IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF KENTUCKY
LEXINGTON DIVISION

GARY AND MARY WEST, Plaintiffs, vs. KENTUCKY HORSE RACING COMMISSION, et al. Defendants.	:	**Case No.: 5:19-cv-00211-KKC**

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Before the Court for judicial review is an administrative action by the Defendants that, in the nearly century and a half history of the Kentucky Derby, is without precedent. Because of a foul allegedly committed during the running of the Derby, the Stewards ordered the disqualification of the horse that had crossed the finish line first. The horse that was disqualified is Maximum Security. He is owned by Plaintiffs.

In their Memorandum of Law in Support of this Motion to Dismiss, Defendants describe the Kentucky Horse Racing Commission Regulations as having the "force of law." (Br. 9).[1] Had Defendants not broken their own laws in disqualifying Maximum Security, Plaintiffs would not be before this Court. That, however, is not what happened.

Foreclosed by a Commission regulation barring review by the Commission of the Stewards' Order ("Order") disqualifying Maximum Security and having exhausted their administrative remedies, Plaintiffs filed their Complaint in this Court. They seek to redress the violation of their constitutional and statutory rights by having this Court reverse the Order disqualifying Maximum Security and restore Maximum Security to his rightful and lawful place as the winner of the 145th Kentucky Derby.

Plaintiffs' Complaint alleges that Defendants' failure to follow their own laws in connection with the disqualification of Maximum Security violated Plaintiffs' Fourteenth Amendment Due Process Liberty and Property rights. Count VI alleges that the Regulation under which Defendants disqualified Maximum Security is void for vagueness in violation of Plaintiffs' Due Process Rights. Count VII of the Complaint incorporates paragraphs 1-160 of the Complaint

[1] References to "(Br. __)" are to Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss. (D.E. 19-1).

and asserts a cognizable claim under 42 U.S.C § 1983 for deprivation of Plaintiffs' constitutional rights.

In addition to their § 1983 claim, Plaintiffs' Complaint alleges a violation of Kentucky Revised Statutes 13B.150. Counts I through V allege that under KRS 13B.150 this Court has the power to, and should, reverse the Order disqualifying Maximum Security because it is not supported by substantial evidence, violates Plaintiffs' constitutional rights, violates Plaintiffs' statutory rights, exceeds the Commission's statutory authority, is arbitrary, constitutes an abuse of discretion by the Stewards, and/or is deficient as otherwise provided by law.

Defendants' Motion to Dismiss has no merit and should be denied.

STATEMENT OF FACTS

A. The 145th Running of the Kentucky Derby

On May 4, 2019, 19 horses competed against each other over a sloppy track in the 145th edition of the Kentucky Derby ("Derby"). (¶ 76).[2] Maximum Security, a three-year-old colt owned by Gary and Mary West ("Plaintiffs"), crossed the finish line first. (¶¶ 1, 29).[3]

B. No Inquiry by the Stewards

Not having seen with their own eyes any foul in the running of the Derby, the three Stewards did not flash the Stewards' inquiry sign on the infield tote board, as is the practice whenever the Stewards are conducting an inquiry. Nor did the Stewards otherwise announce to the public that they would be conducting a general inquiry into the running of the Derby. (¶ 86).

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[2] References to "(¶__)" are to Plaintiffs' Complaint. (D.E. 1).

[3] The complete original order of finish in the Derby was: (1) Maximum Security; (2) Country House; (3) Code of Honor; (4) Tacitus; (5) Improbable; (6) Game Winner; (7) Master Fencer; (8) War of Will; (9) Plus Que Parfait; (10) Win Win Win; (11) Cutting Humor; (12) By My Standards; (13) Vekoma; (14) Bodexpress; (15) Tax; (16) Roadster; (17) Long Range Toddy; (18) Spinoff; (19) Gray Magician. (¶ 77).

C. Two Jockeys Object Against Maximum Security, but Not the Riders of War of Will or Bodexpress

Flavien Prat, the jockey of second-place finisher Country House, lodged an objection ("Prat Objection") with the Stewards against Maximum Security. (¶ 78). Jon Court, the jockey of seventeenth place finisher Long Range Toddy, lodged an objection ("Court Objection") against both Maximum Security and War of Will. (¶ 80). Neither Tyler Gaffalione, rider of War of Will, nor Chris Landeros, rider of Bodexpress, lodged objections with the Stewards even though both riders and horses were implicated in the Prat and Court Objections. (¶ 16).

D. The Manner in Which the Stewards Conducted Their Deliberations

The deliberations by the Stewards consisted of reviewing video footage of the running of the Derby (¶ 92; Affidavit of D. Barry Stilz, D.E. 16-4 ("Stilz Aff. D.E. 16-4"), at Ex. B and D) as well as speaking with Prat, Court and Luis Saez, the jockey for Maximum Security. (¶ 88). Even though Court had objected against Gaffalione for Gaffalione's careless ride on War of Will (¶ 80), the Stewards did not interview Gaffalione (¶ 89). Nor did the Stewards interview Chris Landeros even though his horse was also involved in the alleged interference. (¶¶ 89-90).

The Stewards had two conversations with Jason Servis, the trainer of Maximum Security. (¶ 82). The Stewards told Servis about the Prat Objection, but not the Court Objection. (¶ 82). Defendants say Plaintiffs should have lodged an objection before the Derby was declared official. (Br. 5 n.6). They don't explain why Plaintiffs would object to the original order of finish when it was Plaintiffs' horse that crossed the finish line first.

E. The Stewards' Order Disqualifying Maximum Security

The Stewards disallowed the Prat Objection, upheld the Court Objection, and ordered the disqualification of Maximum Security from first to seventeenth place. (¶¶ 79, 91). Maximum Security's disqualification is the first time in the Derby's 145-year history that the horse that

crossed the finish line first was disqualified for an alleged foul that occurred during the running of the race. (¶ 97).

F. The Findings Made by the Stewards in Connection With the Disqualification of Maximum Security

The Stewards' record of their findings made in connection with the disqualification of Maximum Security is contained in two statements. (¶ 92; Stilz Aff. D.E. 16-4 at Ex. B). The first statement was read to the public and the media ("Statement"). (¶ 92). The Statement says:

> Hello, good evening. The riders of the 18 (Long Range Toddy) and 20 (Country House) horses in the Kentucky Derby lodged objections against the 7 (Maximum Security) horse, the winner, due to interference turning for home, leaving the 1/4 pole.
>
> We had a lengthy review of the race. We interviewed affected riders. We determined that the 7 horse drifted out and impacted the progress of Number 1 (War of Will), in turn, interfering with the 18 and 21 (Bodexpress). Those horses were all affected, we thought, by the interference.
>
> Therefore, we unanimously determined to disqualify Number 7 and place him behind the 18, the 18 being the lowest-placed horse that he bothered, which is our typical procedure.

