IN THE SUPREME COURT OF THE STATE OF FLORIDA

GULFSTREAM PARK RACING ASSOCIATION, INC.,

Appellant/Cross-Appellee,

vs. CASE NO. SC 05-251

TAMPA BAY DOWNS, INC.,

Appellee/Cross-Appellant.
_____/

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

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT TAMPA BAY DOWNS, INC.

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STATEMENT OF THE CASE AND FACTS

. Introduction.

This case arises out of a dispute between two Florida thoroughbred race tracks, Gulfstream Park Racing Association, Inc. ("Gulfstream"), and Tampa Bay Downs, Inc. ("Tampa Bay Downs"). The issue before the Court is whether exclusive dissemination agreements between a Florida thoroughbred racetrack and an out-of-state racetrack (such as Gulfstream's "Exclusive Contracts" with various out-of-state thoroughbred racetracks), which purport to grant the Florida thoroughbred racetrack the "exclusive" right to disseminate broadcasts ("Simulcasts") of the out-of-state thoroughbred races to Florida wagering sites permitted to receive them, violate the Florida Pari-mutuel Wagering Act (the "Wagering Act").

The Florida Division of Pari-Mutuel Wagering ("DPW") -- the administrative agency charged with interpreting and enforcing the Wagering Act and the rules adopted pursuant thereto -- concluded that such agreements "would violate § 550.6305(9)(g)1, Florida Statutes" and "the provisions of Rule 61D-9.001, Florida Administrative Code." (Doc. 60, Ex. J.) The U.S. District Court for the Middle District of Florida agreed with the DPW, and concluded that Gulfstream's Exclusive Contracts with the out-of-state thoroughbred racetracks are unenforceable under Florida law. *Gulfstream Park Racing Ass'n v. Tampa Bay*

Downs, Inc., 294 F. Supp. 2d 1291, 1299-1303 (M.D. Fla. 2003). (Doc. 161, pp. 11-17.)

Determining that "[t]his appeal raises an issue of first impression regarding the interpretation of two important sections of Florida's Wagering Act," the Eleventh Circuit Court of Appeals declined to rule on the enforceability of Gulfstream's Exclusive Contracts without guidance from this Court. *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 18 Fla. L. Wkly. Fed. C 217, *4-5 (11th Cir. February 9, 2005). In this regard, the Eleventh Circuit noted that the enforceability of such "exclusive" contracts presents an "unsettled question of distinct importance to the State of Florida in its effort to regulate the gambling industry. . . ." *Id*. at *1. The Eleventh Circuit therefore certified the question of the "correct interpretation of the Wagering Act regarding such exclusivity agreements" for this Court's resolution. *Id*. at *5.

. <u>Factual background.</u>

0. Florida's pari-mutuel industry.

Gulfstream and Tampa Bay Downs are members of Florida's pari-mutuel industry, which includes a number of different pari-mutuel sports, such as horse racing, jai alai, and greyhound racing. Gulfstream operates a thoroughbred racetrack in Hallandale, Florida, where it conducts live racing during its annual "meet" (i.e., racing season), which typically begins in January and ends in April of

the same year. (Doc. 23, p. 9, ¶ 3.)[1] Tampa Bay Downs operates a thoroughbred racetrack in Hillsborough County, Florida, where it conducts live racing during its annual meet, which typically begins in mid-December and ends in early May of the following year. (Id., p. 10, ¶ 4.) Florida's pari-mutuel industry is governed by the Wagering Act, a comprehensive statutory scheme set forth in Chapter 550, Florida Statutes.

In Florida, there are generally two ways to wager on a thoroughbred horse race: (1) by placing a wager on a race taking place live at the particular venue visited by the patron; or (2) by placing a wager on a race which is "Simulcast" to that venue from another Florida venue, or from an out-of-state thoroughbred racetrack. (Doc. 81, Ex. A, p. 7.) In order to bring an out-of-state thoroughbred racetrack's Simulcast signal into Florida, the out-of-state racetrack must enter into a contract with an in-state thoroughbred racetrack, which is conducting live racing during its meet, to provide its signal and to accept wagers on the out-of-state horse races. *See* § 550.3551(5), Fla. Stat. An out-of-state thoroughbred racetrack is not permitted to contract directly with Florida Intertrack Wagering Sites ("ITWS"), such as jai alai frontons or greyhound racetracks. *Id.* The Florida ITWS, likewise, are not permitted to receive the Simulcasts directly via a contract with the out-of-

[1] The record transmitted to this Court will be identified by reference to the Civil Docket for Middle District of Florida Case No. 8:03-CV-00135-JSM, as it was in the parties' briefing to the Eleventh Circuit.

state thoroughbred racetracks, but rather, must obtain them through a Florida thoroughbred permitholder which has contracted with the out-of-state thoroughbred racetracks. *Id.*[2]

In Florida, pari-mutuel wagers on Simulcasts of live horse races from out-of-state host tracks can be placed only at venues which have pari-mutuel wagering permits from the Florida DPW. *See* 15 U.S.C. §§ 3001, 3007. In addition to Florida's thoroughbred racetracks, holders of such permits operate throughout Florida at one harness track, sixteen greyhound tracks, five jai alai frontons, and at Ocala Breeders Sales, Inc. (Doc. 23, ¶ 6.)

During their "meets," Gulfstream and Tampa Bay Downs cannot compete to accept wagers from Florida ITWS within a protected sixty-mile radius of their racing facilities.[3] Within its protected sixty-mile racing territory, Tampa Bay Downs is the only permitted supplier of Simulcasts for pari-mutuel wagering to three ITWS ("Tampa Bay Downs' ITWS"). (Doc. 23, ¶8.) Within its protected sixty-mile racing territory, Gulfstream is the only permitted supplier of Simulcasts

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[2] As the district court noted, from a "technical perspective," the out-of-state racetracks simulcast their races through satellite television signals to both the in-state thoroughbred racetracks, and the ITWS sites which have contracted with the in-state thoroughbred racetrack to receive the Simulcasts. *See Gulfstream Park Racing Ass'n,* 294 F. Supp. 2d at 1296 n. 7.

[3] Section 3004(b) of the Interstate Horseracing Act, 15 U.S.C. § 3001, *et seq.* (the "IHA"), requires an ITWS site within sixty miles of a thoroughbred racetrack to obtain that track's approval before the site can accept ITWS wagers.

for pari-mutuel wagering to six ITWS ("Gulfstream's ITWS"). (Id., ¶ 9.) Outside of Tampa Bay Downs' and Gulfstream's protected territories, fourteen other ITWS (the "Outside ITWS") have permits to contract for the right to wager on Simulcast signals with whichever of the thoroughbred racetracks is then currently operating. (Id., ¶ 10.) During their overlapping racing meets, Gulfstream and Tampa Bay Downs are the only suppliers from which the Outside ITWS can legally obtain the Simulcasts. (Doc. 144, ¶ 4.) It is the right to compete for the business of those Outside ITWS which is at issue.

0. Gulfstream's Exclusive Contracts.

Prior to 1997, the State of Florida placed statutory restrictions on the number of Simulcasts thoroughbred racetracks in Florida could receive from out-of-state thoroughbred racetracks and disseminate to the Outside ITWS. (Doc. 127, pp. 95-96.) During this period, Tampa Bay Downs and Gulfstream enjoyed an almost equal share of the revenues generated from Simulcasts provided to the Outside ITWS. (Doc. 144, ¶ 5.) In the second half of 1996, however, the Florida legislature removed this limitation and began allowing "full card" or unlimited simulcasting. (Doc. 127, pp. 95-96.) Gulfstream seized this opportunity to begin negotiating with various out-of-state thoroughbred racetracks for the exclusive right to disseminate the out-of-state Simulcasts to the Outside ITWS, thus

eliminating any competition from Tampa Bay Downs in the Outside ITWS market.[4] (Doc. 60, Ex. A-E.)

An Addendum to the Exclusive Contracts Gulfstream entered into with the out-of-state thoroughbred racetracks memorializes the parties' intent to prevent Tampa Bay Downs from competing with Gulfstream in supplying the out-of-state Simulcast signals to the Outside ITWS:

> The [out-of-state racetrack] agrees to disclose the existence of the exclusive dissemination rights granted to Gulfstream by the [out-of-state racetrack] hereunder in all simulcast and/or wagering agreements with any other thoroughbred racetrack located within the State of Florida [i.e., Tampa Bay Downs] **and accordingly to limit the dissemination rights granted to such other thoroughbred racetrack located within the State of Florida in the manner aforesaid** [i.e., to the sixty mile protected zone around the other thoroughbred racetrack].

