

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF PARI-MUTUEL WAGERING

<b>FILED</b>	
<small>Department of Business and Professional Regulation Deputy Agency Clerk</small>	
CLERK	<b>Evette Lawson-Proctor</b>
Date	<b>8/27/2012</b>
File #	<b>2012-05378</b>

FLORIDA HORSEMEN'S BENEVOLENT  
AND PROTECTIVE ASSOCIATION, INC.,  
a Florida corporation, not-for-profit,

Petitioner/Intervenor;

DS 2011-007  
DS 2011-018

and

CALDER RACE COURSE, INC.,  
a Florida corporation,

**DS 2011-007**

Petitioner/Intervenor,

and

**DS 2011-018**

GULFSTREAM PARK RACING  
ASSOCIATION, INC., a Florida corporation,  
d/b/a Gulfstream Park Racing and Casino,

Intervenor.

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**CONSOLIDATED DECLARATORY STATEMENT**

Petitioner, Florida Horsemen's Benevolent and Protective Association, Inc., (FHBPA) filed a Petition for Declaratory Statement (FHBPA Petition) pursuant to Chapter 120.565, Florida Statutes, with the Division of Pari-Mutuel Wagering (the Division) on January 27, 2011. The case number for the FHBPA Petition is DS 2011-007. The FHBPA Petition is hereby incorporated by reference. On March 3, 2011, Petitioner/Intervenor Calder Race Course, Inc. (Calder), after previously filing a petition (granted by the Division) to intervene in this matter, filed a Petition for Declaratory Statement (Calder Petition) pursuant to Section 120.565, Florida Statutes, with the Division. The case number for the Calder Petition is DS 2011-018. The Calder Petition

is also incorporated herein by reference. Both petitions seek the Division's interpretation of Section 849.086(13)(d)2., Florida Statutes, applied to the same or similar facts and circumstances, and have therefore been consolidated.

1. FHBPA is a Florida corporation, not-for-profit, whose principal office is located in Dade County, Florida, and whose address is 21001 N. W. 27th Avenue, Miami, Florida 33056.

2. Calder is a licensed thoroughbred pari-mutuel wagering permitholder authorized under Chapter 550 and Section 849.086, Florida Statutes, to conduct thoroughbred racing and cardroom at its facility in Miami-Dade County, located at 21001 N.W. 27th Avenue, Miami, FL 33056.

3. Both petitions seek a declaratory statement regarding the methodology by which a thoroughbred horseracing permitholder operating cardrooms must calculate and contribute monies to be added to purses and breeders awards. Specifically, both petitions present questions as to the interpretation of Section 849.086(13)(d)2., Florida Statutes.

4. The FHBPA Petition interprets Section 849.086(13)(d)2., Florida Statutes, to mean that every month is treated as a separate reporting and calculation period, and that the statute requires each thoroughbred horseracing permitholder to calculate, each and every month, the amount of net proceeds from cardroom operations and then, at that time, deduct, each month, not less than 50% of the net proceeds from such monthly cardroom operations for the supplementation of the purses and breeders' awards in the next ensuing racing meeting.

5. On February 23, 2011, a Petition to Intervene was filed by Calder, alleging that Calder's substantial interests are affected by the outcome of this proceeding. The Division granted the petition.

6. On February 25, 2011, a Petition to Intervene was filed by Gulfstream Park Racing Association, Inc., d/b/a Gulfstream Park Racing and Casino (Gulfstream), alleging that Gulfstream's substantial interests are affected by the outcome of this proceeding. The Division granted the petition.

7. On March 3, 2011, Calder filed a Petition for Declaratory Statement (Petition) pursuant to Section 120.565, Florida Statutes, with the Division. The case number for this petition is DS 2011-018. The Petition also seeks an interpretation of Section 849.086(13)(d)2., Florida Statutes.

8. Calder asserts that a reasonable interpretation of Section 849.086(13)(d)2., Florida Statutes, should be the supplement to purses and breeders' awards is in the aggregate for Calder's "next ensuing racing meeting" based on the aggregation of monthly net proceeds on a calendar year basis.

9. On March 24, 2011, FHBPA filed a Petition to Intervene and to Transfer/Consolidate, pursuant to Rule 28-105.0027, Florida Administrative Code. The Petition alleges that the issues raised in the Petition for Declaratory Statement filed by Calder (Case Number DS-2010-018) are the same as the issues raised in the Petition for Declaratory Statement filed by FHBPA (Case Number DS-2011-007). Therefore, DS-2011-018 should be transferred/consolidated with DS-2011-007 which was the first filed case seeking a declaratory statement with respect to Section 849.086(13)(d)2., Florida Statutes.

10. The Division is the state agency authorized to administer and regulate the pari-mutuel industry pursuant to Chapter 550, Florida Statutes. The Division is also the state agency authorized to administer Section 849.086 and regulate the operation of cardrooms under Sections 550.0251(12) and 849.086(4), Florida Statutes.

