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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

JERRY HOLLENDORFER,

Petitioner,

v.

CALIFORNIA HORSE RACING BOARD,

Respondent.

CASE NO. 37-2020-00016369-CU-WM-CTL

TRIAL BRIEF AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE PURSUANT TO CODE OF CIVIL PROCEDURE *§1094.5*

[IMAGED FILE]

FILED: MAY 28, 2020

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JUDGE: HON. RONALD FRAZIER

DEPT.: C-65

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I. SUMMARY OF ARGUMENT

Respondent, the California Horse Racing Board ("CHRB") abused its discretion when it failed to act in the manner required by law and misapplied the law by voting to adopt a hearing officer's recommendation to deem the 2019 Race Meet Agreements ("RMA") between the California Thoroughbred Trainers ("CTT") and the signatory racing associations 'expired' and 'incapable of repetition' for purposes of determining claims asserted on Petitioner's behalf by the CTT. Conversely, Respondent has maintained that the same RMAs were extended, effective December 26, 2019, and deemed operative and binding on those same signatory parties for the purposes of re-licensing the racing associations to conduct subsequent race meets, and the resolution of trainer expulsion disputes (RMA Section 5).

Respondent's inconsistent actions constituted, at a very minimum, an abuse of discretion that unlawfully deprived Petitioner of due process and equal protection under the law, as to vested fundamental rights recognized and protected by the constitution and judicial precedent established by the Supreme Courts of the United States and California.

II. INTRODUCTION

Petitioner submits two valid *Code of Civil Procedure §1094.5* writ claims were asserted on his behalf and for which he seeks judicial determinations as to the validity of purported administrative 'decisions' by the CHRB.

1. The CHRB's February 24, 2020, adoption of a hearing officer's decision determining as "moot" claims asserted on Petitioner's behalf by the CTT; and,
2. The CHRB's failure to hold the hearing required pursuant *Business & Professions Code, §19573* despite the the July 24, 2019opinion of its counsel , confirming that the Del Mar Thoroughbred Club's (DMTC) exclusion of Petitioner was made pursuant to CHRB Rule 1989[1] (Removal or Denial of Access).

However, Petitioner understands this Court to have previously determined that only the former has been deemed to constitute a *§1094.5* claim, with the latter to be treated and addressed as a *§1085* claim.

[1] All references to Rules are to title 4, division 4 of the California Code of Regulations.

Having been so limited, Petitioner proceeds in presenting his arguments as to the recognized claim under this statute.[2] Accordingly, Petitioner seeks a determination by this Court that Respondent abused its discretion by adopting the hearing officer's recommendation and prays for judgment to be entered in favor of Petitioner, and that the CHRB's decision be set aside.

Petitioner's complaints, brought on his behalf by the CTT, were made pursuant to CHRB Rules 2040 (Horsemen's Organizations for Owners and Trainers), 2041 (Agreements to Be Binding on Members), 2042 (Agreements to Be Binding on Associations), 2043 (Adjudication of Controversies Relating To Agreements), and 2045 (Prohibited Provisions of Horsemen's Agreements) as such related to the applicable RMAs, which apply to the individual licensed trainers participating in race meets conducted at Santa Anita Park ("SAP") and at Golden Gate Fields ("GGF").

Petitioner specifically challenges the validity of the CHRB's actions because:

- The CHRB has continually extended the 2019 RMAs to every subsequent race meet conducted at SAP and GGF– effective December 26, 2019, the opening Day the SAP's 2019-2020 winter/spring race meet – as a condition of racing association licensure;
- The CHRB subsequently required the racing associations confirm that the RMAs and disputed contractual provision (Section 5) remains viable and operable, and that it has been used by the parties since the 2019 RMA was extended, notwithstanding the prior determination by the hearing officer that the RMA expired (AR 00002-00012); and
- Neither the CHRB nor the racing associations can avoid nor evade judicial review of disputed 2019 RMA terms or conduct relevant thereto where the issues raised are continuing or capable of repetition. *Southern Pacific Terminal Co. v. Interstate Commerce Com.* (1911) 219 U.S. 498, 515; *American Civil Liberties Union of Southern Cal. V. Bd. Of Ed. Of City of Los Angeles* (1961) 55 Cal.2d 167, 181-182.

