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CASE NO. 2018-SC-000630-TG

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

On Transfer from
Court of Appeals Case No. 2018-CA-001689
Franklin Circuit Court Case No. 10-CI-1154

v.

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

APPELLEE KENTUCKY HORSE RACING COMMISSION'S BRIEF

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I certify that on November 5, 2019, I served this brief by U.S. Mail, first class, postage pre-paid, on: Stanton L. Cave, Law Office of Stan Cave, P.O. Box 910457 Lexington, KY 40591; William A. Hoskins, Jay Ingle, Christopher Hoskins, Jackson Kelly PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507; Samuel D. Hinkle, IV, Brad S. Keeton, Stoll Keenon Ogden PLLC, 500 West Jefferson Street, Suite 2000, Louisville, KY 40202; William M. Lear, Jr., Shannon Bishop Arvin, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507; Sheryl G. Snyder, Jason Renzelmann, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Richard W. Bertelson, III, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40601; Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Thomas D. Wingate, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601.

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INTRODUCTION

Under Kentucky law, wagering on horse racing must be done under a "pari-mutuel system." The Kentucky Horse Racing Commission is vested by the General Assembly "with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth." KRS 230.215(2).

In *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, this Court held that the Commission acted within the scope of its authority to authorize pari-mutuel wagering on previously run horse races. 423 S.W.3d 726, 738 (Ky. 2014). The Court remanded this case solely for a factual determination of whether the contemplated wagering complies with the accepted definition of "pari-mutuel wagering" in 810 KAR 1:001 § 1(48). 423 S.W.3d at 730. Under that regulatory definition, there are four required elements for wagering to be "pari-mutuel." It must be a "system or method of wagering [1] approved by the commission in which [2] patrons are wagering among themselves and not against the association and [3] amounts wagered are placed in one or more designated wagering pools and [4] the net pool is returned to the winning patrons." *Id.* at 737 (citing 810 KAR 1:001 §1(48));

After a four day bench trial, the Franklin Circuit Court held that the subject system complies with that definition. Now, the only issue before this Court is whether that holding is "clearly erroneous" even though it is supported by extensive trial testimony and documentary evidence.

STATEMENT CONCERNING ORAL ARGUMENT

In its June 13, 2019 Order granting transfer under Rule 74.02(1), the Court stated that this case will be set for oral argument. The Kentucky Horse Racing Commission welcomes the opportunity to address the Court.

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COUNTERSTATEMENT OF THE CASE

The Foundation's "statement of the case" largely, and in some instances wildly, departs from a recitation of facts. For that reason, the Commission rejects the Foundation's statement and instead incorporates by reference, under Rule 10.03, the Franklin Circuit Court Opinion & Order (Oct. 24, 2018) (hereinafter "Opinion & Order").[1]

Before turning to the facts, the Commission offers a few points about the procedural posture of this case. First, the Commission did not object to transfer under Rule 74.02 because this case is now in its ninth year of litigation and has previously been before the Franklin Circuit Court (twice), the Kentucky Court of Appeals, and is now before this Court for the second time. The Commission, the Racing Associations, the Foundation, and the Commonwealth's citizens deserve a long overdue resolution.

Second, "[f]aced with serious financial challenges and seeking a means to develop new revenue sources, Kentucky's horse racing industry expressed interest in developing the use of devices for wagering on historical horse races." *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W.3d 726, 730 (Ky. 2014) (hereinafter "*Appalachian Racing*").[2] Consistent with its statutory obligation under KRS 230.215 "to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon," the

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1 The Opinion & Order is attached as Exhibit 1.

2 *Appalachian Racing* is attached as Exhibit 2.

Commission initially brought this case. In its initial Petition, the Commission sought a declaration as to whether authorizing the operation of pari-mutuel wagering on previously run horse races would be a valid and lawful exercise of the Commission's statutory authority under KRS Chapter 230. *Id.* at 731. In its Petition, the Commission alleged that such wagering "would improve the economic prospects of the racing industry and generate revenue for the state." *Id.* at 733. Unquestionably, the wagering has done that.[3]

Third, the Foundation intermittently criticizes the Commission for exceeding its statutory authority by making policy decisions otherwise reserved to the General Assembly. *See, e.g.*, Appellant's Br. at 2, 42. However, the "very purpose" of a declaratory judgment is to eliminate or minimize the genuine risk of "wrong" action by any of the parties. *Jamgotchian v. Ky. Horse Racing Comm'n*, 488 S.W.3d 594, 603 (Ky. 2016). The Foundation's critiques are without merit and ignore the fact that the *Commission* is the party that initially sought a declaratory judgment—precisely to avoid exceeding the scope of its authority under the enabling act. *Appalachian Racing*, 423 S.W.3d at

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[3] *See, e.g.*, https://www.paulickreport.com/news/the-biz/historical-racing-machine-revenue-supercharges-churchill-downs-spring-meet-purses/ (last accessed Nov. 3, 2019); *see also* https://www.courier-journal.com/story/sports/horses/horse-racing/2019/09/13/ kentucky-horse-racing-purses-rising-thanks-gaming-machines/2290918001/ (last accessed Nov. 3, 2019); Kentucky Historical Horse Racing Report for September 2019, *available at* http://khrc.ky.gov/Documents/2019-09-Historical%20Horse%20Racing%20Handle%20Report.pdf (last accessed Nov. 3, 2019).

735-38. Thus, the Commission proceeded cautiously to determine the extent of its lawful authority before authorizing such wagers.

Fourth, since this Court's decision in *Appalachian Racing* in 2014, the Commission has approved several different pari-mutuel systems for wagering on previously run horse races (in order of approval, RaceTech, Encore,[4] PariMax, and Ainsworth). Despite the Foundation's claim that this Court must address all four different systems, this case concerns only one—the Encore system.[5] Consistent with this Court's mandate in *Appalachian Racing*, the Franklin Circuit Court considered, and the parties litigated below, only the factual question of whether the Encore System constitutes a "pari-mutuel system of wagering."