(¶ 92). After reading the Statement, the Stewards refused to answer any questions from the media or otherwise explain or elaborate on their findings. (¶ 96).

The second statement, entitled "Steward's Report," ("Report") states:

> An objection was lodged via radio through the outrider by the rider of second place #20 "Country House" (Flavien Prat) alleging interference by the rider of the winner #7 "Maximum Security" (Luis Saez) near the 5/16 pole. In addition, an objection was lodged via telephone at the winner's circle by the rider #18 "Long Range Toddy" (Jon Court) who finished seventeenth, also alleging interference near the 5/16 pole. After a thorough and lengthy review of the race replay and interviews with Saez, Prat and Court, the stewards determined that #7 "Maximum Security" (Saez) veered out into the path of #1 "War of Will" (Tyler Gaffalione) who was forced to check and, who in turn impeded #18 "Long Range Toddy" (Court) who came out into #21 "Bodexpress" (Chris Landeros) who had to check sharply. As #7 "Maximum Security" (Saez) continued to veer out, #18 "Long Range Toddy" (Court) was forced to check sharply, making contact with #20 "Country House" (Prat). The winner, #7 "Maximum Security" (Saez) was disqualified and placed

seventeenth, behind #18 "Long Range Toddy" (Court). Official order of finish: 20-13-8-5-16. (Stilz Aff. D.E. 16-4 at Ex. B).

The Statement and Report are materially inconsistent as to the location during the race where the alleged foul occurred. The Statement says the "interference" occurred "turning for home, leaving the 1/4 pole." (¶ 92). The Report says the interference occurred "near the 5/16 pole." (Stilz Aff. D.E. 16-4 at Ex. B). The distance between the "5/16 pole" and "1/4 pole" is 1/16 of a mile – 330 feet.

The Statement contains an affirmative material misrepresentation. The Statement says the Stewards "interviewed affected riders." (¶ 92). However, the Stewards did not interview Gaffalione or Landeros even though both of them were the "affected riders" on horses that the Stewards expressly found to have been "impacted" by Maximum Security. (¶¶ 89, 112(d)-(e)).

G. The Stewards' Failure to Follow the Commission's Regulation Governing Fouls and Disqualifications

Pursuant to Kentucky Administrative Regulations ("KAR") 810 1:016 Section 17 ("Section 17"), before the Stewards are authorized to post the "official sign [] for the race" they are required to be "satisfied" "that the race has been properly run *in accordance with the rules and administrative regulations of the Commission*." (emphasis added). Section 12 of Title 810 KAR 1:016 ("Section 12") is the Commission regulation that governs fouls and disqualifications.[4] (¶ 110). In four ways the Stewards failed to follow the mandatory requirements of Section 12 when

[4] Section 12 states as follows:

Fouls. A leading horse if clear is entitled to any part of the track. If a leading horse or any other horse in a race swerves or is ridden to either side so as to interfere with, intimidate, or impede any other horse or jockey, or to cause the same result, this action shall be deemed a foul. If a jockey strikes another horse or jockey, it is a foul. If in the opinion of the stewards a foul alters the finish of a race, an offending horse may be disqualified by the stewards. (¶ 110).

they ordered the disqualification of Maximum Security. (¶ 112).

First, Section 12 gives Maximum Security the right of way as the "leading horse" "entitled to any part of the track" "if clear." (¶¶ 112(a) and (b) (quoting Section 12)). Defendants admit (Br. 28) that the Stewards failed to find that Maximum Security *was not "clear"* at the time he allegedly "drifted out and impacted the progress of" War of Will. (emphasis added).

Second, the Stewards did not find, despite the requirement of Section 12, that the foul allegedly committed by Maximum Security altered the order of finish in the Derby. (¶ 112(h)). Nor did the Stewards find that, but for the alleged foul by Maximum Security, the three horses allegedly impacted by Maximum Security would have had a better placement in the order of finish than eighth for War of Will, fourteenth for Bodexpress, and seventeenth for Long Range Toddy. (¶ 112(h)). The video footage viewed by the Stewards conclusively shows that the horses allegedly interfered with by Maximum Security all lost ground to him in the quarter-mile stretch run that followed immediately after the alleged interference. (¶ 112(f)(vii)).

Third, the Stewards did not explain why – despite having the discretion under Section 12 not to disqualify Maximum Security even if he had committed a foul that altered the finish of the Derby – they elected to disqualify the horse that crossed the finish line first in the Derby despite the fact that in the 144 prior runnings of the Derby no horse that crossed the finish line first had ever been disqualified for interference occurring in the race. (¶ 112(i)).

Fourth, the video footage viewed by the Stewards shows that the initiating cause of the interference that was first brought to the Stewards' attention by the Court Objection was the careless ride of Gaffalione, not the ride of Saez on Maximum Security. (¶ 112(f)(i)-(vii)).[5]

[5] The video footage viewed by the Stewards shows the following facts, which are deemed to

H. Damages Caused by the Stewards' Disqualification of Maximum Security

As a result of the Stewards' disqualification of Maximum Security, the bettors who wagered on Maximum Security lost more than an estimated $100 million in winnings they would have received had Maximum Security not been disqualified. (¶ 98). Plaintiffs lost the winning owner's share of $1,488,000 (*i.e.*, 80% of the $1.86 million share of the Derby purse that is awarded to the connections of the winning horse). (¶ 22). Maximum Security's trainer and jockey each lost his winning share of approximately $186,000. (¶¶ 100–101). Moving Country House up from second to first resulted in an approximately $1.26 million windfall in the purse amount awarded to Country House's connections, notwithstanding that Prat's Objection alleging that Maximum Security interfered with Country House was disallowed by the Stewards. (¶ 102).