(Doc. 60, Comp. Ex. A-E (Emphasis added.)).

Although the out-of-state thoroughbred racetracks also entered into "Simulcast Agreements" with Tampa Bay Downs for its 2003 racing meet, in compliance with their obligations under the Addenda referenced above, the out-of-state racetracks purported to limit Tampa Bay Downs' dissemination rights to those permitholders within its sixty-mile protected area. (Doc. 144, ¶¶ 3-5.) These

[4] The out-of-state thoroughbred racetracks included: the New York Racing Association, Inc. ("NYRA"); Fair Grounds Corporation ("FGC"); Turfway Park LLC ("Turfway"); Penn National Racecourse ("Penn National"); Charlestown Racecourse ("Charlestown"); and Sam Houston Racepark, Ltd. ("Sam Houston").

Simulcast Agreements sought to prevent Tampa Bay Downs from disseminating the out-of-state Simulcasts to the Outside ITWS, which were "off limits" to Tampa Bay Downs under Gulfstream's Exclusive Contracts. (Id.) As the district court noted, on those occasions when Tampa Bay Downs and several of the Outside ITWS "attempted to evade Gulfstream's exclusive dissemination rights" by contracting for the Simulcast signals, Gulfstream or the out-of-state thoroughbred racetracks (at Gulfstream's urging) "threatened to terminate the Outside ITWS sites' signal, sue for damages, or otherwise enforce the exclusive dissemination agreements." *Gulfstream Park Racing Ass'n*, 294 F. Supp. at 1297-98.

Gulfstream was able to demand the Exclusive Contracts due to its immense market presence. Gulfstream's sixty-mile protected market is located in the lucrative south Florida area, "one of the premier [thoroughbred] racing locations in the country." (Doc. 131, pp. 61-62.) Approximately one-third of Florida's population resides in Gulfstream's exclusive market, and 60% of all wagering on thoroughbred racing occurs in that market. (Doc. 81, Ex. B, pp. 10-11.)[5] In contrast, the population in Tampa Bay Downs' protected area is considerably smaller, and accounts for only 19% of the wagering on thoroughbred racing in

[5] Gulfstream is owned by Magna Entertainment Corporation, which is the largest owner of thoroughbred racetracks in the United States. (Doc. 131, p. 10.) Simulcast races from Magna-owned tracks are an important source of wagering to the out-of-state thoroughbred racetracks. (Doc. 101, pp. 23-28; Doc. 103, p. 24.)

Florida. (Id., p. 14.) Due to the large concentration of population and wealth in South Florida, Gulfstream's market provides greater economic prospects to out-of-state thoroughbred racetracks than Tampa Bay Downs' market. (Doc. 131, pp. 37-38.)

Gulfstream used its immense market power to procure the Exclusive Contracts. In 1997, for example, Gulfstream sent a letter to the major out-of-state thoroughbred racetracks reminding them, in stark terms, that the majority of their Simulcast business in Florida was from Gulfstream's protected sixty-mile market area. (Doc. 128, Ex. 1.) The unstated premise of Gulfstream's letters was that if the exclusive rights were not granted, Gulfstream would refuse to accept the out-of-state racetracks' signals and foreclose the racetracks from the lucrative south Florida market, because Gulfstream had the power to exclude any Simulcast from its protected market.[6]

Magna, Gulfstream's parent company, also assisted Gulfstream by flexing its considerable muscle on Gulfstream's behalf in extracting the Exclusive Contracts.

[6] In some cases, the letter alone got the point across. In others, Gulfstream was more direct. For example, Gulfstream told a representative of Oaklawn Jockey Club in Hot Springs, Arkansas that unless the Club gave Gulfstream an exclusive contract for its Simulcasts, Gulfstream would likely exclude Oaklawn Simulcasts from being shown in Gulfstream's lucrative south Florida market. (Doc. 102, pp. 17-18.) The message apparently conveyed its intended effect. When Gulfstream's attorney asked Oaklawn's representative how many times Gulfstream told him this, he said: "It only took once." (Doc. 102, p. 43.)

For example, Magna agreed to import NYRA Simulcast signals into its lucrative California tracks (including Santa Anita), in exchange for NYRA granting Gulfstream exclusive contracts. (Doc. 101, p. 31.) As the district court noted, six of the fourteen 2003 Exclusive Contracts were with racetracks owned or controlled by Magna. *Gulfstream Park Racing Ass'n* at 1297 n. 12.

Once Gulfstream extracted the Exclusive Contracts, it zealously enforced them. Having eliminated Tampa Bay Downs as its only competitor in the Outside ITWS market, Gulfstream was able to fix the "price" on the Simulcasts and force the Outside ITWS to pay more than Tampa Bay Downs was willing to accept for the same Simulcasts.[7] (Doc. 121, ¶ 4.) The "price" for ITWS signals is, in reality, the share of net proceeds left over after the payment of certain taxes and other costs. *See* § 550.6305(9), Fla. Stat. The statute sets out minimum terms for the distribution of net proceeds remaining after the payment of such taxes and costs.

[7] For example, in 2001, Orlando Jai-Alai ("OJA") began taking Simulcast signals of races at Penn National, Sam Houston and Fairgrounds (all of whom had granted exclusive rights to Gulfstream) from Tampa Bay Downs. (Doc. 96, p. 128.) In response, Gulfstream contacted the out-of-state tracks and asked them to write letters to OJA's totalisator company demanding that it promptly disconnect OJA from Tampa Bay Downs' wagering hub. (Doc. 96, pp. 128-39; Exs. 26-29 & 31.) The totalisator company responded with a letter to OJA stating that it had been "given no choice . . . but to remove wagering capabilities on Penn National, Sam Houston, Fair Grounds, and Santa Anita from [OJA's] tote system by virtue of its acceptance of wagers through the Tampa Bay Downs hub." (Doc. 127, Ex. 24.) As a result, OJA was forced to resume taking the Simulcast signals, at higher prices, through Gulfstream. (Doc. 121, ¶ 4.)

(Id.) Under the statute, one-third of the remainder of such proceeds are paid to the guest track; one-third are retained by the host track; and one-third are paid by the host track as purses at the host track. *See* § 550.6305(9)(b), Fla. Stat. The host track (i.e., Gulfstream or Tampa Bay Downs) and the guest track (i.e., the Outside ITWS), however, can negotiate different shares of the net proceeds. *See* § 550.6305(9)(c). The "price" received by the host track, therefore, is its share of the net proceeds. If the host track agrees to take a lower share of the net proceeds, then the "price" it is charging authorized venues for the Simulcasts is lower.

During the period from 1997 through 2002 in which Gulfstream enforced its Exclusive Contracts, Gulfstream paid guest tracks the statutory minimum, or one-third of the net proceeds, for the out-of-state Simulcasts. (Doc. 81, Ex. A, p. 12, n. 19.) The clear intent of Gulfstream's Exclusive Contracts was to exclude Tampa Bay Downs from the relevant market and therefore to eliminate competition, so as to permit Gulfstream to continue its practice of allowing the Outside ITWS to retain only the statutory minimum fee. (Doc. 121, ¶3; Doc. 96, pp. 49 & 107; Doc. 130, pp. 11-12.)

As a result of Gulfstream's practices, at least one of the Outside ITWS -- OJA -- became unprofitable and was on the verge of closing its doors. (Doc. 121, ¶ 4.) Before Gulfstream entered into the Exclusive Contracts, OJA obtained the out-of-state Simulcasts through Tampa Bay Downs and not through Gulfstream,

because it received the Simulcast signals at more favorable prices through Tampa Bay Downs. (Doc. 121, ¶ 3.) After Gulfstream entered into the Exclusive Contracts, however, OJA was essentially forced to take the out-of-state Simulcasts from Gulfstream, and to pay higher prices than Tampa Bay Downs was willing to accept for the same Simulcasts. (Id.) As a result, OJA was virtually forced out of business. (Id.) When OJA was later able to obtain the Simulcasts from Tampa Bay Downs at prices materially lower than those charged by Gulfstream, however, OJA was able to remain open due to a positive cash flow. (Id.)