Importantly, RaceTech (the first system authorized by the Commission on which to offer wagering on historical horse races) *is no longer in operation* at any association in Kentucky. No longer in use at any racing association, the RaceTech system *is not* the subject of this litigation. *See* Order Amending Order Entered July 28, 2017 (Aug. 24, 2017), R. at 3147 (holding that the case was "limited to the games in use by the racing associations, namely, Encore and RaceTech"); *Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017) (citing *Morgan*

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[4] In the trial exhibits and testimony, Encore is sometimes referred to as "Exacta" or "Exacta Systems, LLC."

[5] The Franklin Circuit Court expressly held that the January 8, 2018 trial was "limited to the Encore game." Order Amending Order Entered July 28, 2017 (Aug. 24, 2017), R. at 3147. For the Court's convenience, this Order is attached as Exhibit 3.

v. Getter, 441 S.W.3d 94 (Ky. 2014)) ("We do not decide moot cases because the role of our Court is not to give advisory opinions.").

Although the Commission approved a system for use at Churchill Downs in September 2018 (the Ainsworth system), the Franklin Circuit Court held that any wagering at Churchill Downs was not subject to this declaratory-judgment action, and that "a new action would be required to be commenced in the Franklin Circuit as a statutory appeal from the agency decision by the Commission on Churchill Downs' application." Order Amending Order Entered July 28, 2017, R. at 3148. The Foundation did not appeal that order. *See generally* Appellant's Notice of Appeal. Similarly, the system of wagering offered at the Red Mile (PariMax) is not the subject of this litigation. Rather, the Court need only review the Franklin Circuit Court's factual determinations of whether the Encore system (the "System") complies with the legal standard previously adopted by this Court in *Appalachian Racing*.

Finally, facts matter. This Court remanded this case for a *factual* determination. Those facts were established at a four day trial in Franklin Circuit Court following "extensive discovery" conducted over four years. Opinion & Order, at 4. At trial, the Commission presented the testimony of two authoritative witnesses—the person responsible for testing the System prior to approval (Richard LaBrocca), and the person responsible for monitoring all wagering on the System after the its approval (Steven May).

First, Richard LaBrocca was the Senior Director of Engineering for Gaming Laboratories International responsible for all testing of the System before the Commission approved its use. Gaming Laboratories International ("GLI") is the largest global network of accredited independent laboratories dedicated to the testing and evaluation of all types of gaming technology for over 500 regulators throughout the world, including regulatory bodies across the United States. Ex. F to Appellant's Br. at 3 of 40; *see also* VR No. 1: 1/8/18; 10:15-10:34. Based on LaBrocca's twenty years of experience in testing and evaluating gaming technology and his specific experience in actually evaluating the technology under review, the Court certified LaBrocca as an expert. Opinion & Order, at ¶ 1; *see also* VR 1: 1/10/18; 11:38-11:41.

Testifying for nearly three days, LaBrocca gave a "complete, independent picture" of how the System operates and explained how GLI's detailed description of the System ultimately allowed the Commission to grant approval. VR 1: 1/8/18; 10:33. On this System, patrons wager on the results of three races at once. VR 1: 1/8/18; 10:45:25-10:45:31. LaBrocca's testimony detailed how the System meets the four separate components of the regulatory definition of "pari-mutuel wagering" in 810 KAR 1:001 § 1(48). Specifically, LaBrocca testified that patrons wager among themselves. VR 1: 1/8/18; 2:47-2:49. He confirmed that patrons do not wager against the association because all payouts on winning wagers come from the pool, and not any separate account of an association. VR 1: 1/8/18; 11:05:05-11:06:03; 11:20:18-11:21:55.

He also confirmed that amounts wagered are placed in one or more designated wagering pools. VR 1: 1/8/18; 11:25:30-11:25:53. He further confirmed that the "net pool"[6] is returned to the winning patrons and that the System is designed so that "the net pool is going to be paid out many times over." VR 1: 1/8/18; 1:52:33-1:52:55. He also expressly testified—contrary to the Foundation's repeated and baseless assertion—that the System is not a "slot machine." VR 1: 1/8/18; 1:19.

Second, Steven May, the Commission's Director of Pari-mutuel Wagering, testified to his personal knowledge of the System as the individual primarily charged with regulating pari-mutuel wagering in the Commonwealth. 810 KAR 2:010 § 3(1)(a) (listing the director's duties, to include "[v]erifying [the] daily handle for ... historical horse racing wagering"). May testified that, following extensive testing by the independent testing laboratory, the Commission approved each version of the System at a series of open meetings, as is fully documented in the transcripts of those meetings, which were made trial exhibits. VR 1: 1/10/18; 1:42-1:48:30; 4:20:30-4:21:00; *see also* Jt. Petitioners' Tr. Exhibits 12-28.

At trial, May also explained that he regularly reviews daily wagering reports, which detail the System's wagering activity. *See* Jt. Petitioners' Tr. Exhibits 28-32 (containing sample daily wagering reports). Examining these

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[6] Under 810 KAR 1:001 § 1(44), the "net pool" is the "total amount wagered[,] less refundable wagers and takeout."

reports, May confirmed that all wagers are placed in a designated wagering pool. VR 1: 1/10/18; 4:20:20-4:21:50. He further confirmed that, based on these reports, no money has ever been paid out of a pool to a racing association. VR 1: 1/10/18; 4:21. Instead, the associations receive only the approved "takeout."[7] VR 1: 1/10/18; 2:00:00-2:00:40. Finally, May testified that the net pool is returned to the winning patrons. VR 1: 1/10/18; 4:22:00-4:22:30. May's testimony thus confirmed that the System fully complies with the Commission's regulatory definition of pari-mutuel wagering.

Based on the facts established at trial, the Franklin Circuit Court entered its Opinion & Order, holding that—as a factual matter—"the Exacta System is a 'parimutuel system of wagering' as defined under 810 KAR 1:001, Section 1(48) and authorized under the provisions of KRS Chapter 230." Opinion & Order, at 20.

