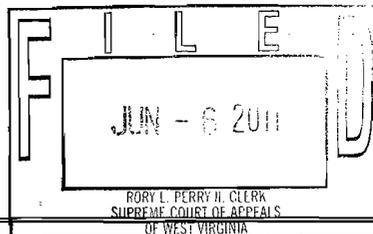


No. 10-101503



IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA

LAWRENCE REYNOLDS, ANTHONY MAWING, ALEX RIOS-CONDE, JESUS SANCHEZ, DALE WHITTAKER, LUIS PEREZ AND TONY A. MARAGH,

Plaintiffs Below and Respondent

v.

WEST VIRGINIA RACING COMMISSION.

Defendant Below and Respondent

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 09-C-688

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I. INTEREST OF AMICUS CURIAE

Jockeys' Guild, Inc. (the "Guild") as representative of jockeys across the country and in the State of West Virginia seeks permission to file an amicus brief in this case. The matters in this case are of great interest and potential impact on the jockeys who are licensed in the State of West Virginia, and in particular, those who are racing at Hollywood Casino at Charles Town Races ("Charles Town"), which is owned by the Petitioner, PNGI Charles Town Gaming, LLC ("the Race Track" or "Petitioner").

The Guild has been working for over 70 years on behalf of the majority of professional jockeys in all states that permit pari-mutuel betting. The Guild was founded by the leading jockeys of the 1940s, who banded together to gain better conditions for jockeys on and off the track. The Guild's members have included Hall of Fame members Gary Stevens, Jerry Bailey, Pat Day and Laffit Pincay, Jr., and our current members include leading riders such as John Velazquez, Ramon Dominguez, Joel Rosario, Rafeal Bejarano, Julien Leparoux, Javier Castellano, Garrett Gomez, DeShawn Parker, G.R. Carter and Jacky Martin. For over seven decades, the Guild, which operates as a not-for-profit labor organization, has been instrumental in setting safety standards, implementing rules of racing, and providing insurance and other benefits for its members and their families.

The Guild is the recognized voice of thoroughbred and quarter horse jockeys in the United States. The Guild appears and participates at most Racing Commission meetings in all 37 states which have pari-mutuel racing, including West Virginia. The Guild actively participates with the National Thoroughbred Racing Association and its committees and frequently participates in the meetings and projects of the Association of

Racing Commissioners International. The Guild is clearly an appropriate organization to provide the Court with a unique perspective on thoroughbred racing and the issues at stake in this case.

For those reasons, the Jockeys' Guild, Inc. respectfully requests permission to file an *Amicus* brief in support of the respondents in this matter. ¹

II. BRIEF AMICUS CURIAE SUMMARY OF ARGUMENT

There has been an ongoing legal controversy for well over a hundred years pertaining to the racetracks and their need or desire to exclude or eject patrons and horsemen from their premises, using the argument that excluding the individuals was in the best interest of the sport of racing. Many of the cases involving the exclusion pertained to individuals who were involved in bookmaking, race fixing, doping of the horses, as well other activities not directly related to the sport such as intoxication, impairment or violent and/or lewd behavior of the individual. A common law of exclusion arose which allowed for the racetracks to exclude patrons and at their discretion. In recent years, more and more courts have recognized that race tracks cannot use their right of ejection to limit the rights of occupational permit holders such as jockeys to practice their profession.

PNGI Charles Town Gaming, LLC (“the Race Track” or “Petitioner”), is seeking to exclude the individual jockey Defendants from being allowed on the Charles Town premise.

¹ Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

In this unique case, the jockeys, who were first threatened with suspension of their racing permits by the Racing Commission, obtained a Court Order that stayed those suspensions while the jockeys exercised their due process rights. The Race tracks claim of unfettered discretion to exclude jockeys from its premises even where a Court has stayed any Commission discipline would render meaningless any due process rights due these jockeys. It is the Racing Commission, after affording the jockey appropriate procedural process, that should make the fundamental decision whether or not a permit holder should be denied access to the race track. In the interest of protecting the jockeys herein, as well as other permit holders, the Guild requests the Court to dismiss, or, alternatively, deny the petition and affirm the Court's Order enforcing the Stay against the Petitioner.

