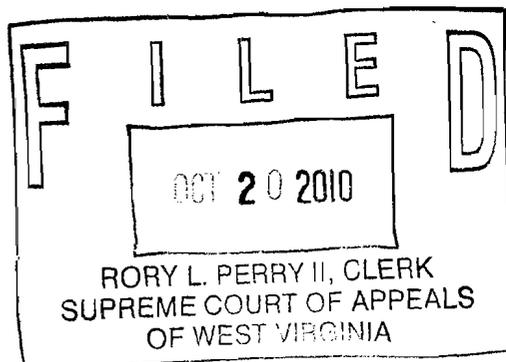


No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**LAWRENCE REYNOLDS, ANTHONY MAWING,
ALEXIS RIOS-CONDE, JESUS SANCHEZ,
DALE WHITTAKER, LUIS PEREZ, and
TONY A. MARAGH,**

Plaintiffs/Petitioners below,



v.

THE WEST VIRGINIA RACING COMMISSION,

Defendant/Respondent below.

**FROM THE CIRCUIT COURT OF KANAWHA COUNTY
THE HONORABLE PAUL ZAKAIB, JR.
CIVIL ACTION 09-C-688**

**RESPONSE OF THE WEST VIRGINIA RACING COMMISSION
TO PETITION FOR APPEAL OF PNGI CHARLES TOWN GAMING, LLC**

I.

INTRODUCTION

The West Virginia Racing Commission, by counsel, Kelli D. Talbott, Deputy Attorney General, and Anthony D. Eates II, Assistant Attorney General, responds to the Petition for Appeal filed in this matter in the Circuit Court of Kanawha County on September 20, 2010. This appeal centers on one question: Who regulates thoroughbred racing in the State of West Virginia -- the Racing Commission or the racetracks that are licensed by the Commission to conduct racing and

pari-mutuel wagering? The Racing Commission urges this Court to accept this appeal and hold that the racetrack's right to eject permit holders from its property is not an unfettered right -- it must yield to the orders of the Racing Commission in cases involving persons who hold valid Commission-issued occupational permits.

In May 2010, after five days of testimony, the Racing Commission entered an order suspending seven jockeys for engaging in corrupt and fraudulent practices. Given the seriousness of the jockeys' infractions, the Commission suspended each jockey for thirty days and imposed upon each jockey the maximum fine of one-thousand dollars. In June 2010, over the objection of the Racing Commission, the Circuit Court stayed the Commission's order pending the jockeys' administrative appeal. The racetrack, indicating that it desired to eject the jockeys from its premises for an unspecified period of time, sought clarification from the Circuit Court to allow it to eject the jockeys despite the administrative appeal. The Circuit Court enjoined the track from ejecting the jockeys, finding that the Commission's proceedings and its review of the jockeys' Circuit Court appeal would be pointless if the track could simply eject the jockeys for however long it saw fit. The track now appeals the Circuit Court's order to this Court.

In this response, the Racing Commission specifically addresses one of the assignments of error raised by PNGI Charles Town Gaming, LLC (hereinafter PNGI) which pertains to the claim that the Circuit Court's injunction prohibiting PNGI from ejecting the seven jockeys (the Plaintiffs/Petitioners below) from the Charles Town racetrack infringes upon its property rights. PNGI's appeal essentially contests two orders, one entered on April 16, 2009 by the Honorable L. D. Egnor, Jr. (for Judge Zakaib in his absence) and one entered on June 3, 2010 by the Honorable Paul Zakiab, Jr., in which PNGI was enjoined from ejecting the seven jockeys during the pendency

of a Racing Commission administrative hearing on the suspension of the jockeys' permits for violations of the Commission's Thoroughbred Racing Rule, 178 W. Va. C.S.R. 1, and during the pendency of an administrative appeal filed by the jockeys contesting the Commission's permit suspension order arising out of the administrative hearing.