STANDARD OF REVIEW

Although the trial court's legal conclusions are reviewed *de novo*, *Jamgotchian*, 488 S.W.3d at 602, findings of fact by a trial judge "rank in equal dignity with the verdict of a properly instructed jury and will not be disturbed unless clearly erroneous," *Daniel v. Kerby*, 420 S.W.2d 393, 395 (Ky. 1967) (citing CR 52.01). And a factual finding is not "clearly erroneous" if it is

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[7] Under 810 KAR 1:001 § 1(75), "takeout" means "the total amount of money, excluding breakage and any amounts allocated to a seed pool, withheld from each pari-mutuel pool, as authorized by KRS 230.3615 and 810 KAR Chapter 1."

supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970)).

"Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotations and citations omitted). Consequently, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts "should not disturb trial court findings that are supported by substantial evidence." *Id.*

ARGUMENT

"[A]ny wagering on horse racing in Kentucky must be based upon a pari-mutuel system." *Appalachian Racing*, 423 S.W.3d at 731 (citing KRS 230.215 and KRS 230.361). In Kentucky, the Commission has "plenary power" to regulate and "prescribe conditions" under which all "legitimate horse racing and wagering thereon is conducted in the Commonwealth." KRS 230.215(2). The term "pari-mutuel wagering" is defined by regulation in 810 KAR 1:001

§ 1(48).[8] This Court previously held that this definition and the "regulations adopted by the Commission to license the operation of pari-mutuel wagering on historical horse racing [were] a valid and lawful exercise of the Commission's statutory authority under KRS Chapter 230." *Appalachian Racing*, 423 S.W.3d at 738. In 2014, the Court remanded this case for a factual determination of "whether the licensed operation of wagering on historical horse racing" constitutes a "pari-mutuel form of wagering." *Id.* at 742. In 2018, the Franklin Circuit Court held that it does. Opinion & Order, at 20. The only issue before this Court, therefore, is whether the Franklin Circuit Court's holding is supported by substantial evidence, or if it is "clearly erroneous."

Here, the Commission will address the statutory basis and authority for its regulations (Section I), catalog the substantial evidence that supports the Franklin Circuit Court's Opinion & Order (Section II), and refute each of the Foundation's meritless critiques (Section III).

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[8] The Commission's regulatory regime previously consisted of three separate but substantially similar sets of regulations for three kinds of horse racing: Thoroughbred racing; Harness racing; and Quarter Horse, Appaloosa, and Arabian racing. *Appalachian Racing*, 423 S.W.3d at 731 n.3. However, the Commission has substantially consolidated and revised its regulatory regime by repealing and re-promulgating nearly all of its regulations. Those changes were effective May 31, 2019. The regulations at issue in this case—those governing pari-mutuel wagering—were not amended. *See* 810 KAR 1:001 ("Definitions"); 810 KAR 1:011 ("Pari-mutuel wagering"); 810 KAR 1:120 ("Exotic wagering").

I. The Kentucky Horse Racing Commission authorizes only that form of wagering permitted under KRS Chapter 230.

Wagering is an "invariable accompaniment" to horse racing. *Grainger v. Douglas Park Jockey Club*, 148 F. 513, 540 (6th Cir. 1906) ("[A]n invariable accompaniment of the operation of ... race tracks is betting on the races there run."). In Kentucky, the sport of horse racing is so important that the General Assembly declared its policy and intent "to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth." KRS 230.215(1). To achieve that goal, it vested the Commission with "forceful control of horse racing in the Commonwealth" and "wagering thereon." *Appalachian Racing*, 423 S.W.3d at 737. The Commission is charged with the "direct implementation" of KRS Chapter 230. *Id.* at 736 (quoting *Flying J Travel Plaza v. Commonwealth, Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996)) (holding that an administrative agency "is limited to a direct implementation of the functions assigned to the agency by the statute. Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation."). And under KRS 230.215 and KRS 230.361, any wagering on horse racing must be pari-mutuel. *Appalachian Racing*, 423 S.W.3d at 731.

"Loosely translated, the term pari-mutuel means 'to wager between ourselves.'" Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 Marq. Sports L. Rev. 473, 496 (2004) (Howland) (citing Fred S.

Buck, *Horse Race Betting: A Comprehensive Account of Pari-Mutuel and Bookmaking Operations* 3 (1971)). In essence, "[t]he pari-mutuel system is really a bookmaking operation in which profits are limited to a certain percentage." Fred S. Buck, *Horse Race Betting: A Comprehensive Account of Pari-Mutuel and Bookmaking Operations* 132. In 2010, the Commission specifically defined "pari-mutuel wagering" to incorporate these central elements. 810 KAR 1:001 § 1(48) (defining such wagering as a "system or method of wagering approved by the commission in which patrons are *wagering among themselves* and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons" (emphasis added)).

After considering the "system of wagering" described in *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 991 (Ky. 1931), this Court concluded that the definition of "pari-mutuel wagering" in 810 KAR 1:001 § 1(48) "is consistent with the references to pari-mutuel wagering in KRS Chapter 230." *Appalachian Racing*, 423 S.W.3d at 738. Under this regulatory definition, there are four required elements for wagering to be "pari-mutuel." It must be a "system or method of wagering [1] approved by the commission in which [2] patrons are wagering among themselves and not against the association and [3] amounts wagered are placed in one or more designated wagering pools and

[4] the net pool is returned to the winning patrons."[9] *Id.* at 737 (citing 810 KAR 1:001 § 1(48)); *see also* Opinion & Order, at 6-7. Consequently, the Commission authorizes only that which is permitted by KRS Chapter 230: pari-mutuel wagering on horse racing. 810 KAR 1:011 § 1 ("The only wagering permitted on a live or historical horse race shall be under the pari-mutuel system of wagering. All systems of wagering other than pari-mutuel shall be prohibited.").