III. ARGUMENT

A. OCCUPATIONAL PERMIT HOLDERS SUCH AS JOCKEYS ARE NOT MERE PATRONS AND HAVE A SUBSTANTIAL DUE PROCESS RIGHT TO ACCESS TO A RACE TRACK AS NECESSARY TO PRACTICE THEIR PROFESSION, ESPECIALLY WHERE A COMMISSION ORDER OF SUSPENSION HAS BEEN STAYED BY A WEST VIRGINIA COURT

The Race Track Petitioner is seeking by this appeal to establish a unilateral right to exclude professional jockeys with valid permits to race at West Virginia tracks from its race track even in the face of multiple Orders against the West Virginia Racing Commission ("the Racing Commission") staying any discipline against the excluded jockeys. It would be a gross violation of the rights of these professional jockeys, with valid permits to race from the Commission, if their right to earn their livelihood while

any discipline was pending could be sustained against the Commission but simultaneously lost by unilateral action of the Race Track.

The Jockeys' Guild understands that common law has recognized the right of an owner of a private race track to exclude patrons. The right to exclude patrons from a private enterprise, here a racetrack, has long been recognized at common law. (See, e.g., *Marrone v. Washington Jockey Club* (1913), 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679; *Flores v. Los Angeles Turf Club, Inc.* (1961), 55 Cal.2d 736, 361 P.2d 921, 13 Cal.Rptr. 201; *Tamelleo v. New Hampshire Jockey Club, Inc.* (1960), 102 N.H. 547, 163 A.2d 10;) Although the authorities in this area are very old and arguably inconsistent with a modern view of the obligations of a race track under both antitrust and due process doctrines, it is clear that many jurisdictions have recognized the right of a track to exclude patrons as long as the exclusions are not based on unlawful grounds such as race, creed or color.

Even in the case of patrons, however, some states have limited the common law right of ejectment held by race track owners. *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 P. 1050 (1903) concluded that a California statute making exclusion from racetracks unlawful was valid. In *Burrillville Racing Ass'n v. Garabedian*, 113 R.I. 134, 318 A.2d 469 (1974), a Rhode Island court held that the common law right of a racetrack operator to exclude a person from its premises without having to show cause had been changed by a statute which established minimal grounds for such an exclusion. Even where a statute permitted a track to exclude patrons "at its sole discretion," the track was required to prove by competent evidence that the patron was in fact undesirable and inconsistent with the orderly conduct of racing.

The racetrack's obligation to avoid ejection of an occupational permit holder is plainly more compelling than the case of a patron who does not depend on access to the racetrack to earn his or her living. The sport of horseracing, because it involves gambling, is subject to strict and pervasive state regulations. The conduct of jockeys is heavily regulated by strictly drawn statutes and regulations because of the need to ensure integrity in racing, and suspected violations are met with disciplinary proceedings held by state horseracing boards and commissions. This regime is necessary for the sport, typical in the majority of jurisdictions in the country and is accepted by its occupational licensees.

But the reverse must also be true: when a Commission concludes that its regulations and their concomitant due process protections should be the only appropriate basis for excluding professional permit holders from access to the track to fulfill their professional commitments, jockeys are entitled to those protections to avoid arbitrary infringements on their rights. The Guild strongly agrees with the Racing Commission's contention that any right of ejection available to the Race Track is not unfettered and must yield to the orders of the Racing Commission in cases involving persons who hold valid commission-issued occupational permits.

Other state courts have recognized the quasi-monopolistic nature of racing and have rejected a track's right to unilaterally eject racing permit holders. *See Cox v. National Jockey Club*, 323 N.E.2d 104, 108 (Ill. App. Ct. 1974) ("We...are of the opinion that with the benefit of receiving a quasi-monopoly comes corresponding obligations one of which is not to arbitrarily exclude a jockey who desires to participate in a racing meet. The arbitrary exclusion of the plaintiff meant that he was deprived of the opportunity to

engage in his chosen occupation within a reasonable geographic area and for a significant period of time."); *Jacobson v. New York Racing Association, Inc.*, 305 N. E.2d 765, 768 (N. Y. 1973) ("NYRA has a virtual monopoly power over thoroughbred racing in the State of New York. Exclusion from its tracks is tantamount to barring the plaintiff from virtually the only places in the State where he may ply his trade and, in practical effect, may infringe on the State's power to license horsemen. In contrast to a racetrack proprietor's common law right to exclude undesirable patrons, it would not seem necessary to the protection of the legitimate interests that the proprietor have an absolute immunity from having to justify the exclusion of an owner or trainer whom the State has deemed fit to license."); *Greenburg v. Hollywood Turf Club*, 7 Cal. App.3d 968, 976 (Cal. Ct. App. 1970) ("It is a matter of judicial notice that by virtue of the licensing powers of the Board, racing associations have a quasi-monopoly and that the number of tracks in operation at any one time is severely limited.... This imposes upon Hollywood certain obligations to which other land owners are not subject.").