0. The Declaratory Statement.

On May 9, 2002, Tampa Bay Downs filed an Amended Petition for Declaratory Statement with the DPW, seeking to resolve whether agreements such as Gulfstream's, which operate to prevent Tampa Bay Downs from disseminating out-of-state Simulcasts to Florida wagering sites permitted to receive them, violate Florida law. (Doc. 127, Ex. 23.) Tampa Bay Downs cited the following provisions of the Wagering Act and related administrative rule applicable to its Amended Petition:

> **Section 550.6305(9)(g)1.** Any thoroughbred permitholder which accepts wagers on a simulcast signal must make the signal available to any permitholder that is eligible to conduct intertrack wagering under the provisions of §§ 550.615-550.6345.
>
> **Section 550.615(3)**. A person may not restrain or attempt to restrain any permitholder that is otherwise authorized to conduct intertrack

> wagering from receiving the signal of any other permitholder or sending its signal to any permitholder.
>
> **Rule 61D-9.001.** No permitholder shall enter into a contractual agreement that is in violation of, or may be construed as waiving, the requirements of these rules or Chapter 550, Florida Statutes.

(Id., pp. 2-3.)

Tampa Bay Downs then sought a declaratory statement from the DPW as to the applicability of these statutes and rules to the facts in order to obtain guidance on the following matters:

> 1. If Tampa Bay Downs, as a host track, receives and accepts wagers on the broadcast of races conducted at out-of-state racetracks, is it obligated to make the simulcast signal of the out-of-state races available to Florida Jai-Alai as a guest track pursuant to the provisions of § 550.6305(9)(g)1, Florida Statutes (2001).
>
> 2. If Tampa Bay Downs receives the broadcast of races conducted at out-of-state racetracks, does Florida Jai-Alai have a right to receive the simulcast transmission of and accept wagers on the simulcast dissemination of those out-of-state races from Tampa Bay Downs pursuant to § 550.6305(9)(g)1, Florida Statutes (2001).
>
> 3. Do agreements between Gulfstream and out-of-state tracks, which prevent Tampa Bay Downs from disseminating the simulcast transmission of out-of-state races it receives to eligible guest tracks such as Florida Jai-Alai, violate Florida law.

(Id., p. 3.)

Various Florida permitholders eligible to conduct intertrack wagering moved to intervene in the administrative proceeding.[8] As noted in the Motion to Intervene

[8] Those "Intervenors" included Ocala Breeders' Sales Company, Inc., Lake Fron, Inc. d/b/a Ocala Jai Alai, Florida Jai Alai, Inc. d/b/a Orlando Jai Alai, Sports

of one of the Intervenor groups, Tampa Bay Downs' petition "puts in issue whether an individual Florida thoroughbred permitholder may create a monopoly on the rebroadcast of out-of-state thoroughbred Simulcast races for purposes of intertrack wagering." (Doc. 127, Ex. 24.) The Intervenors went on to say: "By contractually barring Tampa Bay Downs from complying with F.S. 550.6305(9)(g)1, Gulfstream Park was able to monopolize such signals and deprive the intertrack wagering marketplace of the mandated competition regarding such signals." (Id.) All of the Intervenors urged the DPW to answer the three questions posed in Tampa Bay Downs' Amended Petition in the affirmative. (Id.)

On September 16, 2002, the DPW issued a Declaratory Statement in response to Tampa Bay Downs' Amended Petition. The Declaratory Statement provides, in relevant part:

> . . . Exclusive disseminator agreements which operate to restrict the transfer of a simulcast signal from Tampa Bay Downs to Florida Jai Alai [an Outside ITWS], who is eligible to conduct intertrack wagering on such a signal . . . **would violate section 550.6305(9)(g)1, Florida Statutes**. Similarly, such an agreement which is entered into to restrict dissemination of a simulcast signal . . . **would violate the provisions of Rule 61D-9.001, Florida Administrative Code**.

(Doc. 60, Ex. J, pp. 5-6.) (Emphasis added.)[9]

Palace, Inc. d/b/a Melbourne Greyhound Track, and Sanford Orlando Kennel Club, Inc. d/b/a Sanford Orlando Kennel Club.

[9] Gulfstream was aware of the administrative proceeding that led to the issuance of the Declaratory Statement, yet decided not to participate in or to appeal based on

Armed with the Declaratory Statement, Tampa Bay Downs was free to negotiate with the Outside ITWS for the rebroadcast of the Simulcasts. This uninhibited competition allowed Tampa Bay Downs to offer the guest facilities a share of the net proceeds that ranged from 40% to 47.5%, as well as a variety of other benefits. (Doc. 81, Ex. A, p. 13.) Because they were able to receive a higher share of the net proceeds from Tampa Bay Downs and, therefore, effectively pay a lower "price" for the Simulcasts, the Outside ITWS expressed a clear preference

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the "advice of counsel." As Gulfstream's President and General Manager testified under oath:

> Q: . . . were you aware that an amended petition had been filed?
> A: Yes.
> Q: And you knew about that before the Declaratory Statement was actually entered?
> A: Yes.
> Q: Okay. And based on information you got about this amended petition, was there any further consideration on Gulfstream's part about intervening in the process?
> A: Counsel advised us not to intervene.
>
> * * *
>
> Q: Okay. Did you understand when a declaratory statement is entered that the parties are -- that are affected by it have a right to appeal?
> A: Yes.
>
> * * *
>
> Q: Okay. And you were aware that you had that right?
> A: Yes.
>
> * * *
>
> Q: Can you tell me why you didn't appeal?
> A: Advice of counsel.

(Doc. 96, pp. 93-94; 98-100.)

for receiving the signals from Tampa Bay Downs, rather than from Gulfstream. Indeed, Tampa Bay Downs' share of the handle (e.g., wagering revenues) in the Outside ITWS market increased from less than 20% to more than 70%. (Id.)

In its Statement of Facts, Gulfstream attempts to minimize the effect of the DPW's ruling by relying on "red herring" arguments and semantics. (Initial Brief, p. 14.) Gulfstream begins by asserting that Tampa Bay Downs was "unsuccessful" in its 1997 "effort to persuade [the] DPW to bring an enforcement action against Gulfstream" challenging the Exclusive Contracts. (Id.) Gulfstream fails to mention that the director of the DPW, while concluding that the DPW lacked authority to bring **legal action** against Gulfstream, expressed her "sympathy" with Tampa Bay Downs' "factual situation" and urged Tampa Bay Downs to "seek a legislative remedy or a civil remedy in state or federal court to protect [its] interests. . ." (Gulfstream App. 7.) Of course, Tampa Bay Downs was later successful in its effort to persuade the DPW (and then the district court) that exclusive disseminator agreements, such as those between Gulfstream and the out-of-state thoroughbred racetracks, violate Florida law. (Id.)

Gulfstream alternatively suggests that the Declaratory Statement is based on an incorrect factual premise because it assumes that Florida thoroughbred racetracks, such as Gulfstream and Tampa Bay Downs, **rebroadcast** out-of-state Simulcast signals to other in-state permitholders, when the out-of-state racetracks

in fact send the Simulcasts directly by **satellite** to the Florida ITWS.[10] (Initial Brief, pp. 15-17.) Gulfstream's argument overlooks that the **only way** the Florida ITWS can receive the out-of-state Simulcast signals is by agreement with a Florida thoroughbred racetrack, like Tampa Bay Downs or Gulfstream. *See* § 550.3551(5), Fla. Stat. This "transmission" of the Simulcasts to the Outside ITWS, via an agreement with the Florida thoroughbred racetrack, is precisely the "rebroadcast" referred to in the Declaratory Statement, as explained by DPW Director David S. Roberts in his deposition:

> Q: Sir, is it true that an out-of-state simulcast signal can only be brought into the State of Florida through a Florida horse track that is a permitholder here?
> A: From another horse track from out-of-state?
> Q: Exactly.
> A: Yes.
> Q: And the only way for a non-horse track permitholder in the State of Florida, such as a dog track or a jai alai fronton, to get that out-of-state signal is **through** the Florida horse track that brought it into the state, correct?
> A: Correct.
> Q: Is that what you are talking about, the second step of that, when you talk about a simulcast rebroadcast?
> A: Yes.
> Q: So the first broadcast comes into the horse track, and then the only way for the other dog tracks and jai alai frontons to get

[10] Notably, Gulfstream's President and General Manager, Scott Savin, admitted during his deposition that **all facts** Gulfstream now contests are accurate. (Doc. 96, pp. 90-95.) Gulfstream, of course, had every opportunity to challenge the facts it now contests during the declaratory proceeding, yet chose not to intervene in the action or to appeal the holding. (Id., pp. 93-94 & 98-100.)

that is by virtue of some agreement or permission or consent of the in-state horse track?

