CASE NO. SC05-251

IN THE
SUPREME COURT OF FLORIDA

GULFSTREAM PARK RACING ASSOCIATION, INC.

Appellant/Cross-Appellee

vs.

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 APPELLANT/CROSS-APPELLEE GULFSTREAM PARK RACING ASSOCIATION, INC.

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A. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW.

This appeal is before this Court on a certified question from the United States Court of Appeals for the Eleventh Circuit pursuant to a *per curiam* Order ("Order") (A1)[1] entered on February 9, 2005.

The case arose from a dispute between Gulfstream Park Racing Association, Inc. ("Gulfstream") and Tampa Bay Downs, Inc. ("Tampa Bay Downs") over the enforceability of exclusivity provisions in contracts between Gulfstream and certain out-of-state thoroughbred racetracks. Gulfstream and Tampa Bay Downs operate thoroughbred racetracks under permits issued by the Florida Division of Pari-Mutuel Wagering ("DPW") under the Florida Pari-Mutuel Wagering Act ("Wagering Act"), §§ 550.001, *et seq.*, Fla. Stat. (2003). (A10). As "thoroughbred permitholders," during their annual racing meets, Gulfstream and Tampa Bay Downs conduct, and accept wagers on, live horseraces at their racetracks and on horseraces which are broadcast simultaneously ("simulcasts") from in-state and out-of-state thoroughbred tracks. (R60-1-3; R71-2).[2]

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[1] References to a document included in the Appendix accompanying this Brief are designated with the letter "A" followed by its tab number.

[2] As transmitted to the Court of Appeals, the record was not paginated. If submitted in volumes, the volumes were not numbered on the docket sheet. A document listed on the docket sheet is preceded by "R" and followed by a number. For example, "R60," is the docket number assigned to the Second Amended

For its 2003 racing meet (January 3 to April 24, 2003), six out-of-state tracks (the "Exclusive Hosts") granted Gulfstream exclusive rights to authorize twenty specified holders of Florida pari-mutuel wagering permits ("permitholders") to accept wagers on their horseraces. (R93-3-4; R60-3-5, Exs. A-E; R71-3-4).

Within 60 miles of its location, during its meet, Gulfstream or Tampa Bay Downs must approve acceptance of wagers on out-of-state horseraces by another permitholder.[3] Fourteen permitholders (the "Outside ITWS") are located outside the 60-mile radii of Gulfstream and Tampa Bay Downs. (R161-5; R60-3; R71-3). Tampa Bay Downs knew that the Exclusive Hosts appointed Gulfstream their exclusive distributor to the Outside ITWS (R93-4-5; SJ13, p.114, Ex. 58), and that its own contracts with the Exclusive Hosts limited it to the three permitholders within 60 miles of its racetrack. (R93-5-8; R60-6-7, Exs. F, G, H; R71-5-6; SJ13, pp. 84-117, Exs. 40, 41, 44, 45, 58, 60, 61).

Complaint. "R60-4" refers to page 4 of that document. "R60, Ex. A" refers to Exhibit A to the Second Amended Complaint. Gulfstream's summary judgment exhibits, all indexed and tabbed, were filed under a Notice of Filing (R104). They include 20 deposition transcripts, most with all exhibits attached. The docket sheet identified them as "Box of exhibits on shelf." A complete index to Gulfstream's summary judgment exhibits (A6) is attached to the Notice of Filing. Summary judgment exhibits are cited "SJ" followed by the summary judgment exhibit number, *e.g.*, "SJ13." Deposition citations include the SJ number and page number(s), *e.g.*, SJ13, p.104, and/or a deposition exhibit number, *e.g.*, SJ13, Ex. 92, and sometimes exhibit page number(s), *e.g.*, SJ13, Ex. 92, p. 3.

[3] This "60-mile approval" requirement is imposed by section 3004(b)(1)(A) of the Interstate Horseracing Act of 1978, 15 U.S.C. § 3004(b)(1)(A) (2002).

On January 27, 2003, Gulfstream filed this lawsuit, in response to Tampa Bay Down's actions, commencing on, and continuing after, January 3, 2003, which interfered with and usurped Gulfstream's exclusive rights to authorize the Outside ITWS to accept wagers on the Exclusive Host's horseraces. (Order at 3).

Gulfstream's appeal involves Counts 3, 4 and 5[4] of the Second Amended Complaint. (R60) (A4). In Count 3, Gulfstream sought a declaratory judgment that exclusivity provisions in its contracts with the Exclusive Hosts were valid and enforceable in Florida because (1) they were expressly authorized by the Interstate Horseracing Act of 1978 ("IHA"), 15 U.S.C. §§ 3001, *et seq.* (2002) (A9); and (2) they did not violate the Wagering Act. (R60-15-18). Counts 4 and 5 are common law claims for damages, respectively, for breach of contract (R60-18-19) and intentional interference with Gulfstream's prospective business relationships. (R60-20-21).

Tampa Bay Downs moved for summary judgment on all counts of the Second Amended Complaint. It contended that sections 550.615(3) and 550.6305(9)(g)1 of the Wagering Act prohibit Gulfstream's exclusive agreements (Count 3), and that it was entitled to judgment on Gulfstream's claims for breach of

[4] The parties used Roman numerals in numbering counts in their pleadings, but the District Court used Arabic numerals in its Order and final judgment. In referring to counts in the pleadings in this Brief, Arabic numerals are used.

contract (Count 4) and tortious interference (Count 5) as a matter of law. (Order at 3).

On November 7, 2003, United States District Judge James S. Moody, Jr. entered an Order (R161) (A2), in which he granted Tampa Bay Downs' motion for summary judgment.[5] (R161-17). As to Count 3, Judge Moody concluded that the "plain meaning" of sections 550.615(3) and 550.6305(9)(g)1, Fla. Stat., when considered together, prohibit exclusive or restrictive provisions in simulcast agreements between an out-of-state host track and a Florida thoroughbred guest track. (R161-13).

As the Eleventh Circuit observed, "no Florida appellate court had decided a case that considered whether the Wagering Act prohibits exclusive or restrictive provisions in Simulcast agreements between an out-of-state host track and a Florida thoroughbred guest track." (Order at 4). Instead, the District Court relied on a declaratory statement (the "Declaratory Statement") (A4, Ex. J) issued by DPW in September 2002. (R161-13).