Ohio courts have ruled that a privately owned racetrack may not suspend a party for any reason, and a decision to ban is subject to judicial review. In *Frasher v. Beulah Park Ltd. P'ship.*, a horse trainer was suspended from the track for allegedly "fixing" races. No. 91AP-930, 1992 WL 10274 *1 (Ohio App. 10th Dist. Jan 16, 1992). A state appeals court found that the trial court had erred in granting the summary judgment:

The trial court, in addressing the issues before it, determined in essence that [the defendant race track] had the right to bar whomever it pleased from its race track so long as the person was not barred upon race, creed, color, sex or national origin. Since [horse trainer] could not show that he was barred from the premises based upon his membership in such a classification, he could not recover.... The trial court did not address the question of whether the right could be used maliciously to cause the object

of its malice to suffer loss. . . . If the barring from the track was solely for the purposes of harming [horse trainer], that fact might be relevant.
Id. at 2.

Frasher is significant because it finds that a race track is not free to ban any person for any reason but that those decisions are subject to review based on a common law fairness doctrine and the obligation to provide a fair hearing. In the case at bar, the Commission has merely codified the elements of what it believes are necessary to ensure a fair hearing.

In *Pernalski v. Illinois Racing Bd.*, 295 Ill.App.3d 499, 692 N.E.2d 773 Ill.App. 1 Dist., 1998 an Illinois appeals court recognized that the Illinois Racing Commission had limited the ability of race tracks to exclude occupational licensees to situations where the race tracks had just cause for the exclusion and where the occupational licensee had right to subsequent hearing before the Commission as to the propriety of said exclusion:

“The Board, and any person or persons to whom it delegates this power, may eject or exclude from any race meeting or organization grounds or any part thereof, any occupation licensee or any other individual whose conduct or reputation is such that his presence on organization grounds may, in the opinion of the Board, call into question the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing; provided however, that no person shall be excluded or ejected from organization grounds solely on the grounds of race, color, creed, national origin, ancestry, or sex. *The power to eject or exclude occupation licensees may be exercised for just cause by the organization licensee or the Board, subject to subsequent hearing by the Board as to the propriety of said exclusion.*” (Emphasis added.)

The last sentence of this statute is explicit in treating the organization licensee as an independent authority able to sanction trainers and other personnel operating on its grounds. In so doing, the organization licensee is not operating as an arm of the IRB, but as a private business licensee subject only to IRB review as to the propriety of the exclusion.

In *Wolf v. Louisiana State Racing Comm'n* 545 So.2d 976, La., 1989, the Louisiana Courts reached a similar conclusion that a so called private right of ejection

by race tracks was inconsistent with the extensive due process protections provided by the Louisiana Racing Commission:

We agree with the holdings in *Sims* and *Fox* and find the unilateral exclusion of a permittee by the Fair Grounds is inconsistent with the procedures established by the legislature for revocation of a license or the privileges thereunder, which require notice and a hearing. Exclusion of permittees, therefore, may be accomplished by private parties only through the stewards, acting under the Rules of Racing, or in accordance with a valid Commission order; *Sims*, 778 F.2d at 1075-76.

See also *Sims v. Jefferson Downs Racing Ass'n, Inc.*, 778 F.2d 1068 (5th Cir. 1985).

In *Barry v. Barchi*, 443 U.S. 55 (1979) the Supreme Court found that, Barchi, a licensed horse trainer had a protectable property interest. They held that individuals who are issued occupational permits by the state racing authorities have a property interest in his license under state law sufficient to invoke due process protections, and although the magnitude of the permit holder's interest in avoiding suspension is substantial, the State also has an important interest in assuring the integrity of racing carried on under its auspices.

The West Virginia Rules of Racing requires that the Commission shall provide notice and hearing opportunity for any permit holder before they are subject to an Order suspending their permit for any period of time. *W. Va. Code R* §178-1-68. Those fully developed procedural protections are constitutionally mandated and would be rendered meaningless if a permit holder can be summarily excluded by a Race Track even where a Court has entered an Order staying the Commission's proposed suspension from racing.

B. OCCUPATIONAL LICENSE HOLDERS HAVE A RIGHT TO BE FREE OF UNREASONABLE CONDUCT THAT IS IN VIOLATION OF OTHER LAWS

While Charles Town is a single track, a refusal of one track to allow access to a licensed jockey or trainer is frequently followed throughout this small and close knit industry with other tracks refusing access. Additionally, the Petitioner owns several race tracks and in previous situations, the exclusion from one of their facilities is actually an exclusion of all of their facilities.² Furthermore, while the permit holders are licensed in West Virginia and there is another licensed thoroughbred track, Mountaineer Park, it is approximately five hours away from where the Jockeys currently ride and reside. To expect the jockeys to relocate their family and their tack to another town is completely unreasonable and unjust.

