UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
ELECTRONICALLY FILED

CHOCTAW RACING SERVICES, L.L.C. Plaintiff	)	
v.	)	Civil Action No. 3:07-cv-00237-CRS
KENTUCKY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC. Defendant	)	

KENTUCKY HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC.'S MEMORANDUM IN OPPOSITION TO TEMPORARY RESTRAINING ORDER

Comes Defendant Kentucky Horsemen's Benevolent and Protective Association, Inc. (KHBPA), by counsel, and for its Memorandum in Opposition to Plaintiff Choctaw Racing Services, LLC's (CRS) Motion for Temporary Restraining Order states,

COUNTERSTATEMENT OF FACTS

1. Plaintiff CRS misstates and mischaracterizes key underlying facts:

a. CRS relies upon "Churchill Downs Contract" (a wagering agreement) between CRS and Churchill Downs, allegedly entitling CRS to obtain the interstate simulcast signal of broadcasting live horse races with attendant off-track wagering rights from the 2007 Spring Churchill meet. CRS nowhere attaches a copy of this Contract to its voluminous pleadings. That material omission notwithstanding, Defendant KHBPA points out that, even if a contract did exist, it would be in the form of the Uniform Wagering Agreement, which contains the following important provisions:

> This Agreement shall be ***automatically terminated . . . upon the failure to obtain*** **or withdrawal of** ***any approvals required by any applicable laws*** as to the transactions contemplated hereby.

Paragraph 16(A), Uniform Wagering Agreement (emphasis added).

Paragraph 11(F) of the Uniform Wagering Agreement states that the host racetrack represents, in pertinent part, only that:

> ***It has obtained, or will obtain prior to the transmission*** of the [simulcast] Signals or wagering on the Races at the Guest Facility pursuant to this Agreement, ***the approval of . . . requisite consents to enter into and perform this Agreement in compliance with the Interstate Horseracing Act of 1978 (15 U.S.C. § 3001, et seq.)***, and has satisfied all necessary requirements thereunder, . . . (emphasis added)

While KHBPA does not presently have a copy of the Churchill Downs Contact, there is no reason to believe (absent any evidence to the contrary) that Churchill would have contracted in variance with the above-quoted customary terms. Indeed, the Interstate Horseracing Act (IHA) expressly requires simulcast contracts to be structured such that no agreement could legally come into effect unless and until the horsemen's group's approval to the wagering is obtained. The IHA only allows the "host racing association" (here, Churchill) to enter into simulcast contracts for interstate off-track wagering rights if, as a "condition precedent" to such contracts, the host racing association has obtained, or will obtain, the "written approval" of its "horsemen's group" (at Churchill, the KHBPA). *See* 15 U.S.C. § 3004(a) (2007). Churchill has never obtained KHBPA's approval for simulcasting to the subject OTB sites of CRS to receive Churchill's Spring 2007 meet.

b. Churchill Downs and its horsemen's group (KHBPA) have a "regular contractual process" per the requirements of the IHA. 15 U.S.C. § 3004(a) & § 3002(21). In that contractual process, KHBPA gives its written approval or not to proposed

simulcast sites in advance of every race meet held at Churchill. Churchill submits a written list of proposed off-track betting (OTB) sites, and within thirty (30) days thereafter KHBPA gives its approval (or not) of those proposed sites. This process of seeking and obtaining approval between Churchill and KHBPA is repeated in advance of each of the Spring and Fall meets, and has existed for years as their "regular contractual process."

c. Churchill requested KHBPA, on March 26, 2007, to give its approval to a listing of numerous OTB sites for the upcoming Churchill Downs Spring 2007 meet. *See* Ltr of M. Anderson to M. Maline (3/26/07) attached hereto as Exhibit "A."

d. KHBPA, through its officers, responded to this letter at first orally with Patrick Troutman, Churchill's simulcasting manager, at the end of March, stating that approvals for most of the listed off-track wagering sites would likely be granted by KHBPA with certain exceptions including the CRS OTB sites. KHBPA informed Troutman that KHBPA expected CRS' OTB sites to make contributions to horsemen's purses in Oklahoma for incoming signals from Churchill in the same amounts that all other OTB's in Oklahoma contributed to local horsemen's purses. KHBPA asked Troutman to convey the KHBPA position to CRS, in plenty of time to allow CRS to try and work something out with the horsemen if CRS wanted to do so. The same request had previously been communicated to CRS, and ignored in Oklahoma.

