

Licensing

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Final Order No. BPR-2002-03479 Date: 9-16-02
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Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

IN RE: PETITION FOR DECLARATORY STATEMENT
TAMPA BAY DOWNS, INC.,

Case No. DS 2002-007

Petitioner.

#0000320-1000

DECLARATORY STATEMENT

Petitioner, Tampa Bay Downs, Inc., ("Tampa Bay Downs") filed a Petition for Declaratory Statement with the Division of Pari-Mutuel Wagering ("the Division") on March 19, 2002. The Petition is hereby incorporated by reference.

On May 9, 2002, Tampa Bay Downs filed an Amended Petition for Declaratory Statement that in essence sets forth the same facts as those in its original petition. Pursuant to Rule 28-105.003, Florida Administrative Code, the Division relies upon the statement of facts made by Tampa Bay Downs, Inc., in its Amended Petition without taking any position regarding the validity of the facts as pled.

On May 16, 2002, Florida Jai Alai, Inc., d/b/a Orlando Jai Alai, Sports Palace, Inc., d/b/a Melbourne Greyhound Track, and Sanford-Orlando Kennel Club, Inc., d/b/a Sanford-Orlando Kennel Club, filed a joint Motion to Intervene and an Intervenor's Memorandum of Law. Having reviewed the Motion to Intervene and having noted that Tampa Bay Downs has not filed an objection, the motion is granted.

On May 17, 2002, Ocala Breeders' Sales Company, Inc., and Lake Fron, Inc., d/b/a Ocala Jai Alai filed a Motion for Leave to Intervene. The motion indicates that counsel for Tampa Bay Downs was contacted and had no objection to the motion. Therefore, the motion is granted.

Florida Jai Alai, Inc., d/b/a Orlando Jai Alai, Sports Palace, Inc., d/b/a Melbourne Greyhound Track, Sanford-Orlando Kennel Club, Inc., d/b/a Sanford-Orlando Kennel Club, Ocala Breeders' Sales Company, Inc., and Lake Fron, Inc., d/b/a Ocala Jai Alai shall be collectively referred to herein as "the Intervenors."

The Petition for Declaratory Statement is granted as follows:

STATEMENT OF THE FACTS

1. The Petitioner, Tampa Bay Downs, Inc., is licensed by the Division of Pari-Mutuel Wagering to operate a thoroughbred horseracing track. Tampa Bay Downs is authorized to operate as a host track and to transit broadcasts of horse races conducted at out-of-state racetracks to guest tracks.
2. Florida Jai Alai is a guest track. Gulfstream Park Racing Association is also a host track. Florida Jai Alai entered into a contract with Tampa Bay Downs to receive the simulcast transmission of out-of-state horseraces and to accept wagers on those races.
3. Gulfstream Park has entered into agreements with certain out-of-state racetracks that designate it as the exclusive disseminator of their simulcast signal within the state of Florida.
4. Tampa Bay Downs broadcasts and accepts wagers on the races of the out-of-state racetracks 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 horse races conducted at those out-of-state tracks which have designated Gulfstream Park as their exclusive disseminator.

ISSUES PRESENTED

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 section 550.6305(9)(g), 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 section 550.6350(9)(g), Florida Statutes (2001)?
3. 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?

CONCLUSIONS OF LAW

1. Section 550.6305(9)(g)1, Florida Statutes, provides that:

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 section 550.615-550.6345.
2. Section 550.615(3), Florida Statutes, provides 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 authorized to conduct intertrack wagering from receiving the signal of any other permitholder or sending its signal to any permitholder.

3. Rule 61D-9.001, Florida Administrative Code, provides that:

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

4. Tampa Bay Downs is a permitholder that receives and accepts wagers on simulcast signal of races conducted at out-of-state racetracks. Florida Jai Alai is a permitholder that is eligible to conduct intertrack wagering. Accordingly, Tampa Bay Downs is obliged to make its simulcast signal available to Florida Jai Alai pursuant to section 550.6305(9)(g)1, Florida Statutes.

5. Section 550.6305(9)(g)1., Florida Statutes, provides Florida Jai Alai the right to receive the simulcast transmission of and accept wagers on the simulcast dissemination of those out-of-state races from Tampa Bay Downs.