11. The Division's issuance of a declaratory statement is governed by the provisions of Section 120.565, Florida Statutes, which provides in relevant part:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

12. The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance. *Novick v. Dep't of Health, Br. Of Medicine*, 816 So. 2d 1237, 1240 (Fla. 5<sup>th</sup> DCA 2002). The Supreme Court of Florida in *Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), recognized that, in enacting Section 120.565, Florida Statutes, the Legislature gave citizens a right to get a clear, binding answer from the agency on how the agency's statutes and rules apply. In that case the Court also recognized the unique nature of this industry with limited participants who would almost invariably have an interest in a declaratory statement. The Court further found that changes to that section made by the 1996 amendments to the Administrative Procedure Act authorize the issuance of declaratory statements even

though the interest of persons who are not a party may be affected. *Id.* 747 So. 2d at 378-385.

13. FHBPA is a substantially affected association that may seek the Division's opinion as to the interpretation of Section 849.086, Florida Statutes, and the Division's rules adopted thereunder, and FHBPA's Petition complies with the requirements of Section 120.565(2), Florida Statutes. Likewise, Calder was joined as an Intervenor/Petitioner, and Gulfstream as an Intervenor, because each party's substantial interests may also be affected by the Division's Declaratory Statement; Calder's Petition (Gulfstream did not file a separate petition) also complies with the requirements of Section 120.565(2), Florida Statutes.

14. Both DS-2011-007 and DS-2011-018 raise the same issues as to the interpretation of Section 849.086(13)(d)2. The two cases should be and have in fact been consolidated into one case in order to avoid the issuance of two declaratory statements addressing essentially the same facts and subject matter. Further, since DS-2011-007 was filed before DS-2011-018, case DS-2011-018 should be transferred to and consolidated with DS-2011-007.

#### DECLARATORY STATEMENT

15. Section 849.086(13)(d)2., Florida Statutes, states:

Each thoroughbred and harness horse racing permitholder that operates a cardroom facility shall use at least 50 percent of such permitholder's cardroom monthly net proceeds as follows: 47 percent to supplement purses and 3 percent to supplement breeders' awards during the permitholder's next ensuring racing meet.

16. Section 849.086(2)(k), Florida Statutes, defines "net proceeds" as follows:

[t]he total amount of gross receipts received by a cardroom operator from cardroom operations less direct operating expenses related to cardroom operations, including labor costs, admission taxes only if a separate admission fee is charged for entry to the cardroom facility, gross receipts taxes imposed on cardroom operators by this section, the annual cardroom license fees imposed by this section on each table operated at a cardroom, and reasonable promotional costs excluding officer and director compensation, interest on capital debt, legal fees, real estate taxes, bad debts, contributions or donations, or overhead and depreciation expenses not directly related to the operation of the cardrooms.

17. The crux of the disputed interpretation of these sections between FHBPA and Calder is whether a cardroom operator can net months in which its net proceeds are negative against positive months for purposes of paying purses and breeders' awards. FHBPA contends that the use of the terms "monthly net proceeds" and "supplement" are indicators that the legislature did not intend for a cardroom operator to offset negative months from positive months. Calder's position is that statute allows for aggregation because the statute calls for the funds to be used to supplement purses and breeders' awards in the "next ensuing racing meeting." The statute is not clear and unambiguous on its face because the conflicting terms creating the dispute between FHBPA and Calder all occur within the same sub-subsection.

18. Legislative intent is the controlling factor of statutory construction, *McGhee v. State*, 847 So. 2d 498 (Fla. 4th DCA, 2003), *Quarantello v. Leroy*, 977 So. 2d 648 (Fla. 5th DCA, 2008). The primary guide to statutory interpretation is to determine the purpose of the Legislature, and courts endeavor to construe statutes to effectuate the intent of the Legislature, *Borden v. East-European Ins. Co.*, 921 So. 2d 587 (Fla. 2006). Thus, most of the various rules or principles for the construction of statutes are designed

to subserve one important object, namely, to ascertain the legislative will, and to carry that intent into effect to the fullest degree. To this principle, all rules of statutory construction are subordinate, *American Bakeries Co. v. Haines City*, 180 So. 524, (Fla. 1938).

19. The adjective “monthly” modifies the term “net proceeds.” The calculation of “net proceeds” under the Section 849.086(2)(k), Florida Statutes, can be either a positive or a negative number depending on the total gross receipts and the direct operating expenses. There is nothing in the section that prevents the calculation of net proceeds from resulting in a negative number. Thus, monthly net proceeds can be negative.

20. In the year 2010, Calder’s cardroom had negative monthly net proceeds for five (5) months and positive monthly net proceeds for seven (7) months, resulting in aggregate negative net proceeds, or an operating loss of \$133,402.

21. If Section 849.086(13)(d)2., Florida Statutes, is to be interpreted so that each month is treated as a separate reporting and calculation period, and that it requires each thoroughbred horseracing permitholder to calculate and deduct, each and every month, the amount of net proceeds from cardroom operations, not less than 50% of the net proceeds from such monthly cardroom operations for the supplementation of the purses and breeders’ awards in the next ensuing racing meeting, additional losses may then incur to a thoroughbred horseracing permitholder. For example, for the year 2010, such interpretation would calculate the supplement to purses and breeders’ awards to include only seven (7) months of Calder’s operations as \$99,307. Therefore, in addition to the net operating loss of the cardroom (\$133,402), Calder would increase its aggregate

loss on its 2010 cardroom operations. This would be contrary of the legislative intent of Section 849.086, Florida Statutes.

