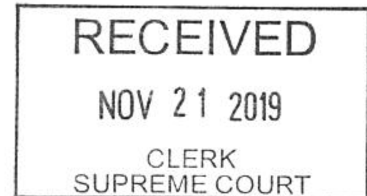

SUPREME COURT OF KENTUCKY
2018-SC-000630-TG

THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION, **APPELLANT,**

ON TRANSFER FROM
KENTUCKY COURT OF APPEALS
NO. 2018-CA-001689
ON APPEAL FROM
VS. **FRANKLIN CIRCUIT COURT**
CASE NO. 10-CI-01154
HONORABLE THOMAS D. WINGATE

THE KENTUCKY HORSE RACING COMMISSION, et al., **APPELLEES.**

REPLY BRIEF OF APPELLANT, THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION TO (I) KENTUCKY HORSE RACING COMMISSION, (II) ELLIS PARK RACE COURSE, INC., KENTUCKY DOWNS, LLC, AND LEXINGTON TROTS BREEDERS ASSOCIATION, LLC, AND (III) CHURCHILL DOWNS INCORPORATED

Respectfully submitted,

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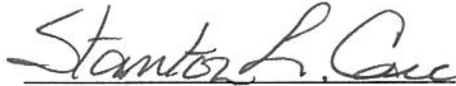
[REQUIRED CERTIFICATES ARE ON BACK OF FRONT COVER]

CERTIFICATES REQUIRED BY CR 76.12(5) AND (6)

I do hereby certify that copies of the foregoing were mailed, by depositing same in the United States Mail, first class, postage prepaid, addressed to the following: Carmine G. Iaccarino, Esq., Office of Legal Services, Kentucky Public Protection Cabinet, 656 Chamberlin Avenue, Suite B, Frankfort, KY 40601, Carmine G. Iaccarino, Esq., Public Protection Cabinet, 500 Mero Street, 5th Floor, Frankfort, KY 40601, John Forgy, Esq., Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington, KY 40511, Richard W. Bertelson, III, Esq., Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40602-0423, Jay E. Ingle, Esq., William A. Hoskins, Esq., Christopher F. Hoskins, Esq., Jackson Kelly, PLLC, 100 West Main Street, 7th Floor, Lexington, KY 40507, William M. Lear, Jr., Esq., Shannon Bishop Arvin, Esq., Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507-1801, Samuel D. Hinkle, IV, Esq., Brad S. Keeton, Esq., Stoll Keenon Ogden, PLLC, 200 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202-2828, Sheryl G. Snyder, Esq., Jason Renzelmann, Esq., Frost Brown Todd, LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202, Hon. Thomas Wingate, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601, Amy Feldman, Circuit Clerk, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601, Samuel P. Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this the 21st day of November 2019.

The undersigned further certifies that the record on appeal was not checked out from the Franklin Circuit Clerk's Office.



Stanton L. Cave, Esq.
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The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation

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MAY IT PLEASE THE COURT:

Appellant, The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation (the "Foundation"), hereby tenders its reply to the three responses from the appellees, (i) Kentucky Horse Racing Commission (the "Commission"), (ii) Ellis Park Race Course, Inc., Kentucky Downs, LLC, and Lexington Trots Breeders Association, LLC (collectively "Kentucky Downs"), and (iii) Churchill Downs Incorporated ("Churchill")(collectively herein, "Appellees").

PARTICULAR ISSUE TO WHICH THE REPLY IS DIRECTED (CR 76.12(e))

The primary issue is whether patrons are required to be wagering on the same event(s) to be engaged in pari-mutuel wagering as a matter of law. If legally required, the undisputed facts confirm that the requirement is not satisfied. The purpose of this reply is to address certain legal and factual arguments of the Appellees, including the application of *Appalachian Racing, LLC, v. The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation,* 423 S.W.3d 726 (Ky. 2014)(herein "*App. Racing*, p. ___").

REPLY TO COUNTERSTATEMENT

The Appellees' attempts to discredit the Foundation should be rejected. Their attacks on the Foundation's discovery efforts distract from the fact the Appellees began licensing and operating historical horse racing long *before* the legality thereof adjudged. This case began with one gaming platform, known as Instant Racing. It evolved into four gaming platforms with multiple gaming themes and math models associated with each platform. Before the Foundation understood Instant Racing, another gaming platform was approved and put in operation. Because the Court had remanded for whether the operation of all historical horse racing "as contemplated by Appellants" was pari-mutuel wagering,

it was incumbent on the Foundation to do its best to find out how each gaming system and the sub-themes/math models thereof operated. *App. Racing*, p. 742. Without a law change, every other jurisdiction in the nation which had considered historic horse racing proposals had rejected them.[1] With no facts in the petition about how the gaming operated and the lack of transparency at the Commission, discovery was tedious. Now some 7,500+ devices on which associated slot gaming systems operate have been approved by the Commission, while the question as to legality remains unanswered. Discovery has not always been cooperative. For example, discovery culminated with the Commission's document dump of tens of thousands of pages of documents on the Foundation at the end of discovery, only weeks before trial, with thousands of pages bearing dates more than a year earlier.

The Appellees' attack on the Foundation for bringing attention to irregularities distracts from the hundreds of thousands of dollars paid by non-associations to the Commission's consultant, Gaming Laboratories International, LLC ("GLI"). Those payments were not excused by 810 KAR 1:120, Section 5(2)(b), which permits integrity testing of devices to be paid by the association (racetrack) seeking approval. These payments included payments for GLI Reports to the Commission containing legal opinions that historical horse racing complied with the legal requirements of pari-mutuel wagering under 810 KAR 1:001, Section 1(48), notwithstanding that GLI's non-lawyer Richard LaBrocca acknowledged that "Legality does not fall within our jurisdiction." R. VR 1: 01/08/18; 10:20:45-10:21:30. The Appellees acknowledged that only payments by an association seeking approval was authorized. Yet the invoices and payments totaling

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[1]For example, in *Wyoming Downs Rodeo Events, LLC, et al., v. State of Wyoming et al.*, 134 P.3d 1223 (Wyo. 2006), the court rejected a claim that the instant racing was pari-mutuel wagering, stating: "Although it may be a good try, we are not so easily beguiled."