III. STANDARD OF REVIEW

A writ is issued for the purpose of inquiring into the validity of an administrative order or decision

[2] Should the Court determine that either claim should have been brought under the different statute, then the Court should treat it as if it were the proper proceeding. *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802; *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115; *Music v. Dept. of Motor Vehicles* (1990) 221 Cal.App.3d 841.

made as a result of a hearing where a hearing is required, evidence presented and a determination of facts by a board. *Code Civ. Proc. §1094.5.* A hearing in administrative mandamus authorizes judicial review as to the exercise of an adjudicatory or quasi-judicial function by an administrative agency. *Wilson v Hidden Valley Municipal Water Dist.* (1967) 256 Cal.App.2d 271.

The trial court in an administrative mandamus action, must exercise its independent judgment on the evidence when the administrative decision substantially affects a fundamental vested right. *Code Civ. Proc. §1094.5*; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144; *Ogundare v. Dept. of Industrial Relations* (2013) 214 Cal.App.4th 822, 828; see also, *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1896, quoting *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34; and *Dickey v. Retirement Bd.* (1976) 16 Cal.3d 745, 751.

The trial court exercises independent judgment on pure questions of law. *McAllister v. Cal. Coastal Com.* (2008) 169 Cal.App.4th 912, 921.

As a licensee of the State engaged in the longstanding practice of his occupation and profession, Petitioner's interests in this matter relate to a vested, fundamental right. Respondent's 'actions' – and/or failures to act – were substantial factors effectively causing Petitioner to suffer the loss of his business.

By failing to adjudicate Petitioner's complaints on their merits, Respondent effectively permitted a ban imposed by one licensee against another without Fair Procedure or due process, to remain in place causing catastrophic damage to Petitioner's well established training business in California, despite contract language it understood/understands to specifically address such situations.

Business & Professions Code §19400, et. seq., sets forth the State's "*Horse Racing Law*" (HRL). Section *19440(a)(2),* requires the Respondent faithfully, consistently, and accurately administer and enforce "all laws, rules, and regulations" as such affect horse racing in the State.

Respondent abused its discretion when it deemed "moot" the issues relating to the 2019 RMAs because the RMAs had purportedly 'expired,' despite : the 2019 RMAs having been extended and made operative effective December 26, 2019, by its own order; including provisions expressly addressing the issues raised; continuing to require the signatories acknowledge and abide by those specific provisions; and recognizing that the issues raised were in fact capable of repetition in the future.

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IV. PETITIONER IS A BENEFICIALLY INTERESTED PARTY

A writ must be brought by one who is beneficially interested, as required by *Code of Civil Procedure §1086*. *Employees Service Assn. v. Grady* (1966) 243 Cal.App.2d 817.

The United States Supreme Court determined that licensed horse trainers have a property interest in their licenses sufficient to invoke the protection of the Due Process Clause. *Barry v. Barchi* (1979) 443 U.S. 55. Consequently, no state agency may deprive – directly or indirectly – a licensed trainer of such property interests without first affording him/her due process and equal protection under the Constitution. *Id.* The California Supreme Court has similarly determined that the State may not hinder a licensee's vested right to practice their profession, without due process and substantial evidence. *Bixby v. Pierno, supra,* 4 Cal.3d 130; *Dare v. Bd. Of Medical Examiners* (1943) 21 Cal.2d 790;; *Sandstrom v. Cal. Horse Racing Bd.* (1948) 31 Cal.2d 401.

In this instance, Petitioner, as a CHRB licensed Thoroughbred trainer – having a vested fundamental right in his occupational license – was bound by CHRB regulation to the procedures it established for the resolution of RMA disputes relating to individual trainer interests. (See CHRB Rules 2041 (Agreements to be Binding on Members) and 2043 (Adjudication of Controversies Relating to Agreements). Accordingly, certain procedures set forth in the regulations and the required RMAs delineate Petitioner's rights thereunder, including the filing of complaints with Respondent as against racing associations, through CTT on his behalf.

In accordance with those regulations and procedures, Petitioner's July 2019 complaints and the December 2019 administrative 'hearing' at issue expressly referenced and were filed and conducted for the purpose of determining the application of regulatory and contractual protections intended for the benefit of Petitioner. Petitioner therefore has clear, present, and beneficial rights as to the performance of the CHRB's duties as such relate to the conduct of the administrative hearing and the validity of its related February 24, 2020 decision adopting the hearing officer's determination. *Cal. Assn. for Health Services at Home v. Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.

