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

GARY AND MARY WEST,	:	
	:	
Plaintiffs,	:	Case No. 5:19-CV-00211
	:	Judge Karen K. Caldwell
v.	:	
	:	
KENTUCKY HORSE RACING COMMISSION, *et al*.,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Gary and Mary West's Complaint fails to state a claim against the Kentucky Horse Racing Commission, its stewards, members, and executive director (the "Commission") upon which relief can be granted, and should be dismissed under Federal Rule of Civil Procedure 12(b)(6). The Commission submits this Memorandum of Law in support of its Motion to Dismiss.

INTRODUCTION

The Kentucky Derby is the most prestigious horse race in the world. Compl. ¶ 1. And horse racing may be the "sport of kings," but it is still that—a sport. As with every sport, it has rules to foster consistent, fair, and safe play, and neutral arbiters, whether called referees, umpires, judges—or in this case, stewards—who enforce those rules. The Wests disagree with the stewards' call to disqualify Maximum Security. And they disagree with the Commission's decision to make that call conclusive. Instead, the Wests want this Court to make the call and determine the winner of the Derby—a demand that threatens to transform the "most exciting two minutes in sports" into tedious, protracted litigation. But their mere disagreement is insufficient to support a claim that

their Constitutional—or any other—legal rights have been violated. In fact, they allege no valid cause of action at all. The Court should therefore dismiss the Wests' Complaint as a matter of law.

STATEMENT OF FACTS

Importantly, the same rules apply to every horse race, whether a Friday night claiming race or the Kentucky Derby. Under those rules, Maximum Security did not win the Derby, and the Wests did not win the Derby purse. And under the Federal Rules of Civil Procedure, the Wests fail to state a claim upon which relief can be granted.[1]

The Kentucky Horse Racing Commission. The Commission is an agency of Kentucky state government created to "regulate the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky." KRS 230.225(1); *see also* Compl. ¶ 31. The General Assembly has vested the Commission with "***full authority*** to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state." KRS 230.260(8) (emphasis added). To enforce the regulations and conditions under which horse racing is conducted in Kentucky and to meet its legislative mandate, the Commission relies upon its stewards. *See* 810 KAR 1:004.[2]

The Commission's stewards. A steward is a "duly appointed racing official with powers and duties specified in 810 KAR 1:004 serving at a current meeting in the Commonwealth." 810 KAR 1:001 § 1(72). Essentially serving as referees at race meets, the stewards "exercise ***immediate*** supervision, control, and regulation of racing at each licensed race meeting on behalf of and

[1] For the purposes of this Motion only, the Commission accepts the facts pleaded by Gary and Mary West as true except to the extent the facts misrepresent established law. To be clear, however, the Commission does not agree with the facts pleaded by the Wests in the Complaint, but accepts them as true for the purposes of this motion solely to demonstrate that even under the Wests' purported facts, they are not entitled to the relief they request.

[2] The Commission has substantially consolidated and revised its regulatory scheme by repealing and re-promulgating its regulations. Those changes were effective May 31, 2019. Although the provisions at issue in this case were not substantially changed, citations to the Commission's regulations in this Memorandum are to the versions of the regulations in effect on May 4, 2019. For the convenience of the Court, the Commission provides a compilation of the relevant regulations at **Exhibit 1**.

responsible only to the commission." 810 KAR 1:004 § 3 (emphasis added); *see also* Compl. ¶ 2. The stewards determine all questions, disputes, protests, complaints, and objections that arise during a race meet; enforce those determinations; and, where appropriate under the regulations, conduct hearings. *See* 810 KAR 1:004 § 3(2), (7). In 810 KAR 1:017, the Commission established the procedure for filing objections and assigned the stewards the duty to resolve them. The relevant provision of that regulation provides:

> Section 4. Final Determination of Objections to Acts in Race. (1) The stewards shall:
>
> > (a) Make all findings of fact as to all matters occurring during and incident to the running of a race;
> >
> > (b) Determine all objections and inquiries based on interference by a horse, improper course run by a horse, foul riding by a jockey, and all other matters occurring during and incident to the running of a race; and
> >
> > (c) Determine the extent of disqualification, if any, of horses in a race for a foul committed during the race.
>
> (2) Findings of fact and determination shall be final and shall not be subject to appeal.[3]

810 KAR 1:017 § 4. After their determination, the stewards issue the official order of finish:

> Official Order of Finish as to Pari-mutuel Payoff. When satisfied that the order of finish is correct and that the race has been properly run in accordance with the rules and administrative regulations of the commission, the stewards shall order that the official order of finish be confirmed and the official sign posted for the race. The decision of the stewards as to the official order of finish for pari-mutuel wagering purposes is final and no subsequent action shall set aside or alter the official order of finish for the purposes of pari-mutuel wagering.