22. The legislative intent expressed in Section 849.086(1), Florida Statutes, regarding cardrooms is to “provide additional entertainment choices for the residents of and visitors to the state, promote tourism in the state, and provide additional state revenues through the authorization of the playing of certain games in the state at facilities known as cardrooms which are to be located at licensed pari-mutuel facilities.” (Underline added.) FHBPA asserts that “the Florida Legislature intended to supplement purses and breeders awards and thus make racing in Florida a more attractive proposition thereby attracting better horses and fostering enhanced competition.” While the desire to enhance competition might be fairly inferred as FHBPA asserts, it cannot usurp the express legislative intent contained in the statute itself. Requiring payments to supplement purses and breeders’ awards without regard to revenue losses that are clearly anticipated in the calculation of net proceeds would constitute a financial disincentive to the operation of a cardroom, as evidenced by Calder’s 2010 operational figures. Such a result would be contrary to the express legislative intent to provide additional state revenue as articulated in Section 849.086(1), Florida Statutes. Section 849.086(13)(d)2., Florida Statutes, should not be interpreted in such a manner that any mandated supplements to purses and breeders’ awards hinder the revenue producing abilities of cardrooms.

23. The ability of thoroughbred and standardbred to offset costs of the operation of the cardroom when determining the amount that will be paid as purses and awards is a clear contrast to greyhound and jai alai cardroom operators who are not



allowed any offset and must pay 4 percent of a cardroom's gross receipts under Section 849.086(13)(d)1., Florida Statutes, for such payments. If the Legislature intended Section 849.086(13)(d)2., Florida Statutes, to be interpreted as requiring thoroughbred cardroom operators to supplement purses and breeders' awards regardless of whether the cardroom operates at a loss or a profit, the Legislature would not have based the supplement on "net proceeds", but rather on "gross receipts," as required for the greyhound and jai alai cardroom operators in Section 849.086(13)(d)1., Florida Statutes.

24. The suggestion that the use of the term "monthly" prohibits horse track cardroom operator from offsetting negative months from positive ignores the overall context of the terms "month" or "monthly" within Section 849.086(13), Florida Statutes. There are "monthly" requirements within Section 849.086(13), Florida Statutes, which are generally applicable to all pari-mutuel cardroom operators. All cardroom operators are required to pay the monthly gross receipts tax imposed by Section 849.086(13), Florida Statutes. Cardroom operators are also required to file a report under oath each month by Section 849.086(13)(c), Florida Statutes, reporting "the total of all admissions, the cardroom activities for the preceding calendar month, and such other information as may be prescribed by the division." Greyhound and jai alai operators are required to make their purse or prize contributions based on their monthly gross receipts by Section 849.086(13)(d)2., Florida Statutes. The gross receipts, which must be calculated and paid monthly to comply with the statutes tax requirements, is expressly allowed as a cost deduction from net proceeds by Section 849.086(2)(j), Florida Statutes. Thus, while a monthly calculation would be required to accurately determine a horse track cardroom operator's net proceeds, the use of the term "monthly" in the sub-subsection does not

evidence a specific intent of the Legislature that horse track cardroom operators cannot offset negative months from positive months.

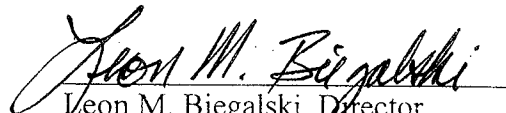
25. FHBPA's argument that a horse track cardroom permit holder's net proceeds cannot be aggregated to offset months with losses would be more persuasive if Section 849.086(13)(d)2., Florida Statutes, required monthly payments of purse and award supplements. The Legislature has a clearly demonstrated ability throughout the statutes pertaining to pari-mutuel permit holder's activities to specify when various payments must be made. *See*, 550.0351(3), Florida Statutes (requiring payments to charities from charity day performances within 120 days after the conclusion of a permit holder's fiscal year); Section 550.095(5), Florida Statutes, (requiring monthly payment of pari-mutuel taxes); Section 551.106(3), Florida Statutes, requiring weekly payment of slot machine taxes); and Section 849.086(13)(c), Florida Statutes, requiring monthly payment of cardroom taxes). However, the Section 849.086(13)(d), Florida Statutes, does not require monthly payments. Monthly payments are not required by the statute even when the pari-mutuel cardroom operator is conducting a live meet. The requirement for all supplements under Section 849.086(13)(d), Florida Statutes, is that they be made during a permit holder's "next ensuing pari-mutuel meet."

26. When reading Section 849.086(13)(d)2., Florida Statutes together, or *in pari materia* with Section 849.086(13)(d)1., Florida Statutes, a reasonable interpretation would be that any supplement to purses and breeders' awards for a thoroughbred horseracing permit holder's "next ensuing racing meeting" is based on the aggregation of monthly net proceeds. Such aggregation is consistent with both the requirement of Section 849.086(13)(d)2., Florida Statutes, that purse and breeders' award supplements

be paid during the next ensuing meet and the ability of a thoroughbred or standardbred cardroom operator to offset losses in the calculation of net proceeds as provided in Section 849.086(2)(k), Florida Statutes.