$860,849.67, included invoices to non-association Encore/Exacta for $357,100.95, to non-association AmTote for $189,328.69, and non-association KRM Wagering for $73,960.25. Foundation Trial Exhibit D-15. When asked how GLI was paid, Mr. LaBrocca confessed: "The Associations paid for all the testing … or, with the Racing Commission's blessings, the manufacturers paid for that." R. VR 1: 01/10/19; 9:50:35-9:50:57.[2] The Foundation believes that these payments violate KRS 521.010, *et seq.* In this case, the Court will decide if such payment arrangements are acceptable practice by Kentucky's state agencies.

Reference to the trial court's law clerk being an extension of the Kentucky Equine Education Project (KEEP), the state's leading advocate for expanded gaming, which is also represented by counsel for Kentucky Downs and Ellis Park, should also be of concern. The issue is not whether the trial court made up its own mind when entering the December 29, 2010 Opinion and Order which was authored by a KEEP associated lawyer/clerk, but whether the trial court was influenced by a KEEP-affiliated lawyer/clerk who, along with KEEP, boasted about their roles in bringing about historical horse racing. Even though partially reversed by *App. Racing*, the 2010 Opinion and Order permitted the Appellees immunity from criminal and civil liability for violation of the gambling laws while getting a foothold to operate gambling parlors with a dare for any court to stop them. *See* KRS 372.005[3]; KRS 501.070.[4] The law did not have to change. The Appellees simply needed

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[2]The Finance and Administration Cabinet did not approve contractual payments by third party non-associations manufacturers/vendors.

[3]KRS 372.005 "The terms and provisions of this chapter do not apply to betting, gaming, or wagering that has been authorized, permitted, or legalized, including, but not limited to, all activities and transactions permitted under KRS chapters 154A, 230, and 238."

[4]KRS 501.070 "(3) A person's mistaken belief that his conduct, as a matter of law, does not constitute an offense does not relieve him of criminal liability, unless such mistaken belief is actually founded upon an official statement of the law, afterward determined to be

immunity. Concern here is entirely validated by *In re Commonwealth of Kentucky, ex rel. v. Dickerson*, Civil Action No. 19-CI-00425 (Ky. September 27, 2019), where a "Like" on Facebook met the standard which "requires disqualification in circumstances where the judge's impartiality might reasonably be questioned."

The Appellees' false confidence is evidenced by the fact that after nine years of litigation they invite the Court to dismiss for lack of standing. Since both seek advisory declarations, if the Foundation lacks standing, so do the Appellees. "[T]he intervention of the Foundation cured the constitutional infirmity attendant to this matter when it lacked parties with adverse interest at stake." *App. Racing*, p. 735. Absent the Foundation's presence as a party, the requirement of a justiciable controversy would be missing. Finding that the Foundation lacks standing would mean a dismissal of the case and would *nun pro tunc* invalidate the *App. Racing* Opinion, the 2010 Opinion and Order of the Franklin Circuit Court, the agency approvals and significantly the associated judicial and agency immunity enjoyed by the Appellees.

The Commission attempts to discredit the Foundation's counsel for not citing to the record where issues were preserved for appeal. CR. 76.12(4)(c)(v). The Commission does not say that issues were not preserved, only that the Foundation neglected to cite to them. Each argument advanced by the Foundation relates to the single issue of whether historical horse racing is pari-mutuel wagering.[5] The Foundation was of the good faith belief that the

invalid or erroneous, contained in: (a) A statute or other enactment; or (b) A judicial decision, opinion or judgment; or (c) An administrative order or grant of permission; or (d) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."

[5]The last argument, Argument J, addressed an anticipated argument that the Appellees would make to continue operations if the slot gaming is found unlawful. Argument F

Court expected the case back following "proceedings relevant to the issue whether the licensed operation of wagering on historical horse racing as contemplated by Appellants constitute a pari-mutuel form of wagering." *App. Racing*, p. 742. Based on this, the Foundation provided more than seventy citations to the trial court record. With extremely limited resources, the Foundation has done its best to present full and complete citations to the law and the record. The Foundation's brief is in no way so deficient as to preclude the Court from reviewing the issues raised. Yet, if a noncompliance with CR 76.12(4)(c)(v) occurred, it was technical and unintentional. The Appellees' memories must be short. The Appellees had multiple failures to comply with CR 76.12 in the *App. Racing* case but were afforded an opportunity to do so. Copies of the multiple notices of deficiency are attached as Exhibit I.[6] Nevertheless, to assure compliance and that citations to the record are in the Foundation's papers, citations to the record where issues were preserved are cited below at the beginning of the Reply Argument. If the Court has a different view about the Foundation's compliance with CR 76.12, upon notice, like that afforded to the Appellees, the Foundation will promptly supplement with its apologies for any inconvenience.[7]

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should say that "Comingling a Discrete Wager With Prior Losses on Unrelated Events Is Not Mutuel Wagering and Is *Not* Placing All Wagers in a 'Wagering Pool'".

[6]Such posturing by the Appellees is reminiscent of the well-known parable of the "Unforgiving Debtor". Matthew 18:21-35. Bearing emphasis is the fact that the Appellees likewise failed to technically comply with the Civil Rules. The Commission and Churchill Downs failed to include a statement that the trial court record was returned. CR 76.12(6). The Commission's brief was not postmarked indicating that the Commission may have failed to comply with CR 76.12(5) regarding service. The Commission brief was received after the other briefs. The Commission made at least 15 erroneous references to the trial court record. CR. 76.12(4)(c)(v).