I. Plaintiffs' Appeal to the Commission Is Summarily Denied

On May 6, 2019, Plaintiffs filed a complaint, protest, objection and appeal (collectively, "Appeal") with the Commission challenging the Stewards' Order disqualifying Maximum

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be true on this motion: (i) Gaffalione repeatedly restrained War of Will for a significant length of time, causing the horse to resist the restraint by throwing his head while on the rail, down the backstretch, into the turn, and approaching the quarter pole; (ii) near the quarter pole Gaffalione attempted to move War of Will from behind Maximum Security in the hope that an opening would materialize to the outside of Maximum Security, but it ultimately did not; (iii) in moving off the rail, Gaffalione bulled his way into Long Range Toddy, setting off a chain reaction of bumps by Long Range Toddy into Bodexpress and then, in turn, into Country House; (iv) in reaction to being bumped, Country House squeezed Bodexpress, causing Bodexpress to bump Long Range Toddy back into War of Will; (v) upon being bumped, War of Will, finding no opening to run through, bulled his way through horses, then interfered with the hindquarters of Maximum Security on five separate occasions, inflicting cuts and abrasions to Maximum Security's hind quarters; (vi) throughout the bumping and striking incidents, all of which occurred behind him, Maximum Security was entitled as the leading horse to a path on the track of his choosing; and (vii) after the exchange of bumps and strikes, none of which involved Maximum Security except as the victim of interference by War of Will, all of the "affected horses" had a clear and unobstructed run for the remaining 20% of the race during which time Country House tried to, but could not, pass Maximum Security, War of Will faded to eighth, Bodexpress dropped to fourteenth, and Long Range Toddy tired to seventeenth. (¶ 112(f)(i)-(vii)).

Security. (¶ 103; Affidavit of D. Barry Stilz D.E. Docket No. 1-1 ("Stilz Aff. D.E. 1-1") at Ex. A). Plaintiffs' Appeal also sought, pursuant to "applicable regulations," a "Stay Pending Appeal" and that "all related purse monies be withheld and placed in escrow pending final determination of the matter." (Stilz Aff. D.E. 1-1 at Ex. A). Within a few hours of receiving the Appeal, counsel for the Commission notified Plaintiffs that "your request for an appeal is denied . . . because the law does not provide for an appeal" and because "the stewards' [f]indings of fact and determination shall be final and shall not be subject to appeal." (¶ 104, Stilz Aff. D.E. 1-1 at Ex. A). The Commission did not find the Appeal was untimely. (Stilz Aff. D.E. 1-1 at Ex. A). The Commission also denied Plaintiffs' request for a Stay Pending Appeal. (*Id.*). The Commission's letter denying Plaintiffs' Appeal attached the unpublished opinion in *March v. The Kentucky Horse Racing Commission*, No. 2013-CA-000900-MR, 2015 WL 3429763 (Ky. Ct. App. May 29, 2015). (¶ 105; Stilz Aff. D.E. 1-1 at Ex. A). On May 14, 2019, Plaintiffs filed this action against Defendants in the United States District Court for the Eastern District of Kentucky.

J. The Stewards' and Commission's Failure To Follow the Commission Regulation Mandating That Maximum Security Be Declared Co-Winner of the Derby

Title 810 KAR 1:017, Section 5, is the Commission Regulation applicable to situations in which, as here, the result of a race is "placed in dispute" after the race is "Declared Official for Pari-mutuel Payoff" ("Section 5").[6] Under Section 5, if after a race is declared official, the result

[6] Section 5 states as follows:

Dispute of a Race after Declared Official for Pari-mutuel Payoff. If the result of a race is placed in dispute by the lodging of an objection or complaint or by discovery of an alleged violation of an administrative regulation, after the race has been declared official for pari-mutuel payoff, the procedures established in this section shall apply pending final determination of the disputed race.

(1) The purse money and trophy to which the horse objected to may have been entitled shall be withheld and placed in escrow by the association until final adjudication of the dispute; except the stewards may order any portion of the purse money to be distributed if the distribution would not be affected by the determination of the dispute.

of the race is "placed in dispute," then it is mandated that the horse that "crossed the finish line first" (here Maximum Security) and "any other horse that may become the winner" "*shall be considered winners of that race until the matter is finally adjudicated*." 810 KAR 1:017 § 5 (emphasis added). Further, "pending final determination of the disputed race," the "purse money" and "trophy" "shall" be held by the "association on order of the stewards." *Id.* Section 5 is a mandatory obligation. It gives neither the Stewards nor the Commission any discretion not to do what the Regulation says it must do, namely, declare Maximum Security and Country House co-winners of the Derby and escrow the purse and trophy.

The result of the Derby was "placed in dispute" by Plaintiffs through the Appeal it filed on May 6. (Stilz Aff. D.E. 1-1 at Ex. A). Consistent with their May 6 Appeal, Plaintiffs, on May 23, 2019, sent another letter to the Commission demanding that, pursuant to Section 5, Maximum Security and Country House be declared co-winners of the Derby and that any purse money and/or trophy previously distributed be "returned immediately" to the association "pending final determination of the disputed race" and "until the matter is finally adjudicated." (Stilz Aff. D.E. 16-4 at Ex. H). In rejecting Plaintiffs' request on May 6 for a Stay Pending Appeal (Stilz Aff. D.E. 1-1 at Ex. A) and in refusing to answer Plaintiffs' May 23, 2019 demand, Defendants have failed to follow the mandates of Section 5. There is no reason for the Court not to immediately right this

(2) If purse money or trophy has been awarded to an owner prior to the lodging of an objection or discovery of an alleged violation of an administrative regulation which places the outcome of a race in dispute, the money or trophy shall be returned immediately to the association on order of the stewards. Upon final adjudication of the dispute, the person deemed to be entitled to the purse money or trophy shall be entitled to an order of recovery from any person or association holding the same.

(3) The horse that crossed the finish line first and any other horse that may become the winner of a disputed race shall be considered winners of that race until the matter is finally adjudicated.

wrong by declaring Maximum Security to be co-winner of the Derby pending final adjudication of this case.

STANDARD OF REVIEW

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) ("Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief.") (internal quotations and citations omitted). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Twombly*, 550 U.S. at 555. *See also Iqbal*, 556 U.S. at 678 ("the pleading standard Rule 8 announces does not require detailed factual allegations") (internal quotations and citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations and citations omitted). *See also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (on motion to dismiss burden lies with the moving party to prove that "no claim exists"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678; *see also Watson Carpet & Floor v. Mohawk Indus.*, 648 F.3d 452, 456 (6th Cir. 2011) (on

motion to dismiss court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff").

In evaluating a motion to dismiss, a court "may consider the complaint and any exhibits attached thereto, public records" and "items appearing in the record of the case." *Luis v. Zeng*, 833 F.3d 619, 626 (6th Cir. 2016); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015); *see also Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, *and exhibits attached to the complaint*, also may be taken into account." (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997); emphasis added in *Amini*)).