A: Yes.

Q: **And that's what you call the rebroadcast?**

A: Correct.

(Doc. 127, pp. 164-165.) (Emphasis added.)[11]

Gulfstream's Exclusive Contracts, if enforced, will prevent Tampa Bay Downs from "rebroadcasting," i.e., making the Simulcast signals "**available**" to the Outside ITWS, in violation of § 550.6305(9)(g)1. This fact was admitted by Gulfstream's top executives. (Doc. 130, pp. 11-12; Doc. 96, p. 49 & 107.) Therefore, the DPW **correctly** concluded in its Declaratory Statement that any attempt to prohibit a Florida thoroughbred permitholder from "rebroadcasting" or "making a Simulcast signal available" to the Outside ITWS would violate Florida law.

Gulfstream also suggests that the Declaratory Statement is based on inaccurate facts because its Exclusive Contracts do not expressly "prohibit" Tampa Bay Downs from disseminating out-of-state Simulcasts to eligible tracks. (Initial Brief, p. 17.) Gulfstream's argument is based on the following "question" and "answer" during DPW Director Roberts' deposition:

[11] It is noteworthy that Gulfstream's Director of Simulcasting and the only other operating thoroughbred racetrack in Florida, Calder/Tropical, also share the same understanding of "rebroadcast" with the DPW. (Doc. 130, pp. 11-12; Doc. 129, pp. 72-73.)

Q: If the contracts do not prohibit Tampa Bay Downs from disseminating the simulcast broadcast it receives to eligible tracks such as Florida Jai Alai, is the conclusion [in the Declaratory Statement] incorrect?
A: Yes.

(Doc. 127, pp. 117-118.) Gulfstream has taken Director Roberts' statement out of context. In the context of this action, Director Roberts was simply commenting on the obvious: if there were no "exclusivity" provisions in Gulfstream's contracts with the out-of-state racetracks, then the Declaratory Statement's conclusion that the contracts violate Florida law would be incorrect.

The testimony of Gulfstream's own President, in any event, defeats Gulfstream's suggestion that its Exclusive Contracts do not operate to prohibit Tampa Bay Downs from doing anything. As Mr. Savin testified in his deposition, the **purpose** of obtaining the Exclusive Contracts was to exclude Tampa Bay Downs from competition in providing Simulcast signals and wagering to the Outside ITWS:

Q: . . . You at Gulfstream knew that by obtaining these exclusive disseminator agreements from the [out-of-state] tracks that you were cutting Tampa Bay Downs out of the competition for ITWs -- outside ITW business on those [out-of-state] signals during the period of your meet.

* * *

A: If I understand your question, excluding the Tampa Bay market area, yes.
Q: Exactly, that's -- when I say the outside ITWs I am excluding the Tampa Bay market, correct?
A: Yes.

Q: So you knew that the necessary consequence of the exclusive disseminator agreements is that Tampa Bay Downs, other than their 60-mile radius, was basically out of the outside ITW market competition for those out-of-state signals that you had exclusives for.

A: As a by-product of us obtaining the exclusive disseminators, yes.

(Doc. 96, p. 49.)

Finally, Gulfstream contends that the Declaratory Statement is invalid for a third reason: because DPW Director Roberts was unaware, at the time it was issued, of a 1997 DPW memorandum purportedly "containing the legal opinion that no provision in Chapter 550 prohibits exclusive dissemination." (Initial Brief, p. 17.) Gulfstream's argument is incorrect, as the DPW memorandum it refers to **contains no such opinion.** (Gulfstream's Appendix 8.) The memorandum addresses an entirely different issue: whether the State of Florida would enjoy Eleventh Amendment protection if it were to take **legal action** to invalidate Gulfstream's Exclusive Contracts. (Gulfstream's Appendix 8, p. 7.) The DPW concluded that Chapter 550 did not provide a basis for such interference by the agency. (Id.) **It did not conclude that exclusive dissemination agreements are permitted under Chapter 550, as Gulfstream inaccurately argues.** To the contrary, the DPW's subsequent Declaratory Statement makes clear that such agreements violate the Wagering Act, and are therefore unenforceable under Florida law.

. **Case background.**

On January 27, 2003, four months after the DPW issued its Declaratory Statement, Gulfstream filed the present action against Tampa Bay Downs. (Doc. 1.) In Counts 1 and 2 of its Second Amended Complaint, Gulfstream sought a declaration from the district court that certain provisions of the Wagering Act and its related administrative rules are preempted by the Federal Copyright Act. (Id.) In Count 3, Gulfstream sought declaratory relief determining that Gulfstream's Exclusive Contracts are enforceable under Florida law. (Id.) In Counts 4 and 5, Gulfstream sought damages for breach of contract and for tortious interference. (Id.)

Tampa Bay Downs filed an Answer and Counterclaim. (Doc. 23.) In Count 1 of its Amended Counterclaim, Tampa Bay Downs sought a declaration that the relevant Florida statutes and administrative rule are not preempted by the Copyright Act and that Gulfstream's Exclusive Contracts are unenforceable. (Id.) In Counts 2 and 3, Tampa Bay Downs sought damages for Gulfstream's alleged violation of Federal and Florida antitrust laws. (Id.) [12]

Gulfstream moved for summary judgment on Counts 3 and 5 of its Second Amended Complaint, and on Counts 2 and 3 of Tampa Bay Downs' Counterclaim.

[12] As in the DPW administrative proceeding, various members of the Outside ITWS moved to intervene in the action. (Doc. 34.)

(Doc. 90, 92.) Tampa Bay Downs moved for summary judgment on all counts of Gulfstream's Second Amended Complaint, and on Count 1 of its Counterclaim. (Doc. 88.) In a thirty-three-page Order, the district court entered summary judgment in favor of Tampa Bay Downs on all counts of Gulfstream's Second Amended Complaint and on Count 1 of its Counterclaim, and in favor of Gulfstream on Counts 2 and 3 of Tampa Bay Downs' Counterclaim. (Doc. 161.) *Gulfstream Park Racing Ass'n, supra.*[13]

The district court recognized that it was required to look to the plain language of the statutes in question in construing their meaning, and in addition, that "great deference" must be given to the interpretation of the statutes by the DPW. (Doc. 161, pp. 11-12.) *Gulfstream Park Racing Ass'n,* 294 F. Supp. 2d at 1299-1300. The district court then acknowledged the DPW's interpretation of section 550.6305(9)(g)1 as "oblig[ing]" a "thoroughbred racetrack (TBD) accepting wagers on an out-of-state racetrack simulcast to make that signal available to [other] ITWS sites," and "making illegal an exclusive dissemination agreement that prevented dissemination by others of a simulcast signal." (Doc. 161, pp. 12-13.) *Id.* at 1300. The court also acknowledged the DPW's

[13] It is the district court's ruling in favor of Tampa Bay Downs on Count 3 of Gulfstream's Second Amended Complaint, and on Count 1 of Tampa Bay Downs' Counterclaim concerning the enforceability of Gulfstream's Exclusive Contracts, which is relevant to this proceeding.

interpretation of section 550.615(3) as "prohibit[ing] exclusive dissemination agreements that operate to restrict the retransmission of a signal by an in-state thoroughbred racetrack to an ITWS site." (Id.) The district court concluded that the "obvious purpose of these sections when construed together is to promote competition among wagering venues in Florida." (Id.) Determining that it could not "conclude that the [DPW's] interpretation was clearly erroneous or in conflict with the legislative intent of the statute," the district court entered summary judgment in favor of Tampa Bay Downs on Count 3 of Gulfstream's Second Amended Complaint, and on Count 1 of its Counterclaim. (Doc. 161, p. 17.) *Id.* at 1303.

Gulfstream appealed the district court's decision to the Eleventh Circuit Court of Appeals on December 5, 2003. (Doc. 165 .)[14] The parties fully briefed their respective arguments to the Eleventh Circuit, which heard oral argument on September 28, 2004.