V. STATEMENT OF FACTS

A. The Parties

Petitioner, Jerry Hollendorfer, is a Hall of Fame licensed Thoroughbred trainer based in

California. Respondent, CHRB, is an administrative and regulatory agency of the State of California.

By statute, Respondent has "jurisdiction and supervision" over all race meets at which wagering on horse races is conducted in the State, and "over all persons or things having to do with the operation of such meetings." *Bus. & Prof. Code* §*19420.* Among its enumerated powers are the: adoption of rules and regulations; control of horse racing and parimutuel wagering; administration and enforcement of all laws, rules, and regulations affecting horse racing; adjudication of controversies arising from the enforcement of those laws and regulations; and the licensing of racing associations and all persons who participate in a horse racing meetings. The CHRB may delegate only to its Stewards those enumerated powers and duties necessary to carry out fully and effectuate the purposes of this the HRL. *Bus. & Prof. Code §19400, et. seq.*

B. RMA Signatories

The Los Angeles Turf Cub, Incorporated ("LATC"), Los Angeles Turf Cub, Inc. II ("LATC II"), Pacific Racing Association ("PRA"), Pacific Racing Association II ("PRA II"), and the California holding company under which they operate – TSG Developments Investments, Inc. ("TSGDI") – were the racing associations involved in the administrative hearing at issue. These five entities operate as part of a group of companies identifying themselves as "The Stronach Group" ("TSG"). (AR00046-00085)

CTT is a "mutual benefit organization," recognized by statute as the official representative of licensed Thoroughbred Trainers in the State. *Bus. & Prof. Code §§19613* and *19613.1*. Its statutory and regulatory purpose is the representation of individual licensed trainers in collectively negotiating matters of interest to those individual trainers with track management. CHRB Rule 2040 (Horsemen's Organizations for Owners or Trainer). All CHRB licensed Thoroughbred trainers are deemed members of the CTT, including Petitioner.

C. Executed TSG Race Meet Agreements

On November 14, 2018, the racing associations and CTT executed RMAs setting forth certain race meet terms and conditions, not otherwise controlled by statute or regulation. (AR 00046-00064; 00066-00084) The RMAs covered the associations' 2019 race meets at SAP and GGF.

Section 5 of the RMA provided that "[t]he agreement of CTT shall be a condition precedent to any execution of a decision by Track to limit or eliminate Applicant's [a trainer's] ability to participate

in racing or training activities at Track or any auxiliary training facility." (AR 00050, 00070)

D. SAP's Disastrous 2018-2019 Winter/Spring Race Meet

During SAP's 2018-2019 winter/spring race meet – December 26, 2018 through June 23, 2019 – at least 31 equine fatalities were reported, involving horses trained by 25 trainers. The number and frequency of the fatalities became the subject of intense media and public scrutiny, as well as concern, actions, and criticism from the CHRB, elected officials, and participating horsemen at the meet. This led to unprecedented investigations and detailed reports by the CHRB and Los Angeles District Attorney's Office. SAP twice suspended racing and training, acquiescing to public, political, and regulatory concerns arising from the unprecedented number of equine fatalities, but declined a third request in June. (Ex. 64)

As a consequence of the extraordinary number of equine fatalities to have occurred, Respondent later undertook a special investigation of events transpiring during the meet, before publishing an extensive 76-page report in March of 2020 entitled "*Report on Fatalities at Santa Anita Park from 12/30/18 through 3/31/19*." (Ex. 64)

On June 22, 2019, without any forewarning, TSG banned Petitioner from their facilities, including SAP and GGF. (AR 00090) After having refused a third request to suspend its operations, this ban was imposed within hours of Petitioner's horse suffering a fatal injury on TSG's consistently unsafe track. TSG did so after having continually encouraged Petitioner to continue his support of and participation in SAP's beleaguered winter/spring meet. TSG banned Petitioner without conducting any investigation as to the cause or causes of that or any other fatality at their tracks, nor did it assess possible contributing track conditions or actions, which was particularly troubling and self-serving given SAP's own failings in not placing lifesaving Kimzey Splints on at least two of Petitioner's injured horses.

