CASE NO. SC05-251

IN THE
SUPREME COURT OF FLORIDA

GULFSTREAM PARK RACING ASSOCIATION, INC.,

Appellant/Cross-Appellee,

v.

TAMPA BAY DOWNS, INC.,

Appellee/Cross-Appellant.

ON REVIEW FROM A QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No. 03-16272

On appeal from the U.S. District Court for the Middle District of Florida
Case No: 03-00135-CV-5-17-EAJ

INITIAL BRIEF ON THE MERITS OF APPELLEES JACKSONVILLE GREYHOUND RACING, INC., FLORIDA JAI-ALAI, INC., AND INVESTMENT CORPORATION OF PALM BEACH

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STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

The First Interveners are licensed Florida pari-mutuel wagering permitholders that intervened as defendants in the trial court proceedings as to Counts 1-3 of Gulfstream's Second Amended Complaint. The First Interveners joined in Tampa Bay Downs, Inc.'s ("TBD") summary judgment motion. The First Interveners otherwise adopt the Statement of the Case--Proceedings and Disposition Below, set forth in TBD's brief.

B. Statement of Facts.

The First Interveners participated in the trial court proceedings so that eligible pari-mutuel wagering permitholders in Florida would have a choice, and not be compelled to take simulcasts of out-of-state thoroughbred races through Gulfstream. The First Interveners otherwise adopt the Statement of Facts set forth in TBD's brief.

SUMMARY OF ARGUMENT

The district court correctly concluded that Gulfstream's Exclusive Contracts violate Florida law, for the reasons articulated by TBD in its brief.

Additionally, the First Interveners note that in no way does the federal Interstate Horseracing Act, 15 U.S.C. §§ 3001 et seq., give a stamp of approval to Gulfstream's illegal contracts. Indeed, the Interstate Horseracing Act defers to the States (here Florida) on the legality of such contracts.

ARGUMENT

I. INCORPORATION OF TAMPA BAY DOWNS' ARGUMENT.

The First Interveners hereby incorporate TBD's brief, but add the following additional discussion.

II. GULFSTREAM'S EXCLUSIVE CONTRACTS ARE IN NO WAY AUTHORIZED BY THE INTERSTATE HORSERACING ACT.

In its brief, Gulfstream frequently suggests, without development of the argument, that somehow its interpretation of the Florida statutory scheme is supported by the federal Interstate Horseracing Act ("IHA"), 15 U.S.C. §§ 3001 et seq. Gulfstream, however, unlike earlier in the case, now makes this suggestion very tentatively, having backed-off its earlier claim that the IHA pre-empts Florida law. Gulfstream now merely implies that the IHA allows the kind of exclusive agreements which are the subject of this dispute. For its position, Gulfstream apparently relies on the phrase "agreements as to the exclusivity," which appears in the definition of the phrase "terms and conditions" in the IHA's definition section, 15 U.S.C. § 3002(22). (Gulfstream brief, p. 32.) Gulfstream's position, however, as the District Court correctly noted, is not supported by the plain language of the IHA, and is explicitly rejected by the IHA's legislative history.

There is absolutely no question that Florida is entitled to pass laws and promulgate regulations that make the subject contracts illegal. The IHA says nothing to the contrary. In Section 3001(a)(1) of the IHA, Congress inserted its

explicit finding that "the States should have the *primary responsibility* for determining what forms of gambling may legally take place within their borders." (Emphasis added.) In the Senate committee report recommending passage of the IHA, moreover, the Judiciary Committee explained: "[T]hese matters [regulation of gambling on horse races] are generally of State concern and . . . the States' prerogatives in the regulation of gambling *are in no way preempted by this or other Federal law.*" S. Rep. 95-1117, at 2, 1978 U.S.C.C.A.N. 4144, 4146 (emphasis added).

Moreover, the only substantive provisions in the IHA are contained in Section 3004, titled "Regulation of interstate off-track wagering." This section provides in relevant part as follows:

> (a) Consent of host racing association, host racing commission, and off-track racing commission as prerequisite to acceptance of wager
>
> An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from—
>
> (1) the host racing association, except that—
>
> (A) as a condition precedent to such consent, said racing association [parenthetical omitted] must have a written agreement with the horsemen's group, under which said racing association may give such consent, setting forth the *terms and conditions* relating thereto … .;

(2) the host racing commission;

(3) the off-track racing commission.

(Emphasis added.)

"Exclusivity," or similar words, do not appear in 15 U.S.C. § 3004. Rather, "exclusivity" makes its lone IHA appearance as an undefined term included in the definition of "terms and conditions":

> "terms and conditions" includes, but is not limited to, the percentage which is paid by the off-track betting system to the host racing association, the percentage which is paid by the host racing association to the horseman's group, as well as any arrangements as to the exclusivity between the host racing association and the off-track betting system.

15 U.S.C. § 3002(22) ("Definitions").

As is clear from even a rudimentary reading of subsection 3004(a) of the IHA, the phrase "terms and conditions" occurs merely in the context of the requirement that certain parties consent in writing to off-track wagering. In no way does Sections 3002(22) or 3004(a) purport to endow particular "terms and conditions" (as to "exclusivity," for example) with legality, or illegality, for that matter. The point of Section 3004(a), rather, is that there be an agreement among the relevant parties—on whatever terms. The legality of such terms would then be decided by other law—principally the law of the applicable states. Gulfstream's

suggestion that the IHA blesses Gulfstream's exclusive agreements is simply not supported by the IHA.

Moreover, the word "exclusivity" in Section 3002(22) is obviously not a reference to agreements such as the ones entered into by Gulfstream and the subject of this lawsuit, because the IHA does not regulate simulcasting. In *Kentucky Division, Horsemen's Benevolent Protective Association v. Turfway Park Racing Association, Inc.*, 20 F.3d 1406, 1412 fn 10 (6th Cir. 1994), the Sixth Circuit reversed a district court judgment finding the IHA unconstitutional, and stated:

> We reject the appellee's claim that Congress was implicitly regulating the simulcasting of horseraces by regulating interstate off-track wagering because interstate off-track wagering may occur without simulcasting, and simulcasting may occur without interstate off-track wagering. Accordingly, because simulcasting and off-track wagering are not inextricably linked, it is irrelevant to our decision that races conducted at Turfway Park are simulcast across state lines.

Also, the IHA explicitly anticipates a particular kind of "exclusivity" unrelated to the issues in the summary judgment motions. Under Section 3004(b), for an off-track wagering office to allow wagering on a race conducted at an out-of-state horse track, currently operating tracks within sixty miles of the off-track wagering office typically must consent. This requirement results in a sixty mile "exclusive" area around the geographically proximate track. It is a much more

natural reading of Section 3002(22) that the term "exclusivity" therein refer to contracts that expressly account for the "market area" provided by Section 3004(b).

CONCLUSION

For the foregoing reasons, this Court should answer the Eleventh Circuit's Certified Question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief utilizes Times New Roman 14-point font.

Dated: March 23, 2005

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