27. Therefore, a thoroughbred horseracing permitholder can offset months in which its net proceeds from the operation of a cardroom are negative against months in which the net proceeds are positive in calculating its supplement purses and breeders' awards due in its next ensuing racing meet, which might result in no supplementation if the aggregate net proceeds are zero or negative. If the sum of the monthly net proceeds is a positive number, such permitholder is required to supplement purses and breeders' awards by no less than fifty percent (50%) of such net proceeds in its next ensuing racing meet.

DONE AND ORDERED this 27<sup>th</sup> day of August 2012.

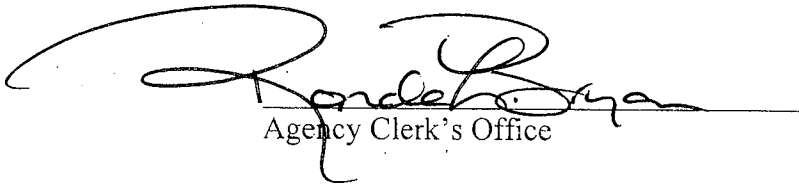
  
Leon M. Biegalski, Director  
Division of Pari-Mutuel Wagering  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this the 27<sup>th</sup> day of August, 2012 to the following: (1) Bruce David Green, Esquire, attorney for the Florida Horsemen's Benevolent and Protective Association, Inc., at 1313 South Andrews Ave., Ft. Lauderdale, Florida 33316; (2) Wilbur E. Brewton, Esquire and Kelly B. Plante, Esquire, attorneys for Calder Race Course, Inc., at 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; and (3) Marc W. Dunbar, Esquire and Daniel Russell, Esquire, attorneys for Gulfstream Park Racing Association, Inc. at Post Office Box 10095, Tallahassee, Florida 32302-2095.

  
Agency Clerk's Office

**FILED**  
Department of Business and Professional Regulation  
Deputy Agency Clerk  
CLERK Brandon Nichols  
Date 1/28/2011  
File #

**STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF PARI-MUTUEL WAGERING**

CASE NUMBER: **DS 2011-007**

IN RE: Petition Of

FLORIDA HORSEMEN'S BENEVOLENT  
AND PROTECTIVE ASSOCIATION, INC.,  
a Florida corporation, not-for-profit,

\_\_\_\_\_ /

**PETITION FOR DECLARATORY STATEMENT PURSUANT TO §120.565, FLA.  
STATS. BEFORE THE STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING**

Petitioner, **Florida Horsemen's Benevolent and Protective Association, Inc. (the "FHBPA")**, by and through undersigned Counsel, files this Petition for Declaratory Statement pursuant to the provisions of §120.565, Fla. Stats., and states:

A. This petition is filed pursuant to §120.565, Fla. Stats.

B. Petitioner, **FHBPA**, is a Florida corporation, not-for-profit, whose principal office is located in Dade County, Florida, and whose address is 21001 N.W. 27th Avenue, Miami, Florida 33056, whose telephone number is (305) 625-4591; whose telefacsimile number is (305) 625-5259, and whose purposes are, among other things, to promote the sport of thoroughbred horse racing in the State of Florida; to foster, promote and otherwise encourage a healthier economic climate and a higher level of public acceptance of the thoroughbred horse industry in the State of Florida; to bring about a closer and more understanding relationship between Florida horsemen, Florida racing associations, the **State of Florida, Department of Business and Professional**

**Regulation, Division of Pari-mutuel Wagering (the "Division")**, and its departments and sub-divisions, and the public, to take part and advise with all officials and representatives, racing associations, the **Division**, and other racing organizations in the establishment and application of laws, rules and conditions that affect, in any manner, pari-mutuel wagering, purses, awards, the interests of horsemen, their employees, and backstretch personnel; to represent the general interests of its members in any matters with any local, state or federal government and any agency thereof, including, but not limited to the **Division**.

C. This Petition seeks a declaratory statement regarding the methodology by which a thoroughbred horse racing permit holder operating cardrooms must calculate and contribute monies to be added to purses and breeders awards. The calculation of purses and breeders awards provided by statute to be paid to the members of Petitioner as required by the provisions of Ch. 550, Fla. Stats. impacts all members of the **FHBPA**. The **FHBPA** is "the horsemen's association" referred to in §550.2614, Fla. Stats. and "the horsemen's group" indirectly referred to in §550.3551(2)(a) & (3)(a), and directly referred to in §550.3551(6)(a), Fla. Stats. The interests of the **FHBPA** are, therefore, substantially affected by interpretations of Chapter 550, Fla. Stats., the interpretation of §849.086(13)(d)(2), Fla. Stats., as well as the rules and regulations of the **Division**, and other statutes which directly effect purses and breeders awards to be paid resulting from thoroughbred horse races conducted in Florida, including, in particular, in the case of the petition, §849.086(13)(d)(2), Fla. Stats., and therefore has standing to prosecute this petition as a substantially effected person (entity).

D. Respondent is the **Division**. The address of the **Division** is 1940 North Monroe Street, Suite 50, Tallahassee, Florida 32399-1035. Petitioner is unaware of an agency file or identification number pertaining to the above entitled matter.