LEGAL ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT SUFFICIENTLY ALLEGES FOUR SEPARATE FOURTEENTH AMENDMENT DUE PROCESS VIOLATIONS THAT, AS A MATTER OF LAW, ARE COGNIZABLE UNDER 42 U.S.C. § 1983

A. Each One of Plaintiffs' Claims Alleging Violation of Their Constitutional Rights Is Cognizable Under 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, a person has a legally cognizable claim against anyone "who, under color of state law, deprives a person of rights, privileges, or immunities secured by the Constitution or conferred by federal statute." *Guertin v. State*, 912 F.3d 907, 915 (6th Cir. 2019) (quoting *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012)). There are two elements to a § 1983 claim. First, "the conduct complained of must be committed under color of state law." *Ana Leon T. v. Fed. Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987). Second, "the conduct must have deprived the claimant of a right, privilege or immunity protected by the United States Constitution or statutes." *Id.* Under § 1983 a court has broad discretion to

shape whatever remedy is necessary to redress a violation of constitutional rights. *See*, *e.g.*, *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("Section 1983 by its terms confers authority to grant equitable relief as well as damages."); *Donahue v. Staunton*, 471 F.2d 475, 483 (7th Cir. 1972) (It is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

Defendants do not dispute that they acted "under color of state law." They also do not dispute that Plaintiffs have a right under § 1983 to pursue a claim alleging that their constitutional rights have been deprived.

Defendants' sole argument to dismiss the § 1983 claim is that Plaintiffs have failed to sufficiently allege any cognizable violations of any of their constitutional rights. (Br. 30). Construing Plaintiffs' Complaint in the light most favorable to Plaintiffs, drawing all reasonable inferences in Plaintiffs' favor, and accepting all allegations in the Complaint as true, the four violations alleged by Plaintiffs of their Fourteenth Amendment Due Process Property and Liberty Rights are each, individually and collectively, cognizable under § 1983.

First, Plaintiffs allege the Stewards failed to follow Section 17 and the mandatory requirements of Section 12 in disqualifying Maximum Security. (Statement of Facts, *supra*, Subheading G). Next, Plaintiffs allege that the Stewards and Commission failed to comply with Section 5's mandatory requirement that Maximum Security be declared co-winner of the Derby. (Statement of Facts, *supra*, Subheading J). Defendants' failures to abide their own Regulations in connection with the disqualification of Maximum Security violate Plaintiffs' Due Process Liberty rights.

Further, Plaintiffs allege that their Property interests under the Fourteenth Amendment's Due Process Clause were violated by the process followed by Defendants in disqualifying Maximum Security. (Statement of Facts, *supra*, Subheadings D - J). Plaintiffs' protectable Property interests, like their Liberty interests, derive from existing Commission Regulations as well as mutual understanding and are cognizable claims under § 1983.

Lastly, Plaintiffs allege that their Due Process rights were violated because a material word in the context of Section 12, the word "clear," is void for vagueness and, thus, is a cognizable Due Process claim under § 1983.

B. The Failure by Defendants to Follow Sections 17, 12, and 5 of the Commission's Regulations in Connection With the Disqualification of Maximum Security Violates Plaintiffs' Due Process Liberty Rights Under the Fourteenth Amendment.

Central to Plaintiffs' claim under § 1983 is the allegation that Defendants did not follow the Commission's Regulations in connection with the disqualification of Maximum Security and in failing to do so violated Plaintiffs' Due Process Liberty rights. (¶¶ 93, 110, 111, 112). Under the standards governing 12(b)(6) motions, the allegations that Defendants failed to follow the Commission's Regulations are deemed to be true.[7]

In *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court established the fundamental principle that, as a matter of Due Process, an agency is required to follow its own Regulations when carrying out its administrative functions. Under *Accardi*, if an agency does not follow its own Regulations in taking administrative action against an individual, it violates the Liberty component of the Due Process Clause. *See Wilson v. Comm'r of Social Security*, 378 F.3d 541, 545 (6th Cir. 2004) (where an agency fails to follow its own Regulations it "may result in a

[7] Defendants accept "the facts pleaded by Gary and Mary West as true except to the extent the facts misrepresent established law." (Br. 2 n.1).

violation of an individual's constitutional right to due process"); *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) ("The Accardi doctrine is premised on fundamental notions of fair play underlying the concept of due process."). Where an agency claims its Regulation is for internal agency guidance only and does not affect third parties or entities, the agency is still required to follow its own Regulations "even when those regulations provide more protection than the Constitution . . . ." *Doe v. United States Dep't. of Justice,* 753 F.2d 1092, 1098 (D.C. Cir. 1985).

This Circuit recognizes that an agency order entered in contravention of its own Regulations "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." *Hollingsworth v. Balcom*, 441 F.2d 419, 422 (6th Cir. 1971). The Kentucky Court of Appeals has similarly noted that "it is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is *per se* arbitrary and capricious." *Commonwealth Transp. Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. Ct. App. 2004).

Not only does the Due Process Clause require Defendants to follow the Commission Regulations in connection with the disqualification of Maximum Security, but the Commission's own Regulations echo what the Due Process Clause requires. Under Section 17 the Stewards must follow the Commission's "rules and administrative regulations" before declaring the order of finish in a race to be "official." This, the Stewards did not do.

First, the Stewards did not follow the requirements of Section 12 governing fouls and disqualifications when they ordered the disqualification of Maximum Security. In particular, the Stewards did not find that Maximum Security was not "clear" when he allegedly drifted out even though he was the leading horse entitled to a path of his own choosing "if clear." Nor did the Stewards find that Maximum Security's alleged foul altered the finish of the race, as more particularly set forth in the Statement of Facts, *supra*, Subheading G. *See also Ramsey v. La. State*

Racing Comm'n, 248 So.3d 648 (La. Ct. App. 2018) (holding that winner of race, under regulation virtually identical to Section 12, cannot be disqualified unless the winner's foul actually altered the finish of the race).

Second, Defendants failed to accord Maximum Security the status of Derby co-winner with Country House. This administrative action is mandated by Section 5, pending final adjudication of the disputed result of the Derby, as more particularly set forth in the Statement of Facts, *supra*, Subheading J.

C. Plaintiffs Have a Property Interest Protected Under the Fourteenth Amendment's Due Process Clause.

The Fourteenth Amendment's Due Process Clause protects an individual from being deprived of "life, liberty, or property, without due process of law." In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court noted that "property" "may take many forms" and can derive from numerous sources among which are "statutory and *administrative standards*" and "*existing rules or understandings*." *Id.* at 576 (emphasis added). The Commission concedes that a protectable property interest can be created by "*existing rules or understandings*." (Br. 7 (emphasis added)). The overarching question is whether a person has a "*legitimate claim of entitlement*" to the benefit at issue. *Board of Regents*, 408 U.S. at 577 (emphasis added).