The Guild submits the Race Track is attempting to obtain judicial sanction for unfair and monopolistic conduct that is unlawful under both Section 1983 and under antitrust law.

1. Anti-Trust Issues

In *Blalock v. LPGA*, 359 F.Supp. 1260 (ND GA, 1970), a suspended ladies golfer established that her suspension from competition for one year from Ladies Professional Golf Association for alleged cheating excluded the golfer from the market and was a “naked restraint of trade” and hence illegal under Sherman Anti-Trust Act, where the suspension was imposed in exercise of defendants' unfettered subjective discretion. In general, group boycotts and concerted refusals to deal are considered per se unlawful. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1959); see *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S.

² The petitioner also owns the following racing facilities: Hollywood Casino at Penn National Race Course located in Grantville, PA; Beulah Park locate in Grove City, Ohio; Zia Park Racetrack located in Hobbs, New Mexico; Co-owners with MI Developments of Laurel Park located in Laurel, Maryland and Pimlico located in Baltimore, Maryland; Co-owners with Sam Houston Race Park, Ltd of Sam Houston Race Park located in Houston, Texas.

457, 465-67, 61 S.Ct. 703, 706-707, 85 L.Ed. 949 (1941). However, in *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-49, 83 S.Ct. 1246, 1252, 10 L.Ed.2d 389 (1963), the Supreme Court recognized a narrow exception to per se invalidity of group boycotts and concerted refusals to deal where a “justification derived from the policy of another statute or otherwise” mandates application of the rule of reason.

In *Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609 (11th Cir., 1985), trainers who had been denied stall spaces at Calder Race Course brought an action under the Sherman Act, 15 U.S.C.A. § 1, alleging a per se violation of the antitrust laws. The Court held that the rule of reason and not a per se rule was the proper standard for evaluating alleged conduct in restraint of trade arising from the track's subjective exclusion of certain trainers from free, on-track horse stall space. Under the rule of reason, a restraint will be held illegal only if it unreasonably harms competition. Under the rule of reason approach, the Court held that the trainers had not demonstrated an impact on competition in racing since they remained able to race at Calder by using other stable facilities and trucking their horses to Calder each day.

In this case, Charles Town is arguing it has a right to unilaterally exclude jockeys (and presumably any other permit holder) for any reason or no reason at all and apparently without regard to the number of jockeys excluded or the competitive impact of its decisions. Unlike *Char-Car, Inc.*, they cannot argue that the banned occupational permit holder will be able to use Charles Town facilities. Even where Courts have rejected a per se antitrust analysis, anti-competitive conduct such as refusals to allow participants in a sport to compete is at least subjected to the rule of reason analysis. See, e.g., *Hatley v. American Quarter Horse Ass'n.*, 552 F.2d 646, 652-53 (5th Cir. 1977) (The

definition of a quarter horse is an inquiry which the AQHA, as a sanctioning organization, ought to be able to pursue. If the inquiry is anti-competitive, the rule of reason can be utilized to attack it).

In *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049 at 1064-65, the Court established an approach to the rule of reason test for sports management decisions that focused on the existence of appropriate procedural safeguards for the participants asserting that they had been injured. Under the *Denver Rockets* test, in order for conduct to fall within the exception to per se invalidation of group boycotts or concerted refusals to deal there must be proof that the sports authority provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

In this case, the appropriate procedural safeguards are the due process procedures available from the Racing Commission. The Race Track's proposed right of unilateral action ignores its obligations under the Sherman Act to avoid unreasonably anticompetitive activity.

2. Section 1983

A recent decision in the United States District Court for the Middle District of Pennsylvania upheld a claim under 42 USC Section 1983 challenging a Racing Commission's ejection of a licensed trainer from Penn National Race Course in Pennsylvania. See *Adamo et al v. Dillion*, Case No1:10-CV-02382, (See March 13, 2011 Order) attached as Exhibit 1. In that recent decision, the Court concluded that licensed horse trainers had a constitutionally protected property interest that requires a showing of cause to uphold revocation or suspension., citing *Barry v. Barchi*, supra and *Hudson v Tex. Racing Comm'n*, 455 F. 3d 597 (5th Cir. 2006). It would be inconsistent with

common sense and the right and obligation of the Racing Commission to regulate conduct in horse racing in West Virginia to permit private parties such as the Race Track to accomplish precisely the same action that the Commission may not do except after constitutionally required due process.