e. KHBPA never heard back from Mr. Troutman or CRS in response to KHBPA's required terms and conditions.

f. On April 25, 2007, KHBPA gave its official simulcasting approval letter to Churchill Downs. Attached as Exhibit "B" is a copy of that letter. In the letter,

KHBPA approved a number of OTB sites proposed by Churchill, but denied approval of CRS sites as listed therein and also denied approval of certain Indiana Downs OTB sites. Contrary to the allegations of CRS, this letter of April 25, 2007 was not the result of any action taken *solely* by Martin A. Maline, Executive Director of KHBPA, or Rick Hiles, KHBPA's President. Rather, the action to approve or disapprove off-track wagering at OTB sites was and is a decision of the Board of Directors of KHBPA (and with respect to this Churchill Spring 2007 meet was a unanimous Board decision).

g. Maline received threatening calls thereafter from counsel for CRS who belligerently asserted that CRS was already entitled to receive simulcasts with interstate off-track wagering rights from Churchill. Maline reiterated KHBPA's position, and thereafter, counsel for CRS sent unresponsive "proof" of various payments that CRS allegedly made to various entities, none of which provided the information KHBPA had asked for, to wit: evidence that CRS's Oklahoma OTB's pay the same remuneration to horsemen's purses in Oklahoma that all other OTB's in Oklahoma pay.

h. All OTB's in Oklahoma except those operated by CRS pay 6 ½ % directly to horsemen's purses (if the OTB site is less than 3 years in operation at its location) and thereafter 7 ½ % to horsemen's purses (if the OTB has operated in excess of 3 years). *See* 3A Okla. Stat. Ann. § 205.6a(6) (copy attached hereto as Exhibit "C").

i. Counsel for CRS say, on the one hand, that CRS wants its OTB's to be treated the same as all other OTB's in Oklahoma, but then obfuscates the issues by not addressing what KHBPA has requested. KHBPA wants CRS-serviced OTB's to make the same contributions to horsemen's purses in Oklahoma as any other Oklahoma OTB, no more and no less. If such "parity" is not attained, CRS-serviced OTB's are likely to

attract bettors away from non-CRS sites and decrease the amounts being contributed directly to horsemen's purses in detriment to the sport of live horseracing.

j. KHBPA is a nonprofit, agricultural horsemen's benevolent organization whose members are exclusively owners and trainers of thoroughbred race horses. KHBPA's member-horsemen race their horses not just in Kentucky but all over the United States. Many of KHBPA's members race horses in Oklahoma. The survival, indeed thrivance, of the sport of horseracing in Oklahoma, Kentucky and nationwide is therefore of vital importance to the KHBPA.

k. The lifeblood of the sport of horseracing is the purse account. If there are not adequate purses, the sport withers. In Oklahoma, the purse account is statutorily funded by all OTB's owned by racetracks. There are only two kinds of OTB's in Oklahoma, racetrack-owned OTB's and CRS-serviced OTB's.

l. KHBPA, using the discretion given to it by Congress under the IHA, has determined in its *business judgment* that it will not let CRS-serviced OTB's in Oklahoma compete with non-CRS OTB sites unfairly and thereby deflect monies from purses. Such is unfair, and has had, and will continue to have, a detrimental effect on live racing in Oklahoma unless and until the practice ceases. Attached hereto as Exhibit "D" is documentation demonstrating that while one of CRS' OTB sites (Choctaw Pocola) has made payments to Blue Ribbons Downs (BRD), the payments have not gone to horsemen's purses. BRD is a Choctaw-owned racetrack. If the same wagers made at the Pocola site had been placed at a non-CRS OTB site, horsemen's purses would have benefited from the wager, and thus the sport would have been enhanced.

m. As to the Oneida OTB in Wisconsin, KHBPA has seen no evidence that CRS has obtained the requisite approval from Hawthorne Racetrack or its horsemen as required by the IHA's provisions found at 15 U.S.C. § 3004(b). Hawthorne is racing live at this time and is the closest track in an adjoining State to Wisconsin. Therefore, its approval of CRS' simulcast of the Churchill races to Oneida OTB is required by that Section of the IHA. Unless and until CRS provides proof that it has obtained both Hawthorne's and its horsemen's group approvals, off-track wagering at Oneida OTB in Wisconsin on Churchill Downs races is simply illegal under the IHA.