[7]*Kentucky Farm Bureau Mut. Ins. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015), the Court made clear the policy of hearing appeals on the merits and disfavoring dismissal as a remedy for violation of procedural rules. Such was permitted in *Krugman et al., v. CMI, Inc.*, 417 S.W.3d 167 (Ky. App. 2014) (Even though multiple issues were not cited, the

REPLY ARGUMENT

Statement of Preservation of Issues on Appeal.

The issues on appeal were preserved by (i) the Foundation's motion for directed verdict in which it argued, among other things, that participants were not wagering on the same events and that such requirement by 810 KAR 1:001, Section 1(48), was not satisfied (VR. 01/11/18, 1:04:12-1:10:15); (ii) the Foundation's post-trial brief, filed March 12, 2018, concerning the remand issue and pointing out that 810 KAR 1:001, Section 1(48) had to be applied consistent with the conception of pari-mutuel wagering in KRS Chapter 230 (R. at V. XXIII, pp. 3404-3407); (iii) the Foundation's proposed findings of fact, conclusions of law and judgment (R. at V. XXIII (included separately)); (iv) the Foundation's post-trial response brief, filed April 2, 2018, emphasizing the requirements of participants betting on the same race, reciprocity, pooling bets, payout odds, return of the pool to winning participants, a totalizator and the prohibition of fixed/static prizes (R. at V. XXIII (included separately)); and (v) the Foundation's post-trial reply brief, filed April 12, 2018, emphasizing application of the Regulatory Definition within the conception of KRS Chapter 230 (R. at V. XXIV, pp. 3480-3484).

A. The Central Question is Whether Patrons are Legally Required to be Wagering on the Same Race(s).

On page 18 of its brief, the Commission states: "That patrons wager on different races is immaterial to whether the patrons 'wager among themselves'". That patrons are not wagering on the same race(s) is an accurate factual summation of the evidence at trial about the Exacta Gaming System. As described in the Foundation's Brief, that status was

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filer was given 20 days to supplement). Such application is consistent with CR 76.12(8)(a) penalties for failure to comply with a *substantial* requirement of CR 76.12.

corroborated by the undisputed evidence that fixed mathematical formulas (rather than pari-mutuel payout odds) are applied to each player's discrete selections to calculate prizes, if any. The Commission's argument that patrons are not legally required to be wagering on the same race(s) is an inaccurate statement of law. For the reasons which follow, the Commission's and the trial court's conclusions of law that patrons do not have to be wagering on the same race(s) to be pari-mutuel wagering are erroneous.[8]

B. Every Element of the Regulatory Definition Must be Satisfied.

The Commission's regulatory definition of pari-mutuel wagering is: "a system of wagering approved by the Commission *in which patrons are wagering among themselves and* not against the association and amounts wagered are placed in one or more wagering pools and the net pool is returned to the winning patrons." [Emphasis added]. 810 KAR 1:001, Section 1(48) (the "Regulatory Definition"). To be pari-mutuel wagering, the gaming system must satisfy every legal element of the Regulatory Definition. The *App. Racing* Court understood, as did the Court of Appeals before it, that the status of the participants and the "form of pay-outs at the specific terminals under review" indicated whether the wagering was pari-mutuel wagering. *App. Racing*, p. 742. If not pari-mutuel, the wagering is outside the scope of the statutory authority of the Commission and is unlawful.

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[8]The Franklin Circuit Court stated: "Pari-mutuel wagering does not require patrons to wager on the same horseraces, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1 (48)". 2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p. 3574. Even though appearing in the Findings of Fact, the reference to 810 KAR 1:001, Section 1(48), confirms that the trial court was interpreting the legal requirements of the Regulatory Definition it was applying to the Exacta Gaming System.

C. Subsumed in the Words "Patrons are Wagering Among Themselves" is the Requirement that Participants must be Wagering on the Same Race(s) as Evidenced by Pay-Outs at the Terminals.

The Foundation is not adding requirements to the Regulatory Definition. According to the meaning of the words "patrons are wagering among themselves", participants are required to be wagering on the same race(s). That was the point of the Foundation's exercise in its brief of going through the meaning of the words: "wager", "wagering", "are wagering", "among", "themselves" and "pool", and its explanation that prizes were determined by fixed mathematical formulas instead of by pari-mutuel payout odds. Payout odds could not be used because participants were not betting on the same events. Words in statutes and in regulations have meaning. Ascertaining the meaning of those words which appear often requires application of definitional words which do not appear. For example, the word "wager", which appears subsumes words which give it meaning even though those words do not appear. This was exactly what this Court did initially in *App. Racing* as a matter of law.

Because "pari-mutuel wagering" was not defined in KRS Chapter 230, to ascertain the scope of the Commission's statutory authority, the *App. Racing* Court ascertained the meaning of the words "pari-mutuel wagering". The Court looked to the meanings of "pari-mutuel wagering" in *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 991 (Ky. 1931)(hereinafter "*Jockey Club*")[9] and the federal Interstate Horse Racing

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[9]The issue in *Jockey Club* was whether pari-mutuel was a lottery. "Lottery, it is said, is a species of gambling, defined as a scheme for the distribution of prizes or things of value, by lot or chance, among persons who have paid, or agree to pay, a valuable consideration for a chance to share in the distribution, or as a game or hazard in which small sums of money are ventured for the chance of obtaining a larger value of money or other articles." *Jockey Club*, pp. 992-93.