Gulfstream filed its Notice of Appeal on December 5, 2003. (R165). The Eleventh Circuit heard oral argument on October 5, 2004.

[5] Tampa Bay Downs appealed the District Court's Order granting Gulfstream summary judgment on Tampa Bay Downs' counterclaims under federal and state antitrust laws. (R161-32; R166).

On February 9, 2005, the United States Court of Appeals for the Eleventh Circuit certified the following question to this Court:

> 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.

(Order at 5).

B. STATEMENT OF FACTS.

1. Wagering on Horseraces in Florida.

The Florida thoroughbred racing season begins on June 1 of one year and ends on May 30 of the next year. § 550.5251, Fla. Stat. (2003).

Gulfstream operates a thoroughbred racetrack on the southeast coast of Florida in Hallandale, near Miami. Gulfstream's 2003 meet began January 3, 2003, and ended April 24, 2003. (R93-2; R60-1-2; R71-2). Since the 2001/2002 racing season, during the eight months when Gulfstream was not running live, Calder Race Course, Inc. ("Calder") and Tropical Park, Inc. ("Tropical") conducted live racing during consecutive meets in Miami. (R91-5-6; SJ22, pp. 28-29, 86-87, Exs. 10, 16; SJ27, pp. 40-41).

Tampa Bay Downs operates a thoroughbred racetrack on the west coast of Florida, in Tampa. Tampa Bay Downs's 2002-2003 meet began December 14, 2002, and ended May 4, 2003. (R93-2-3; R60-2; R71-2).

In Florida, only permitholders can accept wagers on horseraces. (R60-2; R71-2). During the 2002-2003 racing season, Florida permitholders included four thoroughbred tracks, one harness track, sixteen greyhound tracks, five jai-alai frontons, and Ocala Breeders Sales, Inc. (R23-10; R61-1).

Florida thoroughbred permitholders simulcast their live races to other permitholders, which accept wagers on them under the Wagering Act. (R161-3; R91-6-7). Also, when running live, under contracts with out-of-state thoroughbred tracks, they authorize other permitholders to accept wagers on horseraces simulcast from out-of-state tracks. (R161-3; R91-7-8). The Wagering Act identifies both types of wagers as "intertrack wagers." § 550.002(17), Fla. Stat. (2003). The IHA regulates interstate wagers on out-of-state horseraces, 15 U.S.C. § 3001(a) (2002), which are identified as "interstate off-track wagers," 15 U.S.C. § 3002(3) (2002).

The wagers involved in Gulfstream's appeal are interstate wagers accepted at Florida venues on out-of-state horseraces. Except when discussed in language of a specific statute, such wagers are identified in this brief as "Interstate Wagers."

For seven months of the racing season, either Calder or Tropical is the only thoroughbred permitholder which can authorize other permitholders to accept

Interstate Wagers. (R91-6; SJ22, pp. 50-52, 55-61, Ex. 9, pp. 46-47; SJ18, pp. 87-91). During the four months when their meets overlap, Gulfstream and Tampa Bay Downs can authorize the Outside ITWS to accept Interstate Wagers, subject to (1) terms and conditions of contracts with out-of-state tracks and (2) provisions of the IHA and the Wagering Act. (R60-2-3; R71-2; R161-5).

2. Racing Industry Uniform Simulcast Agreements.

Shortly before their meets begin, Gulfstream and Tampa Bay Downs enter into "simulcast agreements" with numerous out-of-state thoroughbred racetracks ("out-of-state tracks") throughout the United States. (R91-7-8; SJ18, pp. 18-22, Ex. 3; SJ30, p.2, Ex. C). In these agreements, the out-of-state track, as "Host," grants Gulfstream or Tampa Bay Downs, as "Guest," rights to accept wagers on, and to authorize identified "secondary recipients" to accept wagers on, the out-of-state track's races, which the Host broadcasts via satellite to the authorized permitholders in Florida. (R91-7-8; SJ30, p.1, Ex. A, pp. 1-2).

Most host tracks use the Racing Industry Uniform Simulcast Wagering Agreement,[6] Version 002, which consists of (1) a standard form agreement with

[6] FairGrounds Corporation ("Fairgrounds") used a form agreement that did not incorporate the Uniform Agreement. (R93-4; SJ26, Exs. 26, 30). The terms of FairGrounds' form agreement are similar to those of the Uniform Agreement with respect to the equipment required for, and the mechanics of, wagering on its races. (SJ21, Ex. 30, pp. 1-5). Except for the FairGrounds agreement, the simulcast agreements discussed in this brief consist of exhibits and an incorporated Uniform Agreement.

Sections 1 through 18 ("Uniform Agreement") (SJ30, Exs. A, B), and (2) "Exhibits" or "Exhibits and Schedules" ("Exhibits"), with various attachments, addenda and other changes to the Uniform Agreement, and information supplied, and insisted upon, by either the Host or the Guest. (SJ18, pp. 37-44, Ex. 11).

The Host and Guest sign and exchange only the Exhibits, which incorporate the Uniform Agreement. (SJ18, pp. 37-44, Exs. 11, 12; SJ30, pp. 1-2, Exs. A, B). The Exhibits contain terms which are unique to a particular Host and Guest and control over conflicting language in the Uniform Agreement. (SJ18, 42-43, Ex. 11).

In part 1 of the Uniform Agreement, "Grant of Rights to Wager on Host Horse Races and Receive Simulcasts" (SJ30, Ex. A, p. 1; R117-8), the second sentence of subpart (A) states:

> Host … grants to Guest the **limited right to accept wagers** on the Races and to commingle said wagers with and into Host's wagering pools. (Emphasis added)

In part 2, "Restrictions on Rights Granted; secondary recipients" (SJ30, Ex. A, p.2; R117-9), subpart (A) states:

> Unless otherwise agreed upon by the Parties, **Guest will not** retransmit, rebroadcast or otherwise distribute the Signals to, nor **permit acceptance of wagers on**, Host's races to any person, entity or facility … **other than the premises specified** in schedule A(1). (Emphases added)

The Exhibits and Uniform Agreement contain provisions which describe, and allocate responsibility for, costs of equipment which transmits the Host's encrypted satellite signal to the Guest and to the Guest's secondary recipients, and which "decodes" the signal so that the Host's races can be displayed on television monitors at these venues. Other provisions describe how wagers on the Host's races are processed through the Guest's totalisator, including wagers accepted by the Guest's secondary recipients. (SJ30, Ex. A, pp. 4-7; SJ18, Exs. 11, 15-18).