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[3] The no-appeal rule has been in the Commission's rules and regulations for almost 60 years. *See* Rules of Racing of Kentucky State Racing Commission, Rule 60 (Feb. 1, 1960) ("[T]he decision or ruling of the Stewards as to the extent of the disqualification of any horse in any race, shall be final and no right of appeal shall exist."). Even before then, the rules implicitly embraced unreviewability of the stewards' racing and foul determinations by firmly committing them to the stewards' discretion. *See* Rules of Racing of Kentucky State Racing Commission, Rule 206 (Jan. 1, 1959) ("The Stewards have been vested by the Commission with power to pass on the extent of disqualifications in all races."). Both sets of rules cited here are included as **Exhibit 2.**

810 KAR 1:016 § 17; *see also* 810 KAR 1:004 § 4(9) ("[T]he stewards shall … cause the 'official' sign to be posted on the infield odds board ***after*** determining the official order of finish for purposes of pari-mutuel payoff." (emphasis added)).

The Wests agreed to the rules of horse racing in the Commonwealth. The General Assembly has proclaimed that "participation in any way in horse racing … is a privilege and not a personal right." KRS 230.215(1). And in Kentucky, "[n]o horse may be entered or raced in this state unless the owner or each of the part owners has been granted a current owner's license." 810 KAR 1:007 § 1. As a condition of licensure and for the privilege of participating in horse racing, every person licensed by the Commission—including a horse owner—agrees to abide by the Commission's rules and regulations. *See* 810 KAR 1:025 § 21(1). Licensees also agree to abide by all stewards' decisions and that the stewards' determinations disqualifying horses for fouls committed during the race are final and not appealable. *See* 810 KAR 1:025 § 21(3), (4)(a), (b).

Gary and Mary West own Maximum Security. Compl. ¶ 29. As horse owners who race in Kentucky, the Wests are licensed by the Commission. *See* Compl. Ex. 1 [DE 1-1 at 10–13]. Thus, the Wests agreed to the Commission's regulations, and agreed that the stewards' determinations are final. *See* 810 KAR 1:025 § 21(1). In completing their renewal applications as recently as December 7, 2018, the Wests agreed "to abide by all applicable rules and regulations," and that "participating in racing is a privilege, not a right, [and] that my license is subject to conditions precedent in the rules of racing." *See* Compl. Ex. 1 [DE 1-1 at 10–13].

The 145th running of the Kentucky Derby. On May 4, 2019, nineteen horses ran in the Kentucky Derby. Compl. ¶ 76. Maximum Security was first in the ***unofficial*** order of finish. Compl. ¶ 77. After the race, however, two objections were lodged with the stewards against Maximum Security. *See* Compl. ¶¶ 78, 80. The stewards were chief state steward Barbara Borden,

Butch Becraft, and Tyler Picklesimer (collectively, the "Stewards").[4] *See* Compl. ¶¶ 33, 36, 39. In reaching their determination, the Stewards "spoke directly with jockeys Prat and Court as well as with Luis Saez, the jockey of Maximum Security." Compl. ¶ 88. Ultimately, the Stewards disqualified Maximum Security. Compl. ¶ 92. Borden explained after the Derby:

> We had a lengthy review of the race. We interviewed affected riders. We determined that the 7 horse drifted out and impacted the progress of Number 1 (War of Will), in turn interfering with the 18 [Long Range Toddy] and 21 (Bodexpress). Those horses were all affected, we thought, by the interference.
>
> Therefore, we unanimously determined to disqualify Number 7 [Maximum Security] and place him behind the 18, the 18 being the lowest-placed horse that he bothered, which is our typical procedure.