On February 9, 2005, the Eleventh Circuit filed a per curiam opinion determining that the enforceability of Gulfstream's Exclusive Contracts presents

[14] Gulfstream challenged the district court's entry of summary judgment in favor of Tampa Bay Downs on Counts 3, 4 and 5 of its Second Amended Complaint, but did not challenge the entry of summary judgment on Counts 1 and 2 of its Second Amended Complaint, or on Count 1 of Tampa Bay Downs' Amended Counterclaim. Tampa Bay Downs filed a cross-appeal, challenging the district court's entry of summary judgment in favor of Gulfstream on Counts 2 and 3 of its Amended Counterclaim alleging anti-trust violations. (Doc. 160.)

"an unsettled question of distinct importance to the State of Florida in its efforts to regulate the gambling industry." *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 18 Fla. L. Wkly. Fed. C 217, *1. The court went on to say that "[b]ecause the resolution of the issues in this case requires us to interpret a Florida law that is an integral part of the state's very extensive regulatory scheme for the pari-mutuel gambling industry, we are reluctant to proceed without any guidance at all from the courts of that state." *Id.* at *4. Acknowledging that the district court had interpreted the plain language of the statutes at issue to prohibit the sort of contracts that Gulfstream claims give it the exclusive right to disseminate out-of-state Simulcasts, the Eleventh Circuit nevertheless concluded that "[t]his issue should be resolved by the Florida Supreme Court." *Id.* at *5. The Eleventh Circuit accordingly certified the following question to this Court, pursuant to Rule 9.150(a), Florida Rules of Appellate Procedure:

> DOES THE FLORIDA PARI-MUTUEL WAGERING ACT PROHIBIT AN AGREEMENT BETWEEN A FLORIDA THOROUGHBRED RACETRACK AND AN OUT-OF-STATE RACETRACK THAT GRANTS THE FLORIDA RACETRACK THE EXCLUSIVE RIGHT TO DISSEMINATE THE OUT-OF-STATE TRACK'S SIMULCAST SIGNAL TO OTHER FLORIDA WAGERING SITES PERMITTED TO RECEIVE THEM.

Id. at *5.

SUMMARY OF ARGUMENT

As both the Florida DPW and the district court correctly concluded, an agreement between a Florida thoroughbred racetrack and an out-of-state thoroughbred racetrack, that grants the Florida racetrack the exclusive right to disseminate the out-of-state Simulcasts to other Florida wagering sites, violates the Florida Wagering Act. This Court therefore should answer the certified question in the affirmative.

The plain language of the statutory sections at issue evidences the legislature's clear intent to promote competition in the horse-racing industry by prohibiting attempts to prevent or "restrain" a Florida permitholder (such as Tampa Bay Downs) from receiving or sending a signal to another Florida permitholder eligible to receive it. Section 550.615(3) plainly prohibits any "attempt to restrain any permitholder that is otherwise authorized to conduct intertrack wagering from receiving the signal of any other permitholder or sending its signal to any permitholder." Section 550.6305(9)(g)1 plainly states that "[a]ny thoroughbred permitholder which accepts wagers on a Simulcast signal **must** make the signal available to any permitholder that is eligible to conduct intertrack wagering. . ." Rule 61D-9.001(1)(b) prohibits "a contractual agreement that is in violation of, or may be construed as waiving, the requirements of these rules or Chapter 550,

Florida Statutes." These statutes and rule plainly and unambiguously forbid the type of "Exclusive Contracts" Gulfstream seeks to enforce.

Contrary to Gulfstream's argument, the district court did not violate "principles of statutory construction" when it concluded that Gulfstream's Exclusive Contracts violate Florida law. The district court correctly construed the statutes within the context of the overall statutory scheme, and after doing so, properly concluded that the purpose of the statutes "when construed together is to promote competition among wagering venues in Florida." Nor did the court err when it relied on the DPW's Declaratory Statement, which also expressly disagrees with Gulfstream's position, to support its own interpretation of the statutes.

Gulfstream's own hypertechnical and self-serving interpretation of the statutes at issue reveals the weakness of its position. The critical inquiry when interpreting the statutes is not whether they expressly address exclusive agreements between an in-state permitholder and an out-of-state racetrack, as Gulfstream incorrectly contends. The relevant question is whether the Exclusive Contracts can be enforced without violating the statutes. They cannot. Gulfstream's own interpretation of the subject statutes is flawed as a matter of law and cannot salvage its unenforceable agreements.

This Court has recognized the benefits to the state of promoting competition and preventing monopolies in the horse racing industry. This policy is in line with

the plain language of Florida's Wagering Act and related administrative rules; the DPW's interpretation of those statutes and rules; and the district court's conclusion that Gulfstream's Exclusive Contracts violate Florida law. This Court, therefore, should answer the certified question in the affirmative, and declare that "an agreement between a Florida thoroughbred racetrack and an out-of-state racetrack that grants the Florida racetrack the exclusive right to disseminate the out-of-state track's simulcast signals to other Florida wagering sites permitted to receive them" violates the Florida Pari-Mutuel Wagering Act.

ARGUMENT[15]

I. AS BOTH THE DISTRICT COURT AND THE DPW CORRECTLY DETERMINED, THE FLORIDA PARI-MUTUEL WAGERING ACT PROHIBITS AN AGREEMENT BETWEEN A FLORIDA THOROUGHBRED RACETRACK AND AN OUT-OF-STATE RACETRACK THAT GRANTS THE FLORIDA RACETRACK THE EXCLUSIVE RIGHT TO DISSEMINATE THE OUT-OF-STATE TRACK'S SIMULCAST SIGNALS TO OTHER FLORIDA WAGERING SITES PERMITTED TO RECEIVE THEM.

A. Florida's pari-mutuel industry is highly regulated and designed to promote competition.

The regulation of gambling lies at the "heart of the state's police power." *Johnson v. Collins Entm't Co.,* 199 F.3d 710, 720 (4th Cir. 1999); *see also Div. of Pari-Mutuel Wagering v. Fla. Horse Council, Inc.,* 464 So. 2d 128, 130 (Fla. 1985). Florida has a paramount interest in the regulation of thoroughbred horse racing because of its economic impact. *Ala. Sportservice Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n, Inc.,* 767 F. Supp. 1573, 1577 (M.D. Fla. 1991) ("Pari-mutuel horse racing is a significant industry which provides substantial revenue to the State. . .); *see also* § 550.09515(1), Fla. Stat. ("Pari-mutuel wagering at thoroughbred horse racetracks in this state is an important business enterprise, and taxes derived therefrom constitute a part of the tax structure which funds operation of the state. . . Due to the need to protect the public health, safety,

[15] Questions of statutory interpretation are subject to the *de novo* standard of review. *B.Y. v. Dep't of Children and Families,* 887 So. 2d 1253, 1255 (Fla. 2004).

and welfare, the gaming laws of the state provide for the thoroughbred horse industry to be highly regulated and taxed.").

This Court has recognized the benefits to the state of promoting competition and preventing monopolies in the horse racing industry. *See, e.g., Gulfstream Park Racing Ass'n v. Div. of Pari-Mutuel Wagering*, 253 So. 2d 429, 433 (Fla. 1971) (recognizing that "more competition and less monopoly favoring one track" may prove helpful to the racing industry and therefore advantageous to the state). Gulfstream itself challenged "the evils of monopoly and inequality of opportunity" which result when one racetrack enjoys an "unconscionable advantage" over another in *Gulfstream Park Racing Ass'n. Id*. at 430-31. This Court agreed with Gulfstream, stating that the law "favor[s] **competition**" between the racetracks," and that "there could be little or none so long as the monopoly decreed" by the invalidated statute "lasted with no equal opportunity extended Gulfstream to compete . . . ." *Id*. at 431. Ironically, Gulfstream now claims that its Exclusive Contracts -- which necessarily grant it the "monopoly and inequality of opportunity" it condemned thirty years ago -- are in compliance with Florida law.[16]

[16] Although Gulfstream has argued that *Gulfstream Park Racing Ass'n* has no bearing on the current "statutory scheme" because it was decided over twenty years before the enactment of the Wagering Act, the case has a clear bearing on the benefits to the State of competition in the horse racing industry -- the issue in this case.