ARGUMENT

I. Background on the Interstate Horseracing Act of 1978

In 1978, Congress enacted the IHA governing all aspects of interstate off-track wagering. The IHA is Congress' exclusively applicable law regulating interstate gambling on horse racing. The IHA was passed, in part, to address an illegal pirating incident that occurred in 1975 by the New York City Off-Track Betting Corporation which, without the approval of Churchill Downs or Kentucky horsemen or any State's racing official, accepted off-track wagers on the outcome of the Kentucky Derby being run at Churchill. S.Rep.No. 95-554, 95th Cong. 1st Sess., 14 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4132, 4142 (views of Mssrs. Cannon and Stevenson re: IHA being enacted to resolve New York Off-Track Corp.'s unauthorized use of the Kentucky Derby).

Before 1975, off-track wagering was a rare, but legal alternative to live betting in some jurisdictions. After this pirating incident, however, Congress considered various bills, all of which ***prohibited entirely any interstate off-track gambling on horse racing***.

At that same time, in or about 1977, the first Commission on the Review of the National Policy Toward Gambling (hereinafter "National Commission on Gambling") issued its report to Congress. *See* S.Rep.No. 95-1117, 95th Cong. 2d Sess. 6 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4144, 4149 (hereinafter referred to as "S.Rep.No. 95-1117").

In 1978, Congress enacted S. 1185 (the IHA), governing interstate off-track wagering on horse races, incorporating the central provisions from its previous bills ***prohibiting all interstate off-track wagering***, but granting a limited exception to that prohibition based on certain compromises reached by representatives of racetracks, horsemen, and OTB interests as well as based on the recommendations of the National Commission on Gambling. *See* S.Rep.No. 95-1117, at 1-2, 6, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS , at 4144-45, 4149. In 2000, Congress adopted the only amendment to the IHA, refining its definition of "interstate off-track wager" to include pari-mutuel wagers made via telephone or other electronic media.

This background on the IHA is key to understanding its simple guiding rule: ***"No person may accept an interstate off-track wager except as provided in this chapter."*** 15 U.S.C. § 3003 (2007) (emphasis added). The plain language of Section 3003 reflects Congress' desire to ***stop*** all interstate off-track betting on horse races, except under properly regulated circumstances, to-wit: only if a series of five (5) separate consents/approvals have each been granted. The consents/approvals necessary to lift Congress' prohibition are: (1) the "horsemen's group's" consent which is a condition precedent to the host racetrack's consent (§ 3004(a)(1)(A) & (B)); (2) the host racetrack's consent (§ 304(a)(1)); (3) the host racing commission's consent (§ 3004(a)(2)); (4) the

off-track racing commission's consent (§ 3004(a)(3)); and (5), the approval of all "currently operating tracks within 60 miles of [the] off-track betting office," or if none are within 60 miles of the office, then the closest such track "in an adjoining State" (§ 3004(b)(1) & (2). Absent any one of these five (5) consents, it is clear from Section 3003 of the IHA that Congress considers the acceptance of any interstate off-track wager to be ***illegal*** activity, as a matter of federal law.

Plaintiff CRS, acknowledges in its memorandum that the IHA is the specific Congressional Act that governs the outcome of this case. Amazingly, however, CRS's motion for temporary restraining order nowhere mentions the Sixth Circuit Court of Appeals' seminal and controlling case interpreting the IHA and upholding its constitutionality. That case is *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n*, 20 F.3d 1405 (6th Cir. 1994). The undersigned is intimately familiar with that case, having argued it successfully before that Circuit Court of Appeals.

The Sixth Circuit's *Turfway* decision recognized that under the IHA, "host racing associations" (like Churchill) and their "horsemen's groups" (like KHBPA) effectively wield an absolute "veto" over interstate off-track wagering. 20 F.3d at 1415. This power stems from the fact that Congress itself has ***outlawed*** (that is, declared it *illegal*) the conduct of interstate off-track wagering by anyone who does not have the consent of the host racetracks' and their horsemen's group. This prohibitory mode of regulating commerce is as complete a method of an "occupying of a field of law" as could be imagined.