In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court expanded the meaning of "property" beyond "statutory and administrative standards" and "existing rules or understandings" to include situations in which the totality of "*circumstances*" show that a person has a "legitimate claim of entitlement" to a benefit. *Id.* at 602 (emphasis added). In *Perry* the "circumstances" that gave rise to a protectable property interest was a mutual understanding rooted in the text of a faculty guide applicable to all faculty members. *Id.* at 600. The Court took special care to note that an express contract is not required for there to be a mutual understanding sufficient to create a protectable

property interest under the Fourteenth Amendment. *Id.* at 601-02; *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause.").

1. The Failure by the Stewards to Comply With Section 12's Mandatory Requirements Provide Plaintiffs With a Protectable Property Interest.

Plaintiffs had every right to expect that the Stewards would follow the mandatory requirements of Section 12 before disqualifying Maximum Security. After all, Defendants say the Commission regulations have the "force of law." (Br. 9). No reasonable person would expect that Defendants would break their own laws in disqualifying Maximum Security. But that is exactly and indisputably what happened.

Defendants place much emphasis on the fact that the Wests must "abide by the Commission's rules and regulations" (Br. 4) even if Defendants acted "corruptly" (Br. 10). However, unless Defendants believe that Plaintiffs must obey Defendants' laws but Defendants need not do so (a proposition absurd on its face), a mutual understanding existed between Plaintiffs and Defendants that when the Stewards determined whether to disqualify Maximum Security they would do so in strict conformity with the legal requirements of Section 12. When the Stewards broke the Commission's law by not following the requirements of Section 12, Plaintiffs' legitimate claim of entitlement to the benefits that accrue to the owner of the horse that crossed the finish line first in the Derby was denied to them.

The Defendants begin their defense of the Stewards' unquestionable failure to follow Section 12 by conceding that the two "prerequisite[s] to disqualify a horse" under Section 12 require "the Stewards" to find "(1) that a foul occurred (in the form of interference, intimidation, or impediment), and (2) that the foul altered the finish of the race in any way." (Br. 28). The

Commission misquotes Section 12. The words "in any way" are not part of Section 12 and should be disregarded by the Court.

Unable to point to any express finding (because there is none) by the Stewards that Maximum Security's alleged foul altered the finish of the Derby, Defendants resort to a post hoc rationalization to invent a new fact of their own. As a replacement for an express finding, they say it is a fact that "implicit" in the Stewards' determination "that a foul occurred" is that "the foul altered the finish." (Br. 28).

This factual argument is not only improper for consideration on this motion, it is also contrived and, at best, disingenuous. Under Defendants' newly minted fact, it would mean that once the Stewards determined that a foul occurred, it would automatically, *ipso facto*, constitute a finding that the finish of the race had also been altered by the foul. If this were true, which it obviously cannot be, it would read out of Section 12 the separate and independent alter-the-finish prerequisite that Defendants admit Section 12 explicitly requires. Under Defendants' post hoc rationalization, one would never know if the Stewards considered whether the foul altered the finish of the race, much less found that it did, inasmuch as their finding that a foul was committed would *per se* include an "implicit" finding that the foul altered the finish of the race. Regulations and statutes cannot be interpreted to reduce their words to meaningless surplusage.[8]

Defendants' post hoc rationalization that the Stewards impliedly found the finish of the Derby was altered by Maximum Security's alleged foul is improper. Such a legal argument is not warranted by, and is inconsistent with, existing law. *See Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 362 (6th Cir. 1976) ("[W]e are not free to accept 'appellate counsel's post hoc rationalization for

[8] *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 140–41, (1994) (warning courts from interpreting statutory terms and requirements as "surplusage—as words of no consequence").

agency action' in lieu of reasons and findings enunciated by the Board.") (internal citations omitted); *Hicks v. Comm'r of Social Security*, 909 F.3d 786, 808 (6th Cir. 2018) ("'An agency's actions must be upheld, if at all, on the basis articulated by the agency itself,' and not based on 'appellate counsel's post hoc rationalizations.'") (internal citations omitted).[9]

Defendants' post hoc rationalization is also factually untrue. It is indisputable that the alleged foul committed by Maximum Security obviously did not alter the finish of the Derby. Anyone can see from the video footage that Maximum Security out-finished the entire field for the remaining 20% of the race immediately after the alleged foul. Despite having a clear path to run down the entire demanding Churchill Downs stretch, Long Range Toddy, Bodexpress and War of Will all had an opportunity to, but could not, catch and pass Maximum Security. The indisputable fact is that the best horse in the Derby crossed the finish line first. That horse was Maximum Security.

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[9] The cases cited by Defendants at pages 28-29 of their Brief are not in conflict with *Flav-O-Rich* and *Hicks* regarding a dispute if the "record" supports an agency's actions. First, three of the cases cited by Defendants – *JP Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014); *S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921 (Ky. 2013); *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004) – dealt with a trial court's determination, and the fourth case – *Gormley v. Judicial Conduct Comm'n*, 332 S.W.3d 717 (Ky. 2010) – dealt with an order of the Judicial Conduct Commission finding that a judge violated the Code of Judicial Conduct. Second, in none of these cases was there a challenge to whether the record supported the court or judicial conduct commission's findings. Third, in all of the cases cited by Defendants, the "implicit" finding referenced in those opinions was not only not challenged but was the clear basis of the courts and judicial commission's determinations. Here, the record is clear that while the Stewards did find that a foul was committed by Maximum Security, they *never* found that the alleged foul altered the finish of the race. Defendants cannot alter the record with post hoc rationalizations to justify the Stewards' illegal action.

2. The Failure by the Commission and Stewards to Comply With Section 5's Mandatory Requirements Provide Plaintiffs With a Protectable Property Interest.

On May 6, 2019, Plaintiffs sought a Stay Pending Appeal, requesting, pursuant to the Commission's regulations, that all Derby purse monies be placed in escrow pending final determination of the Appeal. (Stilz Aff. D.E. 1-1 at Ex. A). On May 23, 2019, pursuant to Section 5, Plaintiffs demanded of Defendants that Maximum Security be declared winner of the Derby along with Country House and that any purse money and/or trophy previously distributed be "returned immediately" to the association "pending final determination of the disputed race" and "until the matter is finally adjudicated." (Stilz Aff. D.E. 16-4 at Ex. H). Defendants denied the request for a Stay Pending Appeal and ignored the demands in Plaintiffs' May 23, 2019 letter, despite the mandatory requirement of Section 5. When Defendants did not follow Section 5, Plaintiffs' legitimate claim of entitlement to the benefits that accrue to the owner of the horse that crossed the finish line first in a race the result of which is under dispute was denied to them.