The extent of a licensed West Virginia racetrack's property right to eject Racing Commission permit holders was placed squarely before this Court in appeals filed by the Racing Commission and three permit holders on January 29, 2010 in the matter of *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Nos. 100098 and 100099. In these appeals, the Racing Commission and three permit holders sought reversal of an order entered by the Honorable Charles E. King, Kanawha County Circuit Court, in which Judge King held that the racetrack had an unfettered right to eject those who hold Racing Commission-issued permits to come onto the racetrack and engage in their racing-related occupations without any right to a hearing or any other review by the Racing Commission. On March 30, 2010, this Court refused to hear the appeals of Judge King's order.

Because Judge King's ruling in *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.* and the rulings entered by the Judges Egnor and Zakaib that PNGI now appeals in this matter are inconsistent with regard to the issue of the racetrack's right of ejectment, the Racing Commission urges this Court to hear PNGI's appeal and resolve the issue.

II.

KIND OF PROCEEDING, NATURE OF RULING BELOW AND PERTINENT FACTS

This matter first arose as a result of a ruling by the Charles Town Stewards¹ to impose a thirty day suspension upon the occupational permits issued by the Racing Commission to seven jockeys as a result of a finding that the seven jockeys had engaged in fraudulent conduct in conniving with the Clerk of Scales² to cover-up their weights³ prior to racing at Charles Town racetrack. Immediately after the Stewards' ruling, PNGI notified the jockeys of their ejection from the racetrack for a thirty day period. (4/16/09 3:00 p.m. Tr. at 4.) Thereafter, the seven jockeys filed suit against the Racing Commission in the Circuit Court of Kanawha County seeking damages and injunctive relief for alleged due process infractions in the conduct of the Stewards' proceedings leading up to the ruling of permit suspension.

On April 16, 2009 at approximately 10:00 a.m., the Honorable L. D. Egnor, Jr., acting in Judge Zakaib's absence, issued a Temporary Restraining Order (TRO) against the Racing

¹ The Stewards are the racing officials at the racetrack that represent the Racing Commission in the supervision and regulation of thoroughbred horse racing.

² The Clerk of Scales is a racing official employed by the racetrack and issued a permit by the Racing Commission to conduct the weigh-outs of jockeys in advance of racing. The Clerk of Scales' permit was indefinitely suspended by the Stewards for his part in the wrongful conduct and such suspension was ultimately upheld by the Racing Commission. The Clerk of Scales was ejected indefinitely by PNGI from the Charles Town racetrack as well. The Clerk of Scales' case was not before the Circuit Court of Kanawha County and is therefore not part of the appeal before this Court.

³ Under the Commission's Thoroughbred Racing Rule, jockeys are required to "weigh-out" on a scale so that their weights may be announced to the betting public in advance of racing. Weights are assigned to thoroughbreds based upon a variety of factors including, the race record of the thoroughbred. The heaviest weights are typically assigned to the thoroughbreds with better race records and the lightest weights to those with the weakest race records. Assignment of various weights is done to even the field and to attempt to make races more competitive. Once the jockey weights are announced, the betting public may then use the information in determining on which thoroughbreds to place bets and the owner/trainer of the horse may determine whether or not they wish to allow the jockey to ride overweight on his or her horse.

Commission in which the Commission was enjoined from suspending the jockeys' permits until such time as a *de novo* hearing was held before the Commission on the jockeys' appeal of the Stewards' suspension ruling.⁴

After discussions between the jockeys' counsel and PNGI's counsel broke down with regard to whether or not PNGI would honor the TRO issued against the Racing Commission and lift its thirty day ejection, the parties and PNGI appeared back before Judge Egnor later in the day on April 16, 2009 to address the issue of whether or not the racetrack should be restrained from ejecting the jockeys pending the outcome of the administrative hearing before the Racing Commission. At 3:00 p.m. on April 16, 2009, Judge Egnor extended the TRO to PNGI and enjoined it from ejecting the jockeys pending the outcome of the Commission's administrative hearing.