Turfway teaches that there is no *legal* commerce in off-track wagering at all *unless* the interested parties, *i.e.*, the ones "putting on the show" (along with affected racing commissions) have granted their consent/approval. There would be no racing "show" at all unless (1) horsemen bought, raised, nurtured and trained their racehorses and (2) Churchill opened its doors and track to sponsor the racing meet. Congress knew that these are the "actors" and the "theatre" of the race "show," and if either one of them was not satisfied with the "terms and conditions" of proposed off-track wagering contracts, then there *shall* not be any off-track wagering. Congress has never treated betting on horseracing as a ***right***, but rather a ***privilege***, granted only if and when affected racetracks and their respective horsemen's groups are completely in agreement with all proposed "terms and conditions" for such gambling, for the protection of live racing.

Plaintiff CRS' motion tries to turn this law upside down. CRS assumes it is ***entitled*** to conduct interstate off-track wagering on Churchill's races. CRS premises its assumption on the idea that it has regularly gotten Churchill's simulcast signal and conducted wagering thereon in the past, and therefore, KHBPA has no right to ever stop it from doing so now. CRS fundamentally misunderstands the law. CRS ignores Section 3003's general rule of prohibition, *i.e.*, that no one may accept an interstate off-track wager on a horserace (by Congressional edict no less) unless and until the host racetrack and its horsemen approve.

With this background on the IHA and the *Turfway* ruling in mind, Plaintiff CRS' motion for injunctive relief can be quickly disposed of. The parties do not disagree as to the applicable standard which this Court must apply for the issuance of extraordinary injunctive relief: (1) Plaintiff's likelihood of success on the merits; (2) Plaintiff's

irreparable injury; (3) substantial harm to others if injunctive relief is granted; and (4) the public interest. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 347 (6th Cir. 1998). The parties greatly disagree, however, as to key facts (misstated by CRS) and the outcome of analyzing each of these factors.

II. No Likelihood of Success on the Merits: The Antitrust Claims

CRS claims first that KHBPA has violated Section 1 of the Sherman Act's prohibition against "restrain[ing] the nation's domestic and foreign trade." [Memorandum p. 9.] This statement completely disregards the IHA. There is no "free trade" or unrestricted commerce in off-track wagering on horse races without all five required consents to simulcasting. 15 U.S.C. § 3003 (2007). Section 3003 plainly ***outlaws*** such gambling unless KHBPA and others have given their respective consents. The IHA's prohibitory mode of regulating all commerce in off-track wagering necessarily occupies the entire "trade" field in off-track wagering, such that there is no room left for the Sherman Act to regulate, at least not with respect to the consent-granting processes so intricately set out in the IHA. The very act of withholding consent would always be a "restraint of trade" if the Sherman Act were construed to apply to the IHA's consent process. As a result, there simply cannot be any logical statutory construction that a "specific" statute, the IHA, fails to control over the "general" one (*i.e.*, Sherman Act) when it comes to parties exercising their consent rights under the IHA. The IHA would be eviscerated if it were otherwise.

The IHA is not the first regulatory scheme that Congress has enacted that in effect impliedly repeals or renders immune certain parties from the otherwise generally

applicable antitrust laws. *See, e.g., JES Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006)(Amateur Sporting Act (ASA) impliedly repeals antitrust laws to the extent the latter would undermine the ASA's operation) and *see also* the cases cited in the *JES Properties* case; *see generally Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385 (1973) (aviation industry); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 689-90 (1975) (securities industry); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (labor and management relations). In this case, there can be no question that if CRS could successfully plead an antitrust claim against either Churchill or KHBPA based on a theory of "wrongful refusal to consent" to off-track wagering, then there would be nothing left to the prohibitions that Congress itself imposed in Section 3003 of the IHA against any and all trade ***unless*** such consents are obtained.

The very structure of the IHA rules out any antitrust theory of "wrongful refusal to consent." *cf.* 15 U.S.C. § 3003 and § 3004(a) & (b). Moreover, the Sixth Circuit expressly held in the *Turfway* case that Congress envisioned that horsemen may exercise their "veto" right under the IHA for "selfish motives" or otherwise (including no reason at all). 20 F.3d at 1406. Indeed, the Court stated: "Congress intended that the horsemen play a significant role in *limiting off-track wagering*." *Id*. at 1414 (emphasis added). "Whereas individual racetracks benefit by contracting with numerous off-track wagering facilities, the *horsemen have a strong interest in limiting off-track betting to ensure continued demand for their services.*" *Id*. at 1415 (emphasis added). "[T]he horsemen's veto affords the horsemen an important means of *protecting the entire sport of horseracing.*" *Id*. (emphasis added).