**E. STATEMENT OF SUBSTANTIAL INTERESTS:**

1. **FHBPA** is a not-for-profit corporation whose membership is comprised of owners, trainers and breeders of thoroughbred horses who are licensed by the **Division** pursuant to the provisions of Ch. 550, Fla. Stats. **FHBPA** represents the interest of in excess of 5,500 thoroughbred race horse owners, trainers and breeders. **FHBPA** is recognized by **Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc.**, respectively, as the sole representative of the interests of thoroughbred race horse owners and trainers in Florida, and is the horsemen's association referred to in various provisions of Ch. 550, Fla. Stats., as referenced above.

2. Each of the thoroughbred horse owner, trainer and breeder members of the **FHBPA** is subject to regulation by the **Division**.

3. The **FHBPA** has filed this Petition seeking a Declaratory Statement regarding the application and interpretation of §849.086(13)(d)(2), Fla. Stats., specifically stating that §849.086(13)(d)(2), Fla. Stats. requires each thoroughbred horse racing permit holder operating cardrooms to calculate, each and every month, the amount of net proceeds from cardroom operations and then, at that time, deduct not less than 50% of the net proceeds from such monthly cardroom operations for the supplementation of purses and breeders awards in the next ensuing racing meeting.<sup>1</sup> Because §849.086(13)(d)(2), Fla. Stats. provides for the addition of monies for the payment of thoroughbred horse racing purses and breeders awards, it directly and materially effects the **FHBPA** and its membership through their participation as contestants in the pari-mutuel industry in Florida, and whose incomes are derived therefrom. As such, §849.086(13)(d)(2), Fla. Stats., and

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<sup>1</sup> This is a proper use of a Declaratory Statement. 28-105.001, F.A.C.

the methodology for the calculation, and the timing of deductions, of revenues derived from cardroom operations to horse racing purses and breeders awards has a direct and substantial impact on the **FHBPA** and its members.

**F. DISPUTED ISSUES OF MATERIAL FACT:**

1. The provisions of §849.086(13)(d)(2), Fla. Stats. apply to Petitioner. Petitioner, representing the interest of in excess of 5,500 thoroughbred race horse owners, trainers and breeders, and being recognized by **Calder Race Course, Inc., Tropical Park, Inc.** and **Gulfstream Park Racing Association, Inc.**, respectively, as the sole representative of the interests of thoroughbred race horse owners and trainers in Florida, is materially interested in the interpretation and application of §849.086(13)(d)(2), Fla. Stats.

2. There is an actual, present and practical need for a Declaratory Statement, Petitioner requests a Declaratory Statement identifying exactly how and when a thoroughbred horse racing permit holder conducting cardroom operations is required to calculate and apply at least fifty percent of the cardroom monthly net proceeds to supplement purses and breeders awards at the next ensuing racing meeting.

3. The **FHBPA** construes §849.086(13)(d)(2), Fla. Stats. to require each thoroughbred horse racing permit holder operating cardrooms to make a monthly calculation of the net proceeds of cardroom operations for each month and then, at that time, deduct not less than 50% of the net proceeds from such monthly cardroom operations for the supplementation of purses and breeders awards in the next ensuing racing meeting. **Calder Race Course, Inc.** and **Tropical Park, Inc.**, each of whom is a thoroughbred horse racing permit holder operating cardrooms, have construed §849.086(13)(d)(2), Fla. Stats. as authorizing them to average cardroom revenues from month to month and then make a single, annual, year end calculation based upon monthly averaging



to then determine the amount of money to be added to purses and breeders awards in the next ensuing racing meeting. Consequently, there is a bonefide disagreement regarding the interpretation and application of §849.086(13)(d)(2), Fla. Stats. and the matter is ripe for a Declaratory Statement by the Division.

**G. STATEMENT OF ULTIMATE FACTS ALLEGED AND RULES AND STATUTES WHICH ENTITLE PETITIONER TO RELIEF.**

1. Pursuant to §120.565, Fla. Stats., any substantially affected person (or entity) may seek a Declaratory Statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

2. All licensed cardroom operators are subject to the provisions of, and compliance with, §849.086(13)(d)(2), Fla. Stats., which addresses, among other things, the application of the net proceeds of card room gaming and the use thereof for thoroughbred race horse purses and breeders awards. §849.086(13)(d)(2), Fla. Stats., provides, in pertinent part:

Each thoroughbred and harness horse racing permitholder that operates a cardroom facility shall use at least 50 percent of such permitholder's cardroom monthly net proceeds as follows: 47 percent to supplement purses and 3 percent to supplement breeders' awards during the permitholder's next ensuing racing meet.

3. On the authority of §550.0251(12), Fla. Stats., and §849.086(4), Fla. Stats., Rule 61D-11.018, F.A.C. was codified, which provides:

(1) Each cardroom operator shall maintain a copy of *monthly records* related to the cardroom activities on the premises. The cardroom operator must maintain documentation supporting all amounts reported in the records.

(a) For greyhound and jai alai permitholders, each record shall clearly show totals of gross revenues.

(b) For harness or thoroughbred permitholders, each record shall clearly show totals of operating revenues, expenses, and net proceeds.

(2) For each license operated, cardroom operators shall file a separate Form DBPR PMW-3640, *Cardroom Monthly Remittance Report*, adopted and incorporated by Rule 61D-12.001, F.A.C., with the division by the fifth day of each month *for the preceding month's cardroom activity*. (Emphasis Added).