Thus, the simulcast agreements provide that (1) the Host simulcasts its races to the Guest's secondary recipients, and (2) the wagers that they accept on the Host's races are processed "through" the Guest.

Paragraph 17(F), "Governing Law," of the Uniform Agreement provides that the law of the Host's state governs "the validity, interpretation and legal effect of this Agreement," and that "[t]he Parties consent and agree to jurisdiction of" the state and federal courts of the Host State. (SJ30, Exs. A, B, p. 13 ¶17(F)).

3. <u>Gulfstream's Exclusive Dissemination Agreements</u>.

The 2003 simulcast agreements between Gulfstream and the following "Exclusive Hosts" each have an attached "Addendum To Uniform Simulcast Agreement Regarding Exclusive Dissemination Rights" (A4, Exs. A-E):

1. The New York Racing Association ("NYRA") for Aqueduct Race Track ("Aqueduct") in Ozone Park, New York, from

January 3 to April 24, 2003. (R60-3, Ex. A).

2. FairGrounds for FairGrounds Race Course in New Orleans, Louisiana, from January 3 to March 31, 2003. (R60-4, Ex. B).

3. Turfway Park, LLC ("Turfway") for Turfway Park in Florence, Kentucky, from January 3 to April 4, 2003. (R60-4, Ex. C).

4. Penn National Race Course ("Penn National") in Grantville, Pennsylvania; and Charlestown Race Course ("Charlestown") in Charlestown, West Virginia, from January 3 to April 24, 2003. (R60-4-5, Ex. D).

5. Sam Houston Race Park Ltd. ("Sam Houston") for Sam Houston Race Park in Houston, Texas, from January 3 to March 29, 2003. (R60-5, Ex. E).

In an addendum, the Host granted Gulfstream, during its meet, the exclusive right, *inter alia*, "to disseminate within the State of Florida to the intertrack wagering sites identified in Exhibit 'A' [listing, *inter alia*, the Outside ITWS], the live broadcasts of the races transmitted by the host track to Gulfstream for pari-mutuel wagering purposes … **to accept wagers thereon, either with or without a live broadcast of the races**,… ." (R60-Exs. A-E) (emphasis added).

4. Statutes Applicable To Acceptance of Interstate Wagers On Horseraces In Florida.

a. Interstate Horseracing Act of 1978.

The Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001, *et seq.* (2002), was enacted to "further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(b). While recognizing that "[t]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders," 15 U.S.C. § 3001(a)(1), Congress found "in the limited area of interstate off-track wagering on horseraces, there is need for Federal action … in the acceptance of legal interstate wagers." 15 U.S.C. § 3001(a)(3). Congress declared its policy "in this chapter to regulate interstate commerce with respect to wagering on horseracing."[7] 15 U.S.C. § 3001(b).

Section 3003 provides: "No person may accept an interstate off-track wager[8] except as provided in this chapter." Wagers accepted by Gulfstream, Tampa Bay

[7] The IHA "**regulates interstate wagering, not simulcasting**. In fact, the Act does not even mention simulcasting." *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1412 (6th Cir. 1994) (emphasis added).

[8] "Interstate off-track wager" means "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools." 15 U.S.C. § 3002(3) (2002).

Downs and the Outside ITWS on horseraces conducted at the Exclusive Hosts' racetracks are interstate off-track wagers (here, "Interstate Wagers").

Under Section 3004(a)(1), Gulfstream and Tampa Bay Downs, as "off-track betting systems," enter into agreements with "host racing associations," including the Exclusive Hosts, in which they agree to "terms and conditions."[9] Each Exclusive Host *and* its horseman's group must consent to these "terms and conditions" before Gulfstream or Tampa Bay Downs can accept Interstate Wagers on the Exclusive Host's horseraces. The "host racing commission" and the "off-track racing commission" (here, DPW) also must consent to acceptance of Interstate Wagers by Gulfstream or Tampa Bay Downs.[10] 15 U.S.C. §§ 3004(a)(2), (3) (2002).

For the 2002-2003 Florida racing season, DPW consented to acceptance of Interstate Wagers on horseraces of every host racing association that Gulfstream and Tampa Bay Downs proposed, including the Exclusive Hosts. (SJ18, Ex. 3; SJ30, pp. 1-2, Ex. C).

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[9] "'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 horsemen'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) (2002) (emphasis added).

[10] "Under the Act, each state may prohibit interstate off-track wagering within its borders, and may prohibit a resident racetrack from contracting with an off-track wagering facility in another state." *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc.,* 20 F. 3d at 1414.

b. Florida Pari-Mutuel Wagering Act.

In 1992, the Florida Legislature enacted the Wagering Act, Ch. 550, Fla. Stat.; Laws of Florida, Ch. 92-348.[11]

The Wagering Act authorized permitholders to accept Interstate Wagers. Subsection 550.3551(3)(a), Fla. Stat., provides: "All broadcasts of horse races received from locations outside this state must comply with the provisions of the Interstate Horseracing Act of 1978… ." Assuming such compliance, "[a]ll forms of pari-mutuel wagering are allowed on races broadcast under this section." § 550.3551(3)(c), Fla. Stat.

Under the 1992 version, Gulfstream and Tampa Bay Downs could accept no more than twenty per cent (20%) of their wagers on races or games conducted outside Florida. Laws of Florida, Ch. 92-348 at 64, § 550.3551(6) (1992). Amendments to section 3551 in 1996 allowed Gulfstream and Tampa Bay Downs, while conducting live racing, to accept wagers on the "full card" of races conducted at any thoroughbred racetrack outside Florida. Laws of Florida, Ch. 96-364 at 2082, § 550.3551(6)(a) (1996).

The District Court's rulings from which Gulfstream appealed were based on two unrelated provisions of the Wagering Act, subsections 550.615(3) and 550.6305(9)(g)(1). The 1996 amendments did not alter subsection 550.615(3),

[11] A shorter version of Chapter 550 preceded the Wagering Act.

which applies to wagering on intrastate simulcasts of Florida permitholders. Subparts (g)1, (g)2 and (g)3, which apply to simulcasts of out-of-state horseraces, were added in 1996 to subsection 550.6305(9). Laws of Fla., Ch. 96-364 at 2088.