Compl. ¶ 92. In the Steward's Report issued for May 4,[5] the Stewards further explained:

> After a thorough and lengthy review of the race replay and interviews with Saez, Prat and Court, the stewards determined that #7 "Maximum Security" (Saez) veered out into the path of #1 "War of Will" (Tyler Gaffalione) who was forced to check and, who in turn impeded #18 "Long Range Toddy" (Court) who came out into #21 "Bodexpress" (Chris Landeros) who had to check sharply. As #7 "Maximum Security" (Saez) continued to veer out, #18 "Long Range Toddy" (Court) was forced to check sharply, making contact with #20 "Country House" (Prat). The winner, #7 "Maximum Security" (Saez) was disqualified and placed seventeenth, behind 18 "Long Range Toddy" (Court).

Steward's Report for May 4, 2019 [DE 16-4 at 24]. On May 6, Gary and Mary West tried to appeal the disqualification. Compl. ¶ 103. Relying on its regulations and controlling case law, the Commission denied the Wests' appeal.[6] Compl. ¶ 104. On May 14, the Wests filed this action.

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[4] Under KRS 230.240(1), "[t]wo (2) stewards shall be employed and compensated by the Commonwealth, subject to reimbursement by the racing associations pursuant to subsection (3) of this section. One (1) Thoroughbred steward shall be employed and compensated by the racing association hosting the race meeting." Tyler Picklesimer is employed by Churchill Downs, but he too "is responsible only to the Commission." 810 KAR 1:004 § 3.

[5] This report was made pursuant to 810 KAR 1:004 § 4(11).

[6] The Wests filed their "complaint, protest, objection, and appeal (collectively 'appeal')," two days after the Derby was run and the result declared official. Compl. ¶ 103. This "appeal," as they put it, is largely an objection about the running of the race itself. *Id.* ¶ 112(f) (arguing that another horse caused the interference). Objections and complaints concerning "any … matter occurring during and incident to the running of the race" must be lodged with the stewards "[b]efore the race has been posted as official on the infield results board." 810 KAR 1:017 § 3(1)(b). The Derby was posted official on May 4, 2019. *See* Compl. ¶¶ 76–77 (stating Derby was run May 4, 2019 and laying out unofficial order of finish)); 9–10, 91–92 (admitting disqualification and setting of official order). Because the Wests

STANDARD OF REVIEW

Rule 12(b)(6) requires the Court to dismiss the Wests' Complaint if it fails "to state a claim upon which relief can be granted." The Court's analysis turns on whether the Complaint contains "enough facts to state a claim to relief that is ***plausible*** on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added). The Wests must provide the grounds of their entitlement to relief. *Id*. at 555. And that "requires more than labels and conclusions[;] … a formulaic recitation of the elements of a cause of action will not do." *Id*. Although the Court must view the allegations in a light most favorable to the Wests and accept well-pleaded facts as true, it "need not accept as true legal conclusions or unwarranted factual inferences." *See Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Because the Wests do not "state a claim to relief that is plausible on its face," the Complaint must be dismissed. *Twombly*, 550 U.S. at 570.

In evaluating a motion to dismiss, the Court "may consider the complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein." *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016).

ARGUMENT

The Wests have not sufficiently stated a cause of action entitling them to the unprecedented relief they seek because they have identified no due process deprivation and the Kentucky Horse Racing Commission appropriately rendered its conclusive disqualification determinations.

I. The Wests' due process claim fails as a matter of law because they have failed to sufficiently allege any protected property interest that has been violated.

"The text of the Fourteenth Amendment's Due Process Clause makes clear that the state

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did not file an objection before the Derby was posted as official, their "objection" is untimely to the extent it concerns any matter occurring during and incident to the running of the race.

need not afford due process every time it takes an action that impacts negatively on citizens' lives. The amendment makes a narrower guarantee: 'No State shall ... deprive any person of life, liberty, or property, without due process of law.'" *Golden v. City of Columbus*, 404 F.3d 950, 955 (6th Cir. 2005) (quoting U.S. Const. amend. XIV). To bring a procedural due process claim, the Wests must allege: "(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process." *Fields v. Henry Cnty., Tenn.*, 701 F.3d 180, 185 (6th Cir. 2012).