Act, 15 U.S.C. § 3001, *et seq*. (the "Interstate Horse Racing Act"). The Court was not finding facts. Finding facts was not possible due to the absence of an evidentiary record as a result of the Franklin Circuit Court having barred discovery, including on how pay-outs were determined. Thus, ascertaining the meaning of words in Chapter 230 was a judicial/court function with a resulting conclusion of law defining the Commission's statutory authority. The *App. Racing* Court found that in *Jockey Club,* pari-mutuel wagering was described as: "In French pool the operator of the machine does not bet at all. He merely conducts the game, which is played by the use of a certain machine, the effect of which is that *all who buy pools on a given race bet as among themselves*; the wagers of all constituting a pool going to the winner or winners." [Emphasis added]. *App. Racing*, p. 737. The *App. Racing* Court also found that § 3002(13) of the Interstate Horse Racing Act, defined pari-mutuel wagering as "any system whereby *wagers with respect to the outcome of a horserace* are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the *participants are wagering with each other* and not against the operator." [Emphasis added.] *App. Racing*, p. 737. Thus, any application of the Regulatory Definition has to be within the Commission's statutory authority of regulating pari-mutuel wagering as explained by *Jockey Club* and the Interstate Horse Racing Act. Based on *Jockey Club*, the Commission cannot apply the Regulatory Definition to permit gaming any broader than that in which "all who buy pools on a given race bet as among themselves". Based on the Interstate Horse Racing Act, the Commission cannot apply the Regulatory Definition to permit gaming any broader than that in which "participants are wagering with each other" and "with respect to the outcome of a horserace." While not appearing in KRS Chapter 230, these words are subsumed in

the statutory and Regulatory Definition. Based on this, an application of the Regulatory Definition of pari-mutuel wagering in a manner whereby *all who buy pools do not do so on a given race,* where *participants are not wagering with each other* and where pari-mutuel payout odds are not used would be outside the statutory authority of the Commission. Such is the case here.

Application of the definition of the words appearing in the Regulatory Definition compels the same conclusion as a matter of law. The *App. Racing* Court defined "wager" as "something risked or staked on an uncertain event" (*App. Racing*, p. 740, fn 14). Risking something on an uncertain event is subsumed by the word "wager". The Merriam-Webster Dictionary defines "Wager as: "1a: something (such as a sum of money) risked on an uncertain event: STAKE, 1b: something on which bets are laid: GAMBLE // do a stunt as a *wager*". [10] Added to this is the application of the words "are wagering" as they appear in the Regulatory Definition. The words "are wagering" make the word "wagering" a "participle present progressive" which means that the words "are wagering" refer to *presently* risking something of value on a *particular* occasion or event.[11] The words "are wagering" are modified by the words "among themselves". The words "among themselves" is a prepositional phrase describing how the "patrons are wagering".[12] In relevant part, Merriam-Webster Dictionary defines the word "among" as: "1: in or through

[10] 2019 http://www.merriam-webster.com/dictionary/wager (last visited July 25, 2019).

[11] *A Comprehensive Grammar of the English Language*, by Randolph Quirk, Sidney Greenbaum, Geoffrey Leech, Jan Svartvik, § 4.25 pp. 197-98, Copyright, Longman Group Limited 1985.

[12] *Grammar Essentials for Dummies*, by Geraldine Woods, Chapter 5, p. 145, Copyright, Wiley Publishing, 2010.

the midst of: surrounded by // hidden *among* the trees . . . 6a: through the reciprocal acts of". [13] "Themselves" means "those identical ones who are they".[14] Consistent with this, the word "pool" has an ordinary meaning as follows: "1. a: an aggregate stake to which each player of a game has contributed b: all the money bet by a number of persons on a particular event".[15] Again, pool subsumes the place where all the money spent to buy pools on a given event on which "patrons are wagering" is placed. The Foundation is not adding or subtracting words to the application of the Regulatory Definition. Words which give meanings to and are subsumed by the words which appear are to be applied in a manner consistent with the statutory authority of the Commission in KRS Chapter 230.

Appellees complain that the Foundation is adding the word "reciprocal" to the Regulatory Definition. First, such an argument disregards that "reciprocal" is subsumed in the meanings of the words "are wagering among themselves" and in "all who buy pools do so on a given event." Second, Kentucky Downs' argument supports the conclusion that reciprocity is subsumed in the meanings of "are wagering among themselves". Citing https://www.collinsdictionary.com/dictionary/french-english/mutuel, Kentucky Downs says that "pari-mutuel" means "mutual bet". Kentucky Downs Brief, p. 32. Citing the *Collins' French-English Dictionary*, Kentucky Downs says "mutuel" in French means "mutual" in English, while the French word for "reciprocal" is "reciproque". This same definition of mutuel, which says that "mutuel" means "mutual", provides that "You use

[13] 2019 https://www.merriam-webster.com/dictionary/among (last visited July 25, 2019).

[14] 2019 https://www.merriam-webster.com/dictionary/themselves (last visited November 16, 2019).

[15] 2019 https://www.merriam-webster.com/dictionary/pool (last visited August 4, 2019).

mutual to describe a situation, feel, or *action that is experienced, felt, or done by both of two people mentioned*." [Emphasis added]. This same *Collins' French-English Dictionary* also gives "mutual" two acceptable French translations (one of which is "mutuel"), which is: "1. (= common) [benefit, interest] commun(e) a mutual friend un ami commun; 2. (= reciprocal) [respect, understanding support] mutuel(le) * réciproque the feeling is mutual c'est réciproque.[16] Pari-mutuel pay-outs at the terminals reflect the reciprocal effect each participant has on another. The Exacta Gaming System must use mathematical formulas instead of pari-mutuel payout odds because participants are not betting on the same race(s).