The monopoly the Exclusive Contracts purport to grant Gulfstream in the dissemination of out-of-state Simulcasts to the Outside ITWS is inconsistent with the plain language and intent of Florida's Wagering Act. Section 550.615(3) of the Act evidences the legislature's clear intent to promote competition and to prevent monopolies in the horse-racing industry by unambiguously prohibiting any attempts to prevent or "restrain" a Florida permitholder authorized to conduct intertrack wagering (such as Tampa Bay Downs) from receiving or sending a signal. According to the statute:

> If a permitholder elects to broadcast its signal to any permitholder in this state, any permitholder that is eligible to conduct intertrack wagering . . . is entitled to receive the broadcast and conduct intertrack wagering under this section . . . . **A person may not restrain or attempt to restrain any permitholder that is otherwise authorized to conduct intertrack wagering from receiving the signal of any other permitholder or sending its signal to any permitholder**.

See § 550.615(3), Fla. Stat. (Emphasis added.)

Section 550.6305(9)(g)1 of the Act, in turn, **requires** a Florida thoroughbred racetrack accepting wagers on a Simulcast signal to make the signal available to other eligible permitholders:

> **Any thoroughbred permitholder which accepts wagers on a simulcast signal must make the signal available to any permitholder that is eligible to conduct intertrack wagering . . . .**

See § 550.6305(9)(g)1, Fla. Stat. (Emphasis added.)

Rule 61D-9.001(1)(b) of the Florida Administrative Code makes clear that the above-referenced statutes, as well as other mandatory provisions of the Wagering Act, cannot be avoided by contract. According to the rule:

> No permitholder shall enter a contractual agreement that is in violation of, or may be construed as waiving, the requirements of these rules or Chapter 550, Florida Statutes.

See Rule 61D-9.001(1)(b), F.A.C.

Finally, to avoid attempts by persons to take advantage of select provisions of the Wagering Act while avoiding others (as Gulfstream has attempted to do in this case), the legislature included a non-severability clause which provides:

> If the provisions of any section of this act are held to be invalid or inoperative for any reason, the remaining provisions of this act shall be deemed to be void and of no effect, it being the legislature's intent that this act as a whole would not have been adopted had any provision of the act not been included.

See Section 550.71, Fla. Stat.

. **Gulfstream's Exclusive Contracts violate the plain language of the Wagering Act and Rule and are therefore unenforceable.**

Under Florida law, "an agreement which cannot be performed without violating . . . a constitutional or statutory provision is illegal and void." *Local No. 234, United Ass'n of Journeymen & Apprentices v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953); *see also In re Voltarel*, 236 B.R. 464, 466 (Bankr.

M.D. Fla. 1999).[17] Section 550.6305(9)(g)1 of the Wagering Act plainly states that a Florida thoroughbred permitholder accepting wagers on a Simulcast signal **must** make the signal available to any other Florida permitholder eligible to conduct intertrack wagering. Gulfstream's Exclusive Contracts are designed to prevent Tampa Bay Downs from disseminating the Simulcasts to the Outside ITWS, and therefore cannot be performed without violating this statutory mandate.[18] The Exclusive Contracts, therefore, are unenforceable under section 550.6305(9)(g)1.

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[17] In its Reply Brief to the Eleventh Circuit, Gulfstream sought to distinguish these cases based on their facts. (Reply Brief, p. 50.) Tampa Bay Downs, however, relies on the decisions for the principle of law they advocate: that agreements which cannot be performed without violating constitutional or statutory provisions are illegal and void. Gulfstream's Exclusive Contracts are meaningless unless they operate to prevent Tampa Bay Downs from supplying the out-of-state Simulcasts to the Outside ITWS. Enforcing those agreements, and thus preventing Tampa Bay Downs from disseminating the Simulcasts, would violate the Wagering Act. *See* § 550.6305(9)(g)1, Fla. Stat. Gulfstream's Exclusive Contracts are therefore "illegal and void."

[18] Gulfstream argued in its Reply Brief to the Eleventh Circuit that the "fundamental flaw in [Tampa Bay Downs'] argument that Gulfstream's agreements cannot be performed without violating Florida law is the false premise that Gulfstream's agreements *restrained* [Tampa Bay Downs]." (Reply Brief, p. 51.) Gulfstream's argument that its Exclusive Contracts do not "restrain" Tampa Bay Downs from doing anything reveals the weakness of its position. The clear purpose of the Exclusive Contracts -- as admitted by Gulfstream's own President -- is to prevent Tampa Bay Downs from disseminating the out-of-state Simulcast signals to the Outside ITWS. (Doc. 96, p. 49.) Moreover, as illustrated by the case of OJA, Gulfstream indeed attempted to "restrain" Tampa Bay Downs from supplying Simulcasts to the Outside ITWS by urging OJA's totalisator company to disconnect OJA from Tampa Bay Downs' wagering hub, thus forcing OJA to resume taking the Simulcast signals, at higher prices, through Gulfstream.

The plain language of section 550.615(3) further supports the determination that the Exclusive Contracts violate Florida law. The relevant portion of the statute states that: "[a] person may not restrain or attempt to restrain any permitholder that is otherwise authorized to conduct intertrack wagering from receiving the signal of any other permitholder or sending its signal to any permitholder." The plain language of the statute prohibits exclusive dissemination agreements. (Doc. 161, p. 13.) Moreover, both section 550.615(3) and section 550.6305(9)(g)1 demonstrate that a critical purpose of the statutory scheme is to promote competition among Florida's wagering venues.

The conclusion that Gulfstream's Exclusive Contracts violate the plain language of Florida's Wagering Act is firmly supported by the DPW's September 16, 2002 Declaratory Statement. The DPW sought to resolve the following question: "Are agreements that designate an exclusive disseminator of simulcast signals for certain out-of-state racetracks in violation of Florida law since they conflict with sections 550.6305(9)(g) and 550.615 Florida Statutes (2001), and Rule 61D-9.001, Florida Administrative Code?" (Doc. 60, Ex. J.) In determining that they are, the DPW noted that "[t]he applicable provisions of section 550.615(3), Florida Statutes, clearly and unambiguously provide that '[a] person may not restrain or attempt to restrain any permitholder that is otherwise authorized to conduct intertrack wagering from receiving the signal of any other

permitholder or sending its signal to any permitholder.'" (Id.) The DPW then concluded:

> **Exclusive disseminator agreements** which **operate to restrict** the transfer of a simulcast signal from TBD to Florida Jai Alai, who is eligible to conduct intertrack wagering on such a signal . . . would **violate** § 550.6305(9)(g)1, Florida Statutes. Similarly, such an agreement which is entered into to restrict dissemination of a simulcast signal . . . would **violate** the provisions of Rule 61D-9.001, Florida Administrative Code.

(Id.) (Emphasis added.)

Gulfstream cannot deny that its Exclusive Contracts, if enforced, would deprive Tampa Bay Downs of its right to compete with Gulfstream in the market and therefore would violate the "overall statutory scheme" of the Wagering Act; the plain language of Section 550.6305(9)(g)1; and Rule 61D-9.001. (Doc. 96, p. 40.) Indeed, both Gulfstream's President and its Simulcast Director admitted that Gulfstream knew, by obtaining the Exclusive Contracts, that it was cutting Tampa Bay Downs out of competition with the Outside ITWS market for the out-of-state Simulcasts. (Doc. 96, p. 49; Doc. 130, pp. 11-12.) Enforcing the Exclusive Contracts, in turn, would prove highly profitable to Gulfstream at the expense of the industry as a whole. Specifically, if allowed to enforce its Exclusive Contracts, Gulfstream will be in a position to force the Outside ITWS to pay prices higher than Tampa Bay Downs is willing to accept for the same Simulcasts. This practice nearly forced one Outside ITWS, OJA, out of business.

(Doc. 121, ¶ 4.) It would be contrary to the intent of the Wagering Act, therefore, to declare such agreements enforceable under Florida law. *See* § 550.09515(1), Fla. Stat.

C. Gulfstream's "statutory construction" arguments cannot salvage its unenforceable contracts.

1. The district court did not violate "principles of statutory construction" in determining that the Exclusive Contracts violate Florida law.