4. The Division promulgated Form DBPR PMW-3640 - Cardroom Monthly Remittance Report. This form provides for monthly reporting and remittance of monies due from cardroom operations.

5. In construing a statute (or rule) courts are obliged to strictly interpret the legislative enactment. In so doing, courts apply what has become known as the "plain meaning" doctrine, which is to say, courts look "primarily" to the plain text of the relevant statute, and when the text is unambiguous, the inquiry is at an end. *E A R v. State*, 4 So.3d 614, 629 (Fla.2009); *Borden v. East-European Ins. Co.*, 921 So.2d 587, 595 (Fla.2006). Applying the plain meaning of §849.086(13)(d)(2), Fla. Stats., and Rule 61D-11.018, F.A.C., it is apparent that each month is a separate period for calculating, reporting and remitting/deducting monies due from cardroom operations. Accordingly, the State of Florida receives a report of cardroom operations from each cardroom operator each and every month on DBPR PMW-3640 - Cardroom Monthly Remittance Report. Cardroom operators should, at that same time, deduct monies to be added to purses and breeders awards in the next ensuing racing meet, but Calder Race Course, Inc. and Tropical Park, Inc. are not doing so. Rather, they are withholding all deductions for purses and breeders awards and then averaging the prior twelve (12) months of monthly net proceeds and then, based upon that improper averaging calculation, determining what monies will be added to purses and breeders awards, which results in a lower amount of money being added to purses and breeders awards than was intended by the Legislature with the enactment of §849.086(13)(d)(2), Fla. Stats.

6. The **FHBPA** has historically represented the interests of horsemen in

Florida and contracts with permitholders (including Calder Race Course, Inc. and Tropical Park, Inc.) regarding racing and purses to be paid. Purses and breeders awards are funded from, among other things, the net proceeds of card room gaming. Therefore, Petitioner is materially interested in, and substantially affected by, the application and interpretation of §849.086(13)(d)(2), Fla. Stats.

7. Under the circumstances set for herein, it is appropriate and proper for the **FHBPA** to seek an interpretation of §849.086(13)(d)(2), Fla. Stats. and the **FHBPA** has standing to seek a Declaratory Statement as herein requested. See: *Federation of Mobil Homeowner's of Florida, Inc. v. Dept. of Business Regulation*, 479 So.2d 252 (Fla. 2d DCA 1985). Trade and professional associations are accorded standing to represent the interests of their members. *Florida League of Cities, Inc. v. Dept. of Environmental Regulation*, 603 So. 2d 1363 (Fla. 1st DCA 1992); *Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc.*, 612 So. 2d 646 (Fla. 1st DCA 1993). The **FHBPA**, as “the horsemen's association” and/or “the horsemen's group” referred to in Ch. 550, Fla. Stats., the recognized representative of the interests of thoroughbred race horse owners and trainers, and the representative of over 5,500 thoroughbred race horse owners and trainers, is substantially effected as is each of its members, and thus has standing to prosecute this administrative petition pursuant to §120.565, Fla. Stats.

8. **FHBPA** requests a Declaratory Statement because the provisions of §849.086(13)(d)(2), Fla. Stats. apply to the **FHBPA** and its thoroughbred race horse owner, trainer and breeder members. The **FHBPA** is comprised of and represents the interests of in excess of 5,500 thoroughbred race horse owners, trainers and breeders and is specifically recognized by **Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc.** (the largest thoroughbred racing associations in Florida), respectively, as the sole representative of the interests of thoroughbred race horse owners and trainers in Florida. Petitioner is materially interested in the

interpretation and application of §849.086(13)(d)(2), Fla. Stats.

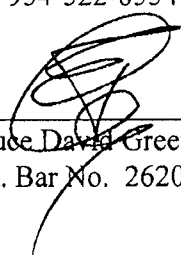
**H. DEMAND FOR RELIEF.**

**WHEREFORE**, Petitioner, **FHBPA**, respectfully requests:

1. That a Declaratory Statement be issued specifically stating and setting forth, in detail, the **Division's** interpretation of §849.086(13)(d)(2), Fla. Stats., as it applies to the **FHBPA** and its membership, specifically stating that §849.086(13)(d)(2), Fla. Stats. requires each thoroughbred horse racing permit holder operating cardrooms to calculate, each and every month, the amount of net proceeds from cardroom operations and then, at that time, deduct, each month, not less than 50% of the net proceeds from such monthly cardroom operations for the supplementation of purses and breeders awards in the next ensuing racing meeting, and further declaring that §849.086(13)(d)(2), Fla. Stats. does not authorize a thoroughbred horse racing permit holder to average cardroom revenues from month to month and make a single, annual, year end calculation based upon monthly averaging to determine the amount of money to be added to purses and breeders awards in the next ensuing racing meeting.

Respectfully submitted this 21<sup>st</sup> day of January, 2011.