The foregoing is corroborated by the testimony of the Foundation's uncompensated expert witness, Dr. Robert Molzon, a professor of mathematics at the University of Kentucky, who testified that the meaning of the French word "mutuel" means "reciprocal". Trial, Molzon VR 01/11/18 2:24:30 – 2:27:12. The Appellees mischaracterize Dr. Molzon's trial testimony by saying that Dr. Molzon said that mutuel wagering could be on different events. That was not Dr. Molzon's testimony. Rather, Dr. Molzon testified: "Uh . . . Again, it would depend upon how, what, how he meant the word 'event'. So, an uncertain event, the random event can have can be a compound event, could be a multiple, um, you know, multiple outcomes. So, you could, I could … could see a system in which you had, um, pari-mutuel wagering, um, in which people were wagering on different events. Yes, I could concoct … concoct a system like that. . . . But again, again, I think you have to be very careful what you mean by 'event' because one person would call part of a compound event a single event. . . . So, for example, the, so, if I roll two, if I roll two

[16] https://www.collinsdictionary.com.dictionary/french-english/mutual. Despite its argument that mutual and mutuel are the same on page 32 of its brief, Kentucky Downs posits that mutuel cannot be supplanted by a dictionary definition of mutual on page 37.

dice, is that one event or is it two?" Trial Molzon. VR1: 01/11/18 3:59:13-4:01:42. The Appellees further misquote Dr. Molzon saying that he testified that "among" simply means doing something together or collectively. Dr. Molzon actually testified: "Molzon: Uh, it's the definition of 'against', but it certainly is part of 'among', as well. Mr. Ingle: But 'among' doesn't require cause and effect, does it? Dr. Molzon: In the context of pari-mutuel wagering, it does. Mr. Ingle: And what's your basis for saying that? Dr. Molzon: Uh, 150 years of history of pari-mutuel wagering." Trial Molzon VR 01/11/18, 4:07:01-4:08:10.

D. Because the Requirements are Not Redundant, the Appellees are Subtracting the Requirement That Wagering be on the Same Event(s).

The Commission argues that "patrons are wagering among themselves" is redundant and has to be ignored. The Commission says that "patrons are wagering among themselves and not against the association" is a single element of the requirement to be pari-mutuel wagering, notwithstanding that the word "and" appears between the two separate elements. Commission Brief, p.17. The Commission says that "among themselves" and "not against the association" are "interlocking elements" that "collectively" ensure that the association is not betting at all. Commission Brief, p. 17. According to the Appellees, if the association is not betting, the patrons are, by definition, wagering among themselves. The Appellees' sophistry is nonsense. Plainly, two separate legally required elements appear in the Regulatory Definition. Both must be applied.

E. The Requirement That Participants be Wagering on the Same Event(s) is Not Satisfied by Commingling Wagers with Prior Losses of Unrelated Discrete Events.

The Appellees argue that what the operator does with prior losses and a present discrete wager on a discrete event somehow transforms the status of a discrete participant

who is placing a discrete wager on a discrete event into a participant who is wagering with others on the same event(s). They argue that this satisfies the requirement of "among themselves". Commission Brief, p. 18. Such an argument ignores the *Jockey Club*'s description of a lottery which perfectly describes the Exacta Gaming System. *Jockey Club*, pp. 991-93. Such an argument also assumes a false legal premise that participants do not need to be wagering on the same event(s) as is required by the statutory meaning of pari-mutuel and the meanings of the words which appear in the Regulatory Definition. First, if the wager is not on the same event(s), the participants fail to satisfy the requirement that patrons are wagering among themselves with resulting pari-mutuel payouts at the terminals. As pointed out in the Foundation's brief such an argument is like saying that all who shower over the course of a decade are showering together if their shower water drains into the same sewer.

F. Exacta Gaming Differs from Exotic Wagering Because Exotic Wagering Involves Paying Prizes from Losses on the Same Event(s).

The Commission says that "the Foundation will reply by faulting the System for using 'losses' to pay winning wagers, but that is true in all 'pari-mutuel wagering.' For example, the losing patrons' wagers on a 'trifecta' are used to pay winning patrons. See 810 KAR 6:020 § 9. The same is true in every other wager permitted under Kentucky law, including, among others, the 'Superfecta,' 'Super high-five,' 'Big Q' and 'Pick-n.' 810 KAR 6:020 §§ 11, 13, 14." Commission Brief, p. 31. The Commission's premise ignores a dispositive fact which makes exotic wagering different from historical horse racing. In true exotic wagering, prizes are paid from losses of current wagers on the same current compound events (i.e., two races, four races or six races) *and* from carried over losses from prior events, if any. Certainly, a payout from a Pick-Six on the first day offered would have

not carried over losses but would nonetheless be pari-mutuel because those who cast wagers met the definition of "patrons are wagering among themselves." In such a case, current participants are wagering among themselves on the same events (even though compound) such as two, three, four or six races. Prizes in historical horse racing are, by contrast, paid only from carried over losses from prior events, like the lottery described in *Jockey Club*.[17]

All exotic wagering must still be pari-mutuel wagering.[18] This Court recognized as much when it remanded *not* for a determination of whether historical horse racing was exotic wagering, but whether "operation of historical horse race wagering as contemplated by Appellants conforms to the requirements of KRS Chapter 230 and KRS 436.480 for pari-mutuel wagering, so as to exempt such wagering from the prohibitions of KRS Chapter 528." *App. Racing*, p. 742.

G. The Trial Court is Not Supported by Substantial Evidence.

Even though expressed as a finding of fact in the 2018 Opinion and Order, instead of a matter of law, the Franklin Circuit Court found that "Pari-mutuel wagering does not require patrons to wager on the same horseraces, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1 (48)". 2018 Opinion and Order, Findings of Fact, ¶ 92, p. 18, R. at V. XXIV, p.

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[17]Confirming this was Mr. LaBrocca's testimony that no exotic wagerer has any effect on the prize/outcome on any previously participating exotic wagerer. R. Trial, LaBrocca 1/8/18 10:58:05 – 11:04:01.

[18]810 KAR 1:011, Section 1(1) "The only wagering permitted on a live or historical horse race shall be under the pari-mutuel system of wagering. All systems of wagering other than pari-mutuel shall be prohibited." 810 KAR 1:001, Section 1(24) "'Exotic wager' means any pari-mutuel wager placed on a live or historical horse race other than a win, place, or show wager placed on a live horse race.".