Gulfstream argues that the district court violated "principles of statutory construction" in interpreting the subject statutes to prohibit its Exclusive Contracts. According to Gulfstream, the court erred when it read section 550.6305(9)(g)1 together with section 550.615(3) to reach its conclusion that the Exclusive Contracts violate Florida law. (Initial Brief, p.20.) It is Gulfstream, however, which has misconstrued principles of statutory construction.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nyaga v. Ashcroft,* 323 F.3d 906, 914 (11th Cir. 2003), *citing Davis v. Mich. Dep't of Treas.,* 489 U.S. 803, 809 (1989); *see also U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) ("statutory construction 'is a holistic endeavor' and . . . the meaning of a provision is 'clarified by the remainder of the statutory scheme. . . .'"); *Fla. Dept. of Rev. v. New Sea Escape Cruises, Ltd.,* 30 Fla. L. Wkly. S109 (Fla. Feb. 17, 2005) ("In ascertaining the

legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another."); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read **together** in order to achieve a consistent whole.") (Emphasis in original.)

The plain language of section 550.71 of the Wagering Act, moreover, evidences the legislature's clear intent that the statutory provisions should be considered within the overall context of the Wagering Act. Section 550.71 states:

> If the provisions of any section of this act are held to be invalid or inoperative for any reason, the remaining provisions of this act shall be deemed to be void and of no effect, **it being the legislative intent that this act as a whole would not have been adopted had any provision of the act not been included.**

See § 550.71, Fla. Stat. (Emphasis added.) As the district court correctly determined, the purpose of the statutory sections "when construed together is to **promote competition** among wagering venues in Florida." (Doc. 161, p. 13.) (Emphasis added.) Because Gulfstream's Exclusive Contracts violate both the plain language of the statutes at issue as well as the Wagering Act's "overall" purpose of promoting competition, the certified question should be answered in the affirmative.

2. Gulfstream's assertion that its Exclusive Contracts are valid in Florida because they are not *expressly* prohibited by section 550.615(3) is without merit.

Gulfstream devotes over five pages of its brief to defining various terms found within section 550.615(3), i.e., "permitholder," "signal," and "restrain," to reach its tortured conclusion that the Exclusive Contracts are valid because they are not **expressly** prohibited by the statute. (Initial Brief, pp. 23-29.) Gulfstream reasons that its Exclusive Contracts in fact **comply** with section 550.615(3) because (1) the statute merely addresses the "signal" of a Florida "permitholder" and not the Simulcast of an out-of-state racetrack, and (2) because neither Gulfstream nor the Exclusive Contracts "restrain anyone from doing anything." (Id., pp. 34-35.) Gulfstream has violated well-established principles of statutory construction in its interpretation of section 550.615(3).

One can hardly imagine a better "test case" than this to illustrate why exclusive agreements, such as Gulfstream's, violate the plain language of the Wagering Act as a whole. By eliminating competition via the enforcement of its Exclusive Contracts, Gulfstream was able to offer the Simulcasts to the Outside ITWS for the statutory minimum. This cost structure, in turn, resulted in lower profits, to the point that at least one Outside ITWS forced to accept the Simulcasts from Gulfstream was on the verge of closing its doors. Once Tampa Bay Downs was free to compete with Gulfstream in the Outside ITWS market, however,

Tampa Bay Downs was able to negotiate a share of the net proceeds significantly above the statutory minimum, resulting in greater profits for more venues. Allowing this competition to continue fosters a greater economic benefit for the industry as a whole, and therefore promotes the clear intent of the Wagering Act.

Rather than focusing on the goal of the legislation, however, Gulfstream relies on a hypertechnical and self-serving interpretation of one statutory provision, section 550.615(3), in an effort to support its Exclusive Contracts. In doing so, Gulfstream ignores the statute's **express** prohibition on attempts to "restrain" a Florida permitholder from transmitting a signal to another Florida permitholder entitled to receive it. Gulfstream cannot deny that it has actively attempted to "restrain" Tampa Bay Downs from supplying Simulcasts to the Outside ITWS, by seeking to curtail the Outside ITWS' ability to wager on Simulcasts rebroadcast from Tampa Bay Downs. Gulfstream instead attempts to avoid this prohibition by arguing that it applies only to the dissemination of **in-state** signals, and not to the dissemination of Simulcast signals of out-of-state racetracks. (Initial Brief, pp. 27-28.) It is frivolous for Gulfstream to assert that its Exclusive Contracts are enforceable because they involve an out-of-state racetrack, when it concedes that exclusive arrangements within the state are **expressly prohibited** by the statute.

Gulfstream's interpretation of section 550.615(3) as applying to in-state signals only, moreover, is contradicted by the testimony of DPW Director David

Roberts. Mr. Roberts testified in his deposition that section 550.615(3) refers not only to in-state signals, but to signals of out-of-state tracks "[i]f they are rebroadcast within the state." (Doc. 127, pp. 99-100.) When asked whether an out-of-state signal which is transmitted by satellite to Florida becomes the signal of an in-state permitholder, Director Robert responded "[i]f that in-state permitholder then rebroadcasts that to any other permitholder in the state," it does. (Id., p. 100.) The district court agreed with the DPW that the plain meaning of section 550.615(3) "makes it unlawful for anyone to restrain a permitholder (Tampa Bay Downs) from licensing or sub-licensing another permitholder (an ITWS site) the right to receive by satellite transmission an out-of-state racetrack's signal to conduct intertrack wagering." *Gulfstream Park Racing Ass'n,* 294 F. Supp. 2d at 1301. Both the DPW's and the district court's correct interpretation of section 550.615(3) defeat Gulfstream's arguments that its Exclusive Contracts do not violate the statute.

3. Gulfstream's Exclusive Contracts cannot be performed without violating section 550.6305(9)(g)1, Fla. Stat.

Gulfstream's attempt to salvage its Exclusive Contracts by distorting the "plain meaning" of the Wagering Act is even more apparent from its analysis of section 550.6305(9)(g)1, Florida Statutes. (Initial Brief, pp. 29-35.) Section 550.6305(9)(g)1 states:

> Any thoroughbred permitholder which accepts wagers on a simulcast signal **must** make the signal available to any permitholder that is eligible to conduct intertrack wagering under the provisions of sections 550.615-550.6345.

(Emphasis added.) If enforced, Gulfstream's Exclusive Contracts will prevent Tampa Bay Downs from making Simulcasts of the out-of-state races available to the Outside ITWS. Under section 550.6305(9)(g)1, however, Tampa Bay Downs **must** make the Simulcast signals available to those permitholders. The Exclusive Contracts, therefore, cannot be performed without violating section 550.6305(9)(g)1, and therefore violate Florida law. *See, e.g., In re Voltarel*, 236 B.R. at 466. ("Under Florida law, an agreement . . . **which cannot be performed without violating a statute, is illegal and void, and will not be enforced**.") (Emphasis added.)

4. Section 550.6305(9)(g)1 is not preempted by the Interstate Horseracing Act.

In an effort to avoid section 550.6305(9)(g)1, Gulfstream essentially suggests that the statute is preempted by the Interstate Horseracing Act, 15 U.S.C. §§ 3001 *et. seq.* (2002) ("IHA"). (Initial Brief, p. 29.)[19] According to Gulfstream,

[19] The district court expressly disagreed with Gulfstream's argument, concluding "that the Florida laws as interpreted are not preempted by the IHA." *Gulfstream Park Racing Ass'n*, 294 F. Supp. 2d at 1302. The court noted, for example, that to the extent section 550.6305(9)(g)1 requires dissemination by an in-state thoroughbred track to an ITWS site within sixty miles of another in-state thoroughbred racetrack currently conducting live racing, the IHA's approval

because the statute does not (1) expressly impose any obligation on an out-of-state racetrack, or (2) regulate the "upstream" relationship between an out-of-state racetrack and an in-state track, the statute does not apply to bar its Exclusive Contracts with the out-of-state racetracks. (Initial Brief, p. 29.) In short, it is Gulfstream's position that the State of Florida must defer to the IHA when agreements between in-state and out-of-state racetracks are at issue, and further, that the IHA supports the type of "exclusive" contract at issue in this case. (Initial Brief, pp. 30-32.)

Gulfstream's "preemption" argument is fundamentally flawed for a number of reasons. To begin with, there is no inconsistency or conflict between the IHA and the Wagering Act, and therefore, no reason to argue that the IHA has any "preemptive" effect over the Wagering Act. Indeed, Congress's first pronouncement in the IHA was its finding that "the states . . . have the **primary responsibility** for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1) (Emphasis added.) In the Senate Committee Report recommending passage of the IHA, the Judiciary Committee explained: "These matters [regulation of gambling on horse races] are generally of state concern and . . . **the states' prerogatives in the regulation of gambling are**

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requirement can be read in without creating a conflict with the Florida statute. *Id.* at n. 23.

in no way preempted by this or other federal law." S Rep. No. 95-1117, at 2, *reprinted in* 1978 U.S.C.C.A.N. 4144, 4146. (Emphasis added.) *See also Ocala Kennel Club, Inc. v. Rosenberg*, 725 F. Supp. 1205 (M.D. Fla. 1989). Thus, far from "preempting" the states' authority to regulate wagering on horse racing, the IHA makes clear at its outset that the states -- and not the Federal Government -- retain "primary responsibility" for regulating the practice of gambling within their borders.