This is not to suggest that the antitrust laws are impliedly repealed across the board with respect to horseracing, only that antitrust liability for failure to grant IHA-required consent must necessarily be repealed.[1] Any other construction of the IHA as it interplays with the Sherman Act would simply void the IHA. For this reason, CRS has no chance of prevailing on its Sherman Act claim. It is a cardinal rule of statutory construction that a specific statute controls over a general one, and in the context of an implied repeal of the antitrust laws, the test applied in the *JES Properties* case, 458 F.3d at 1231-32, amply demonstrates that CRS' antitrust theory cannot bail any legal water.

Even if the IHA's implied repeal were not applied, clearly the *Turfway* decision reveals that in the context of the IHA's and Sherman Act's intersection, there is absolutely no basis to attempt to apply a *per se* antitrust analysis to the facts of this case. This is a sporting event with specific rules of conduct which Congress itself laid down under the IHA, and which the *Turfway* Court has construed to grant horsemen a right to exercise their statutory veto over off-track wagering for selfish motives, for limiting (restraint) of trade reasons, etc. 20 F.3d at 1414-15. Clearly, the only antitrust analysis that could even possibly be applied in this scenario is a "rule of reason" analysis.

The Supreme Court and the Sixth Circuit have held that the "rule of reason" applies to trade restraints involving sports leagues and events. *NCAA v. Board of*

[1] Plaintiff attempts to rely on *Alabama Sportservice, Inc. v. National Horsemen's Benev. & Prot. Ass'n, Inc.*, 767 F. Supp. 1573 (M.D. Fla. 1991). That case, however, erroneously quotes from the legislative history of another bill (H.R. 14089) which was never enacted into law: "This legislation in no way modifies or affects the scope or application of the antitrust laws. …" 767 F. Supp. at 1578, citing H.R> Rep. No. 95-1733, 95th Cong,2dSess., at 4(1978), referenced, but NOT reprinted in 1978 U.S. Cong. & Admin. News, at p. 4132. Instead, Senate substitute bill, S. 1185, became the IHA. The applicable legislative history to the IHA is, therefore, Senate Report No. 1117 which accompanied S.1185. The Senate Report differs from the House Report in one key respect: The Senate Report does not contain any reference to the affect that the IHA has upon the antitrust laws. S.Rep.No. 95-1117, reprinted in 1978 U.S. Code Cong. & Admin. News, 4132, at pp. 4144-54.

Regents, 468 U.S. 85, 109-110, 104 S.Ct. 2948, 2964-65 (1984); *Nat'l Hockey League Players Assoc. v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 719 (6th Cir. 2003).

In the Counterstatement of the Facts section above, KHBPA has set out its business judgment rationale for not granting consent to CRS's OTB sites in Oklahoma. It has also set out its rationale for not granting consent to CRS's OTB site in Wisconsin. Fairness to horsemen's purses in Oklahoma and parity with other non-CRS sites in that State is KHBPA's objective. If CRS wants to satisfy those objectives, KHBPA stands ready and willing to grant consent to the requested simulcast by Churchill to CRS-operated OTBs once CRS has committed to pay its proper percentage into horsemen's purses in Oklahoma. As to CRS' Wisconsin OTB site, CRS must demonstrate it has complied with the approval provisions of Section 5(b) of the IHA, 15 U.S.C. § 3004(b), requiring that the adjoining State's closest live racing track, Hawthorne Racetrack and its horsemen's group must give approval to an off-track wager being accepted by the Wisconsin OTB.

In *Sterling Suffolk Racecourse, Ltd. Ptnrshp v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), *cert. denied* 510 U.S. 1024 (1994), the First Circuit Court of Appeals expressly recognized that a party's insistence upon compliance with the consent provisions set out in Section 5(b) of the IHA (§3004(b)) was a "potential defense [to antitrust law claims based on] . . . withhold[ing] consent to interstate off-track wagering." 989 F.2d at 1271.