The Commission, with the agreement of the jockeys, appointed Jack McClung, Esquire, to preside over the administrative hearing. The three-member Commission itself was also present, either in person or by telephone. Mr. McClung conducted the hearing over five days in August and September 2009. He rendered a Recommended Decision to the Commission on April 22, 2010 finding that the jockeys' willful participation in the chaotic and farcical weigh-outs was "dishonest, corrupt, fraudulent and detrimental to racing" and that they connived with the Clerk of Scales to engage in such conduct, all in violation of the Thoroughbred Racing Rules, 178 W. Va. C.S.R. §§ 60.1 and 60.5. (Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order at 27 -28.)

⁴The Racing Commission has a two-tier administrative hearing process. The Stewards are authorized to hold hearings and take action against permit holders at the racetrack level. If a permit holder is adversely affected by a Stewards' ruling, he or she may appeal that ruling for a *de novo* hearing before the Racing Commission. The seven jockeys in this matter did in fact appeal the Stewards' suspension ruling to the Racing Commission.

By Order entered May 21, 2010, the Commission adopted the Hearing Examiner's Recommended Decision insofar as it was consistent with its own final order. The Commission found that the jockeys did indeed "connive" with the Clerk of Scales in a "corrupt" practice. The Commission ultimately levied thirty day suspensions against the jockeys' occupational permits and imposed one-thousand dollar fines to each jockey. The Commission initially granted a stay of its own order pending a Circuit Court appeal upon the request of the jockeys' counsel, but then lifted that stay effective June 1, 2010 after concluding that West Virginia Code § 19-23-17 precluded the granting of a stay.

On May 24, 2010, PNGI filed a motion with the Circuit Court seeking confirmation that the TRO issued against it with regard to the ejection of the jockeys had expired so that it could eject the jockeys from its premises. Although PNGI's initial ejection of the jockeys was for a thirty day period, it did not specify in its motion whether or not it intended to keep the ejection at thirty days or extend the ejection for a longer period of time.

On June 1, 2010, the jockeys appealed the Commission's Order to the Circuit Court of Kanawha County and on that same date, the Circuit Court granted a stay of the Commission's suspension order until a full hearing could be held on June 3, 2010 on whether the stay should be extended for an additional period of time.

On June 3, 2010, the Circuit Court, the Honorable Paul Zakaib, Jr. presiding, extended its stay of the Commission's suspension order pending the outcome of the jockeys' Circuit Court appeal of the same. In addition, the Circuit Court denied PNGI's motion to allow it to eject the jockeys from the racetrack and ordered that it could not eject the jockeys pending the outcome of the appeal. In denying PNGI's motion, Judge Zakaib noted that to allow the track to eject the jockeys would

essentially render the appeal before him moot and would allow the track the right to “supercede” the Court’s stay. (6/3/10 Tr. at 41-43.)

PNGI now appeals this matter to this Court. However, it should be noted that the jockeys’ appeal of the Commission’s suspension order is still pending disposition by the Circuit Court. Accordingly, the Circuit Court’s stay of the Commission’s order is still in effect and the Circuit Court’s injunction of the track’s intended ejection remains.

III.

ARGUMENT

THE EXTENT OF A LICENSED WEST VIRGINIA RACETRACK’S PROPERTY RIGHT TO EJECT RACING COMMISSION PERMIT HOLDERS HAS NEVER BEEN ADDRESSED BY THIS COURT AND THEREFORE THE COURT SHOULD TAKE THIS APPEAL AND RENDER A DECISION THAT THE RACETRACK’S RIGHT OF EJECTION IS NOT UNFETTERED AND THAT IT MUST YIELD TO THE ORDERS OF THE RACING COMMISSION IN CASES INVOLVING PERSONS WHO HOLD VALID COMMISSION-ISSUED OCCUPATIONAL PERMITS.