Having established the controlling law, this Court remanded this case solely for a *factual* determination as to whether the System satisfies the requirements of the controlling law—not for the parties to repeatedly litigate the meaning, derivation, and definition of "pari-mutuel wagering." *Appalachian Racing*, 423 S.W.3d at 742 (remanding this case to the "Franklin Circuit Court for discovery pursuant to CR 26, and further proceedings relevant to the issue whether the licensed operation of wagering on historical horse racing as contemplated by Appellants constitutes a pari-mutuel form of wagering"). Although the Foundation attempts to re-litigate that definition, the definition accepted by this Court in *Appalachian Racing*—and followed by the Franklin Circuit Court in its Opinion & Order below—controls in this appeal. *Brooks v. Lexington-Fayette Urban Cnty. Housing Auth.*, 244 S.W.3d 747, 751 (Ky. App. 2007) ("The law of the case doctrine is an iron rule,

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[9] Because the System uses only previously run thoroughbred races, only the Thoroughbred regulations are relevant. *See* 810 KAR 1:001 ("Definitions"); 810 KAR 1:011 ("Pari-mutuel wagering"); 810 KAR 1:120 ("Exotic wagering").

universally recognized, that an opinion or decision of an appellate court *in the same cause* is the law of the case for a subsequent trial or appeal[.]" (emphasis added) (internal quotations omitted)).[10]

After years of extensive discovery and following a four-day bench trial, the Franklin Circuit Court found that because each element of the definition was *factually* satisfied, "the Exacta System is a 'parimutuel system of wagering' as defined under 810 KAR 1:001, Section 1(48) and authorized under the provisions of KRS Chapter 230." Opinion & Order, at 20. Substantial evidence supports the factual determinations made by the Franklin Circuit Court in applying the legal definition of "pari-mutuel wagering," and those factual determinations should be affirmed. Rule 52.01; *Owens-Corning Fiberglas Corp.*, 976 S.W.2d at 414.

II. Substantial evidence supports the Franklin Circuit Court's factual findings and holding that the System offers a "pari-mutuel system of wagering" under 810 KAR 1:001 § 1(48).

As a *factual* matter, the Franklin Circuit Court found that the System complies with Kentucky's definition of "pari-mutuel wagering." Opinion & Order, at 20. That finding was based upon substantial evidence supporting all

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[10] To the extent the Foundation now seeks to challenge that definition, not only has this Court already deemed the definition valid, but the Foundation also does not have standing to challenge that definition. *Commonwealth Cabinet for Health and Family Services, Dep't for Medicaid Services v. Sexton*, 566 S.W.3d 185, 192 (Ky. 2018) ("We hold that all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court, because the issue of constitutional standing is not waivable.").

four of the required elements. As the trier of fact, the Franklin Circuit Court must be "afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before [it]." *See Fuller*, 481 S.W.2d at 308. It is the "exclusive province and function" of the Franklin Circuit Court, as trier of fact here, "to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, [to] judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence." *Id.*

Following a four-day bench trial and the presentation of witness testimony and documentary evidence, the Franklin Circuit Court "appraised conflicting testimony" and "made findings and conclusions of fact" with detailed references to the testimony of "witnesses and the evidence adduced by the parties." *Id.* The Court relied on the substantial evidence presented at trial, including the expert testimony described above, which is sufficient to "induce conviction in the minds of reasonable persons." *Curd v. Ky. State Bd. of Licensure for Prof'l Engineers and Land Surveyors*, 433 S.W.3d 291, 308 (Ky. 2014) (affirming board's determination based on substantial-evidence review). The Franklin Circuit Court's *factual* findings as to each of the four essential elements of the definition of "pari-mutuel wagering" are, therefore, controlling in this appeal. Rule 52.01.

A. The Commission approved the System.

The Commission's approval is a prerequisite for an association to offer any wager on an historical horse race. 810 KAR 1:001 § 1(48); *see also* 810 KAR 1:011 § 3(6) ("[A]n association [must] first obtain the commission's written approval of all wagers offered as set forth in 810 KAR 1:120" before offering such wagers). An association may not offer wagering on an "historical horse race without the prior written approval of the commission." 810 KAR 1:120 § 2. The Commission does not grant its approval until certain regulatory requirements are satisfied. To ensure those requirements are satisfied, Kentucky law requires "testing of each terminal used for wagering on historical horse races by an independent testing laboratory to ensure its integrity and proper working order." 810 KAR 1:120 § 5(2)(a). And exotic wagers on historical horse races must be "reviewed and tested," and approved only if the Commission is satisfied "[t]he wager does not adversely affect the safety or integrity of horse racing or pari-mutuel wagering in the Commonwealth; and ... [t]he wager complies with KRS Chapter 230 and 810 KAR Chapter 1." 810 KAR 1:120 § 2(5).

The Franklin Circuit Court held that "[t]he Exacta System is a system *approved* by the Commission to offer wagering on historical horse racing." *See* Opinion & Order, at ¶ 58 (emphasis added); *see also id.* at ¶¶ 73-80. Substantial evidence supports the Circuit Court's finding that the Commission approved the System. At trial, the Commission demonstrated that two racing

associations applied to offer exotic wagers on historical horse races using the System. Jt. Petitioners' Tr. Exhibits 16, 25-27. In compliance with the governing regulations, the System was subjected to extensive testing by an independent testing laboratory, GLI, before even a single patron placed a wager on it. Opinion & Order, at ¶ 74; *see also* Ex. F to Foundation Br. at 6 ("Testing of the historic horse racing equipment was conducted in accordance with regulations applicable to historic horse racing set forth by statute in KRS [Chapter] 230 and the ... regulations in KAR title 810 and 811.").

This testing allowed the Commission to understand *how* wagers on the System operate because the independent testing laboratory produced an extensive report detailing the System's design, "integrity[,] and proper working order." Opinion & Order, at ¶ 74; *see also* VR No. 1: 1/8/18; 9:48 (explaining that the testing laboratory's purpose is to explain how the technology operates). Based upon that testing, the Commission approved the System in a series of open meetings satisfied that it complied "with KRS Chapter 230 and 810 KAR Chapter 1." 810 KAR 1:120 § 2(5); Opinion & Order, at ¶ 75-80 (citing Jt. Petitioners' Tr. Exhibits 12-24). Because substantial and uncontested evidence demonstrates that the Commission approved the System, the Court should affirm the Franklin Circuit Court's *factual* finding on this element. *Fuller*, 481 S.W.2d at 308.