3. The Stewards' Decision to Disqualify Maximum Security Was Not a Discretionary Determination.

Defendants argue that the Wests do not have a protectable property interest because the decision to disqualify Maximum Security was "discretionary." The premise of their argument is that racing in Kentucky is a "privilege and not a personal right" because Kentucky's General Assembly says so. (Br. 6-14).

The fact the Kentucky General Assembly proclaims that racing in Kentucky is a "privilege" (Br. 4) may be true for the reason that the General Assembly believes proudly that Kentucky is the highest, best quality, and most beautiful racing venue in the world. Plaintiffs do not challenge the General Assembly's proclamation. But this has nothing to do with what Due Process requires. The Kentucky General Assembly cannot erase an otherwise constitutionally protected property

right by labeling it a mere privilege. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court rejected the idea that a legislature can determine whether an interest asserted is a protectable property interest under the Constitution or not. The Court wrote: "The right to due process is conferred, not by legislative grace, but by constitutional guarantee." *Id.* at 541; *see also Moody v. Mich. Gaming Control Bd.*, 790 F.3d 669, 677 (6th Cir. 2015) ("A state may not condition a statutory entitlement on a beneficiary's acceptance of process so minimal that it fails to satisfy constitutional standards.").

Building on the false premise that the General Assembly can erase a constitutional right by the stroke of a pen, Defendants next argue that the decision to disqualify Maximum Security was discretionary. (Br. 9). They are wrong. Under Section 12, discretion is only given to the Stewards NOT to disqualify a horse. In all other respects, the prerequisites to disqualification of a horse under Section 12 are mandatory.

Similarly, under Section 5, Defendants have no discretion. When a race result is placed in dispute, it is mandated that the horse that crosses the finish line first (Maximum Security) be declared a co-winner until the disputed result is finally adjudicated.

4. The Decision in *March v. The Kentucky Horse Racing Commission* Does Not Support Defendants' Argument That Plaintiffs Do Not Have a Protectable Property Interest.

Defendants rely on the unpublished decision in *March v. The Kentucky Horse Racing Commission*, 2013-CA-0009000-MR, 2015 WL 3429763 (Ky. App. May 29, 2015), to support the argument that the Wests have no protectable property interest. (Br. 10). Defendants' reliance on *March* is misplaced.

On the question of the property interest asserted by the Wests, *March* is irrelevant. The *March* opinion says nothing about the legally created rights conferred on the Wests by Sections

17, 12, and 5 of the Commission's Regulations, which Defendants equate to state laws. When the *March* court wrote, "[o]ne cannot forfeit something one does not possess," it did not consider or have before it Sections 17, 12, and 5, which, individually and collectively, have the "force of law" (Br. 9) and confer legally protected rights on Plaintiffs as the owners of the horse who crossed the finish line first in the Derby.

Perhaps the *pro se* plaintiff in *March* didn't make arguments he should have made. In any event, *March* is irrelevant to the issue of whether the Wests have a protectable property interest because it does not address or decide any of the facts or legal arguments asserted by Plaintiffs. Nor is *March*, as an unpublished opinion by an intermediate appellate state court, binding on this Court.

5. The Process Followed by Defendants in Disqualifying Maximum Security Does Not Comport With the Minimum Requirements of Procedural Due Process.

The governing criteria for determining whether the process followed in depriving a person of life, liberty, or property under the Due Process Clause are set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* has been applied in this Circuit. *Hicks v. Comm'r of Social Security*, 909 F.3d 786, 808 (6th Cir. 2018); *Revis v. Meldrum*, 489 F.3d 273 (6th Cir. 2007).

Mathews requires the balancing of three factors: First, "the private interest that will be affected by the official action." *Id.*, 424 U.S. at 335. Second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* Third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

The process followed by Defendants in disqualifying Maximum Security fails each of the *Mathews* three-part balancing test.

i. The Wests' Private Interests

The Wests' private interests are the significant benefits gained by the owners of a Kentucky Derby winner. These benefits include purse money totaling approximately $1,488,000, millions of dollars in syndication and/or stallion fees to be earned by the owners of a Kentucky Derby winner, and their legacy for having achieved what only a select few owners in the history of the sport have been able to achieve, namely, owning a Kentucky Derby winner.

ii. Risk of an Erroneous Deprivation

The process followed by Defendants in disqualifying Maximum Security was doomed from the beginning and entailed a near certain risk of an erroneous deprivation of the Wests' property interest.

First, the Commission unwisely abdicated its delegated statutory authority by merging in the Stewards the inconsistent functions of investigators, prosecutors, and supreme unreviewable judges with respect to deciding disqualifications based on fouls committed during the running of all horse races in Kentucky. Merging these inconsistent functions in the Stewards violates the wise principle that "no man is allowed to be a judge in his own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (internal quotation and citation omitted).

Second, the manner in which the Stewards disqualified Maximum Security can only be described as "bizarre and unconstitutional." (¶ 1). The Court is respectfully referred to the Statement of Facts, *supra*, describing the litany of errors, omissions, misrepresentations, and failures by the Stewards to carefully, competently, and transparently follow the Commission's Regulations in connection with the process by which Maximum Security was disqualified. (¶ 1).

iii. No Fiscal or Administrative Burden

Preventing a repeat of the unconstitutional and illegal process to which the Wests were subjected by Defendants would not impose any fiscal or administrative burden on the Commission or Kentucky and would, in fact, be simple to achieve. For example, making the Stewards' decision to disqualify Maximum Security (or any horse) appealable to the Commission would serve as a prudent check and balance on the Stewards' decision to disqualify a horse. This procedure is followed by the majority of Thoroughbred racing jurisdictions in the United States, including Arizona, Arkansas, Colorado, Delaware, Florida, Louisiana, Illinois, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, and Virginia.[10] Checking and balancing the Stewards' conduct when deciding whether to disqualify a horse is not only consistent with common practice in the industry, but it is also a cornerstone of

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States that Permit Appeals	Regulation
Arizona	19 A.A.C. 2-123
Arkansas	Ark. Racing Comm'n Rule 1256
Colorado	1 Colo. Code Reg. 208-1:6.400
Delaware	3 Code Del. Reg. 1001-19.0
Florida	Fl. St. § 120.8(4)(a)(1)
Illinois	11 Ill. Admin. Code 1416.5(f)
Louisiana	35 La. Admin. Code Pt V, § 8301
Maryland	Md. Code Reg. 09.10.04.04(B)
Michigan	Mich. Admin. Code R 431.1220(3)
Minnesota	Minn. R 7897.0155
Nebraska	294 Neb. Admin. Code Ch. 7, §001
New Jersey	NJ Admin. Code 13:70-13A.1
New Mexico	NM Admin. Code 15.2.1.9(9)
New York	9 NYCRR 4039.5
Ohio	Ohio Admin. Code 3769-7-42
Pennsylvania	58 Pa. Code § 163.481
Texas	16 Tex. Admin. Code § 307.67
Virginia	11 Va. Admin. Code 10-90-10

the Constitution. *See* Federalist No. 51 (Madison's discussion of the virtues of checks and balances and the need to separate the powers of government).