The Wests have not sufficiently stated even the first element. "Property interests … are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). A person's interest in a benefit is a due process property interest only "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994) (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)). Legitimate claims of entitlement stem from two sources: "state statutes and contracts, express or implied, between the complaining citizen and the state or one of its agencies." *Golden*, 404 F.3d at 955.

Importantly, one "can have no legitimate claim of entitlement to a discretionary decision." *Richardson v. Twp. of Brady*, 218 F.3d 508, 517 (6th Cir. 2000); *see also Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202–03 (6th Cir. 1995) (explaining, in the substantive due process context, that plaintiff had no property interest in a special use permit because the city council had the discretion to grant or deny such a permit), *cert. denied*, 516 U.S. 816 (1995); *Silver v. Franklin*

Twp. Bd. of Zoning Appeals, 966 F.2d 1031, 1036 (6th Cir. 1992) (discretion to grant a "conditional zoning certificate" bars a "legitimate claim of entitlement" or a "justifiable expectation" in the approval of the certificate).

Only after the Plaintiffs demonstrate a protected property interest can the court "consider the form and nature of the process that is due." *Ferencz v. Hairston*, 119 F.3d 1244, 1247 (6th Cir. 1997) (citing *Roth*, 408 U.S. at 570–71). "Absent a protected property interest, a plaintiff cannot assert a due process violation." *Willie McCormick & Associates, Inc. v. City of Detroit*, 61 F. App'x 953, 955 (6th Cir. 2003). Here, no process is due because the Wests have no property interest recognized by law or contract. *See Golden*, 404 F.3d at 955. To find otherwise would contradict controlling law. Consequently, Count II of the Complaint must be dismissed.

A. The Wests can claim no property interest recognized by Kentucky law in the stewards' discretionary determinations or the purse before the official order of finish is posted.[7]

Quite simply, the Wests fail to identify a legitimate claim of entitlement to any property interest based upon Kentucky statute, regulation, or case law. Thus, their due process claim fails as a matter of law, and should be dismissed. *See Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002) ("In considering procedural due process claims, this court first determines whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property."); *Roth*, 408 U.S. at 569 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.").

The Wests have not established any property interest that would trigger a Fourteenth Amendment due process analysis. First, Kentucky's General Assembly has unambiguously declared: "the participation in any way in horse racing … is a ***privilege*** and not a personal right."

[7] The Wests allege only deprivation of a property interest and not the deprivation of any life or liberty interests.

KRS 230.215(1) (emphasis added). Second, under its broad statutory authority, the Commission has promulgated comprehensive regulations governing the sport, which have the force of law and under which the stewards ultimately determine the official order of finish. *See Sheffield v. City of Ft. Thomas*, 620 F.3d 596, 610 (6th Cir. 2010) (noting the Kentucky Supreme Court's observation that "regulations properly adopted and filed have the force and effect of law ... and ... have the same effect as statutes" (quoting *Rietze v. Williams*, 458 S.W.2d 613, 617 (Ky. 1970))). By regulation, the Commission has entrusted the stewards with the authority to make certain discretionary determinations, which do not create property interests. *Richardson*, 218 F.3d at 517.

The stewards are entrusted with such discretion because they are highly qualified. *See* 810 KAR 1:004 § 1 (requiring, among other things, certain education, experience, and 20/20 vision). Before calling the race official, the stewards determine all fouls based on objections or otherwise, and may, in their sole discretion, disqualify horses for fouls. *See* 810 KAR 1:016 § 12 ("If in the ***opinion of the stewards*** a foul alters the finish of a race, an offending horse may be disqualified by the stewards." (emphasis added)); 810 KAR 1:017 § 4(1)(c) ("The ***stewards shall … [d]etermine*** the extent of disqualification, if any, of horses in a race for a foul committed during the race." (emphasis added)). Only after making these discretionary determinations do the stewards post the official order of finish announcing the winner of the race. 810 KAR 1:016 § 17.