This matter goes to the very core of the Racing Commission’s regulatory authority over the racetracks that it licenses and the persons to whom it issues permits to engage in occupations and business on those licensed racetracks. While the Commission shares PNGI’s concern about the racing integrity breach presented by the jockeys’ misconduct, the Commission believes that it should be the arbiter of what the appropriate penalty is for its permit holders who violate the rules of racing. The racetracks that the Commission licenses should not be permitted to “trump” the Commission’s determinations on the appropriate punishment for rule violations by effectively deciding whether or not the Commission’s permit holders can use their permits on the racetracks once the punishment imposed upon permit holders is served out.

To the extent that PNGI seeks to eject the seven jockeys in excess of the thirty day permit suspension imposed by the Racing Commission and despite the fact that such permit suspension is pending appellate review by the Circuit Court of Kanawha County, such action guts the Racing Commission's authority over its licensed racetracks and its permit holders, and usurps the Court's role in reviewing the Commission's decision. Simply put, pursuant to PNGI's apparent position, if a person holds a permit issued by the Racing Commission which authorizes him to engage in his occupation or business on the racetrack, the racetrack can kick him off anyway; can do so without due process of law; can do so for any reason; can do so without any review, oversight or check and balance by the West Virginia Racing Commission or the courts; and, can do so despite the fact that the permit holder may have served the permit suspension that the Commission determined was appropriate for the misconduct.

Taking PNGI's position to its logical end, the permits that the Racing Commission issues and the due process proceedings that it conducts to determine the appropriate punishment for permittee rule violations are meaningless because it is the racetracks who ultimately decide who gets to participate in racing. Granting the authority to the racetracks to unilaterally eject racing permit holders without any check by the Racing Commission is to allow the tail to wag the dog. It effectively allows racetracks to usurp the Racing Commission's regulatory authority and to engage in the *de facto* revocation of Racing Commission-issued permits without due process and despite the fact that the Commission may determine that revocation is not warranted for a permit holder's misconduct.

The seven jockeys are required pursuant to West Virginia Code § 19-23-2 and 178 W. Va. C.S.R. 1, § 43 to hold occupational permits issued by the Racing Commission in order to engage in

their occupations on West Virginia thoroughbred racetracks. Moreover, Charles Town Races must (and does) hold a license issued by the Racing Commission pursuant to West Virginia Code § 19-23-1(a) and 178 W. Va. C.S.R. 1, § 8 in order to conduct thoroughbred horse racing. Charles Town is one of only two licensed thoroughbred racetracks in West Virginia. The other track, Mountaineer Racetrack, is in Chester, West Virginia, a five hour drive from Charles Town.

Pursuant to West Virginia Code § 19-23-6, the Racing Commission “has full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in holding or conducting of horse or dog race meetings and, in this regard, it has plenary power and authority” The Racing Commission is the only entity with the authority to issue permits to those who wish to engage in racing-related occupations. Charles Town Races has no such authority. The fact that Charles Town gets to hold horse racing at all is due to a grant of licensure by the State. The State has the power to regulate or even to abolish horse racing if it sees fit. *Hubel v. West Virginia Racing Commission*, 376 F. Supp. 1 (S.D.W.Va. 1974); *Tweel v. West Virginia Racing Commission*, 76 S.E.2d 874 (W. Va. 1953); *State ex rel. Morris v. West Virginia Racing Commission*, 55 S.E.2d 263 (W. Va. 1949).

The issuance of a permit by the Racing Commission means something. The United States Supreme Court has recognized that those who are issued occupational permits by a state racing authority have a property interest in their permit sufficient to invoke due process protections. *Barry v. Barchi*, 443 U. S. 55 (1979). Allowing licensed racetracks to unilaterally eject racing permit holders plainly usurps the Racing Commission’s regulatory authority and allows them to essentially revoke state-issued permits without due process. *See Wolf v. Louisiana State Racing Commission*, 545 So. 2d 976, 980 (La. 1989) (“[T]he unilateral exclusion of a permittee by the [track] is

inconsistent with the procedures established by the legislature for revocation of a license or the privileges thereunder, which require notice and a hearing.”)