The cost of making the Stewards' disqualification orders appealable to the Commission is minimal. Yet the benefit is substantial. Among other things, requiring the Commission to review disqualifications by Stewards makes the Stewards accountable for their actions and reduces the risk of actual bias, or the appearance of bias, that comes from concentrating too much power in any single person or group.

The Stewards also should be required to complete a form provided by the Commission that contains a checklist corresponding to the requirements for a disqualification under Section 12. Completion of the form will insure that the Stewards address every one of Section 12's prerequisites, something the Stewards utterly failed to do in disqualifying Maximum Security. Instead of Defendants having to engage in post hoc rationalizations to explain away what the Stewards did not say or do, completing a simple checklist corresponding to the requirements of Section 12 would leave no doubt about what the Stewards actually found. The cost of preparing and completing a checklist is nothing.

D. The Wests Were Denied Due Process Because the Commission's Regulation Governing the Disqualification of Maximum Security Is Vague in Violation of the Due Process Clause.

"The Due Process Clauses of the Fifth and Fourteenth Amendments provide the constitutional foundation [underlying] the void-for-vagueness doctrine." *Al Maqablh v. Heinz*, No. 3:16-CV-00289-JHM, 2017 WL 1788666, at *2 (W.D. Ky. May 4, 2017). "It is a general principle of due process that 'an enactment is void for vagueness if its prohibitions are not clearly defined.'" *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 387 (E.D. Ky. 1993) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). A statute or regulation "must delineate

any prohibited conduct 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). In order to avoid arbitrary and discriminatory enforcement, laws and regulations "must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. A vague law or regulation "impermissibly delegates basic policy matters … on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

Section 12 provides that "if clear," a "leading horse" "is entitled to any part of the track." It is undisputed that Maximum Security was the "leading horse" at the time of the alleged interference. Thus, a critical question for the Stewards under Section 12 was whether, as the leading horse, Maximum Security was "clear" to alter paths before the point of the alleged interference. If Maximum Security was "clear" at the point he commenced to change his path, then he had the right of way because he was "entitled" to do so and, therefore, could not have committed a foul.

The Commission – despite defining 85 other words in its regulations – neglected to define the word "clear." 810 KAR 1:001. This is a fatal error, especially as it relates to a race like the Derby. In the context of the Derby, which is historically a roughly run race that requires large fields of young horses to run a mile and a quarter carrying high weight in tight quarters, the word "clear" could have a virtually limitless number of meanings. Without explicit guidance, no one knows what "clear" means, and therefore, the Stewards are given unchecked and undefined ability to arbitrarily decide whether a "leading horse" is "clear."

POINT II

KENTUCKY REVISED STATUTE 13B.150 EMPOWERS THIS COURT TO REVERSE THE STEWARDS' ORDER DISQUALIFYING MAXIMUM SECURITY

In addition to asserting claims under § 1983, Plaintiffs' Complaint also alleges that the Stewards' Order disqualifying Maximum Security should be reversed because it violates Kentucky Revised Statute 13B.150.[11] Currently pending before this Court is Plaintiffs' motion for summary judgment, which is confined to the Commission's record and argues that Defendants violated KRS 13B.150, subsections (a), (b), (d), and/or (g). (D.E. 15).

Defendants seek dismissal of Plaintiffs' claims under KRS 13B.150 on two grounds. First, they argue that the Stewards' Order disqualifying Maximum Security is neither judicially reviewable under KRS 13B.150 nor reviewable by anybody, not now and not ever. (Br. 23-25). Second, they make the factual argument (improper in itself on this motion) that if KRS

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[11] KRS 13B.150 states as follows:
Conduct of judicial Review.
(1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.
(2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Without support of substantial evidence on the whole record;
(d) Arbitrary, capricious, or characterized by abuse of discretion;
(e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
(f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
(g) Deficient as otherwise provided by law.

13B.150 does empower this Court to reverse the Stewards' Order disqualifying Maximum Security, the disqualification by the Stewards withstands this Court's review. (Br. 25-29).

A. The Stewards' Order Disqualifying Maximum Security Is Judicially Reviewable Under KRS 13B.150.

The text of KRS 13B.150 unambiguously provides for "judicial review" of an "agency's final order" and empowers courts to "reverse" the "agency's final order." Pursuant to KRS 13B.020(1), the scope of KRS 13B – and thus KRS 13B.150 – includes "all administrative hearings conducted by an agency," unless specifically excluded. Final orders of the Kentucky Horse Racing Commission are not excluded by KRS 13B.020 from the scope of judicial review under KRS 13B.150. Under routine canons of statutory construction, the plain and ordinary meaning of KRS 13B.150 is that unless final orders of the Kentucky Horse Racing Commission are specifically exempted from the scope of KRS 13B.150, the power to judicially review the Commission's final orders exists. *Lincoln Cty. Fiscal Court v. Dep't of Pub. Advocacy Com. of Ky.*, 794 S.W.2d 162, 163 (Ky. 1990) ("Where the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written."); *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984) ("We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.").

The only case relied on by Defendants to support their argument that KRS 13B.150 is not applicable to judicially review the Order disqualifying Maximum Security is *March v. The Kentucky Horse Racing Commission*, 2013-CA-0009000-MR, 2015 WL 3429763 (Ky. App. May 29, 2015). Defendants' reliance on *March*, however, overlooks the fact that the trial and appellate courts in *March*, relying on KRS 13B.150, did judicially review the merits of the decision by the Kentucky Horse Racing Commission's stewards to disqualify the winner of a race based on a foul

committed in the running of the race. *March* was not a dismissal of a plaintiff's claim on jurisdictional or failure to state a claim grounds. It was a dismissal on the merits.

At the outset of its opinion, the court in *March* notes that it is reviewing the "administrative proceeding" "under Kentucky Revised Statutes (KRS) 13B.150." What the court then did was to review and decide the merits of the *pro se* plaintiff's claims in support of his argument that the stewards' disqualification of his horse should be reversed. None of this would have been necessary if the court thought it did not have the threshold power under KRS 13B.150 to review the plaintiff's claims. The fact that the court in *March* did not reverse the disqualification order does not alter the fact that KRS 13B.150 empowered the court, in the first instance, to judicially review the stewards' decision. Rather than supporting Defendants' motion, *March* confirms that KRS 13B.150 affirmatively confers on courts the power to judicially review the Order disqualifying Maximum Security.