TSG's ban occurred without previously warning or meeting with Petitioner, nor the identification of any alleged impropriety or culpability, nor did TSG specify – prior to or after-the-fact – purported causations for which Petitioner was asserted to be responsible. Rather, TSG itself had approved all of Petitioner's horses to train and/or race at the time each sustained a fatal injury on a TSG's track. Moreover, under oath, TSG's senior most management personnel later admitted and acknowledged that Petitioner had not violated a single CHRB or TSG equine health or safety rules, protocols, or measures, at any time, at any TSG racetrack. In short, Petitioner was banned without valid justification and without

any modicum of fair procedure for PR reasons considered 'strategic' by beleaguer TSG management.

At no time prior to nor afterward did TSG ever obtain CTT's consent of concurrence to its ban of Petitioner. (AR00041-44) In fact, TSG did not even notify CTT of its intent to exclude Petitioner nor did it request CTT to consent or concur as to such exclusion, as a condition precedent, notwithstanding the express requirements of Section 5 of the RMAs.

Defendants' ban was imposed not as part of a formal or previously disclosed hearing or review process. Rather it was undertaken as a unilateral act via track management, who themselves were under scrutiny for their own conduct, omissions, and mishandling of the race meet and track surfaces.

The ban of Petitioner was an act consistent with a crisis communications strategy developed by attorneys and consultants that had been hired by TSG to represent its interests in the context of a Los Angeles County District Attorney's investigation into the fatalities at their track; a strategy shared with other industry representatives, as a means to respond to media and regulatory criticism associated with the continuing fatalities meet, one specifically intended to shift media and public focus from track conditions to the horsemen who cared for the horses.

E. <u>Pervasive Bias and Lack of Impartiality Tainted Respondent's Actions</u>

Respondents' former Chair was acutely aware of TSG's strategy having himself participated in the consideration and crafting of strategic communications for TSG during the relevant timeframe. (Ex. 50; Ex. 65; Ex. 66, Deposition of Charles Winner, p 99 ln 22-p 104 ln 20; p 132 ln 1-p 134 ln 8; Ex 67, Deposition of Rick Baedeker, p 150 ln 15-p 152 ln 11.)

During the same timeframe, the press uncovered multiple undisclosed financial/business dealings between Respondent's then Vice-Chair and senior TSG's representatives, including a $485,000.00 foal share arrangement with TSG' Chair and a racehorse partnership with the then TSG COO. (Ex. Nos. 59-61; Ex. 68, Deposition of Madeline Auerbach, p 196 ln 19-p 205 ln12; Ex. 67, Deposition of Baedeker, p 89 ln 3-p 95 ln 20, p 242 ln 21-p 244 ln 2.) According to the Respondent's then Executive Director, when uncovered, the news surprised both the CHRB's Chair and Executive Director, which led to private discussions with the Vice-Chair and the forced divestiture by TSG's COO. (Ex. 67, Deposition of Baedeker, p80 ln 13-85 ln 4).

Shortly following TSG's June 22, 2019 announcement of Petitioner's ban, the Chair and Vice-

Chair copied senior CHRB staff including its Executive Director, General Counsel, and Public Information/Communications Director on personal email communications in which they expressed approval and pleasure in the fact that media coverage changed the narrative and redirected attention from the number of fatalities occurring at SAP to the expulsion of a Hall of Fame Trainer. (Ex. 55) By doing so, leadership of the CHRB influenced the actions of staff and overall response of the CHRB from the outset, leaving the fate of occupational licensee to the racing associations it licensed.

As reported by the San Jose Mercury News on July 10, 2019, then Chair Winner was fully aware that required legal process could "take the horse racing board months, even years to suspend or revoke a license," but that the current system "allows track owners to take immediate action." Nonetheless, he acknowledged that "as far as the CHRB is concerned, Hollendorfer is a licensed trainer," and presumably understood entitled to a hearing and other due process rights. (Ex. 49)

F. Petitioner, through CTT, Filed Timely Administrative Complaints

On July 12, 2019, Petitioner, through the CTT, filed a regulatory complaint with the CHRB in accordance with CHRB Rule 2043 (Adjudication of Controversies Relating to Agreements) as against the DMTC because of its decision to honor the ban imposed by TSG. (AR 00390-393)

Thereafter on July 24, 2019, CTT counsel notified Respondent of its filing of a second formal complaint, also pursuant to CHRB Rule 2043 on behalf of Petitioner, against LATC arising from its exclusion of Petitioner Jerry Hollendorfer, a CTT member. (AR 00041-42) CTT identified Section 5 of the RMA as central to the complaint, and specifically requested the CHRB "immediately intervene and order TSG to stay its ongoing exclusion of Hollendorfer pending the rendering of a decision from a CHRB hearing."