In an effort to support its erroneous argument, Gulfstream cites to the requirement in section 550.3551(3)(a) that "[a]ll broadcasts of horse races received from locations outside the state must comply with the provisions of the [IHA]." (Initial Brief, p. 31.) Gulfstream then argues that in order to comply with the IHA, a Florida thoroughbred permitholder must enter into a contract with a host racing association under section 3004(a)(1) of the IHA, on "terms and conditions" which are acceptable to the host racing association and its horsemen. (Id.) Gulfstream goes on to talk about the need for "consent" from the horsemen's group under the IHA, again suggesting that agreements with out-of-state racetracks are a matter of federal rather than state concern. (Initial Brief, p. 31, n. 16.)

Contrary to Gulfstream's argument, Congress's goal in enacting the IHA had nothing to do with promoting "exclusive" arrangements like those Gulfstream seeks to enforce. Congress's goal, rather, was to protect the host state, the host

racing association, and its horsemen's groups, "to insure that states which desire to run off-track betting operations do not pirate the races of the host state **without providing adequate compensation therefore**." *New Suffolk Downs Corp. v. Rockingham Venture, Inc.*, 658 F. Supp. 1190, 1993 (D.N.H. 1987). (Emphasis added.) To further this purpose, the Act prohibits "off-track betting unless consent is obtained" from those entities. *Id.* at 1192. The sole purpose of the "consent" requirement, accordingly, is to assure that the out-of-state entities are adequately compensated.[20]

Gulfstream not only mischaracterizes the purpose of the "consent" requirement in the IHA, but also misconstrues the meaning of the undefined term "exclusivity" hidden within the definition of the phrase "terms and conditions." 15 U.S.C. § 3002(22). (Initial Brief, p. 32.) According to Gulfstream, "[j]ust as the host racing association can make contractual 'arrangements as to the exclusivity between the host racing association' and the in-state guest, 15 U.S.C. § 3002(22)

[20] Notably, Gulfstream has never once suggested that Tampa Bay Downs did not compensate the out-of-state racetracks with respect to off-track betting operations on their Simulcast signals. To the contrary, the undisputed facts demonstrate that the out-of-state racetracks received the exact compensation provided for in their Simulcast Agreements with Tampa Bay Downs. Indeed, not one of the out-of-state racetracks ever intervened in the case or brought a separate action to protect interests Gulfstream claims have been breached. It is undisputed that the out-of-state racetracks, in fact, continued to accept payment from Tampa Bay Downs for its supply of the Simulcast signals to the Outside ITWS, without protest. (Doc. 98, p. 51.)

(2002), it can impose contractual limits on an in-state guest's rights to license eligible third parties to accept wagers on its horse races." (Id.) Contrary to Gulfstream's suggestion, the IHA does not address the legality of the type of "exclusive" contracts that are at issue in this case. Indeed, "exclusivity" or similar words do not even appear in any substantive provision of the IHA.[21]

In short, nothing in the IHA supports Gulfstream's argument that an out-of-state entity can prevent an in-state thoroughbred permitholder (like Tampa Bay Downs) from complying with the legislative mandate set forth in section 550.6305(9)(g)1 by entering into an "exclusive" contract with another in-state permitholder. To the extent Gulfstream believes the state's authority to regulate wagering within its borders can somehow be ousted by the withholding of "consents" of these out-of-state racetracks, Gulfstream is sorely misguided. Gulfstream's argument implicates those entities in a clear violation of the purpose and intent of the IHA. In sum, no logical reading of the IHA can support Gulfstream's argument that the Exclusive Contracts at issue in this case are not subject to the state's authority to regulate gambling within its borders.

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[21] The district court correctly found that "Gulfstream's reliance on Section 3002(22) is misplaced because that section is a definitional section defining 'terms and conditions' and does not grant any party any right under the IHA or expressly or impliedly exclude a state from prohibiting exclusive dissemination agreements." *Gulfstream Park Racing Ass'n,* 294 F. Supp. 2d at 1302.

1. The district court did not improperly "imply" the prohibition found in section 550.615(3) into section 550.6305(9)(g)1.

Gulfstream alternatively claims that the district court improperly "implied" the prohibition against exclusive dissemination agreements found in section 550.615(3) into section 550.6305(9)(g)1, in order to reach its conclusion that Gulfstream's Exclusive Contracts are unenforceable. (Initial Brief, pp. 33-35.) Contrary to Gulfstream's argument, however, there was no need for the district court to "imply" the prohibition found in section 550.615(3) into section 550.6305(9)(g)1 in order to determine that the Exclusive Contracts violate Florida law. The Exclusive Contracts operate to restrict Tampa Bay Downs from making the Simulcast signals available to the Outside ITWS, and by their very performance, violate section 550.6305(9)(g)1. *See Local No. 234* at 821; *Voltarel*, 236 B.R. at 466. The determination that the Exclusive Contracts violate Florida law may be reached for this reason alone.

0. The district court did not impermissibly rely on extrinsic evidence in determining that the Exclusive Contracts violate Florida law.

The district court likewise did not violate "principles of statutory construction" when it relied on the DPW's interpretation of the plain language of the subject statutes. (Initial Brief, pp. 36-38.) This Court has held that "[a]n agency's interpretation of the statute that it is charged with enforcing is entitled to

great deference," and that the Court "will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous'." *See Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003). Although this Court has noted that there is no need to rely on other canons of statutory interpretation where the language of a statute is clear, the Court has gone on to say "[t]here is no rule totally precluding the examination of legislative history where the statutory language is clear." *Florida Convalescent Centers v. Somberg,* 840 So. 2d 998, 1002 (Fla. 2003) (Anstead, C.J., specially concurring); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (relying on legislative history underlying statutory subsections to support court's construction of the plain language of the statutes); *Volusia Jai Alai, Inc., v. McKay*, 90 So. 2d 334, 340 (Fla. 1956) (court's conclusion based on unambiguous legislation is buttressed by administrative interpretation which should not be disregarded).

As the administrative agency charged with enforcing the Wagering Act and related administrative rules, the DPW's interpretation of the statutes and rule at issue is "entitled to great deference" and to be upheld "unless clearly erroneous or in conflict with the legislative intent of the statute." *Donato v. AT&T*, 767 So. 2d 1146, 1153 (Fla. 2000). The district court properly relied on the DPW's interpretation of the statutes at issue to support its conclusion that Gulfstream's

Exclusive Contracts violate the Wagering Act. Indeed, the court's analysis would have been incomplete had it not referred to the DPW's own very pertinent conclusion that exclusive disseminator agreements -- such as Gulfstream's Exclusive Contracts -- which operate to restrict the transfer of a Simulcast signal from Tampa Bay Downs to a Florida permitholder eligible to receive it, would violate both section 550.6305(9)(g)1 and Rule 61D-9.001. The DPW's interpretation was neither "clearly erroneous" nor "in conflict with the legislative intent of the statute." The DPW's conclusion -- as well as the district court's -- supports an affirmative response to the certified question in this case.

CONCLUSION

As both the district court and the DPW correctly concluded, exclusive disseminator agreements, such as Gulfstream's Exclusive Contracts, which purport to grant a Florida thoroughbred racetrack the exclusive right to disseminate out-of-state Simulcast signals to other Florida wagering sites permitted to receive them, violate Florida's Pari-Mutuel Wagering Act. If enforced, Gulfstream's Exclusive Contracts will contravene a critical purpose of the Wagering Act, which is to promote competition in the pari-mutuel wagering industry, and thereby benefit the state and its citizens. Gulfstream's Exclusive Contracts cannot be enforced without violating both the plain language and intent of the Act. Tampa Bay Downs

respectfully submits that this Court, therefore, should answer the certified question in the affirmative.

Respectfully submitted,

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I hereby certify that this brief is in compliance with Rule 9.210, *Fla. R. App. P.*, and is in the required font of Times New Roman 14.

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