Moreover, because the law requires the Commission to provide notice and a hearing to its permit holders before it may take action against their permits, its due process proceedings mean something as well. But, pursuant to the racetrack’s position in this appeal, those proceedings mean nothing because the track can completely ignore the ultimate decision rendered against a permit holder, like the thirty day suspension imposed upon the seven jockeys, and kick the jockeys off of the racetrack for life.

While it is true that there is another licensed thoroughbred track in Chester, West Virginia where the seven jockeys may work under their permits in the event that they are ejected from Charles Town, one cannot ignore that the track in Chester is a five hour drive from the Charles Town area. The permits that the Commission issues to jockeys and other racing occupation holders are meant to be valid on all West Virginia racetracks. The racetrack’s position is that it should get to decide whether a Commission-issued permit is good on its racetrack.

Moreover, under Judge King’s decision in *PNGI v. Charles Town Gaming, LLC v. West Virginia Racing Commission*, which the track seeks to have this Court apply in reversing Judges Egnor and Zakaib, there is absolutely nothing that prohibits Mountaineer Racetrack from also unilaterally barring the jockeys from its premises. Under such a scenario, the Racing Commission could exercise its authority to issue permits ad nauseam and it would mean absolutely nothing. The permits would be meaningless and the tracks would be the sole arbiters of who gets to race in West Virginia.

However, whether it is one track that seeks to exclude, as is the situation presented in this case, or both, one must recognize that engaging in an occupation related to horse racing in this State is not like engaging in the practice of law, or dentistry, or land surveying or many other occupations for which the State requires a license. While lawyers, dentists and land surveyors can hang out a shingle anywhere they wish within the confines of the State's boundaries and practice their occupations, horsemen and jockeys (and other racing-related practitioners) have only two tracks on which to work in the State of West Virginia. Therefore an ejection by one or both of the tracks directly and substantially impacts a permit holder's ability to use his permit.

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.”)

To allow the unilateral ejection of permit holders despite what the Commission has decided is the appropriate punishment for a rule violation, is to render the Racing Commission’s permits subject to the control of the racetracks that it licenses. This scenario is in direct contradiction to the plenary regulatory authority that is granted to the Racing Commission by the Legislature and confounds reason and the law.

Deciding whether or not a permit holder gets to race and/or whether he should be precluded from racing for a specified period of time is not interference in the internal business or internal affairs of a licensed racetrack. Deciding whether a permit holder can race is at the core of the Racing Commission’s regulatory function. The track is not a Wal-Mart or a private citizen’s home. It is a gambling enterprise that owes its very existence to a grant of authority from the State of West Virginia. One doesn’t have to get a permit from the State to enter Wal-Mart to shop or to visit a friend in his private home. One does, however, have to obtain a permit from the State of West Virginia to come on a licensed racetrack to race horses, to ride horses, to groom horses, to give veterinary care to horses, etc. To characterize a licensed racetrack as a private enclave where the property owner is free to do as it wishes without regulatory oversight is to miss the point entirely as to the nature of the State’s racetracks.

IV.

CONCLUSION

WHEREFORE, based upon the foregoing, the West Virginia Racing Commission respectfully requests that this Court grant PNGI's Petition for Appeal and render a decision that the racetrack's right of ejection is not unfettered and that it must yield to the orders of the Racing Commission in cases involving persons who hold valid Commission-issued occupational permits.

Respectfully submitted,

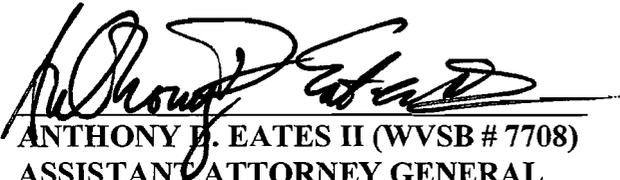
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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing **RESPONSE OF THE WEST VIRGINIA RACING COMMISSION TO PETITION FOR APPEAL OF PNGI CHARLES TOWN GAMING, LLC** was served by depositing the same postage prepaid in the United States Mail, this 20th day of October, 2010, addressed as follows:

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