B. Patrons wager among themselves and not against the association.

It is an essential element of "pari-mutuel wagering" that patrons wager "among themselves" and "not against the association." 810 KAR 1:001 § 1(48). Those interlocking elements are so essential to pari-mutuel wagering that the Commission's regulations provide that "[a]n association conducting wagering on an historical horse race shall not conduct wagering in such a manner that patrons are wagering against the association, or in such a manner that the amount retained by the association as a commission is dependent upon the outcome of any particular race or the success of any particular wager." 810 KAR 1:011 § 4(1)(c). Moreover, an association may "only pay a winning wager on an historical horse race out of the applicable pari-mutuel pool and ... not ... out of the association's funds." *Id.* at § 4(2).

Collectively, these requirements ensure that each association operating the System "does not bet at all." *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d, 987, 991 (Ky. 1931). Rather, an association "merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves." *Id.* As required by the "common law expression" of the "conception of pari-mutuel wagering," "[t]he operator receives [a] per cent of the wages as his commission." *Appalachian Racing*, 423 S.W.3d at 737 (citing *Ky. Jockey Club*, 38 S.W.2d at 991).

The Franklin Circuit Court held that "[i]n the Exacta System, patrons are wagering among themselves and not against the Association." Opinion &

Order at p. 20, ¶ 8(2). Substantial evidence supports this finding because in the System, patrons wager "among themselves" and "not against the association" in two essential ways. First, as the expert testimony presented at trial confirmed patrons "wager among themselves" because amounts wagered are "commingled" in a wagering pool from which all winning wagers are paid. *See* VR No. 1: 1/8/18; 1:47-48. Patrons compete "among themselves" for a portion of the "carry-over"[11] pool based on the accuracy of their selections—regardless of the identity of the race. Opinion & Order, at ¶¶ 70, 92. That patrons wager on different races is immaterial to whether the patrons "wager among themselves." Rather, patrons wager among themselves because they wager on a set of three ten-horse races and winning wagers are paid from the pari-mutuel pool into which all patrons have wagered. VR No. 1: 1/8/18; 1:47-1:48.

Second, the expert testimony at trial confirmed that an association offering wagering on this System "does not bet at all," and has no financial stake in the outcome of any wager. Opinion & Order, at ¶¶ 72, 83 (citing VR No. 1: 1/8/18; 11:05:05-11:06:03; 11:25:30-11:25:53; 1120:18-11:21:55). Rather, at trial the Commission proved as a *factual* matter that in this System, "[a]ll payouts on winning wagers come from the pool, not any separate account of the Association." Opinion & Order, at ¶¶ 72, 83; *see also* VR No. 1: 1/10/18;

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[11] Under 810 KAR 1:001 § 1(11), "carryover" means "nondistributed pool monies which are retained and added to a corresponding pool in accordance with 810 KAR Chapter 1."

2:06. As with all pari-mutuel wagering, an association's profit on this System is *limited* to the takeout established by agreement and statute. *See id.* at ¶¶ 62, 82; *see also* 810 KAR 1:011 §10(3) (requiring each association to deduct a takeout not in excess of the percentages set in KRS 230.3615). Director May confirmed that no association has ever received funds from a wagering pool in excess of the approved takeout rate. VR No. 1: 1/10/18; 2:00; 4:21.

Thus, an association offering wagering on this System "merely conduct[s] a game" and "does not bet at all." *Ky. Jockey Club*, 38 S.W.2d at 991. For these reasons, patrons wagering on this System bet "among themselves" and "not against the association." 810 KAR 1:001 § 1(48). Therefore, substantial evidence supports the Franklin Circuit Court's factual finding that the System complies with this element of the regulatory definition of "pari-mutuel wagering."

C. Amounts wagered are placed in designated wagering pools.

The Franklin Circuit Court held that "amounts wagered are placed into one or more designated pools." Opinion & Order, at ¶ 86. That finding is supported by substantial evidence in the record, including trial testimony and documentary evidence that, in this System, "amounts wagered are placed in one or more designated wagering pools." 810 KAR 1:001 § 1(48).

First, consistent with the Commission's regulations, an independent testing laboratory tested "each terminal used for wagering on historical horse races." Opinion & Order, at ¶ 74 (citing Jt. Petitioners' Exhibits 2-8, 15, 17,

and 19). That testing confirmed the System's functionality and integrity, including its methodology for accounting for all wagers placed on the System. Based on the results of that testing, the testing laboratory confirmed that all wagers on this System, less takeout, are placed in designated pools from which winning wagers are paid. VR No. 1: 1/8/18; 10:58, 11:00, 11:05, 1:51; *see also* Jt. Petitioners' Exhibits 2-8, 15, 17, and 19. Consequently, "[a]ll payouts on winning wagers come from the pool, not any separate account of the Association." Opinion & Order, at ¶¶ 72, 83.

Second, Director May, confirmed that—*as a matter of fact*—amounts wagered are placed into designated wagering pools. Opinion & Order, at ¶ 86 (citing VR 1: 1/8/18; 11:25:30-11:25:53). May also testified that he reviews the wagering reports produced by the System on a daily basis. Through his review, May is able to monitor wagering pool balances. VR No. 1: 1/10/18; 2:12; *see also* Jt. Petitioners' Tr. Exhibits 29-32. May's testimony and these reports confirm that amounts wagered on the System are placed "in one or more designated wagering pools." VR No. 1: 1/10/18; 2:00-2:45; *see also* Jt. Petitioners' Exhibits 25-28. And the reports show that wagering pool balances increase and decrease based on patrons' wagers and whether those wagers are successful. *Id.* As wagers are made and the betting public is winning, the pool balances decrease. *Id.* Conversely, as wagers are made and the betting public is losing, the pool balances increase. *Id.* Through this daily review of the wagering reports, the Commission ensures that the System complies with the regulatory

requirement that "amounts wagered are placed in one or more designated wagering pools." VR No. 1: 1/10/18; 4:20-4:22.

Consequently, substantial evidence supports the Franklin Circuit Court's factual finding that in this System, "amounts wagered are placed in one or more designated wagering pools," as required under 810 KAR 1:001 §1(48). Opinion & Order, at ¶¶ 72, 83, 85.