The Wests have no property interest here because "a party cannot have a property interest in a discretionary benefit." *EJS Prop., LLC v. City of Toledo*, 698 F.3d 845, 856–57 (6th Cir. 2012); *Richardson*, 218 F.3d at 517. That remains true "even if that discretion had never been exercised previously." *EJS Prop., LLC.*, 698 F.3d at 856–57. Thus, the Wests can claim no property interest in the Stewards' discretionary disqualification determination—even if no horse previously had been disqualified at the Derby, or if any of the allegations in Paragraph 142 of the Complaint were

actually true. *Id.* The Sixth Circuit has gone so far as to hold that no property or liberty interest—and thus no remedy—exists in a discretionary benefit even if denied corruptly. *Id.* at 857, 860. And even the Wests' most insulting and unfounded allegations—that the Stewards were "not truthful" or "lied"—do not even rise to that level.[8]

Kentucky case law further supports this conclusion. In *March v. Ky. Horse Racing Commission*, 2013-CA-000900-MR, 2015 WL 3429763 (Ky. App. May 29, 2015), the Kentucky Court of Appeals addressed a claim indistinguishable from the Wests' claim. Because this case involves an interpretation of Kentucky state law on whether Kentucky recognizes any property interest in the purse before the race is called official, this Court is bound by the Kentucky Court of Appeals. *Reeves v. City of Georgetown*, 539 F. App'x 662, 663 (6th Cir. 2013) ("On questions of state law, this Court is bound by the rulings of the state supreme court. When there is no state law construing a state statute, a federal court must predict how the state's highest court would interpret the statute. In the absence of any state supreme court precedent, a state's appellate court decisions are the best authority." (internal citations and quotation marks omitted)).[9] Because the Supreme Court of Kentucky has not addressed this issue, *March* is the best authority, and federal courts generally follow a policy against expanding state law. *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) ("Federal courts hearing diversity matters should be extremely cautious about adopting 'substantive innovation' in state law."); *see also A. Johnson & Co., Inc. v. Aetna Cas. & Sur. Co.*, 933 F.2d 66, 73 n.10 (1st Cir. 1991) (stating a diversity plaintiff "cannot expect this court

[8] The Commission strongly rejects the Wests' wholly unfounded allegations that the Stewards were "not truthful" or "lied." *See, e.g.*, Compl. ¶¶ 18, 124.

[9] The Court may consider the *March* opinion even though unpublished. *See Managed Health Care Assoc., Inc., v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding Sixth Circuit courts may consider unpublished opinions from Kentucky's lower courts to determine how the Kentucky Supreme Court would likely decide a question); *Hunter v. City of Highland Heights*, 2015-CV-176, 2017 WL 1028568, at *2 n.3 (E.D. Ky. Mar. 16, 2017) (noting Ky. R. Civ. P. 76.28(4)(c) permits citations to unpublished Kentucky Court of Appeals opinions issued after January 1, 2003 if no published opinions would adequately address the issues before the Court).

to torture state law into strange configurations or precipitously to blaze new and unprecedented jurisprudential trails." (quoting *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1224 (1st Cir. 1990)).

In *March*, the horse Ethical Lawyer crossed the finish line first in a race at Turfway Park, but the stewards found his jockey had committed a careless riding foul in violation of 810 KAR 1:016 § 12. *March*, 2015 WL 3429763, at *1. The stewards disqualified Ethical Lawyer and later suspended the jockey for the foul. *Id*. William March, Ethical Lawyer's owner and trainer, brought a due process claim, but the Kentucky Court of Appeals, citing KRS 230.215, held that any alleged interest in the purse was "at best, a privilege, not a property interest." *Id.* at *3. Instead, the Court reasoned: "One cannot forfeit something one does not possess. Ethical Lawyer did not win the … race even though he crossed the finish line first. The horse was disqualified and placed seventh. Ethical Lawyer's purse was not forfeited, it was awarded to the horse which won the race." *Id.* at *2. The court held that Ethical Lawyer "simply did not win [the purse] to begin with." *Id.* at *3.