5. Tampa Bay Downs' Unsuccessful Effort To Persuade DPW To Bring An Enforcement Action Against Gulfstream.

The dispute between Gulfstream and Tampa Bay Downs over enforceability of Gulfstream's exclusive contracts dates back to the first racing season after the 1996 amendments to Chapter 550. On November 6, 1997, Howell Ferguson, a member of the Board of Directors and co-owner of Tampa Bay Downs (SJ13, pp. 7-8), and Cindy Bartin, an attorney for Tampa Bay Downs, met with Deborah R. Miller, Director of DPW, and her staff, to persuade them that DPW should commence an action "regarding simulcast exclusive provider provisions in private contracts between in-state and out-of-state thoroughbred permitholders." (SJ22, Ex. 25).

On December 22, 1997, in a letter to Mr. Ferguson (A7), Director Miller concluded: "[T]he Division sympathizes with your factual situation but believes you must seek a legislative remedy or a civil remedy in state or federal court to protect your interests in this matter. The Division and the Office of The General Counsel have exhausted many hours of researching these issues and unfortunately, **we are unable to assist you**." (*Id.*) (emphasis added).

Ms. Miller enclosed copies of research memoranda prepared by staff attorneys in the Office of the General Counsel. (*Id.*). In one such memorandum, dated November 21, 1997 (A8), staff attorney Miriam Wilkinson warned, "[I]f the State of Florida took action to interfere in the contractual relationship between a resident track and an out-of-state track, it would be in the absence of any statutory authority, since there is **no provision in Chapter 550** that provides any basis for such interference." (*Id.*, Ex. 26, p.7) (emphasis added). In conclusion, Ms. Wilkinson wrote, "**Florida has no legal grounds on which to prohibit exclusive dissemination**." (*Id.*, p. 8) (emphasis added).

DPW maintained this position for nearly five years.

6. Tampa Bay Downs's Amended Petition And The Declaratory Statement.

On March 19, 2002, Tampa Bay Downs filed a Petition for Declaratory Statement with DPW (*id.*, Ex.22, p.1) and an Amended Petition on May 9, 2002. (*Id.*, Ex. 23). Tampa Bay Downs sought "a declaratory statement as to the applicability of [Sections 550.6305(9)(g)1 and 550.615(3), and Fla. Admin. Code R. 61D-9.001 (A11)] to *these facts*"[12] (emphasis added), including: "Tampa Bay Downs *broadcasts and accepts wagers* on the races of the out-of-state racetracks

[12] "The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances." § 120.565(2), Fla. Stat. (2002).

that have designated Gulfstream Park as their exclusive disseminator. Tampa Bay Downs *has been unable to transmit and Florida Jai-Alai has been unable to receive from Tampa Bay Downs* the simulcast dissemination of the broadcast of the horseraces conducted at those out-of-state tracks which have designated Gulfstream as their exclusive disseminator." (*Id*., Ex. 23, p.2) (emphases added).

On September 13, 2002, DPW Director David S. Roberts issued the Declaratory Statement, which granted Tampa Bay Downs's Amended Petition. (*Id.*, pp. 104-05, Ex. 22, p.2). The facts in the Declaratory Statement were taken from Tampa Bay Downs's Amended Petition. (*Id.*, p. 106). DPW accepted Tampa Bay Downs's statement of facts without conducting an investigation to verify those facts. (*Id*., pp. 105-06, 136-39, 166).

Mr. Roberts testified that the conclusion of law that Gulfstream's exclusive agreements "would violate" section **550.615(3)** was premised entirely on the fact that out-of-state tracks transmit their signals to Tampa Bay Downs, which "rebroadcasts" them to other in-state permitholders, such as Florida Jai-Alai.[13] (*Id*., pp. 98-103).

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[13] Q: Are you saying that a signal that is owned by Aqueduct, transmitted by satellite to Florida becomes the signal of an in-state permitholder?

A. If that in-state permitholder then rebroadcasts that to any other permitholder in the state.

(*Id.*, p. 100, ll. 13-18).

* * * * [footnote continued on next page]

When the Amended Petition was filed, Tampa Bay Downs knew it was not rebroadcasting out-of-state signals to Florida Jai-Alai. Peter N. Berube ("Berube"), Vice President and General Manager of Tampa Bay Downs, testified that Tampa Bay Downs had not rebroadcast out-of-state signals for the "last several years" and that Tampa Bay Downs's last "occasional" rebroadcast was in 2000. (SJ13, pp. 47-48).

The conclusion of law that Gulfstream's exclusive agreements "would violate" section **550.6305(9)(g)1** was premised on the Amended Petition's assertion that Gulfstream's exclusive agreements "prohibit Tampa Bay Downs from disseminating the simulcast broadcast it receives to eligible tracks such as Florida Jai Alai." (SJ22, pp.116-17, Ex. 22, p. 4 ¶7). Director Roberts testified that if *Gulfstream's contracts* did not prohibit Tampa Bay Downs from disseminating imported simulcasts to eligible tracks, this conclusion was incorrect. (*Id.*, pp. 117-18).

When the DPW issued the Declaratory Statement, Director Roberts was not aware of Director Miller's December 22, 1997 letter to Howell Ferguson or of Ms. Wilkerson's memorandum containing the legal opinion that no provision in Chapter 550 prohibits exclusive dissemination. (*Id.*, pp. 126-32).

Q. So your assumption is that there is a rebroadcast of the satellite feed?

A: Yes.

(*Id*., p. 103, ll. 5-7).

DPW did not determine that Gulfstream's exclusive agreements are unenforceable (SJ22, p.116), or that they violate Florida law. (*Id.*, p.120, Ex. 22, pp. 4-5 ¶¶6-7). The Declaratory Statement did not address provisions in Tampa Bay Downs's agreements with out-of-state tracks that limit Tampa Bay Downs to disseminating imported simulcasts to permitholders within 60 miles of Tampa Bay Downs. (*Id.*, p.119; SJ13, p.98, l.6 ("Tampa Bay Downs contracts weren't at issue")). Although they involved rights to accept Interstate Wagers, neither the Amended Petition nor the Declaratory Statement mentioned the IHA.