D. The net pool is returned to the winning patrons.

The Commission's regulations require that the "net pool is returned to the winning patrons." 810 KAR 1:001 § 1(48). The Franklin Circuit Court found that the net pool, in this System, is returned to the winning patrons. Opinion & Order, at ¶¶ 87-91. Substantial evidence in the form of trial testimony and documentary evidence supports this factual finding.

The System is designed so that the "net pool is going to be paid out many times over." *Id.* at ¶ 89. At trial, the Commission presented substantial evidence in the form of testimony that confirmed—*as a factual matter*—"each pool in operation has paid out the net pool and the daily wagering reports demonstrate that the pari-mutuel pools fluctuate based on the outcome of patrons' wagers." *Id.* at ¶ 91 (citing VR No. 1: 1/10/18; 2:00-2:45; 4:20-4:22). Apart from the "initial seed pool,"[12] the associations offering wagers on this

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12 The "initial seed pool" is "a nonrefundable pool of money funded by an association in an amount sufficient to ensure that a patron will be paid the minimum amount required on a winning wager on an historical horse race." 810 KAR 1:001 § 1(33). In live wagering, a "minus pool" may occur when the amount of money to be distributed by the association on winning wagers exceeds the amount actually bet by patrons. *See* 810 KAR 1:001 § 1(41)

System add no money to any of the wagering pools and winning wagers are paid only from amounts wagered by other patrons—not from any association funds. *Id.* at ¶¶ 69, 72, 83. Using this System, associations retain only their approved takeout. *Id.* at ¶ 82. Unequivocally, the trial testimony and documentary evidence demonstrates that, in this System, the net pool is returned to the winning patrons. The Foundation has not shown otherwise—nor can it—because there is no evidence that the net pool has not been returned to the winning patrons or that the associations receive anything more than their lawful takeout.

The Franklin Circuit Court found that the net pool in this System is returned to the winning patrons, as required under 810 KAR 1:001 § 1(48). Opinion & Order, at ¶¶ 87-91. "In the light of all the evidence," substantial evidence supports the Franklin Circuit Court's factual finding that the net pool is returned to the winning patrons. *Fuller*, 481 S.W.2d at 308.

III. The Foundation disregards this Court's procedural rules and the substantive requirements of "pari-mutuel wagering" and challenges the Franklin Circuit Court's holding based on requirements not stated in controlling law.

As a threshold matter, the Foundation's Brief does not comply with Rule 76.12(4)(c)(v), which requires "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved

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(defining "minus pool"). In wagering on historical horse races, however, the Commission requires the initial seed pool as an up-front commitment to ensure a minus pool does not occur.

for review and, if so, in what manner." This procedural requirement "is intended to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 171 (Ky. App. 2014) (quoting *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App.1990)) (internal quotations omitted). Of course, "[i]t is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated." *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (internal quotations omitted). Although the Court has wide latitude to determine the proper remedy, "CR 76.12(8)(a) vests this Court with the discretion to strike a brief as a penalty for non-compliance with any substantial requirement of the rule." *Krugman*, 437 S.W.3d at 171.

A. The Foundation improperly seeks to re-litigate issues this Court has already conclusively decided.

Disregarding this Court's procedural rules, the Foundation proceeds to also disregard the controlling text of the regulatory definition of "pari-mutuel wagering" and the proper standard of review. In 2014, this Court affirmed the regulatory definition of pari-mutuel wagering and also granted the Foundation's request to remand this case for a *factual* determination of whether the system "constitutes a pari-mutuel form of wagering" in its operation. *Appalachian Racing*, 423 S.W.3d at 742. The Court remanded this

case to answer the simple question of whether, as a factual matter, the form of wagering offered in this System meets that definition.[13] The Franklin Circuit Court found that it does. The only issue before this Court is whether that finding is "clearly erroneous." *Owens-Corning Fiberglas Corp.*, 976 S.W.2d at 414. Unable to demonstrate that the Court's *factual* findings are clearly erroneous, the Foundation instead tries to cast this matter as involving only legal questions in order to evade the proper, more deferential standard of review of the Franklin Circuit Court's *factual* findings. To do so, the Foundation attacks the legal definition of "pari-mutuel wagering" accepted *by this Court in this case. Appalachian Racing*, 423 S.W.3d at 737 (citing 810 KAR 1:001 § 1(48)). But the Foundation "cannot accept the benefits of an opinion which is favorable and later relitigate that portion which is not." *Brooks*, 244 S.W.3d at 751.

Rather than challenge the facts established at a four-day trial as clearly erroneous, the Foundation attempts to re-litigate legal questions already conclusively determined. This Court has already held that the Commission's regulatory definition "comports well with the system of wagering" described in *Commonwealth v. Kentucky Jockey Club* and in federal law. *Appalachian Racing*, 423 S.W.3d at 737-38. That definition is controlling in this litigation, and the Foundation should not be permitted to re-litigate it. *Brooks*, 244

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[13] To the extent the Foundation seeks reconsideration of this issue, the time for doing so has long since expired. Rule 76.38(2).

S.W.3d at 751. Additionally, by claiming that the Commission has exceeded its authority and infringed on the policy-making role of the General Assembly, the Foundation wants this Court to remedy that alleged infraction by exceeding the scope of its review in this case. The Court should reject the Foundation's invitation to violate well-established legal principles in order to manufacture a desired result. *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003) (reiterating that a court "abuses its discretion ... when it improperly applies the law or uses an[] erroneous legal standard"). The trial court's factual determinations may be set aside only if "clearly erroneous." *Owens-Corning Fiberglas Corp.*, 976 S.W.2d at 414. Because the Franklin Circuit Court's Opinion & Order is supported by evidence of substance, the Court should affirm its factual findings.

To re-litigate the definition already "litigated and determined finally" by this Court as "between the same parties" would lead to "interminable" litigation and render this appeal "only a starting point for new litigation." *Brooks*, 244 S.W.3d at 751 (citing *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)) (explaining that the law of the case doctrine is an "iron rule" that is "predicated upon the principle of finality" and that "it would be intolerable if matters once litigated and determined finally could be relitigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for new litigation").

B. The Foundation asks this Court to ignore the plain meaning of the regulation and instead to insert requirements not contained in the language of the text.