IV. CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should affirm the decision of the Circuit Court and that this Court should not allow the Race Track to refuse to yield to the orders of the Racing Commission or the lower court with regards to matters involving professional jockeys who are authorized by the Racing Commission to race within West Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served via the US Mail and/or facsimile upon the following individuals and entities on this the 6th day of June, 2011.

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fundamentally unsound in a way that endangered the safety of all jockeys riding in a race against them.” (Doc. 1, Complaint at ¶¶ 16, 29, 30, 59.) The orders were issued “pending final resolution of the matter” and without hearings. (*Id.* at ¶¶ 29, 30, 31.) Plaintiffs were given 48 hours to remove Gill’s horses from the premises and were not allowed to participate in racing at Penn National. (*Id.* at ¶¶ 32, 33, 60, 61.) Adamo requested a hearing in front of the Commission regarding his ejection and also requested a supersedeas of the ejection order pending his hearing. (*Id.* at ¶¶ 35, 36.) The Commission never scheduled a hearing. (*Id.* at ¶ 39.) On March 5, 2010, Defendant Dillon issued an order rescinding the ejection order against Adamo. (*Id.* at ¶ 40.) That order stated, in part, that the “Commission hereby deems the February 2, 2010 Ejection matter and Anthony Adamo’s request for an administrative hearing as moot. Accordingly, no hearing will be scheduled.” (*Id.* at ¶ 41.) On May 18, 2010, Plaintiff Gill requested that the Commission rescind his ejection or, in the alternative, hold a hearing on the matter. (*Id.* at ¶¶ 79, 80.) On July 6, 2010, the Commission stated that Gill’s ejection is final, no hearing will be held on the matter, and Gill remains barred from Penn National. (*Id.* at ¶ 81.)

II. Legal Standard

When presented with a motion to dismiss for failure to state a claim, the court “must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions,” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009), and ultimately must determine “whether the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’” *Id.* at 211 (quoting *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1950 (2009)). Additionally,

the court must “accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff.” *Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005)). The complaint must do more than allege the plaintiff’s entitlement to relief; it must “show such an entitlement with its facts.” *Fowler*, 578 F.3d at 211 (citations omitted). As the Supreme Court instructed in *Iqbal*, “[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a) (alterations in original)). In other words, a claim has “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Id.*

“To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.” *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted); *see also Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007). The court may consider “undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the [attached] document[s].” *Pension Benefit*, 998 F.2d at 1196. Additionally, “documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to

the pleading, may be considered.” *Pryor v. Nat’l Collegiate Athletic Ass’n*, 288 F.3d 548, 560 (3d Cir. 2002) (citation omitted); *see also U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002) (“Although a district court may not consider matters extraneous to the pleadings, a document *integral to or explicitly relied upon* in the complaint may be considered without converting the motion to dismiss into one for summary judgment.”) (internal quotation omitted). However, the court may not rely on other parts of the record in making its decision. *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994).

Finally, in the Third Circuit, a court must grant leave to amend before dismissing a civil rights complaint that is merely deficient. *See, e.g., Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247,252 (3d Cir. 2007); *Weston v. Pennsylvania*, 251 F.3d 420, 428 (3d Cir. 2001); *Shane v. Fauver*, 213 F.3d 113, 116-17 (3d Cir. 2000). “Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility.” *Alston v. Parker*, 363 F.3d 229, 236 (3d Cir. 2004).

III. Discussion

In order to prevail on a procedural due process claim under 42 U.S.C. § 1983, a plaintiff must show (1) that he possessed a life, liberty, or property interest within the meaning of the Fourteenth Amendment, and (2) that he did not have procedures available to him that would provide him with "due process of law." *Rockledge Dev. Co. v. Wright Township*, 2011 WL 588068, at *2 (M.D. Pa. Feb. 10, 2011) (citing *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984)). More

specifically, a plaintiff must prove each of the following five elements in relation to a § 1983 procedural due process claim:

(1) that he was deprived of a protected liberty or property interest; (2) that this deprivation was without due process; (3) that the defendant subjected the plaintiff, or caused the plaintiff to be subjected to, this deprivation without due process; (4) that the defendant was acting under color of state law; and (5) that the plaintiff suffered injury as a result of the deprivation without due process.

Id. (citing *Sample v. Diecks*, 885 F.2d 1099, 1113-14 (3d Cir. 1989)).