III. No Likelihood of Success on the Merits: The Tortious Interference Claim

CRS' tortious interference claim fares no better than its antitrust claims. First of all, CRS has no legally enforceable contract with Churchill to receive simulcasts with off-

track wagering rights for the 2007 Spring meet. Assuming a contract was in fact signed between Churchill and CRS, such contract necessarily and by standard custom in the industry (as reflected in the Uniform Wagering Agreement's language quoted above in the Counterstatement of Facts) was "automatically terminated" before it ever became operative once KHBPA declined in April to give its approval to simulcasting to CRS' OTB sites. No one in the industry, much less its leader, Churchill Downs, executes a *binding* agreement to conduct interstate simulcasting without the IHA's "condition precedent" being satisfied, to wit: the horsemen's group's "written approval" having been obtained. 15 U.S.C. § 3004(a)(1).

CRS totally mischaracterizes its contractual status by acting as though it had some perpetual, binding and enforceable contract with Churchill to receive simulcasts and conduct off-track wagering, and KHBPA tortiously interfered with that contract. The IHA, as a matter of federal law, however, preempts any state law theory of tortious interference founded on a claim that a *binding* contract could even be entered into by Churchill and CRS without the federally required "condition precedent" of horsemen's consent having first been obtained. Thus, CRS has no chance of prevailing on its tortious interference claim. KHBPA's statutory right to consent or withhold consent under IHA Section 3003 is not "improper" interference under Restatement of the Law of Torts (2d), Section 767.[2]

The IHA envisions a "regular contractual process" between horsemen and the racetrack. 15 U.S.C. § 3004(a)(1)(A) & (B) & § 3002(21). In this process, "written approval" of the horsemen's group is to be obtained by the racetrack before it may enter

[2] *See,* Comment; ("Recognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not "sanctioned by the 'rules of the game.'")

into binding contracts with OTB's to conduct interstate off-track wagering. Such contractual process envisions horsemen and their racetracks negotiating over "terms and conditions" which OTB's are to comply with if they are to be permitted to conduct interstate off-track wagering. *See* 15 U.S.C. § 3002(21) & (22).

The "regular contractual process" that exists between Churchill and the KHBPA is such that KHBPA gives its consent on a meet by meet basis. That consent was given by KHBPA at any prior meet of Churchill's or at any other racetrack in Kentucky (such as Keeneland, etc.) is irrelevant to whether KHBPA has given its consent to wagering for Churchill's Spring 2007 meet. At no time did the KHBPA give to Churchill Downs its consent for CRS-serviced OTB's to accept interstate off-track wagers on Churchill's races for the Spring 2007 meet. CRS is wrong in its assumption that there has been a "withdrawal" of consent.

One final point with respect to the tortious interference claim: CRS has included in its pleadings accusations about Martin A. Maline and Rick Hiles, Executive Director and President (respectively) of the KHBPA. CRS claims that KHBPA's refusal to consent to CRS was "motivated in large part by the personal animus of the[se two individuals]." [Memo in Support of Mot. for TRO, at p. 12.] This is a defamatory statement with absolutely no basis in fact. The decision to grant or withhold consent each race meet at Churchill Downs is one that is made by the ***full*** Board of Directors of the KHBPA. It was not made by Marty Maline or Rick Hiles, acting separately or conjointly; indeed, they do not have the authority to make such a decision; only the Board does. Maline and Hiles merely execute Board policy. In this case, the full Board voted and approved the sending of Churchill's Spring meet 2007 signal to the proposed sites on

Churchill's list and voted to disapprove of the proposed CRS and Indiana OTB sites. *See* Exhibits "A" and "B", attached hereto. The CRS allegation, "upon information and belief," that these two persons' purported animosity toward CRS was the motivation behind KHBPA's decision not to consent to simulcast to CRS is mistaken and irrelevant. *See, Gray v. Central Bank & Trust Co.*, 562 S.W.2d 656-66 (Ky. App. 1978) (suit by unsuccessful bidder for Lexington airport construction project against member of the Airport Board for defamation and tortious interference with prospective contract.) In the concurring opinion, Judge James Park, Jr. wrote "Kincaid had a right to protect both the interests of the Airport Board and Central Bank in attempting to persuade other members of the Airport Board not to contract with [the plaintiff]." *Id.* at 661. Here, KHBPA (and even its management) have an absolute right under the IHA to advocate and do what they think best protects live racing anywhere when considering whether to consent to simulcasting.

