sales Inc. Biscayne Kennel Club and Sanford-Orlando therefore illuminate this case by contrast, not by similarity. As in Hialeah Race Course, no one but Breeders' Sales Inc. can "reasonably be expected to qualify" for the § 550.615(9) license.

In Sec. II.C. of its Initial Brief Breeders' Sales Inc. asks this Court to focus solely on § 550.615(9)(a), nee 550.61(8)(a) - and to disregard subs. (9)(b) [nee (8)(b)], the "tiebreaker" elements of this licensing scheme.

By this reasoning Breeders' Sales Inc. asks to the Court to uphold the statute if it finds subs. (9)(a), standing alone, constitutional.[7] The Court should reject this attempt to disregard the cumulative effect of interlocking statutory provisions which (a) was designed, not inadvertent, (b) was intended to have and must be presumed to have had a deterrent effect on other hypothetical contenders, and (c) has been for nearly ten years the only ostensible legal cover for otherwise illegal off-track betting at Breeders' Sales Inc.

The interrelation of these provisions is apparent in the subs. (a) pronouncement that only one license be issued, thereby implicating subs. (b) to resolve any duplication, and the statement in subs. (e) that its protections apply only to the entity holding "the license set forth in paragraph (a)." §§ 550.615(9)(a), (b), (e), Fla. Stat.; See also, Gallagher v. Motors Ins. Corp., 605 So.2d 62, 69 (Fla. 1992) (court considers interrelated statutory provisions in *pari materia* when passing on the constitutionality of one of them). It defies common sense to say this Court should look at an isolated single section of a multi-section statute, then sustain the whole if any one of its

[7] Alternatively, Breeders' Sales asks the Court to sever subsection (b). However, as the First DCA correctly observed subsection (a), in providing that only one license may be issued, necessitates legislative guidance to resolve multiple applications. 731 So.2d at 26. Given the single-permit limitation in subsection (a), it cannot reasonably be said that the legislature would have enacted it without subsection (b).

parts, had it been enacted alone, could be validated.

This Court should decline Breeders' Sales Inc.'s invitation to indulge in result-oriented semantics in order to uphold this unconstitutional legislation.

III. OCALA JAI-ALAI HAS STANDING

The appellant brief argues that Jai Alai lacks standing to contest the constitutionality of this statutory scheme. While we respond to that argument, we point out first that Breeders Sales Inc. did not preserve the point in circuit court, indeed expressly waived it. After raising the point initially, 1R 76, Breeders' Sales Inc.'s did not preserve it by its Cross-Motion for Summary Judgment and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (5R 643-702). At oral argument in circuit court, counsel for Breeders' Sales Inc. stated, "we're not going to raise the standing argument." (T. 24; 6R 801).

The legislature itself recognized in 1992 that its special dispensation for Breeders' Sales Inc. in Marion County inflicted a competitive injury on Ocala Jai Alai's pari-mutuel business. At the same time the 1992 Act greatly increased the number of days annually when Breeders' Sales Inc. might conduct off-track betting, the Act limited its additional gambling during five months of the year to "such times and on such days as any jai alai permitholder in the same county is not conducting live performances." Ch. 92-348 § 46, § 550.615(8)(a), Fla. Stat.

(1992 Supp.). The legislature thus recognized the competitive injury that remained in the other seven months of the year, and left that injury unabated.

This Court in West Flagler Associates, Ltd. v. Board of Business Regulation, 241 So.2d 369, 376 (Fla. 1970) recognized "the right to profitably enjoy the benefits of a license [under Chapter 550, Florida Statutes] after it is already granted without undue prejudice to the licensee, or undue discrimination in favor of other licensees similarly situated...." It is this very right of Ocala Jai-Alai that is implicated in this case and it is this right that the trial court held Ocala Jai-Alai had standing to protect.

This court has previously recognized the right of pari-mutuel permitholders to challenge unconstitutional benefits coffered upon a competitor, without any need for the challenger to show, as Breeders' Sales would require, that it is a potential rival applicant under the unconstitutional statute. In West Flagler Kennel Club, 153 So.2d at 7, this Court held that five pari-mutuel permittees (four greyhound tracks and one thoroughbred track) had standing to challenge special benefits afforded to two standard bred horse racing permittees. The defendants in West Flagler, as Breeders' Sales in the case at hand, suggested as a threshold matter that the plaintiffs lacked standing to challenge the constitutionality of legislation relating to rival permittees engaged in different types of wagering. This Court unanimously concluded that such a limited view of standing would constitute "an inordinate and unjustified

restriction on the litigation of such issues." Id. (emphasis added). Based on the competitive economic impacts from the harness track's unconstitutional privilege, the dog racing permitholders had standing to contest legislative amendments to Chapter 550 as running afoul of the Constitution's equal protection clause and proscriptions against special legislation.

The competitive impact of Breeders' Sales unconstitutional operations on Ocala Jai-Alai is verified in the "Annual Report" which constitutes Exhibit A to Breeders' Sales Cross-Motion and Memorandum in Opposition to Ocala Jai-Alai's Motion for Summary Judgment in the trial court. (4R 493-642) For example, at pp. 90-91 of that document, we see that both Breeders' Sales and Ocala Jai Alai went head-to-head in conducting ITW on all 62 of the thoroughbred racing simulcasts from Gulfstream Park in 1996. The adverse impact to Ocala Jai Alai in consequence of the unconstitutional special benefits afforded to Breeders' Sales is evidenced by the $2.75 million wagered at Breeders' Sales in this head-to-head competition. Also note, on page 91 of that report, that Ocala Jai Alai's total handle for 62 broadcasts is substantially lower than the handle for any other jai alai site that also carried all of the Gulfstream Park broadcasts.

On those several grounds, Jai Alai demonstrably has standing to contest a licensing scheme that results in its economic injury.

CONCLUSION

The decision of the District Court of Appeal, First District, is correct in all respects. It should be affirmed.

Respectfully submitted,

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Certificate of Service

I do certify that a copy hereof was furnished by mail, this July 19, 1999, to Daniel S. Pearson, William F. Hamilton and Linda Collins Hertz, of Holland & Knight LLP, 701 Brickell Avenue, Miami, Florida 33131 and Stephanie A. Daniel, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399.

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