SUMMARY OF THE ARGUMENT

The District Court erred in concluding that the plain meaning of subsections 550.615(3) and 550.6305(9)(g)1, Fla. Stat., prohibits Gulfstream's exclusive agreements.

A. Application of basic rules of statutory construction to subsection 550.615(3) compels the conclusion that it does not prohibit Gulfstream's exclusive agreements. It applies to *intrastate* broadcasts and prohibits a "person" from preventing a Florida permitholder from sending its signal to, or receiving the signal of, another Florida permitholder. Gulfstream's exclusive agreements involved signals of out-of-state racetracks, who were not Florida permitholders. In the agreements, Gulfstream did not "restrain" a Florida permitholder from

doing anything. Nor, in appointing Gulfstream its exclusive distributor, did the out-of-state track "restrain" Tampa Bay Downs from sending signals of its own live races to, or receiving signals of live races from, another Florida permitholder.

B. Application of basic rules of statutory construction to subsection 550.6305(9)(g)1 compels the conclusion that it does not prohibit Gulfstream's exclusive agreements. It applies to the downstream relationship between a Florida thoroughbred track and another permitholder, not to the upstream relationship between an out-of-state track and a Florida thoroughbred track. It imposes no obligation at all on an out-of-state track. Nor does it purport to limit the "terms and conditions" which can be included in the agreements between an out-of-state host track and an in-state guest rack entered pursuant to section 3004(a)(1) of the IHA. Before Tampa Bay Downs could accept a wager on an out-of-state horserace, subsection 550.3551(3)(a) required Tampa Bay Downs to comply with provisions of the IHA, including subsections 3004(a)(1) and (b)(1)(A). Further, binding precedent precludes what the District Court did: implying the prohibition of 550.615(3) into 550.6305(9)(g)1, which has no such prohibition.

C. The District Court erred as a matter of law in basing its legally erroneous conclusion on DPW's clearly erroneous conclusions in the Declaratory Statement.

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE "PLAIN MEANING" OF SUBSECTIONS 550.615(3) AND 550.6305(9)(g)1, FLORIDA STATUTES, PROHIBITS GULFSTREAM'S EXCLUSIVE DISSEMINATION AGREEMENTS.

The Standard Of Review.

This Court reviews *de novo* questions of statutory interpretation. *See State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) (citations omitted); *see also Bellsouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003) (citations omitted).

A. Introduction.

The foundation for the District Court's grant of summary judgment in favor of Tampa Bay Downs on Counts 3, 4 and 5 was the following erroneous conclusion of law: "While Section *550.6305(9)(g)1, by itself*, does not directly prohibit an exclusive dissemination agreement, *it must be read together with Section 550.615(3)*, which by its *plain language* does prohibit such arrangements." (R161-13) (emphasis added).

B. Fundamental Principles And Rules Of Statutory Construction.

"When the Court construes a statute, we look first to the statute's plain meaning." *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998, 1000 (Fla. 2003) (citation and internal quotations omitted); *see also State v. Bradford*, 787 So. 2d 811, 817 (Fla. 2001) (citation omitted).

While "[i]t is well-settled that legislative intent is the polestar that guides a court's statutory construction analysis," *Florida Convalescent Centers*, 840 So. 2d at 1000 (citations omitted); *see also State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001); this Court has declared that "[l]egislative intent must be determined primarily from the words expressed in the statute." *Florida Dept. of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 323 (Fla. 2001); *Rollins v. Pizzarelli*, 761 So. 2d 294, 297 (Fla. 2000) (citation omitted). Thus, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *State v. Vanbebber*, 848 So. 2d 1046, 1049 (Fla. 2003) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)); *see also Burris*, 875 So. 2d at 410 ("When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.") (citation omitted). When a court

concludes that the language of the statute is clear and unambiguous, its "analysis need not proceed any further." *Bradford*, 787 So. 2d at 817.

"It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence and part of a statute if possible, and words in a statute should not be considered as mere surplusage." *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003). "[S]tatutory phrases are not to be read in isolation, but rather within the context of an entire section." *Acosta v. Richter*, 671 So. 2d 149, 154 (Fla. 1996) (citations and internal quotations omitted).

"[T]he courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Rife*, 789 So. 2d at 292 (citations and internal quotations omitted); *see also Burris*, 875 So. 2d at 413-14 (citation omitted). Further, "it is a basic principle of statutory construction that courts are not at liberty to add words to statutes that were not placed there by the Legislature." *Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001) (citations and internal quotations omitted). "[I]f the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute." *Id*. (citations and internal quotations omitted).

"Where the words used have a definite and precise meaning, the courts have no power to go elsewhere in search of conjecture in order to restrict or extend the meaning." *State v. Swope*, 30 So. 2d 748, 751 (Fla. 1947) (citation omitted). "Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature." *Capers v. State*, 678 So. 2d 330, 332 (Fla. 1996) (citation omitted); *Florida State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 576 (Fla. 1958).

After acknowledging that it was required to interpret the plain meaning of the words used in the subject statutes (R161-11), the District Court proceeded to ignore their plain meaning and to violate all of the foregoing principles of statutory construction and several others in construing the statutes contrary to their plain meaning.

C. Subsection 550.615(3), Florida Statutes, Does Not Prohibit Gulfstream's Exclusive Dissemination Agreements.

1. <u>The Same Meaning Must Be Given To The Same Terms Within Subsections Of 550.615.</u>

Subsection 550.615(3) unambiguously applies only to in-state signals of holders of Florida pari-mutuel wagering permits. It states, in pertinent part:

> If a **permitholder** elects to broadcast **its signal** to any **permitholder** in this state, any **permitholder** that is eligible to conduct intertrack wagering under the provisions of ss. 550.615-550.6345 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**.

(Emphases added).

The words "permitholder and "its signal" appear throughout this provision. The same meaning should be given to the same term within subsections of a statute. *See WFTV, Inc. v. Wilken*, 675 So. 2d 674, 678 (Fla. 4th DCA 1996), *cited approvingly by Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 293 (Fla. 2000).

2. <u>The Plain Meaning Of "Permitholder."</u>

The word "permitholder" is not defined in Chapter 550. Nevertheless, as used in subsection 550.615(3), "permitholder" unambiguously means the holder of a Florida pari-mutuel wagering permit. This interpretation is supported by each of the uses of the word "permitholder" in the two subsections of section 550.615 which precede 550.615(3), as well as its uses in that subsection.