IV. Plaintiff's Lack of "Irreparable Harm"

Plaintiff CRS founds its assertion of "irreparable harm" on *Basicomputer Corp. v. Scott*, 973 F.2d 507 (6th Cir. 1992). CRS claims that "an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate." *Id.* at 511. CRS then argues that its loss of customer goodwill constitutes "immeasurable damages." [Memo in Support of Mot. for TRO, at p. 14.]

Basicomputer is inapplicable to this case. It involved a former employee against whom a non-compete and confidentiality agreement was in place. The employee allegedly violated the terms of the agreement giving rise to the irreparable injury. This case presents no facts even comparable to *Basicomputer*. This case involves no

confidential information. This case involves no binding agreement (since the IHA's required "condition precedent" of the KHBPA giving consent to CRS' OTB sites has never been given for Churchill's Spring 2007 meet). By operation of law, there can be no binding effect to any "agreement" signed between Churchill and CRS without KHBPA's having consented to it.

Furthermore, CRS cannot found an irreparable injury claim upon an expectation it purportedly had that the KHBPA would forever give its consent. Churchill and KHBPA, in the "regular contractual process," negotiate every meet whether KHBPA will give or withhold consent to proposed OTB sites. Everyone in the industry knows this is how the process works. The custom and usage of the industry is embodied in the terms of the model simulcasting agreement (Uniform Wagering Agreement), the pertinent terms of which (set out above in the Counterstatement of Facts) clearly indicate that the contract is conditioned upon approval from all the requisite parties whose consents are required under the IHA. No one could reasonably or equitably expect they would get consent forever and always from a horsemen's group or any other entity whose consent is required under the IHA. Too many contingencies exist for someone to claim, as CRS does here, that it is entitled to receive a TRO based upon such a speculative assumption.

In any event, CRS would be more than capable of calculating "damages" if its claims were in any way meritorious. Its pleadings are strewn with references to how much wagering handle it claims it took in from Churchill's signal in years past, and on which it says it has made payments to racetracks. There is nothing credible about CRS' contention that it would incapable of proving damages if it were successful. This fact alone reveals that there is an "adequate remedy at law" sufficient to deny a TRO.

V. Harm to Others

If this Court were to issue the TRO requested by CRS, there would be irreparable harm done to the rights of horsemen. Congress clearly envisioned that neither the "actors" nor the "theatre" should have to put up with off-track betting at unapproved sites. Let there be no doubt: if this Court were to grant the requested TRO, wagering would occur without horsemen's consent. To allow such to occur without their approval is nothing short of "piracy." CRS is asking this Court, in effect, to condone CRS' plan to steal the property rights of horsemen. The legislative history to the IHA plainly refers to horsemen as co-proprietors of the wagering revenues that off-track betting provides. It is their property.

Irrespective of the direct insult that a TRO would have on horsemen's rights under the IHA, a tremendous disservice will continue to be done to the sport of horseracing in Oklahoma. As mentioned above, KHBPA has stated what "terms and conditions" it demands in order to give its consent to CRS' OTB sites receiving Churchill's simulcasts. Those terms are intended to uphold horsemen's purses and thereby contribute to the enhancement of the sport. Non-CRS OTB's in Oklahoma contribute a fixed statutory amount to horsemen's purses. The CRS sites do not. If CRS will not compete fairly with those sites that contribute the most to the lifeblood of the sport, this Court's issuance of a TRO would only further this ongoing disparity and continue the harm that has already occurred and to which KHBPA has determined it is going to put a stop.

It is respectfully submitted that Congress recognized that horsemen are the parties in the off-track wagering industry who are most likely to exercise their consent right for

the betterment and health of the sport of horseracing. This fact was recognized and expressed by the Sixth Circuit in the *Turfway* case. *See* 20 F.3d at 1414-15. Kentucky horsemen have exercised their congressionally granted "business judgment," and if this Court substitutes its (or CRS' judgment) for KHBPA's as to what is (or is not) best for the sport, then the sport will continue to suffer. KHBPA asks this Court not to issue a TRO that will continue harm to the sport. It is not this Court's function to do so, nor CRS' place to ask the Court to do so.