**BRUCE DAVID GREEN, P.A.**  
Counsel for **FHBPA**  
1313 South Andrews Avenue  
Fort Lauderdale, FL 33316  
Phone: 954-522-8554

By:   
Bruce David Green, Esq.  
Fla. Bar No. 262048

Federal Express

January 27, 2011

Ms. Rhonda Bryan, Agency Clerk  
Division of Pari-mutuel Wagering  
Department of Business & Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-1035

Re: Petition for Declaratory Statement

Dear Ms. Bryan:

This firm represents the Florida Horsemen's Benevolent and Protective Association, Inc. which represents the interests of over 5,500 thoroughbred race horse owners, trainers and breeders. Enclosed you will find a Petition for Declaratory Statement pursuant to the provisions of §120.545, Fla. Stats. Kindly process same, assign a case number and publish notice as required by law. Please notify me of the case number assigned to the matter at your earliest convenience. If you should have any questions or otherwise care to discuss the matter, please feel free to contact me.

Very truly yours,

  
Bruce David Green

BDG:jdf  
cc: FHBPA, Board of Directors

**RECEIVED**

**JAN 28 2011**

**DBPR Agency Clerk**

From (954) 522-8554  
Bruce Green  
BRUCE D GREEN, P A  
1313 SOUTH ANDREWS AVENUE  
FORT LAUDERDALE, FL 33316

Origin ID HWOA



Ship Date 27JAN11  
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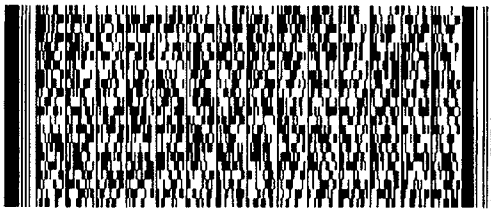


SHIP TO: (850) 413-0750 **BILL SENDER**  
**Rhonda Bryan, Agency Clerk**  
**Division of Pari-Mutuel Wagering**  
**1940 N MONROE ST**  
**TALLAHASSEE, FL 32399**

Ref # FHBPA  
Invoice #  
PO #  
Dept #

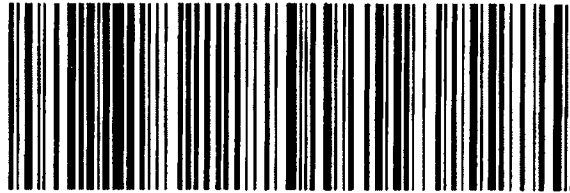
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Department of Business and Professional Regulation  
Deputy Agency Clerk  
CLERK Brandon Nichols  
Date **3/3/2011**  
File #

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF PARI-MUTUEL WAGERING

**DS 2011-018**

IN RE: PETITION OF

CASE NO. \_\_\_\_\_

CALDER RACE COURSE, INC.,  
a Florida Corporation

**RECEIVED**  
2011 MAR -3 A 10:26  
DIVISION OF  
PARI-MUTUEL WAGERING

**PETITION FOR DECLARATORY STATEMENT**

Petitioner, Calder Race Course, Inc. (hereinafter "Calder"), by and through its undersigned counsel, pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, hereby submits to the State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Department"), the following Petition for Declaratory Statement, and states:

1. Calder is the holder of a pari-mutuel wagering permit for the conduct of thoroughbred racing pursuant to Chapter 550, Florida Statutes, and is licensed to operate a cardroom pursuant to Section 849.086, Florida Statutes.

2. Petitioner's business address is 21001 N.W. 27th Avenue, Miami, FL 33056; Phone: 305-625-1311; Fax: 305-620-2569.

**RECEIVED**

MAR 03 2011

DBPR Agency Clerk

3. Petitioner's representatives in this matter are Wilbur E. Brewton, Esquire, and Kelly B. Plante, Esquire, and the law firm of Brewton Plante, P.A., whose business address is 225 South Adams Street, Suite 250, Tallahassee, Florida 32301; telephone number (850) 222-7718; and facsimile number (850) 222-8222.

4. Petitioner seeks a declaratory statement as to the Department's interpretation of Section 849.086(13)(d)2., Florida Statutes.

5. As a licensed thoroughbred cardroom operator, Petitioner's actions are regulated by the Department and are subject to disciplinary action in the event that its activities do not comply with the Department's interpretation of its rules, regulations and governing statutes. As more specifically stated below, Petitioner is directly and substantially affected by the Department's interpretation of Section 849.068(13)(d)2., Florida Statutes.

6. Section 846.086(13)(d)2., Florida Statutes, provides:

Each thoroughbred and harness horse racing permitholder that operates a cardroom facility shall use at least 50 percent of such permitholder's cardroom monthly net proceeds as follows: 47 percent to supplement purses and 3 percent to supplement breeders' awards during the permitholder's next ensuing racing meet.

7. Section 849.086(2)(k), Florida Statutes, defines "net proceeds" as follows:

[t]he total amount of gross receipts received by a cardroom operator from cardroom operations less direct operating expenses related to cardroom operations, including labor costs, admission taxes only if a separate admission fee is charged for entry to the cardroom facility,



gross receipts taxes imposed on cardroom operators by this section, the annual cardroom license fees imposed by this section on each table operated at the cardroom, and reasonable promotional costs excluding officer and director compensation, interest on capital debt, legal fees, real estate taxes, bad debts, contributions or donations, or overhead and depreciation expenses not directly related to the operation of the cardrooms.