Recognizing the inherent urgency of such controversies, Respondents own regulations – Rule 2043 – expressly obligated the CHRB to "immediately investigate" the allegations of such complaints.

G. Respondents Unreasonably Delayed Acknowledging and Investigating CTT's Complaint

Rule 2043 required Respondents "immediately investigate the allegations" raised in a complaint. Notwithstanding that obligation, Respondent did not do so, nor did it even acknowledge the complaints until after Petitioner and CTT had filed two civil actions.

On August 13, 2019, one month after CTT's first regulatory complaint was filed, Respondent

acknowledged receipt and advised that a hearing officer would be appointed, with staff to eventually "find a mutually acceptable date and time to initiate the hearing." (AR 00405) The following day, on August 14, CTT's counsel expressed its and Petitioner's concerns related to Respondent's delay in acknowledging the complaints and/or its failure to immediately investigate what were understood to be urgent claims. In the absence of any action by Respondent, CTT and Petitioner had filed two civil actions: one each in Alameda and San Diego Counties.

Nearly two months after the Complaints were filed, on September 16, 2019, Respondent finally named a hearing officer. (AR 00410) On that same day, CTT requested a briefing schedule. A conference call was eventually scheduled to discuss the issues that required briefing. (AR 00409)

On September 26, 2019, the hearing officer, Patrick Kane, ordered the Opening Brief be filed on November 1, with a Response due December 6, and Reply by December 16. His Order also provided that the "hearing" would be scheduled later, sometime after the matter had been fully briefed, if at all. (AR 00388-389) No hearing was scheduled.

Accordingly, per the hearing officer's schedule, all evidence was submitted by the parties by December 16, 2019, prior to the expiration of the 2019 RMAs. Consequently, both at the time the complaints were filed, and all evidence submitted, all issues were ripe.

H. <u>Respondent's Actions Were Inconsistent with Hearing Officer's Factual Determinations</u>

On February 11, 2020, without the benefit of an actual hearing, and two months after CTT's Reply Brief had been timely submitted, the hearing officer issued a proposed decision. (AR 00003-00012)

The decision recommended CTT's complaint be dismissed on "mootness grounds," based on the intervening 'expiration' of the 2019 RMAs, some five months after the complaints were first filed. (AR 00008-00012.) Specifically, the hearing officer concluded an actual controversy no longer existed because he deemed the LATC and PRA RMAs expired as of December 25, 2019, nine days after the deadline he had set for the filing of the Reply Brief. He concluded expiration of the 2019 RMAs deemed moot "all issues asserted in the Dispute," and that, despite filing the complaints in July, "[b]ecause the Agreements expired on December 25, 2019, the Petitioner had improperly sought "redress for 'past wrongs.'" (AR 00009.)

Finally, the hearing officer concluded there was no probability the dispute would "likely recur

because any future dispute between Petitioner and Respondent will solely concern whatever race meet agreement is in place at that time as opposed to the Expired Agreements." Consequently, the aggrieved parties' ability to seek a declaration as to whether the racing associations had violated Section 5 of the RMAs expired at the same time the Agreements did. (AR 00011)

Respondent adopted the proposed decision, effective February 24, 2020. (AR 00002.) As explained herein below, when it did so Respondent ignored facts that controverted the findings of the hearing officer – specifically that the RMA the hearing officer concluded had expired, in fact was extended by Respondents, effective and operative as of December 26, 2019.