Similarly, the Wests do not have a protected property interest in the Derby purse simply because Maximum Security crossed the finish line first. *See* Compl. ¶¶ 121, 122. Kentucky law exposes the error in the Wests' bare legal assertions because no protected property interest arises simply when a horse crosses the finish line. *March*, at *2. Exercising their ***discretion***, the Stewards determined that Maximum Security committed a foul that altered the finish of the Derby. Compl. ¶ 92; 810 KAR 1:016 § 12; 810 KAR 1:017 § 4(1)(b). The Stewards, therefore, disqualified Maximum Security and in the official order of finish placed him behind the horses they believed suffered by reason of the foul.[10] *See* Compl. ¶ 92; *see also* 810 KAR 1:017 § 4(3). Like Ethical Lawyer in *March*, Maximum Security "simply did not win [the purse] to begin with," and the purse

[10] On May 12, 2019, the Stewards suspended Luis Saez, Maximum Security's jockey, for 15 race days. *See* Stewards Ruling 19-0044, *available at* http://khrc.ky.gov/Rulings/190044.pdf (last accessed June 7, 2019). Saez has since appealed that ruling. Under KRS 230.330 and 810 KAR 1:029, the Commission will conduct an administrative hearing on that separate matter consistent with the provisions of KRS Chapter 13B.

was instead awarded to the horse that won the race—Country House. *See March*, 2015 WL 3429763, at *2.[11] The Wests can neither claim a property interest nor assert a due process claim in a purse they never won. *See id.*, at *3; *see also Willie McCormick & Associates, Inc.*, 61 F. App'x at 955 ("Absent a protected property interest, a plaintiff cannot assert a due process violation."). Because the Wests never won the purse, they can claim no property interest based on Maximum Security's performance in the Derby.

B. The Wests can claim no express or implied contractual property interest, and have—at best—articulated a mere abstract desire.

For the reasons in subsection A above, state law provides no basis for any non-unilateral claim of entitlement—let alone a legitimate one. In a strained attempt to identify a property interest where none is recognized in Kentucky, the Wests allege a "reasonable expectation and legitimate claim of entitlement … premised on the fact that in the 144 prior runnings of the Derby no horse that has crossed the finish line first had ever been disqualified." Compl. ¶ 123; *see also id.* ¶ 115. In this way, the Complaint hints at—but does not sufficiently allege—an implied contract that the stewards would not disqualify a horse at the Kentucky Derby, because previously they had not done so. *See, e.g.*, Compl. ¶ 123. But the Court need not accept these unfounded legal assertions. *Deters v. Ky. Bar Ass'n*, 130 F. Supp. 3d 1038, 1053 (E.D. Ky. 2015), *aff'd*, 646 F. App'x 468 (6th Cir. 2016) ("While the Court is bound to accept the complaint's factual allegations as true, the Court 'need not accept as true legal conclusions or unwarranted factual inferences.'" (quoting *Directv, Inc.*, 487 F.3d at 476)).

[11] Although the Wests agree and the record demonstrates that objections were lodged against Maximum Security following the running of the race, Compl. ¶¶ 5–9, the Complaint makes much of the fact that the Stewards did not post an inquiry sign following the race, Compl. ¶¶ 3–4. However, owners, agents, trainers, jockeys, and all racing officials may lodge objections. 810 KAR 1:017 § 1. And under 810 KAR 1:016, stewards "shall take cognizance of riding which results in a foul, irrespective of whether an objection is lodged." Because the Wests agree objections were lodged and the Stewards resolved those objections by disqualifying Maximum Security based on a foul, Compl. ¶ 92, any pedantic quibbling over whether an inquiry sign should have been posted is irrelevant.

The Wests' Complaint, apparently relying on *Perry v. Sindermann*, 408 U.S. 593 (1972), suggests that their "understanding" and "expectation" in the sport of horse racing entitles them to some previously unrecognized property interest. But *Perry* does not support the Wests. First, the Supreme Court's concern for employment prospects is not comparable to participation in the sport of horse racing. *Roth*, 408 U.S. at 570–71. Although horse racing is an important sport in the Commonwealth and many people have ordered their lives around participation in it, the alleged "loss" of one purse following the disqualification of one horse from one race at one race meet in one jurisdiction on one evening in May is not comparable to the loss of a years-long contractual employment relationship.