Subsection 615(1) permits "[a]ny horserace permitholder licensed under this chapter" [Chapter 550] to "accept wagers on horseraces conducted by horserace permitholders licensed under this chapter at its facility." Subsection 615(2) permits "[a]ny track or fronton licensed under this chapter" to "accept wagers on such races or games conducted by any class of permitholders licensed under this chapter." Thus, in the two subsections which immediately precede subsection 615(3), (1) each time that the term "permitholder" is used, it is followed by "licensed under

this chapter"; and (2) licensed permitholders are authorized to "accept wagers" on events conducted by other licensed permitholders.

In subsection 615(3), the word "permitholder" is followed repeatedly by "eligible" or "authorized" to conduct "intertrack wagering." "Intertrack wager" is defined in section 550.002(17), Fla. Stat., to mean "a particular form of pari-mutuel wagering in which wagers are accepted at a **permitted, in-state** track, fronton or **pari-mutuel facility** on a race or game transmitted from and **performed live at**, or simulcast signal rebroadcast from, **another in-state pari-mutuel facility**." Only the holder of a pari-mutuel wagering permit issued under Chapter 550 is "eligible" or "authorized" to conduct intertrack wagering.

3. <u>The Plain Meaning Of "Signal" Of A "Permitholder."</u>

The first sentence of subsection 615(3) applies to a "permitholder" who elects to "broadcast **its signal** to any permitholder in this state." (Emphasis added). If a permitholder so elects, "any permitholder that is eligible to conduct intertrack wagering … is entitled to receive the broadcast and conduct intertrack wagering under this section." § 550.615(3), Fla. Stat. (2003).

Because an intertrack wager can be accepted only by an in-state pari-mutuel facility on races or games performed at an in-state pari-mutuel facility, the sending and receiving "permitholder" in the first sentence of subsection 615(3) must each be an in-state pari-mutuel facility. The plain meaning of "signal" of a

"permitholder" in the first sentence of subsection 615(3) is a signal which is owned by the holder of a Florida pari-mutuel wagering permit.

The words "signal" and "permitholder" must be read the same way each time they appear in subsection 615(3), just as a defined word or phrase, such as "intertrack wager," must be ascribed the same meaning whenever it is repeated in subsection 615(3). Thus, the terms "permitholder," "signal of a permitholder" and "intertrack wagering" have the same meanings in the second sentence of subsection 615(3) as they have in the first sentence of that subsection.

4. The Plain Meaning Of "Restrain."

The second sentence of subsection 615(3) provides that a "person may not restrain or attempt to restrain" any "permitholder that is otherwise authorized to conduct intertrack wagering." The word "restrain" is not defined in Chapter 550.

In absence of statutory definitions, the Court looks to common usage of words for their meaning. *See Burris*, 875 So. 2d at 411. The Court can look to a dictionary definition of "restrain" to ascertain its common usage. *Id.*; *see also Seagrave*, 802 So. 2d at 286.

The *Merriam-Webster On-Line Dictionary* (2004) defines "restrain" (A12) as follows:[14]

[14] *See also Webster's II New College Dictionary* 945-946 (1995) (defining "restrain" as follows: "**1.** To control: check. **2.** To take away the freedom or liberty of. **3.** To restrict or limit.")

> ***restrain*** **1 a:** to prevent from doing, exhibiting or expressing something…. **b:** to limit, *restrict*, or keep under control…. **2:** to moderate or limit the force, effect, development, or full exercise of…. **3:** to deprive of liberty; *especially*: to place under arrest or restraint.

Definition **1a,** "to prevent from doing … something," best fits "restrain" as it is used in the last sentence of subsection 615(3). Thus, a "person" may not "prevent" a Florida permitholder "from" sending its signal to another Florida permitholder, or "from" receiving the signal of, another Florida permitholder.

Further, the word used in subsection 615(3) is "restrain," which is a transitive or "action" verb. Therefore, subsection 615(3) applies only to a "restrainer" ? that is, a person who directly and actively *prevents* a Florida permitholder *from* sending its signal to, or receiving the signal of, another Florida permitholder.

This interpretation is required to give effect to the "plain and ordinary meaning" of "restrain" in the context of its use in subsection 615(3).

5. <u>Subsection 550.615(3) And Gulfstream's Exclusive Dissemination Agreements.</u>

The unambiguous language of subsection 615(3) does not prohibit Gulfstream's exclusive dissemination agreements, because:

a. They did not involve the "signal" of a Florida "permitholder." NYRA, FairGrounds, Turfway, Penn National/Charlestown and Sam Houston are not Florida permitholders. (SJ22, p.98, ll.2-18; R60-15). In each

exclusive addendum, the out-of-state Host granted Gulfstream, a Florida permitholder, rights to authorize specific secondary recipients to accept Interstate Wagers on the Host's horseraces, "with or without a live broadcast of the races." (R60-Exs. A-E).

b. Gulfstream did not "restrain" anyone from doing anything. Instead, the out-of-state Host that owned the right under the IHA to consent to acceptance of the Interstate Wagers on its horseraces exercised that right to appoint Gulfstream as its exclusive distributor to specified secondary recipients in Florida during Gulfstream's 2003 meet.

c. The agreements did not "restrain" a Florida permitholder, especially Tampa Bay Downs, from broadcasting its signal (that is, from broadcasting live races run at Tampa Bay Downs) to any Florida permitholder, or from receiving the signal of, another Florida permitholder.

Application of well established principles of statutory construction to subsection 550.615(3) compels the conclusion that the unambiguous language of subsection 550.615(3) does not apply to, much less prohibit, Gulfstream's exclusive dissemination agreements. The District Court erred as a matter of law in concluding that the "plain meaning" of subsection 615(3) prohibits Gulfstream's agreements. *See State v. Jett*, 626 So. 2d 691, 693 (Fla. 1993) ("It is a settled rule

of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language").

D. Subsection 550.6305(9)(g)1, Fla. Stat., Does Not Prohibit Gulfstream's Exclusive Dissemination Agreements.

1. Subsection 550.6305(9)(g)1 Regulates Relationships Between In-State Racetracks And Other In-State Permitholders.

Subsection 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.