This Court's power under KRS 13B.150 to review the decision disqualifying Maximum Security is further confirmed by the Commission's Regulations. As already discussed in Point I, under Section 5 certain rights are conferred on Plaintiffs "pending final determination of the disputed race" and "until the matter is finally adjudicated." Under Section 4 of the Commission's Regulations (810 KAR 1:017 § 4), the Commission informed Plaintiffs that it does not hear appeals from stewards' orders disqualifying horses. (Stilz Aff. D.E. 1-1 at Ex. A). That being the case, Section 5 obviously contemplates a final adjudication by a tribunal other than the Commission. The only forum that could provide final adjudication of the Order disqualifying Maximum Security is a court of law.

The proposition advanced throughout Defendants' brief that the Stewards are the only and final arbiters who can decide the fate of Maximum Security's owners' constitutional rights is at

once both breathtaking and dangerous. Breathtaking in the sense that it runs contrary to the core principle in *Marbury v. Madison*, 5 U.S. 137 (1803), that unconstitutional acts by state actors, such as the actions alleged here, are judicially reviewable and, if found to violate the constitution, will be declared void. Dangerous in the sense that it empowers three unelected state actors, cloaked with the mantle of investigators, prosecutors and judges, to make unreviewable decisions of momentous importance without being held accountable to Plaintiffs, to persons similarly situated to Plaintiffs, to the public, and indeed, to anybody ever. Concentrating such enormous power over others in the hands of a few state actors is the very definition of tyranny and is an anathema to the structure of our constitutional system of checks and balances. *See generally Antoniu v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989) ("We begin with the fundamental premise that principles of due process apply to administrative adjudications."); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) ("when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process"). As the court stated in *Amos Treat*:

> We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed.

Id., 306 F.2d at 266-67.

B. The Stewards' Order Disqualifying Maximum Security Is a Final Order Under KRS 13B.150.

Defendants contend the Stewards' Order disqualifying Maximum Security is not a "final order" under KRS 13B.150. (Br. 24-25). They are wrong. A final order in an administrative agency context is one from which an agency's ruling can no longer be appealed or reviewed by the agency. That is the case here. *See, e.g.*, *Dickinson v. Zech*, 846 F.2d 369, 371-72 (6th Cir. 1988) ("an order is final only if it 'imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process' … [and] represents the end of that agency's analysis of the issues involved") (internal citations omitted); *N. Am. Aviation Props., Inc. v. Nat'l Transp. Safety Bd.*, 94 F.3d 1029, 1030 (6th Cir. 1996) (in determining whether a National Transportation Safety Board ruling is a "final order" for purposes of appeal to a court under 49 U.S.C. § 1153, court will look to whether the order is "adjudicative in nature"); *see also* KRS 13B.010(6) (defining "final order" as "the whole or part of the final disposition of an administrative hearing, whenever made effective by an agency head, whether affirmative, negative, injunctive, declaratory, agreed, or imperative in form"); KRS 13B.010(4) (defining "agency head" as the "individual or collegial body in an agency that is responsible for entry of a final order").

The Order disqualifying Maximum Security is a "final order" under KRS 13B.150 because the Commission said so and the Commission's Regulations make it a "final order." Under 810 KAR 1:017, Section 4(2), the Stewards' "findings of fact and determination shall be final and shall not be subject to appeal." When Plaintiffs appealed the Stewards' Order disqualifying Maximum Security to the Commission, they were told there was no right to appeal and that the Stewards' decision would be the final word by the Commission on the matter. (Statement of Facts, *supra*, Subheading I).

Plaintiffs have exhausted all of their administrative remedies. As it turns out, there are no administrative remedies provided by the Commission to review the Stewards' Order disqualifying Maximum Security. The Stewards' Order, therefore, is by the Commission's own definition a "final order" and falls squarely within the scope of KRS 13B.150.

C. The Stewards' Disqualification of Maximum Security Does Not Withstand Judicial Review Under Any Subsection of KRS 13B.150.

Defendants insist on arguing the facts, even though doing so is wholly inappropriate under the standards governing their 12(b)(6) motions to dismiss. They make the factual argument that the Stewards' disqualification of Maximum Security does not violate any part of KRS 13B.150. (Br. 25-29). Defendants will have their opportunity to argue that the Commission's record shows the Stewards did not violate KRS 13B.150 in their response to Plaintiffs' pending summary judgment motion. A motion to dismiss is not the time for that argument.

Defendants' improper factual argument is exacerbated because the facts asserted are plainly wrong. Defendants admit that before a horse can be disqualified under Section 12 there must be a finding that the foul found by the Stewards altered the finish the race. They then say that the Stewards' finding "that a foul occurred" automatically implies that "the foul altered the finish." (Br. 28). As discussed *supra* (pp.16-18): (a) there is no support in the record for the factual contention that the foul found by the Stewards altered the finish of the race; (b) the alleged "implicit" finding suggested by Defendants is a post hoc rationalization, which is improper under established Sixth Circuit law (*see Flav-O-Rich*, 531 F.2d at 362; *Hicks*, 909 F.3d at 808); and (c) the purported fact that the finish of the race was altered by Maximum Security's alleged foul is plainly untrue as the video footage of the Derby indisputably shows (Stilz Aff. D.E. 16-4 at Ex. D).

Defendants also assert that this Court's review of the Stewards' Order disqualifying Maximum Security "is limited to review for arbitrariness." (Br. 26). This is clearly wrong. Under KRS 13B.150 there are seven separate and alternative grounds upon which a court can decide to reverse the Stewards' order, only one of which is that it is "[a]rbitrary, capricious, or characterized by abuse of discretion."

Defendants further admit that the Stewards *never* found, as required by Section 12, that Maximum Security was not "clear" when he allegedly "drifted out." (Br. 28). Yet they argue that even if Maximum Security was "clear" under Section 12, the Stewards could still disqualify him. This is a blatant misreading of Section 12. Under Section 12, a horse that is "clear" cannot be deemed to have committed a foul by "swerv[ing]" or being "ridden to either side" and "imped[ing] any other horse" because a horse that is "clear" under Section 12 "is entitled to any part of the track."

Defendants' admission that the Stewards failed to find that Maximum Security was not "clear," perforce, means that their disqualification determination violates Section 12 and, in and of itself, is reversible under KRS 13B.150.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: Lexington, Kentucky
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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing have been served via CM/ECF to counsel of record for all parties on this the 21st day of June, 2019.

/s/ D. Barry Stilz
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