I. Respondent Has Continually Extended the RMAs

For all Thoroughbred race meets conducted since at least 1995, Respondent has required the filing of RMAs between racing associations seeking race dates and the two organizations representing Thoroughbred horsemen as a condition of licensure, repeatedly citing as authority for that requirement *Bus. & Prof. Code §§19613* and *19613.1,* and *CHRB Rules 2040, 2042, 2043,* and *2044.*

In this instance, to satisfy those requirements, the CHRB extended the 2019 RMAs between CTT and the racings associations conducting race meets at SAP and GGF effective December 26, 2019, to correspond with the opening day of the '2020 racing year' in California. Respondent has continued to extend and make operative the relevant 2019 RMAs for all subsequent race meets conducted at SAP, GGF and DMTC in similar fashion. Transcripts of CHRB Board meetings make clear that the RMAs have been continually extended.[3] (Exs. No 1-11[4])

At CHRB Board meetings, CHRB's staff has consistently identified the CHRB Rules requiring a RMA with the CTT be filed as part of LATC and PRA race meet applications and cited the *Business & Professions Code* provisions authorizing it to resolve such issues, including the determination of which RMA applied to a race meet in order "to ensure the continuity of the racing program." (See Ex. 2, JH00356-358.)

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[3] Petitioner previously moved to augment the administrative record with CHRB meeting transcripts. The Court deferred ruling on this until the time of trial on the writ but requested Petitioner lodge complete copies with the opening brief. Petitioner requests the Court augment the administrative record with these transcripts and take judicial notice of the same.

[4] Petitioner specifically identifies for the convenience of the Court the following: Ex. 1 JH00041-64, JH00152-160; Ex. 2, JH00305-332; JH00355-00359; Ex. 3, JH00590-00606, JH00640-00642; Ex. 4, JH00775-00800; Ex. 5, JH00942-00986; Ex. 6, JH01172-01238; Ex. 7, JH01360-01364; JH01399-01419; Ex. 8, JH01513-01531; Ex. 9, JH01624-01657; Ex. 10, JH01714-01737; Ex. 11, JH01816-01850; Ex. 12, JH01920-01935.

Per Respondent, in accordance with CHRB Rule 2044 (Agreements to be Filed), the 2019 RMA was extended for each of LATC's subsequent race meets. Those official actions are reflected in the hearing transcripts including: June 11, 2020; July 16, 2020; August 20, 2020; December 17, 2020; September 21, 2021; December 15, 2021; and July 14, 2022. (*See* Ex. No. 1-12) At the July 16, 2020 CHRB meeting, TSG's representative, Aidan Butler, confirmed that they would "abide by" the existing RMA. (Ex. 3, JH00598)

Moreover, at the December 17, 2020 meeting, CHRB Vice Chair Gonzales specifically noted that the previously extended 2019 RMA was working, "particularly sections five and six." (Ex. 6, JH01179) CTT Executive Director Alan Balch further noted that the dispute resolution provisions of the 2019 RMA had been "used over the past year in a few instances very effectively." (Ex. 6, JH01182)

LATC's 2022 Winter/Spring race meet application came before Respondent on December 15, 2021. At the request of CHRB Vice-Chair Gonzales, CHRB Executive Director Scott Chaney specifically read into the record the procedures that must be followed under Sections 5 and 6 of the 2019 RMA, should LATC attempt to deny a licensed trainer a stall or race entry. In doing so, the CHRB confirmed that any such action by LATC must be done with the "coordination of CTT" in accordance with the requirements of the 2019 RMA. (Ex. 11, JH01844-1846)

Most recently, at the July 14, 2022 CHRB Board Meeting, Commissioner Hudnut confirmed that, "Every race meeting in California since 2019 has been covered by the 2019 RMA." (Ex. 12, JH01921)

VI. PETITIONER'S COMPLAINT AS ASSERTED BY CTT WAS NOT MOOT AND RESPONDENT ABUSED ITS DISCRETION IN ADOPTING THAT POSITION

An abuse of discretion is established if the administrative agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. *Code Civ. Proc. §1094.5(b)*; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 164.

A case is only moot when any ruling by the court can have no practical impact. *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.

Moreover, where the issues raised in a complaint are continuing or capable of repetition, the affected parties can neither avoid nor evade administrative or judicial review of terms or conduct relevant

thereto based on a claim of "mootness." *Southern Pacific Terminal Co. v. Interstate Commerce Com., supra,* 219 U.S. at p. 515; *American Civil Liberties Union of Southern Cal. v. Bd. of Ed. of City of Los Angeles, supra,* 55 Cal.2d at pp. 181-182.