3574. That the interpretation of a statute and regulation is a conclusion of law is a fundamental tenant of jurisprudence. Inserting it as a finding of fact in an Opinion and Order does not change that. Had the correct legal requirement of wagering on the same event(s) been applied, not only is the Franklin Circuit Court's Opinion and Order not supported by "substantial evidence", it is supported by no evidence at all. The Commission itself acknowledges that patrons are not wagering on the same event(s). Commission Brief, p. 18. This, plus the plain meaning of the words of the Regulatory Definition, falls far short of meeting the legal requirement that participants are wagering among themselves on the same event(s). The trial court even misapplied the legal requirement that all wagers had to be placed in "wagering pools". Under the Opinion of the Kentucky Attorney General, attached to the Appellees' joint petition, comingling a discrete wager with prior losses may be pooled betting but not all pooled betting is pari-mutuel wagering. *See e.g.*, Ky. OAG, 10-001, p. 8. According to the Ky. OAG, in historical horse racing "[A] person who successfully chooses a winning horse never shares a mutuel pool with other bettors simply because there is no one else betting on the same race." Ky. OAG, 10-001, p. 8. This is what occurs in Exacta Gaming. The trial court found as a matter of law that under the Regulatory Definition participants were not required to be betting on the same events to be engaged in pari-mutuel wagering. Under the trial court's reasoning, participants' competitive opinions about potential outcomes of the same uncertain events (payout odds) are not required and are irrelevant. Under such erroneous reasoning, payouts at the terminals can be determined not by payout odds but instead by fixed mathematical formulas applied to carried over balances in loss pools as is the case with fixed-odds seen in raffles, jackpots and lotteries.

H. The Commission and the Foundation Agree on Certain Aspects of the Application of the Regulatory Definition.[19]

The Commission and the Foundation agree that: 1. There is no ambiguity in the Regulatory Definition. Commission Brief, p. 26. 2. "If uncertainty does not exist . . . [t]he regulation then just means what it means – and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019); *Commonwealth v. Ky. Public Serv. Comm'n*, 243 S.W.3d 374, 381 (Ky. App. 2007)("[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required."). 3. "The cardinal rule of statutory interpretation is that the plain meaning of the statute control. *Lamb v. Holmes*, 162 S.W.3d 902, 909 (Ky. 2005)." Commission Brief, p. 26. 4. "The Court nor the Commission is 'at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.' *Commonwealth v. Ky. Public Serv. Comm'n*, 243 S.W.3d 374, 381 (Ky. App. 2007)(citing *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000)." Commission Brief, p. 27. 5. Whether participants are legally required to be wagering on the same event(s) under the application of the Regulatory Definition is a question of law which is reviewed *de novo*. *Owen v. University of Kentucky*, 486 S.W.3d 266, 269 (Ky. 2016); *Schmidt v. Leppert*, 214 S.W.3d 309, 311 (Ky. 2007); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998).

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[19]There is little, if any, factual disagreement that the Exacta Gaming System uses fixed mathematical formulas in place of pari-mutuel payout odds. Since the Foundation is not an operator, evidence at trial was deduced largely from that discovered from the Commission. Discovery required a lot of effort by the Foundation. On August 31, 2017, the last day of discovery, the Commission dropped tens of thousands of pages of documents on the Foundation, many of which had been withheld for years. Working as hard as it could, with very limited resources, the Foundation readied for a trial to begin on January 8, 2018. The court allowed evidence only on Exacta Gaming.

I. Payouts at the Terminals are Material to Whether the Gambling is Pari-Mutuel Wagering.

The *App. Racing* Court opined that whether "'operation' of historical horse race wagering in the form of the payouts at the specific terminals . . . actually 'is' an authorized form of pari-mutuel wagering" was a question of fact which could not be determined without a record. *App. Racing*, p. 742. The parties disagree on the effect of *App. Racing*. On one hand, the *App. Racing* opinion found the Regulatory Definition of pari-mutuel wagering to be valid on its face as being within the "conception of the pari-mutuel wagering described in" *Jockey Club* and the Interstate Horse Racing Act. *App. Racing*, p. 737. On the other hand, the *App. Racing* opinion remanded not for a determination of whether the operations complied with the Regulatory Definition but with "KRS Chapter 230 and KRS 436.480 and for pari-mutuel wagering, so as to exempt such wagering from the prohibitions of KRS Chapter 528" and to find out how "pay-outs at the specific terminals" worked. *App. Racing*, p. 742. The differences of opinion about the application and meaning of the *App. Racing* opinion can only be reconciled by application of the plain meanings of the words used in the Regulatory Definition applied within the scope of the statutory authority of the Commission as corroborated by how the pari-mutuel payouts at the terminals are calculated. Such an application violates neither the law of the case doctrine nor the canons of statutory/regulatory construction nor does it result in an open-ended slot/lottery-type expansion of gaming beyond that allowed by Chapter 230 without an approval of the General Assembly.

J. *App. Racing* Requires Application of the Regulatory Definition within the Conception of Pari-Mutuel Wagering in Chapter 230.

The Court's initial review of the Regulatory Definition determined that the Regulatory Definition was *facially* within the statutory authority of the Commission. *App. Racing*, p. 738. The second review here is whether the legal requirements of the Regulatory Definition were correctly *applied* within the Commission's statutory authority. If the Franklin Circuit Court improperly applied the legal requirements to the facts and accepted non-pari-mutuel payouts at the terminals as pari-mutuel, it would be an error for which the trial court would have to be reversed. Commission Brief, p. 25, citing *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. 2003)(A court "abuses its discretion . . . when it improperly applies the law or uses an [] erroneous legal standard."). The *App. Racing* Court said nothing about excusing the legal requirement that participants be wagering with each other on the outcome of a given horserace(s) or that pay-outs at the terminals did not have to be pari-mutuel. Such would have been contrary to the legal requirements of the statutory and Regulatory Definition of pari-mutuel wagering. *App. Racing*, p. 742.