The Foundation should be prohibited from relitigating the definition of "pari-mutuel wagering." Yet, the Foundation's proposed definition also fails for another reason, "one that inheres in most incorrect interpretations of statutes: It asks [the Court] to add words to the law to produce what is thought to be a desirable result." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (Scalia, J.). On one point, the Commission and Foundation agree: "there is no ambiguity in the [r]egulatory [d]efinition." Appellant's Br. at 39. Thus, "[i]f uncertainty does not exist ... [t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *Commonwealth v. Ky. Public Serv. Comm'n*, 243 S.W.3d 374, 381 (Ky. App. 2007) ("[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.").

The Commission's regulations have the "force and effect of law." *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) ("An agency must be bound by the regulations it promulgates. Further, the regulations adopted by an agency have the force and effect of law." (internal citations omitted)). In interpreting those regulations, "the same rules apply that would be applicable to statutory construction and interpretation." *Revenue Cabinet v. Gaba*, 885 S.W.2d 706, 708 (Ky. App. 1994). The cardinal rule of statutory interpretation is that the plain meaning of the statute controls. *Lamb v. Holmes*, 162 S.W.3d 902, 909

(Ky. 2005). And neither the Court nor the Commission is "at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Ky. Public Serv. Comm'n*, 243 S.W.3d at 381 (citing *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000)). In fact, state agencies are statutorily prohibited from "modifying an administrative regulation by internal policy or another form of action." *Hagan*, 807 S.W.2d at 490 (citing KRS 13A.130).

Although the definition of "pari-mutuel wagering" is clear, the Foundation insists that it is "at liberty to add" several requirements not stated in the text of the regulation. *Ky. Public Serv. Comm'n*, 243 S.W.3d at 381. Specifically, the Foundation posits that "*pari*" means "betting" and "*mutuel*" means "reciprocal." Appellant's Br. at 23. Proceeding from that false premise, the Foundation contrives several requirements for "pari-mutuel wagering" not found in *Appalachian Racing*'s holding or the accepted definition of that term. Moreover, the Foundation fails to fully explain its manufactured requirements or how those requirements invalidate the approval granted by the Commission under the controlling definition. The Foundation's "requirements" also rest on a flawed, misconceived, and strained definition of pari-mutuel wagering at odds with the meaning and history of the term. *See* Fred S. Buck, *Horse Race Betting: A Comprehensive Account of Pari-Mutuel and Bookmaking Operations* 3 (1971) (explaining that after developing the system in the late 1800s, M. Oller "began searching for a name" and combined "*parrier*" (to bet) and "*mutuel*"

(between ourselves) to arrive at a name that, loosely translated, means "to wager between ourselves"). The Foundation's proposed requirements simply are nowhere found in the holding of *Appalachian Racing*.

To be clear, the Foundation endorses a lawlessness that should be foreign to a state agency: the *addition* of requirements not contained in the text of the regulation. *Ky. Public Serv. Comm'n*, 243 S.W.3d at 381. The Foundation has not established clear error, but merely that the trial court's holding does not conform to the Foundation's preferences. The Foundation *prefers* that patrons wager "with, among or against" each other on the "same event." Appellant's Br. at 23. The Foundation claims that patrons are not wagering "among themselves" if "no reciprocity exists among discrete players." *Id.* at 24. Having molded its preferences to cast them as contrived requirements, the Foundation therefore claims the net pool is not paid out properly in this System because no patron can wager "with, among or against" another patron. Although the Foundation tries to rephrase these artificial requirements in several ways to multiply the number of errors assigned—*i.e.*, that patrons are not wagering against each other, that patrons wager "against the machine," and that prizes are not "determined by players," *id.*—the Foundation's conception of "reciprocity" is neither relevant under the regulatory definition approved by this Court nor articulated in any meaningful way.

There is simply no legal or historical "reciprocity" requirement, nor is there any requirement that patrons wager on the "same event." *See generally* KRS Chapter 230; 810 KAR Chapter 1. The Franklin Circuit Court considered this issue, heard extensive testimony on the matter, and rightly concluded that pari-mutuel wagering "does not require reciprocity among patrons." Opinion & Order, at ¶ 92. If the Foundation's policy preferences are not reflected in the textual definition of "pari-mutuel wagering," the appropriate recourse is to lobby the General Assembly.[14]

Instead, the Foundation lobbies this Court to give legal effect to its policy preferences, which are not required by the text of the regulation. In short, the Foundation claims that pari-mutuel wagering requires "reciprocity." Appellant's Br. at 37. And the Foundation claims that, in this System, "players lack reciprocity." *Id.* Yet, despite defining multiple terms throughout its brief, the Foundation does not even attempt to define "reciprocity" or "reciprocal," and entirely fails to explain its alleged significance. Must wagers be "inversely related" or "mutually corresponding"? *See* https://www.merriam-webster.com/dictionary/reciprocal (last accessed Nov. 3, 2019). If so, in what way? And in what other traditional or exotic wager does one patron's specific wager "mutually correspond" or "inversely relate" to another patron's wager?

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[14] For example, the Foundation also complains about the rate at which pari-mutuel wagering is taxed. Appellant's Br. at 49. Again, such complaint must be made to the General Assembly—not this Court. *Appalachian Racing*, 423 S.W.3d at 738 ("Only the legislature has the authority to impose a tax.").