Defendants argue that Plaintiffs failed to state a procedural due process claim because Plaintiffs do not have a property interest in their horse racing licenses. (Br. in Supp. of Mot. to Dismiss at 3.) In support, Defendants note that the state legislature enacted legislation specifically stating that no property interest exists in such licenses. 4 P.S. § 325.213(a) (“Each commission shall license trainers, jockeys, drivers, persons participating in thoroughbred and harness horse race meetings, horse owners and all other persons and vendors exercising their occupation or employed at thoroughbred and harness horse race meetings. *The license gives its holder a privilege to engage in the specified activity, but the license does not give its holder a property right.*”) (emphasis added); *see also* 4 P.S. § 325.209(a) (“Any corporation desiring to conduct horse race meetings at which pari-mutuel wagering shall be permitted may apply to the appropriate commission for a license. *The license gives its holder the privilege to conduct horse race meetings at which pari-mutuel wagering is permitted. The license does not give its holder a property right.*”) (emphasis added.)

In response, Plaintiffs contend that, notwithstanding the above-quoted statutory language, Pennsylvania regulations nevertheless grant a set of procedural rights to licensees facing ejection. (Br. in Opp. to Def.'s Mot. to Dismiss at 3.) Plaintiffs cite to regulations that require a timely hearing following an ejection. (*Id.*) (citing 58 Pa. Code § 165.213(b & c)). Thus, in Plaintiff's view, the regulations provide certain due process protections of which they were deprived as a result of Defendants' failure to hold hearings on the ejections. (*Id.*) Plaintiffs also claim procedural due process violations in light of the harm and loss caused by their ejections. (*Id.*) Plaintiffs argue that ejection is more serious than a suspension because, unlike a suspension, ejection requires that the licensees' horses be removed from the grounds. (*Id.*) Thus, Plaintiffs claim that they suffered irreparable harm and a grievous loss to an even greater extent than they would have had they been merely suspended because, not only were they precluded from racing, but they were also forced to undertake efforts to remove the horses. (*Id.*)

Our disposition of this motion hinges in part on whether Plaintiffs' licenses constitute a property interest sufficient to invoke protection of the Due Process Clause. Notwithstanding the brevity of the parties' briefs, our review of relevant caselaw suggests that this issue is not as clear-cut as the parties contend. For the reasons set forth below, the court finds that Plaintiffs' complaint sufficiently pleads a cause of action to withstand Rule 12(b)(6) scrutiny and therefore the motion to dismiss will be denied.

Arguably, our analysis could end with a plain reading of the Pennsylvania statute that explicitly states "the license does not give its holder a property right." 4 P.S. § 325.213(a); 4 P.S. § 325.209(a). Notably, however,

Defendants are unable to point to any controlling caselaw that interprets this language. Rather, Defendants cite to *Jackson v. Miller*, 93 B.R. 421 (W.D. Pa. 1988), which is distinguishable from the case at bar. In *Jackson*, the court analyzed similar statutory language pertaining to *liquor* licenses in a *bankruptcy* context. The court noted that amended statutory language that states “the license shall continue as a personal privilege granted by the board and nothing therein shall constitute the license as property” prevented a liquor license from being considered property or a valid security interest under the Uniform Commercial Code. *Id.* at 422-23 (quoting 47 P.S. § 4-468(b.1)). The Defendants also cite *Hawkeye Commodity Promotions, Inc v. Vilsack*, 486 F.3d 430, 440 (8th Cir. 2007). In that case, the Eight Circuit Court of Appeals similarly found that a monitor vending machines (MVM) retailer license is considered a privilege, not a legal right, under Iowa regulations, and therefore it cannot be sold, assigned or transferred. Thus, the court found the license lacks the indicia of a property interest for the purposes of the Takings Clause. *Id.* However, neither case is binding on this court and neither case addresses whether a race horse trainer’s or owner’s license constitutes a property interest for the purposes of assessing a procedural due process claim.

Precisely what constitutes a property interest is an inquiry that evades clear definition. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 206, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause. . . .”). It has been said that a person has a property interest in benefits to which that person “has a legitimate claim of entitlement.” *Board of Regents v. Roth*, 408 U.S. 564, 577. The Supreme Court’s decision in *Barry v. Barchi*, 443 U.S. 55 (1979) is instructive. In that case, John Barchi, a licensed

harness race trainer, was advised by the New York State Racing and Wagering Board that one of his horses tested positive for a prohibited substance. As a result, Barchi's license was suspended for fifteen days. The Court ultimately held that the suspension violated the Due Process Clause of the Fourteenth Amendment because Barchi was not afforded the opportunity for a prompt post-suspension hearing. In determining that Barchi had a property interest in his license, the Court noted that, under New York law, a license may not be revoked or suspended at the discretion of the racing authorities. *Id.* at 64, n. 11. Rather, a suspension may ensue only upon a showing of cause. As a result, the Court determined that "state law has engendered a clear expectation of continued enjoyment of the license absent proof of culpable conduct by the trainer" and therefore Barchi asserted a "legitimate claim of entitlement . . . that he may invoke at a hearing." *Id.* (citations omitted). The Court summarized its holding as follows:

[U]nder New York law, Barchi's license could have been suspended only upon a satisfactory showing that his horse had been drugged and that he was at least negligent in failing to prevent the drugging. As a threshold matter, therefore, it is clear that Barchi had a property interest sufficient to invoke the protection of the Due Process Clause.

Id. at 64.

Relying in part on *Barry*, the Fifth Circuit Court of Appeals similarly held that a licensee had a protected property interest in his horse racing license. *Hudson v. Tex. Racing Comm'n*, 455 F.3d 597 (5th Cir. 2006). In *Hudson*, the plaintiff owned and trained race horses. As in *Barry*, one of the plaintiff's horses tested positive for an illegal substance. Addressing the issue of whether a horse

trainer licensed by the Texas Racing Commission has a constitutionally-protected property right in a racing license, the court stated:

Certain provisions of Texas law . . . lead us to conclude that such a right exists. The Texas Administrative Code provides that a license issued by the Commission may be denied, suspended, or revoked after notice and a hearing. 9 Section 311.6(b) enumerates several grounds for the denial, revocation, and suspension of racing licenses, including, among others, violations of racing rules, a felony conviction, a conviction of a crime of moral turpitude that is reasonably related to the licensee's fitness to hold a license, and providing false information in a license application. Based on the above provisions, we conclude that Hudson has a protected property interest in his racing license.

Id. at 600 (referencing *Barry*, 443 U.S. at 64 & n.11).

Barry and *Hudson* in essence hold that the creation of a property right in a racing license depends, at least in part, on whether there must be a showing of cause in order to uphold a revocation or suspension.¹ Here, the relevant statute states:

Any corporation desiring to conduct horse race meetings at which pari-mutuel wagering shall be permitted may apply to the appropriate commission for a license. The license gives its holder the privilege to conduct horse race meetings at which pari-mutuel wagering is permitted. The license does not give its holder a property right. If, in the judgment of the appropriate commission, the public interest, convenience or necessity will be served and a proper case for the issuance of the license is shown, the appropriate commission may issue the license. *The license*

¹ The complaint does not state that Plaintiffs' licenses were revoked or suspended; rather it claims that Plaintiffs were "ejected" and were required to leave the property. In Plaintiffs' response to the instant motion, Plaintiffs argue that an ejection is a more severe sanction than a suspension because an ejection requires that the licensee's horses leave the grounds while a suspension does not. (Doc. 15 at 3.) In neither instance are the horses allowed to race. Therefore, for the purposes of resolving this motion, the court finds there to be no legal distinction between an "ejection" and a "suspension" or "revocation" and the court notes that Defendants do not assert any argument based on this distinction.

shall remain in effect so long as the licensed corporation complies with all conditions, rules and regulations and provisions of this act. A commission may revoke or suspend the license of any corporation, if the commission finds by a preponderance of the evidence that the corporation, its officers, employees or agents, has not complied with the conditions, rules, regulations and provisions of this act and that it would be in the public interest, convenience or necessity to revoke or suspend the license. A license is not transferable.

4 P.S. § 325.209(a) (emphasis added). Thus, the statute requires a very specific showing be made in order to uphold the revocation or suspension of a racing license in the sense that the Commission must find, by a preponderance of the evidence, a violation of the Race Horse Industry Reform Act, 4 P.S. § 325.101, *et seq.* Accordingly, here, as in *Barry*, the state law has engendered a clear expectation of continued enjoyment of the licenses absent proof of culpable conduct by Plaintiffs. Under *Barry* and *Hudson*, this is enough to create a property interest in Plaintiffs' licences, notwithstanding the statutory language to the contrary.