The Appellees argue that because the words "on the same race" do not appear in the Regulatory Definition, that wagering on the same race is not required. Thus, they say that evidence at trial reviewed as "clearly erroneous". Such arguments ignore the principle that it is a conclusion of law when courts ascertain the meaning of the words which appear in a statute or a regulation. Indeed, when ascertaining the meaning of "pari-mutuel wagering" as it appeared in KRS Chapter 230, the *App. Racing* Court engaged in the very judicial exercise of finding the law.[20] Applications of questions of law are reviewed *de novo*. In this case the trial court applied the law incorrectly.

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[20]The *App. Racing* opinion does not say that patrons are not required to be wagering on the same race. The plain meaning of the words in the Regulatory Definition, participants must be wagering on the same event(s). Kentucky Downs insists that the *App. Racing* Court

K. Churchill Brought this Case and Chose Not to Offer Proof.

The Foundation appealed from the 2018 Opinion and Order which was made final and appealable, thus foreclosing a trial on the Churchill gaming and from the Order, entered July 28, 2017, which granted Kentucky Downs' motion for a trial on Exacta Gaming only. The Foundation did not appeal from a "(Proposed) Order" because it was a "Proposed" Order. There was no need to make and appeal from a motion for directed verdict. Churchill had already indicated that it was not going to put on proof and the Franklin Circuit Court had already approved that action by the July 28, 2017 Order. That its gaming system was later developed is irrelevant. Exacta, PariMAX and Ainsworth all came online after this case. The Court remanded for proceedings on historical horse racing "contemplated by Appell[ees]". *App. Racing,* p. 742. That Churchill chose to remain in its own case but present no evidence was its choice. Now it should be bound by that decision.

CONCLUSION

For the reasons stated herein and in its Appellant Brief, the Foundation respectfully requests that the 2018 Order of the Franklin Circuit Court be reversed, vacated and held for naught. In the alternative, the Foundation respectfully requests that it be afforded a trial on the gaming systems on remand with the appropriate legal standard being applied.

Stanton L. Cave, Esq.
Counsel for Appellant, The Family Trust Foundation of Kentucky, Inc., d/b/a The Family Foundation

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rejected the Foundation's arguments about the requirements that patrons be wagering on the same race(s). Kentucky Downs Brief, pp. 33-34. Admitted by the Commission, the *App. Racing* Court held the Regulatory Definition to be valid because the "Commission's regulatory definition 'comports well with the system of wagering' described in *Commonwealth v. Kentucky Jockey Club* and in federal law. *Appalachian Racing*, 423 S.W.3d 737-38". Commission Brief, p. 24.

REPLY APPENDIX

EXHIBIT I .... NOTICES OF DEFICIENCY TO APPELLEES, MARCH 14, 2013

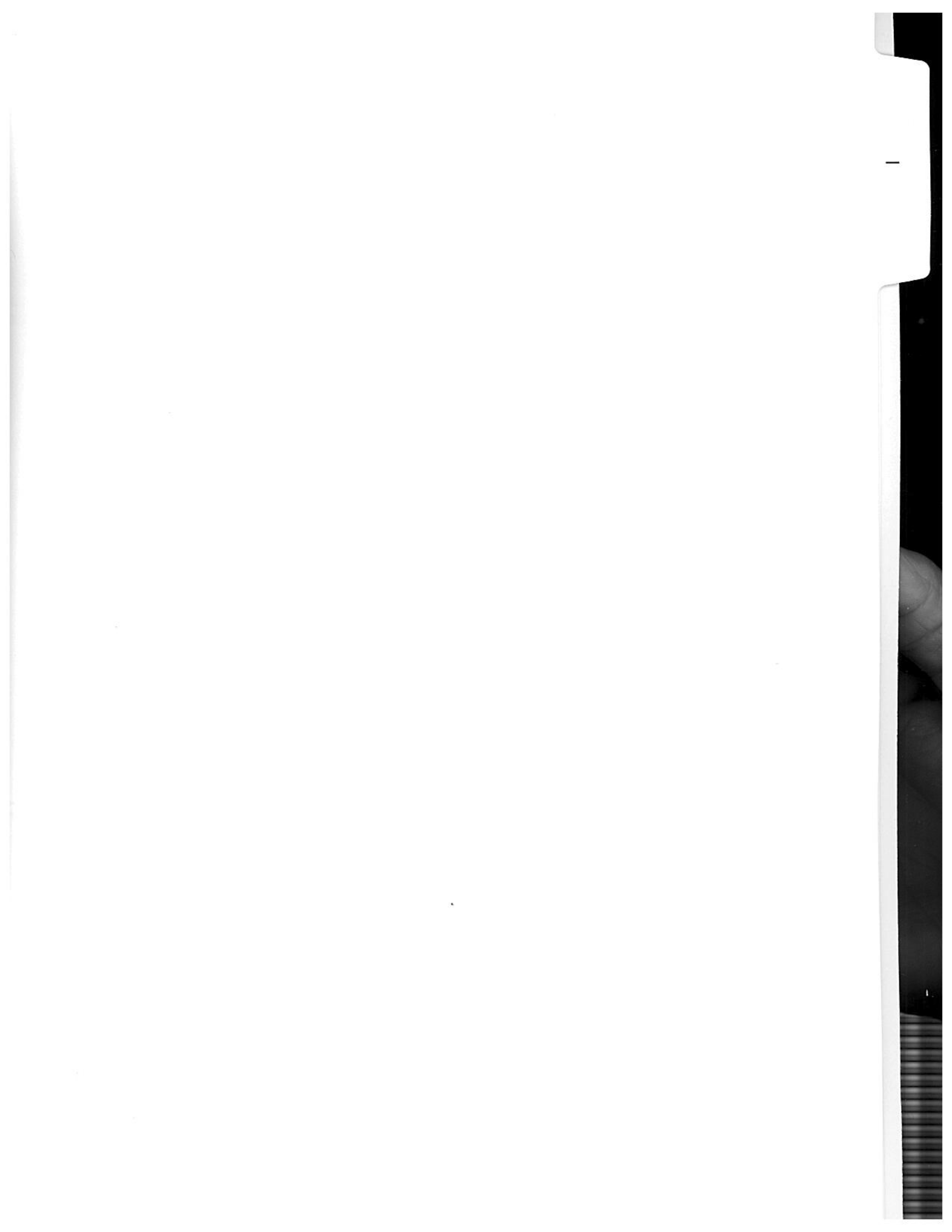


EXHIBIT I
NOTICES OF DEFICENCY TO APPELLEES
March 14, 2013

RECEIVED 3-14-13

Supreme Court of Kentucky

FILE NUMBER: 2012-SC-000414-D
2011-CA-000164

APPALACHIAN RACING, LLC, ET AL — APPELLANTS

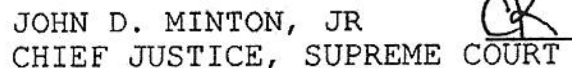
V.

FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION (THE "FOUNDATION"), ET AL — APPELLEES

THE APPELLANT (#1 BELOW) HAS TENDERED FOR FILING ON Mar. 12, 2013 THE PLEADING IDENTIFIED BELOW WHICH CANNOT BE FILED BECAUSE IT IS DEFICIENT AS EXPLAINED BELOW. THE PLEADING MUST BE CORRECTED TO MEET MINIMUM FILING STANDARDS.

IT IS ORDERED THAT THE CLERK SHALL RETAIN THE PLEADING AND THE APPELLANT (#1 BELOW) SHALL HAVE TEN (10) DAYS FROM THE DATE OF THIS ORDER TO MAKE THE NECESSARY CORRECTIONS. TIME FOR ANY FURTHER STEPS WILL BEGIN TO RUN FROM THE DATE THIS PLEADING IS PROPERLY FILED, NOTICE OF WHICH WILL BE SENT. FAILURE TO COMPLY WITH THIS ORDER SHALL RESULT IN THE DISMISSAL OF THIS ACTION.

ENTERED: 03/12/2013



JOHN D. MINTON, JR
CHIEF JUSTICE, SUPREME COURT

PLEADING: APPELLANT BRIEF

DEFICIENCY REASON(S):
DEFICIENT- PURSUANT TO 76.12 (4) III BRIEF COVERS SHALL SHOW THE FILE NUMBER OF THE APPEAL, A CAPTION CONTAINING AT LEAST THE LEAD APPELLANTS AND APPELLEES AND THE CERTIFICATE REQUIRED BY SUBSECTION (6) OF THIS RULE.

#1: APPALACHIAN RACING, LLC

RECEIVED 3-14-13

Supreme Court of Kentucky

FILE NUMBER: 2012-SC-000415-D
2011-CA-000164

THE KENTUCKY DEPARTMENT OF REVENUE APPELLANTS

V.

THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION, ET AL APPELLEES

THE APPELLANT (#1 BELOW) HAS TENDERED FOR FILING ON Mar. 12, 2013 THE PLEADING IDENTIFIED BELOW WHICH CANNOT BE FILED BECAUSE IT IS DEFICIENT AS EXPLAINED BELOW. THE PLEADING MUST BE CORRECTED TO MEET MINIMUM FILING STANDARDS.

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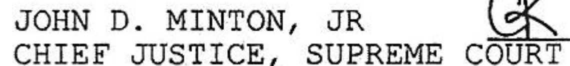

JOHN D. MINTON, JR
CHIEF JUSTICE, SUPREME COURT

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DEFICIENT- CR 76.12 (6) THE NAME OR NAMES OF THE ATTORNEYS SUBMITTING A BRIEF AND RESPONSIBLE FOR IT'S CONTENTS SHALL APPEAR FOLLOWING IT'S "CONCLUSION."

#1: THE KENTUCKY DEPARTMENT OF REVENUE

RECEIVED 3-14-13

Supreme Court of Kentucky

FILE NUMBER: 2012-SC-000416-D
2011-CA-000164

THE KENTUCKY HORSE RACING COMMISSION — APPELLANTS

V.

THE FAMILY TRUST FOUNDATION OF KENTUCKY, INC., D/B/A THE FAMILY FOUNDATION, ET AL — APPELLEES

THE APPELLANT (#1 BELOW) HAS TENDERED FOR FILING ON Mar. 12, 2013 THE PLEADING IDENTIFIED BELOW WHICH CANNOT BE FILED BECAUSE IT IS DEFICIENT AS EXPLAINED BELOW. THE PLEADING MUST BE CORRECTED TO MEET MINIMUM FILING STANDARDS.

IT IS ORDERED THAT THE CLERK SHALL RETURN THE PLEADING AND THE APPELLANT (#1 BELOW) SHALL HAVE TEN (10) DAYS FROM THE DATE OF THIS ORDER TO MAKE THE NECESSARY CORRECTIONS. TIME FOR ANY FURTHER STEPS WILL BEGIN TO RUN FROM THE DATE THIS PLEADING IS PROPERLY FILED, NOTICE OF WHICH WILL BE SENT. FAILURE TO COMPLY WITH THIS ORDER SHALL RESULT IN THE DISMISSAL OF THIS ACTION.

ENTERED: 03/12/2013

JOHN D. MINTON, JR
CHIEF JUSTICE, SUPREME COURT

PLEADING: APPELLANT BRIEF

DEFICIENCY REASON(S):
DEFICIENT- PURSUANT TO 76.12 (4) III BRIEF COVERS SHALL SHOW THE FILE NUMBER OF THE APPEAL, A CAPTION CONTAINING AT LEAST THE LEAD APPELLANTS AND APPELLEES AND THE CERTIFICATE REQUIRED BY SUBSECTION (6) OF THIS RULE.
DEFICIENT- CR 76.12 (6) THE NAME OR NAMES OF THE ATTORNEYS SUBMITTING A BRIEF AND RESPONSIBLE FOR IT'S CONTENTS SHALL APPEAR FOLLOWING IT'S "CONCLUSION."

#1: THE KENTUCKY HORSE RACING COMMISSION