VI. The Public Interest is Unequivocally Against a TRO

The public interest factor would be absolutely offended by the grant of a TRO (injunction). The public interest is summed up in one sentence authored by Congress: "No person may accept an interstate off-track wager except as provided in this chapter." 15 U.S.C. § 3003 (2007). Congress enacted this language. Congress weighed the equities in favor of off-track gambling interests (such as CRS), the rights of the co-proprietors of off-track wagering revenues (horsemen and tracks) and the interests of furthering the sport of horseracing (horsemen), not to mention affected States (racing commissions), and struck the balance in favor of ***prohibiting*** any off-track wagering on horseracing unless the interested parties agree to allow it. Congress has spoken what the public interest, and that public interest is unequivocally opposed to this Court issuing a TRO. Any such TRO will have the effect of overriding an act of Congress because KHBPA, an interested party in the eyes of Congress, has not given its consent.

This situation is not unlike what the Supreme Court addressed as the "public interest" factor relating to injunctions in the case of *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). In *Oakland Cannabis Buyers' Cooperative*,

the Supreme Court held, with respect to a lower court's injunction granted with respect to medical use of marijuana in the face of the Controlled Substances Act, as follows:

> [T]he mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion [as to an]. . . injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, . . . On the contrary, a court sitting in equity cannot "ignore the judgment of Congress, deliberately expressed in legislation." *Virginia R. Co. v. Railway Employees*, 300 U.S. 515, 551. . .(1937). ***A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited.*** "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." [*TVA v.*] *Hill*, 437 U.S. [153,] at 194 [(1978)]…. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. *Id.* at 194-195….Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all…. ***Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction,"*** [*Weinberger v.*] *Romero-Barcelo*. 456 U.S. [305], at 312 … [(1982)], over the other available methods of enforcement. Cf. *id.*, at 316…(referring to "discretion to rely on remedies other than an immediate prohibitory injunction") ***To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.***

532 U.S. at 497-898 (emphasis added).

What the foregoing quote from *Oakland Cannabis Buyers' Cooperative* teaches is that this Court is not simply at liberty, as CRS argues, to ignore the IHA's prohibition against interstate off-track wagering without the requisite consent of KHBPA. Congress has already struck the balance in favor of ***prohibition*** of such wagering, and the Court should not second-guess that public interest determination of Congress. The Court should not, in other words, enter into a balancing of the purported advantages or

disadvantages of nonenforcement of the IHA, but may only balance the advantages or disadvantages of issuing a TRO. The public interest factor cannot, therefore, be weighed in CRS' favor in any respect. Indeed, it can only be deemed unequivocally in favor of KHBPA's decision not to give consent under the IHA.

The policy choice of Congress, for and on behalf of the "public interest," is clearly opposed to the issuance of a TRO. Indeed, there would have to be the most extraordinary of circumstances to override Congress' public policy choice given the clear cut violation of the IHA that would occur if this Court were to grant a TRO as CRS requests.

Plaintiffs' Posting of Bond

Clearly FRCP 65 ordinarily requires the posting of bond by any party attempting to obtain preliminary injunctive relief. In this instance, CRS is not entitled to a TRO, but if the Court were to grant it such relief, the Court must establish an appropriate bond. In this instance, since CRS will have succeeded in "pirating" off-track wagers without horsemen's consent as required under the IHA, the IHA has a measure of damages payable to KHBPA for anyone who accepts a wager in violation of the terms of the IHA. That measure of damages should be the basis of any bond required of CRS in the event the Court grants injunctive relief. Section 3005 of the IHA sets out the damage formula, and it is that any person who accepts an off-track wager in violation of the IHA must pay to the horsemen's group damages as if the wager were made on-track as opposed to off-track. Here, this means, CRS if it wrongfully obtains a TRO will have to pay to KHBPA damages in a sum far greater than the signal fee which it may otherwise intend to purchase the simulcast wagering rights from Churchill.

KHBPA will obtain on average approximately 10 % of all handle wagered on Churchill Downs races (on-track), and CRS should be required to post bond in an amount not less than that figure. Adequate bond in this case is particularly important too since CRS claims it is a tribally owned entity but has not indicated what its stance will be as to whether it will claim entitlement to "tribal immunity." KHBPA does not believe CRS is in any way entitled to claim such immunity, but the bond issue could bear on CRS' stance is on that matter.

CONCLUSION

For the foregoing reasons, KHBPA requests the Court to overrule Plaintiff CRS' Motion for Temporary Restraining Order.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Charles M. Pritchett, Jr., FROST BROWN TODD LLC, 400 West Market Street, 32nd Floor, Louisville, Kentucky, 40202-3363.

s/ Douglas L. McSwain

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