Defendants argue in their reply brief that Plaintiffs' livelihood will not be affected by the ejection because "the ejection . . . only prevented [Plaintiffs] from racing their horses at Penn National [and] Plaintiffs are free to continue to pursue their livelihood at other race tracks . . ." (Doc. 16 at 3.) As a general rule, it is well recognized that:

Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Barry, at 70 (Brennan, J., concurring) (citing *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 39 U.S. 96 (1978); *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Further, “the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer a grievous loss.” *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Plaintiffs claim, and Defendants do not deny, that the ejection prevented Plaintiffs from racing at Penn National. It is unclear to what extent the ejection might impart a grievous loss or affect Plaintiffs’ livelihood because the record does not reflect the extent to which Plaintiffs raced at Penn National or if, for that matter, horse racing is Plaintiffs’ primary occupation or livelihood. Although nothing in the record indicates that Plaintiffs are barred from racing at other racetracks, it seems intuitive that the ejection will likely affect Plaintiffs’ livelihood to some extent. In any event, Defendants’ attempt to minimize the affect that the ejection has had (or will have) on Plaintiffs’ livelihood does not warrant dismissal of Plaintiffs’ due process claims.²

To the extent that Defendants argue that the Plaintiffs’ licenses should be characterized as a privilege as opposed to a right (*see* Doc. 16 at 2) (referencing

² Moreover, a Pennsylvania federal court has held that a horse trainer’s denial of access to a race track that, in turn, led to a loss of work at the racetrack was tantamount to a loss of a constitutionally protected property right. In *Whetzler v. Krause*, 411 F. Supp. 523 (E.D. Pa. 1976), the plaintiff, a thoroughbred horse trainer, was licensed to engage in horse training by the Commission. Without notice or hearing, the plaintiff’s license was revoked. Following a hearing in front of the Commission, the plaintiff’s license was reinstated, but he was still denied access to, and the right to work at, the racetrack. Plaintiff’s complaint alleged §§ 1983 and 1985 civil rights violations. Defendants filed a motion to dismiss, contending, *inter alia*, that the plaintiff’s claim did not involve a constitutional right. The court disagreed and held that the revocation had “the effect of restraining him in the enjoyment of constitutionally protected rights – to wit, ‘property’ in the loss of his job and ‘liberty’ in seriously affecting, if not destroying, his ability to obtain employment. . . .” *Id.* at 527 (citing *Greene v. McElroy*, 360 U.S. 474 (1959)).

Hawkeye, 486 F.3d at 440, for the proposition that there is no property right in a gambling license where the statute characterizes the license as a privilege, not a right), the court is not persuaded by this argument because the Supreme Court has “fully and finally” rejected the distinction between “rights” and “privileges” that once governed the applicability of procedural due process rights. *Roth, supra*, at 571.

Defendants’ argument that the language of the statute expressly precludes a procedural due process claim is somewhat perplexing in light of the hearing rights guaranteed to a licensee facing ejection. For example, 58 Pa. Code § 165.231, entitled “Hearing rights” provides, in part:

b) At the time of or immediately following ejection of or denial of access to a licensee, the association or Commission agents acting therein shall advise the licensee in writing of his right to demand a hearing by mailed service of the form of notice as shall from time to time be prepared and supplied by the Commission. The form of notice shall be in a form prepared by the Commission and shall be mailed to the most current licensed address of the ejectee by certified return receipt mail.

c) The notice shall advise the ejectee that he shall have a right to demand a hearing upon the ejection if written demand for the same is served upon the association in question and is received by the executive offices of the Commission no later than 48 hours following receipt by the ejectee of the notice confirming ejection. If an ejectee shall timely file a demand for a hearing, the hearing shall be scheduled within 48 hours of the time of receipt of the demand or as soon thereafter as possible. The hearing shall be at the executive offices of the Commission. Notice of the date and time of the hearing shall be forwarded to the most current licensed address of the ejectee and to the executive office of the association.

58 Pa. Code § 165.231(b & c). Moreover, 4 P.S. § 325.215 provides that any ejection shall be reviewable by the Commonwealth Court. (“The action of the commissions in refusing any person admission, or ejecting him from, a race meeting ground or enclosure shall not be because of the race, creed, color, sex, national origin or religion of that person and shall be reviewable by the Commonwealth Court.”). At this point, the record is not clear as to precisely which of these guarantees, if any, were provided to the Plaintiffs. Such facts could be material to Plaintiffs’ due process claims. The only facts that are clear, and apparently undisputed, are that Plaintiffs were ejected from Penn National; Plaintiff Adamo (and later Plaintiff Gill) requested a hearing on the ejection orders; in neither case was a hearing held. (Complaint at ¶¶ 29, 31, 35, 39, 41, 80).

In short, the court does not find Defendants’ argument that Plaintiffs’ licenses do not constitute a property right sufficiently compelling to grant dismissal of Plaintiffs’ procedural due process claims. Moreover, the facts at this early stage, particularly when viewed in the light most favorable to the Plaintiffs, do not warrant dismissal. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: March 10, 2011.