6. The original Petition filed by Tampa Bay Downs sought to have the Division issue a statement which determines whether the conduct of Gulfstream Park, in entering into contracts for the exclusive dissemination of out-of-state races, is "unenforceable" under the provisions of Chapter 550, Florida Statutes, and Chapter 61D, Florida Administrative Code. Such a request to declare the contracts entered into between Gulfstream Park and certain out-of-state racetracks "unenforceable," the Petition would be denied and Tampa Bay Downs' remedy, if any, would be in circuit court. *Grippe v. DBPR*, 729 So. 2d 459 (Fla. 4th DCA 1999).

7. The Amended Petition, however, asks whether agreements between Gulfstream Park and out-of-state tracks, which prohibit Tampa Bay Downs from disseminating the simulcast broadcasts it receives to eligible tracks such as Florida Jai Alai, violate Florida law.

The Division is aware that Rule 28-105.001, Florida Administrative Code, provides that a declaratory statement is not the appropriate means for determining the conduct of another person.

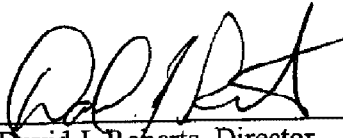
Nothing in this declaratory statement should be construed as a statement by the Division that Gulfstream Park has, in fact, violated Section 550.615(3), Florida Statutes, or Rule 61D-9.001, Florida Administrative Code.

8. However, the Supreme Court of Florida in *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999) recognized that in enacting Section 120.565, Florida Statutes, the Legislature gave citizens a right to get a clear, binding answer from the agency on how the agency's statute and rules apply. In *Investment Corp. of Palm Beach*, the Court also recognized the unique nature of this industry with limited participants who would almost invariably have an interest in a declaratory statement. The Court further found that changes to that section made by the 1996 amendments to the Administrative Procedure Act that declaratory statements may not be issued even though the interest of persons who are not a party may be affected. *Id.* 747 So. 2d 374, at 378 and 385 Therefore, pursuant to Rule 28-105.003, Florida Administrative Code, the Division issues its response to the third question solely in regard to such exclusive disseminator agreements and the effect of those agreements as described in the Amended Petition.

9. The 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.” Exclusive disseminator agreements which operate to restrict the transfer of a simulcast signal from Tampa Bay Downs to Florida Jai Alai, who is eligible to conduct intertrack wagering on such a signal, as described in the Amended Petition, would violate Section 550.6305(9)(g)1., Florida Statutes. Similarly, such an agreement or contract which is entered into to restrict dissemination of a simulcast signal as

described in the Amended Petition, would violate the provisions of Rule 61D-9.001, Florida Administrative Code.

DONE AND ORDERED this 13TH day of SEPTEMBER, 2002.



David J. Roberts, Director
Division of Pari-Mutuel Wagering
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1035

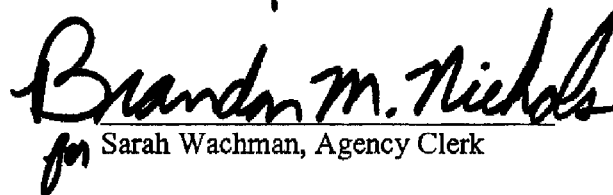
NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaratory Statement has been provided to Robert W. Clark, attorney for Tampa Bay Downs, by U.S. Mail to Post Office Box 2939, Tampa, Florida 33601, to Harold F. X. Purnell, attorney for Florida Jai Alai, Inc., d/b/a Orlando Jai Alai, Sports Palace, d/b/a Melbourne Greyhound Track; and Sanford-Orlando Kennel Club, Inc., d/b/a Sanford-Orlando Kennel Club by U.S. Mail to Post

Office Box 551, Tallahassee, Florida 32302-0551, and to Warren H. Husband, Post Office Box
10909, Tallahassee, Florida 32302-2909, this 16th day of Sept., 2002.


for Sarah Wachman, Agency Clerk

Copy to:

Joseph M. Helton, Jr., Chief Attorney for PMW
Suzanne Printy, Joint Administrative Procedures Committee