This provision unambiguously applies only to the "downstream" relationship between an in-state thoroughbred permitholder and an in-state permitholder.[15] It does not (1) impose any obligation whatever on an out-of-state racetrack, or (2) regulate the "upstream" relationship between an out-of-state racetrack and an in-state thoroughbred track, or (3) establish requirements or limits on the "terms and conditions" which an out-of-state host track and its horsemen may include in a contract with an in-state guest track under § 3004(a)(1) of the IHA, 15 U.S.C. § 3004(a)(1).

[15] The District Court observed, "The IHA regulates the relationships between out-of-state racetracks, in-state racetracks, both state gaming authorities, and both racetracks' horsemen groups. The Florida laws regulate the relationship between the in-state racetracks and the ITWS sites." (R161-19, n.33).

Based on the unambiguous, facially limited scope of this unambiguous language, the District Court concluded that "Section 550.6305(9)(g)1, by itself, does not directly prohibit an exclusive dissemination agreement." (R161-13).

Because the language of the statute is facially clear and unambiguous, the District Court's analysis should not have proceeded any further. *See Bradford*, 787 So. 2d at 817 ("Because we conclude that the language of this statute is facially clear and unambiguous, our analysis need not proceed any further").

The unequivocal language of subsection 6305(9)(g)1 simply cannot be extended or modified to prohibit Gulfstream's exclusive dissemination agreements. *See Burris*, 875 So. 2d at 413-14 (citations omitted); *Rife*, 789 So. 2d at 289.

2. The Obligation Imposed By Subsection 550.6305(9)(g)1 Is Subject To Compliance With Provisions Of The IHA.

The crux of Tampa Bay Downs' argument that subsection 6305(9)(g)1 by itself prohibits Gulfstream's exclusive agreements is that they "operate to prohibit" Tampa Bay Downs from complying with the requirement to make available to eligible permitholders the simulcast signals of those out-of-state tracks which granted Gulfstream exclusive rights. The facially clear and unambiguous language of subsection 6305(9)(g)1 does not support this argument, and the requirement of compliance with provisions of the IHA imposed by subsection 550.3551(3)(a) contradicts it.

First, it is significant that the requirement of subsection 6305(9)(g)1 that a thoroughbred permitholder make simulcast signals "available" to any permitholder does not also authorize that permitholder to accept wager on such simulcast signals. The legislature's omission from subsection 6305(9)(g)1 of express authorization to accept wagers was not inadvertent in the context of acceptance of Interstate Wagers. For example, in subsections 550.615(1), (2) and (3), each time that the legislature required an in-state permitholder to make its signal available to an eligible permitholder, the legislature also authorized the receiving permitholder "to accept wagers on" the races or games of the sending permitholder.

In contrast, the provisions of Chapter 550 which authorize Florida permitholders to wager on out-of-state horseraces are found in section 550.3551. Subsection 550.3551(3)(a) requires a thoroughbred permitholder, as a condition precedent to receiving broadcasts of out-of-state horseraces, to comply with the IHA. Thus, subsection 550.3551(3)(a) requires that a Florida thoroughbred permitholder enter a contract with a host racing association under section 3004(a)(1) of the IHA, the "terms and conditions" of which are acceptable to the host racing association and its horsemen.[16]

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[16] "The Interstate Horseracing Act of 1978 provides that the consent of the horsemen's group may be withdrawn or varied only within the regular contractual process of negotiating an agreement as to terms and conditions between the horsemen's groups and the host racing association. **The contractual process is not one that can be regulated**." *Alabama Sportservice, Inc. v. National Horsemen's*

In short, before a thoroughbred permitholder can "accept[] wagers on a simulcast signal" under subsection 550.6305(9)(g)1, it must comply with the requirements of § 3004(a)(1) of the IHA. Subsection 550.3551(3)(a) incorporates compliance with the IHA into subsection 6305(9)(g)1. Just 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) (2002), it can impose contractual limits on an in-state guest's rights to license eligible third parties to accept wagers on its horseraces.

Tampa Bay Downs cannot deny that compliance with the IHA is required by both subsection 550.3551(3)(a) and 15 U.S.C. § 3003 before it can accept Interstate Wagers. Nor can Tampa Bay Downs deny that the IHA limits the apparently unrestricted obligation of a thoroughbred permitholder to make simulcast signals available to eligible permitholders. For example, Tampa Bay Downs has not contended that the requirement imposed by 6305(9)(g)1 applies within the 60-mile radius of Gulfstream when Gulfstream is conducting its live meet. This 60-mile limit on acceptance of Interstate Wagers is imposed by section 3004(b) of the IHA.

Benevolent & Protective Assoc., Inc., 767 F. Supp. 1573, 1579 (M.D. Fla. 1991) (emphasis added).

For the same reason, the requirement imposed by 6305(9)(g)1 can be limited by the "terms and conditions" of a contract between an out-of-state host track and an in-state thoroughbred track entered under the authority of section 3004(a)(1) of the IHA.

Had the legislature intended to modify the requirement that Florida thoroughbred permitholders comply with the IHA as a condition of accepting Interstate Wagers under subsection 550.6305(9)(g)1, it would have amended the unqualified language of subsection 550.3551(3)(a). In addition, the legislature surely would have included an explicit statement to that effect in subsection 550.6305(9)(g)1. Instead, subsection 6305(9)(g)1 is absolutely silent on this subject.

A determination that subsection 550.6305(9)(g)1 by itself prohibits exclusivity provisions or restrictive provisions in contracts between an in-state thoroughbred track and an out-of-state track would contravene two fundamental principles of statutory construction. First, regarding subsection 550.6305(9)(g)1, it would violate the "basic principle of statutory construction that courts are not at liberty to add words to statutes that were not placed there by the Legislature." *Seagrave*, 802 So. 2d at 287 (citations and internal quotations omitted). Second, regarding subsection 550.3551(3)(a), it would violate the "elementary principle of statutory construction that significance and effect must be given to every word,

phrase, sentence and part of the statute if possible, and words in a statute must not be considered as mere surplusage." *Hechtman*, 840 So. 2d at 996 (citation omitted).

The District Court did not find that the facially clear and unambiguous language of 550.6305(9)(g)1 prohibits the exclusivity provision in Gulfstream's agreements and the restrictive provisions in Tampa Bay Downs' agreements.