And, more importantly, where is the reciprocity requirement stated in the text of the definition approved by this Court?[15]

Under the regulation, the methodology to return the net pool is "pari-mutuel" so long as "the total amount wagered less refundable wagers and takeout" is returned to the winning patrons and not paid by or returned to the racing association offering the wager. In this manner, patrons wager "among themselves" on the System and the wagering is "reciprocal," "inversely related," and "mutually corresponding" because amounts wagered by losing patrons are returned to winning patrons. Regardless, the Commission's expert testified that "[w]hen patrons are wagering amongst themselves into the same pool[,] they are affecting the other wagers who come after them by either increasing the funding of the pool, as every wager is going to do, and at some cases when there is a win, decreasing the number ... thereby affecting other

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[15] Implicit in the Foundation's "reciprocity" argument—although not clearly articulated—is the contention that the net pool must be returned to winning patrons in an amount proportional to the amounted wagered. *See, e.g.*, Buck, *Horse Race Betting: A Comprehensive Account of Pari-Mutuel and Bookmaking Operations* 3 ("Eventually [Oller] hit upon the idea of a system which would permit people to bet among themselves and to distribute to the winners a division of all the money bet in the proportion of individuals wagers."). As a threshold matter, however, the text of the regulation does not require such distribution in this form of exotic wagering. 810 KAR 1:001 § 1(48). Rather, such a requirement would impermissibly *add* to the text of the regulation—something that the Foundation, the Court, and the Commission are not at liberty to do. *Ky. Public Serv. Comm'n*, 243 S.W.3d at 381. Instead, the regulation's "plain meaning" merely requires that the "net pool is returned to the winning patrons." *See* 810 KAR 1:001 § 1(48). The Foundation's contention, if adopted, would also invalidate widely accepted exotic wagers with payouts made to unique winning tickets, like the Pick-6. *See, e.g.*, 810 KAR 6:020 § 14.

future players." Opinion & Order, at ¶ 94 (citing VR No. 1: 1/9/18; 3:55:55-3:56:52). Predictably, the Foundation will reply by faulting the System for using "losses" to pay winning wagers, but that is true in all "pari-mutuel wagering." For example, the losing patrons' wagers on a "trifecta" are used to pay winning patrons. *See* 810 KAR 6:020 § 9. The same is true in every other wager permitted under Kentucky law, including, among others, the "Superfecta," "Super high-five," "Big Q," and "Pick-n." 810 KAR 6:020 §§ 10, 11, 13, 14.

C. The Foundation's remaining criticisms are not relevant to whether the System offers a "pari-mutuel system of wagering."

The Foundation makes several undeveloped and scatter-shot critiques of the System that are immaterial to the issue before this Court. First, the Foundation's criticism of the way the System presents the outcome of a wager is not relevant to whether the System meets the definition in 810 KAR 1:001 § 1(48). The display used to present the outcome of a wager "has no impact or bearing on the result of the race or the value of any prizes awarded. It only acts as an entertaining way to display the results of [a patron's] racing wager." *See* Exhibit F to Appellant's Br. at 36; see also Opinion & Order, at 20 (finding that the "design of the device is merely for entertainment purposes").

Second, the Commission requires an independent testing laboratory test and evaluate each wagering system before it is approved by the Commission. 810 KAR 1:120 § 5(2)(a). The racing associations pay for this testing. Although the Foundation suggests—*without any basis*—this must be evidence of some

ill-defined inducement, *see*, *e.g.*, Appellant's Br. at 37-38, this attack fails for two reasons. For one thing, the manner in which the testing is conducted is *required by law*. The Commission's regulations mandate that "the expense of the testing shall be paid by the association offering the wagering on historical horse races"—rather than the taxpayer. 810 KAR 1:120 § 5(2)(b). This is a common, accepted, and common-sense practice for regulating industries without reliance on general funds. *See*, *e.g.*, 808 KAR 1:140 (setting the fee schedule for bank examinations conducted by the Department of Financial Institutions); 808 KAR 10:400 (requiring broker-dealers, firms employing issuer agents, and investment advisers to compensate the Department of Financial Institutions for their examination); 820 KAR 1:032 § 29(2) (requiring the manufacturer to bear the "cost of testing and certification" of electronic pull tabs); KRS 230.240 (requiring that certain Commission employees "be employed and compensated by the Commonwealth, subject to reimbursement by the racing associations").

The Foundation's attack is really an attempt to have this Court re-weigh and assess on its own the credibility of the testimony and evidence presented at trial. The Franklin Circuit Court is entrusted with those determinations. *Moore*, 110 S.W.3d at 354 (holding that "due regard" must be given the trial court's credibility findings, "[r]egardless of conflicting evidence"). And the Franklin Circuit Court considered the evidence and reached its determination with full knowledge that the expense of testing was paid by the associations

that offer wagers on historical horse races. The Foundation made the invoices a trial exhibit, *see* Defendant's Exhibit 15; *see also* Opinion & Order at ¶ 54, and questioned the Commission's witnesses on this subject at trial. *See, e.g.*, VR No. 1: 1/10/18; 9:50-9:55; 3:29-3:33. Thereafter, the Franklin Circuit Court weighed the evidence and considered that testimony credible, as seen by the Court's repeated reliance upon the trial testimony of the witnesses in its Opinion & Order. *See, e.g.*, Opinion & Order at ¶¶ 54, 64-67, 69, 70-72, 82-84, 89, 94-95; Thus, the Foundation's criticism is without merit.

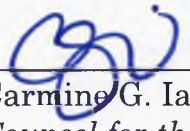
To the extent the Franklin Circuit Court's credibility finding is implicit, Kentucky law recognizes such findings. *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 910 (Ky. 2014) (holding an "implicit finding" in part made trial court's order is not clearly erroneous); *S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 931 (Ky. 2013) (no "error in the trial court's implicit finding"); *Gormley v. Judicial Conduct Comm'n*, 332 S.W.3d 717, 727 (Ky. 2010) ("agree[ing] with the Commission's implicit finding"); *Miller v. Eldridge*, 146 S.W.3d 909, 922 (Ky. 2004) ("implicit finding ... was not clearly erroneous"). Thus, the Franklin Circuit Court's implicit credibility determinations are entitled to this Court's deference.

Accordingly, the Foundation has not demonstrated how the Franklin Circuit Court's factual findings are "clearly erroneous."

CONCLUSION

The weight of the evidence amply supports the Franklin Circuit Court's Opinion & Order, and the result is not "clearly erroneous." After nearly ten years of litigation, the Kentucky Horse Racing Commission respectfully requests that the Court bring this case to a final resolution and affirm the Franklin Circuit Court's Opinion & Order.

Respectfully submitted,



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Appendix

Exhibit	No.
Franklin Circuit Court Opinion & Order (Oct. 24, 2018)	1
Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc., 423 S.W.3d 726 (Ky. 2014)	2
Franklin Circuit Court Order Amending Order Entered July 28, 2017 (Aug. 24, 2017)	3