Respondent cannot be afforded the luxury of deeming the 2019 RMAs expired for one purpose yet extended, operative, and legally enforceable for other purposes.

Respondent cannot deny that it has for purposes of licensing the very same racing associations, extended the 2019 RMAs between those associations and CTT for every subsequent race meet conducted at SAP and GGF since December 26, 2019. It has similarly done so for all such meets conducted at DMTC since November of 2019, for the same reasons. The first extension of the 2019 RMA was made effective and operative as a of December 26, 2019, a date *before* Respondents adopted the decision of the hearing officer. (Ex. 1, JH00041-64) Therefore the articulated factual basis set forth in the decision is/was erroneous. Yet, Respondents continue to assert determination of Petitioner's claims were/are moot, to the substantial detriment of Petitioner.

By extending the 2019 RMAs for only one purpose, Respondent cannot shield itself from its obligation to fairly resolve the issues raised by CTT on Petitioner's behalf. Petitioner's claims have continually been relevant and ripe, and require adjudication on the merits. Respondent's decision to ignore its extension of those RMAs for the purpose of adopting the hearing officer's determination that the complaints be deemed "moot" constitutes an abuse of discretion. That subjective and erroneous determination has caused Petitioner substantial damage and harm. It also constitutes a failure to act in the manner required by law such that Respondent deprived petitioner of due process and equal protection under the law. *Barry v. Barchi, supra,* 443 U.S. 55; *Bixby v. Pierno, supra,* 4 Cal.3d 130.

VII. JUDICIAL ESTOPPEL PRECLUDES RESPONDENT FROM ASSERTING THE RMA MOOT

The principal of judicial estoppel precludes Respondents from asserting that its finding was factually accurate, and therefore there was no abuse of discretion. Judicial estoppel prevents inconsistency, precludes a litigant from paying "fast and loose" with the courts, and prohibiting parties from deliberately changing positions according to exigencies of the moment. *People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189; see also *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13 (Judicial estoppel comes into play when (1) the same party has taken

two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the position; (4) the positions are inconsistent; and (5) the position was not taken as a result of ignorance, fraud, or mistake.)

Respondents have continually asserted that 2019 RMAs to have been extended, operative, and binding on the parties. Yet, only as to Petitioner, has it determined the 2019 RMA has expired. These two positions are entirely inconsistent.

Quite simply, Respondents abused their discretion by adopting the hearing officer's Proposed Decision. The factual underpinning of the Proposed Decision are incorrect, and it is/was an egregious error to dismiss Petitioner's Complaint.

VIII. CONFORM TO PROOF

The court may, in furtherance of justice, and on any terms as may be proper, allow an amendment to any pleading. *Code Civ. Proc. §473*. Slight variance in the pleadings may be disregarded as immaterial, and even substantial variances may be disregarded or cured under the doctrine of "theory on which the case was tried." 5 Witkin, Cal. Proc. 6th Pleading § 1252 (2002); see also *McAllister v. Union Indem. Co.* (1935) 2 Cal.2d 457, 459-460. To the extent that there are any variances between the operative petition for writ, and the evidence and argument presented herein, the legal authority and theory as presented herein controls as it is the theory by which this Court will make a determination, akin to proceeding to trial. Respondents are not prejudiced by any such amendments to conform to proof as the Administrative Record has been well settled, and Respondents have a full opportunity to oppose Petitioner's position as set forth herein.

IX. PETITIONER'S IS ENTITLED TO DAMAGES

Judgment for the petitioner permits the recovery of damages which the individual has sustained as found by a jury or as determined by the court, together with costs. *Code Civ. Proc. §1095*.

X. REQUEST FOR STATEMENT OF DECISION

Petitioner hereby requests a Statement of Decision as such relates to the decisions made by the Court in these proceedings. *Code Civ. Proc. §632*; *Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1300-1301.

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XI. CONCLUSION

Based on the foregoing, Petitioner respectfully requests his Petition for Writ of Mandamus be granted, a jury trial be scheduled for the purpose of determining the harm and damages sustained by Petitioner, and the Court set a motion hearing for a determination of Petitioner's attorney's fees and costs, as approved by the court, should the parties be unwilling or unable to resolve and settle such amounts independently.

Dated: September 2, 2022

Respectfully submitted

couto&associates

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