The calculation of “net proceeds” can be either a positive or negative number depending on the total gross receipts and the direct operating expenses. For example, in the year 2010, Calder’s monthly net proceeds were as follows:

<b>MONTH</b>	<b>NET PROCEEDS (LOSS)</b>
January	(\$131,015)
February	(\$91,824)
March	(\$60,740)
April	(\$40,019)
May	\$51,802
June	\$8,438
July	\$43,538
August	\$21,683
September	(\$8,418)
October	\$20,417
November	\$24,361
December	\$28,375
TOTAL:	(\$133,402)

Thus, for the year 2010, Calder’s cardroom had negative monthly net proceeds for five (5) months, and positive monthly net proceeds for seven (7) months, for an aggregate negative net proceeds, or an operating loss of \$133,402. This operating

loss will not be carried forward for purposes of the calculation of the 2011 monthly “net proceeds.”

8. Calder also incurred a loss of \$542,758, from September through December of 2009 in the operation of the Calder cardroom. Calder, for purposes of 2010 monthly “net proceeds” calculations, has not utilized the 2009 loss in such calculations. Thus, for purposes of the payments of “net proceeds” in the “next ensuing race meet,” Calder has adopted a calendar year, and does not carry forward any negative “net proceeds.”

9. Calder asserts that the method of applying the monthly “net proceeds” calculation in the next calendar year is a reasonable interpretation of “next ensuing race meet” for ease of audit, is transparent and equitable.

10. Calder anticipates that Calder expects to have monthly “net proceeds” be positive for calendar year 2011.

11. Calder asserts that a reasonable interpretation of Section 849.086(13)(d)2., Florida Statutes, which takes into consideration the language of such section and the definition of “net proceeds” would be for Calder to consider all monthly net proceeds for a calendar year, both positive and negative. If the sum of the monthly net proceeds is a negative number (an aggregate loss), Calder would not be required to supplement purses and breeders’ awards in its next ensuing racing meet because of the absence of positive net proceeds on its

cardroom operations. On the other hand, if the sum of the monthly net proceeds is a positive number, Calder would be required to supplement purses and breeders' awards by fifty percent (50%)<sup>1</sup> of the sum of such net proceeds in its next ensuing racing.

12. Calder asserts that if Section 849.086(13)(d)2., Florida Statutes, required thoroughbred cardroom operators to supplement purses and breeders' awards regardless of whether the cardroom operated at a loss or a profit, the Legislature would not have based the supplement on "net proceeds," but rather on "gross receipts," as required for the greyhound and jai alai cardroom operators in Section 849.086(13)(d)1., Florida Statutes.

13. A contrary interpretation that Section 849.086(13)(d)2., Florida Statutes, requires a supplement purses and breeders' award based upon only those months that Calder has positive net proceeds, by ignoring any months with negative net proceeds, for purposes of the calculation, would not be reasonable and would be contrary to the legislative intent of Section 849.086, Florida Statutes. For example, for the year 2010, such interpretation would calculate the supplement to purses and breeders' awards to include only seven (7) months of Calder's operations as follows:

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<sup>1</sup> 47% to purses/3% to breeder's awards.

<b>MONTH</b>	<b>POSITIVE NET PROCEEDS</b>
May	\$51,802
June	\$8,438
July	\$43,538
August	\$21,683
October	\$20,417
November	\$24,361
December	\$28,375
<b>TOTAL:</b>	<b>\$198,614</b>

Therefore, in addition to the net operating loss of the cardroom, Calder would incur the additional expense of the payment of supplement to purses and breeders' awards under Section 849.086(13)(d)2., Florida Statutes, thereby increasing Calder's loss as follows:

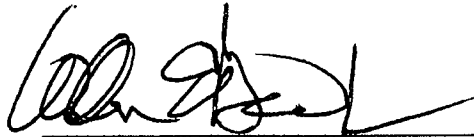
Aggregate loss on 2010 Cardroom operation	(\$133,402)
Payment of 50% of positive net proceeds (.5 x 198,614) =	+(\$ 99,307)
New Aggregate Loss on 2010 Cardroom operations	(\$232,709)

The contrary interpretation of Section 849.086(13)(d)2., Florida Statutes, is neither logical or consistent with the definition of net proceeds.

WHEREFORE, it is respectfully requested that the Division issue a Declaratory Statement which states that under Section 849.086(13)(d)2., Florida Statutes, any supplement to purses and breeders' awards is in the aggregate for Calder's "next ensuing racing meeting" based on the aggregation of monthly net proceeds on a calendar year basis. Therefore, Calder may consider all monthly net proceeds for a year, both positive and negative. If the sum of the monthly net

proceeds is a negative number (an aggregate loss), Calder would not be required to supplement purses and breeders' awards in its next ensuing racing meet because of the absence of an annual profit on its cardroom operations. If the sum of the monthly net proceeds is a positive number, Calder would be required to supplement purses and breeders' awards by fifty percent (50%) of such net proceeds in its next ensuing racing.

Respectfully submitted this 3<sup>rd</sup> day of March, 2011.



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WILBUR E. BREWTON  
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KELLY B. PLANTE  
Florida Bar Number: 866441  
BREWTON PLANTE, P.A.  
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**ATTORNEYS FOR CALDER**