Instead, the District Court found that prohibition in subsection 550.615(3).

3. The Prohibition In 550.615(3) Cannot Be Implied In 550.6305(9)(g)1.

"When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (citation omitted); *see also Bellsouth Telecommunications, Inc.*, 863 So. 2d at 291 ("[W]hen the legislature includes a provision in one section of a statute but excludes it in another, courts will deem the difference intentional and will assign meaning to the omission.")

Subsection 550.6305(9)(g)1 imposes on a thoroughbred permitholder an obligation to make a simulcast signal available to "any permitholder eligible to conduct intertrack wagering." Similarly, the first sentence of subsection 550.615(3) imposes an obligation on "a permitholder" to broadcast "its signal" to "any permitholder that is eligible to conduct intertrack wagering." Subsections 550.6305(9)(g)1 and 550.615(3) are direct counterparts. The former applies to the

"simulcast signal" of an out-of-state horse track, and the latter applies to the "signal" of a Florida "permitholder."

In contrast with subsection 550.615(3), subsection 550.6305(9)(g)1 does not contain a second sentence which expressly prohibits a "person" from restraining a thoroughbred permitholder from sending or receiving the simulcast signal of an out-of-state horse track.[17] Binding precedent precludes implication of that express prohibition in subsection 550.6305(9)(g)1, where the legislature excluded it.

Thus, the District Court erred as a matter of law when it concluded: "While section 550.6315(9)(g)1.[sic], *by itself*, does not directly prohibit an exclusive dissemination agreement, *it must be read together with Section 550.615(3)*, which by its plain language does prohibit such arrangements." (R161-13) (emphasis added).

[17] Subparts 550.6305(9)(g)2 and (g)3, which, like (g)1, require a thoroughbred permitholder to make simulcast signals available to eligible permitholders, also do not contain this prohibition. Subsection 550.615(3) was in the 1992 version of Chapter 550, but subparts 550.6305(9)(g)1, (g)2 and g(3) were added in the 1996 amendments. The omission of the prohibition from every subpart of 6305(9)(g) reinforces the conclusion that the omission was intentional. *See Paragon Health Services, Inc. v. Central Palm Beach Community Mental Health Center, Inc.*, 859 So. 2d 1233, 1235-36 (Fla. 4th DCA 2003) ("Where the legislature has included a specific provision in one part of a statute and omitted it in another part, we must conclude that it knows how to say what it means and its failure to do so is intentional.") (citations omitted).

E. The District Court Erred As A Matter Of Law In Relying On DPW's Clearly Erroneous Interpretations Of Subsections 550.615(3) and 550.6305(9)(g)1 In The Declaratory Statement.

In Count 3, Gulfstream did not seek declaratory relief regarding the Declaratory Statement.[18] This case, accordingly, contrasts with those in which the appellant appealed from an administrative agency's interpretation of a statute in a declaratory statement issued in response to the appellant's petition. *See, e.g., Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 909-10 (Fla. 2002) (reversing, as "clearly erroneous," Public Service Commission's interpretation of statute in a declaratory statement); *Florida Dept. of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) (affirming reversal of Department of Revenue's interpretation of statute in a declaratory statement). In such cases, the Court must review the agency's interpretation to decide the appeal.

This Court has frequently observed that an agency's interpretation of a statute is "entitled to great deference and will not be overturned unless it is clearly erroneous or contrary to legislative intent." *Florida Dept. of Revenue*, 789 So. 2d at 323 (citation omitted). This "deference" is not a departure from the fundamental

[18] Under section 120.68(1), Fla. Stat. (2002), Gulfstream lacked standing to appeal the Declaratory Statement to a Florida court, because it was not a party to the underlying proceedings. *See Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So. 2d 982, 986 (Fla. 1996) (stating, "[T]here are four requirements for standing to seek [judicial review of administrative action]: (1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action.") (citations omitted).

principle that "[t]here is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning." *Verizon Florida*, 810 So. 2d at 908 (citation omitted); *see also Florida Department of Revenue*, 789 So. 2d at 323; *Southeastern Utilities Service Co. v. Redding*, 131 So. 2d 1, 2 (Fla. 1961) (quashing an administrative order, "There can be no doubt that an administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous. …It is also an elemental rule that if the terms and provisions of a statute are plain there is no room for judicial or administrative interpretation.").

"Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered *only in the construction of a statute of doubtful* meaning." *Donato v. American Telephone and Telegraph Co.*, 767 So. 2d 1146, 1153 (Fla. 2000) (citation omitted), 767 So. 2d at 1153 (citations omitted)[19] (emphasis in original); *accord*, *Florida State Racing Comm'n*, 102 So. 2d at 576-77.

[19] In *Donato*, this Court expressly rejected an argument, identical to one made by Tampa Bay Downs and accepted by the District Court, that the court was required to adopt the statutory interpretation of an administrative agency charged with its enforcement, stating, "We ... reject *Donato's* contention that we must strictly defer to the Florida Commission on Human Relations' interpretation of the statute." *Id.* at 1153.

The District Court did not find that the subject statutory provisions were ambiguous or "of doubtful meaning." The District Court's consideration of extrinsic matter, accordingly, violated an explicit mandate of the Eleventh Circuit. *See, e.g., CBS Broadcasting, Inc. v. Echostar Communications Corp.*, 265 F.3d 1193, 1212 (11th Cir. 2001) ("This Circuit's decisions ... mandat[e] that ambiguity in statutory language be shown **before** a court delves into 'extrinsic matter.'") (citations and internal quotations omitted) (emphasis in original). The District Court also violated a basic rule of statutory construction applied by this Court.

The District Court erred in considering DPW's construction of the subject statutes at all. (R161-12-13). The District Court compounded its error by according the "Division's interpretation" the status of binding precedent. (R161-13).

CONCLUSION

Based on the foregoing:

1. The District Court erred as a matter of law in concluding that subsection 550.615(3) and 550.6305(9)(g)1, whether separately or together, prohibited Gulfstream's exclusive agreements;

2. No provision of the 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 signal to other Florida wagering sites permitted to receive them.

Accordingly, this Court should answer the Eleventh Circuit's certified question in the **negative**.

Respectfully submitted,

Dated:_____, 2005.

_____

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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.

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