Second, in *Perry* the professor alleged that his termination was for "an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." *Perry*, 408 U.S. at 598. But the Wests have not claimed that Maximum Security was disqualified for some impermissible reason contrary to the Constitution—i.e., the Wests' race or religion. Finally, and importantly, although the professor had no written contract in *Perry*, the Court reasoned that there may be an implied contract (and thus a property interest) because "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Perry*, 408 U.S. at 602. But here, the ***written*** regulations provide the mutual expectations, and they contradict the Wests' legal claims. At best, the Wests have articulated a mere abstract desire that their horse be declared the winner because he crossed the finish line first. Yet, as explained above, the Wests can identify no mutual expectation in this regard because the regulations clearly establish conditions precedent to "winning." *Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). The

governing regulations expressly provide that (1) the stewards have discretion to determine fouls and to disqualify horses, and (2) licensees have no right to appeal such determinations. *See* 810 KAR 1:016 § 12; 810 KAR 1:017 § 4; 810 KAR 1:029 § 2(9). But, for the privilege of participating in horse racing, the Wests agreed to all of the Commission's rules and regulations. *See* Compl. Ex. 1 [DE 1-1 at 10–13]; *see also* 810 KAR 1:025 § 21(1) and § 21(4)(a),(b). The rules and regulations to which the Wests agreed—including the provisions cited above—demonstrate the Wests have no legitimate claim of entitlement to the purse. Thus, the Wests cannot demonstrate even a unilateral expectation to support their abstract desire—let alone the mutual expectation required to sustain a due process claim. Instead, the mutual expectation was—and remains—that participants in horse racing abide by the rules of racing, that the stewards have discretion under those rules, and that the stewards' discretionary determinations on objections and disqualifications for fouls are non-appealable. *See* 810 KAR 1:025 § 21(1), (4)(a), (b); *see also* Compl. Ex. 1 [DE 1-1 at 10–13].

C. To the extent the Wests allege a property interest in any alleged regulatory procedures, such a claim fails as a matter of law.

Finally, the Wests seem to allege a property interest in certain regulatory "procedures." Compl. ¶¶ 87–92, 124, 142. But this claim also fails because the Wests "can have no protected property interest in the procedure itself." *Richardson*, 218 F.3d at 518; *see also Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) (holding that "disappointed bidder" had no property interest in the state purchasing guidelines, and suffered no due process violation when the state did not follow guidelines); *LRL Prop. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1110 (6th Cir. 1995). For these reasons, and because Kentucky law recognizes no such protected property interest, Plaintiffs' due process claim fails as a matter of law and should be dismissed.

II. The Kentucky Horse Racing Commission is vested with plenary power to regulate horse racing in Kentucky, and its regulations are valid expressions of that authority.

The Wests have not sufficiently alleged a Constitutional—*or any other*—reason why the Commission should not have broad authority nor why the Commission cannot assign to the stewards the discretion with which they have been entrusted. "Horse racing as we know it 'exists only because it is financed by the receipts from controlled legalized gambling which must be kept as far above suspicion as possible.'" *Jamgotchian v. Ky. Horse Racing Comm'n*, 488 S.W.3d 594, 611 (Ky. 2016), *cert. denied*, 137 S.Ct. 493 (2016) (quoting *Jacobson v. Md. Racing Comm'n*, 274 A.2d 102 (Md. 1971)). Horse racing thus requires strong regulation to "assur[e] that the races are fair and genuinely competitive" and to maintain "public confidence in the industry." *Id.* at 612; *see also Deaton v. Ky. Horse Racing Auth.*, 172 S.W.3d 803, 807 (Ky. App. 2004) ("Obviously, the horse industry is a major part of our economy which needs to not only enforce its regulations, but needs to deter violations in order to promote the Commonwealth's interest.").

Although the Wests' Complaint cites only one source for it, the Commission's authority actually stems from multiple statutes. The Commission "shall have all powers necessary and proper to carry out fully and effectually the provisions of [KRS Chapter 230]." KRS 230.260. The Commission has "full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state." KRS 230.260(8). And it has authority to "promulgate any reasonable and necessary administrative regulation for the enforcement of the provisions of this chapter [KRS Chapter 230] and the conduct of hearings held before it." KRS 230.370. In addition, the Commission, "for the purpose of maintaining integrity and honesty in racing, shall prescribe by administrative regulation the powers and duties of the persons employed under this section…." KRS 230.240(1). The stewards are "persons employed under" that section. *See id.* ("Three (3) Thoroughbred stewards shall be employed at each Thoroughbred race meeting."). And "[a]ll licenses granted under [KRS Chapter

230] … [s]hall be subject to all administrative regulations and conditions as may from time to time be prescribed by the racing commission." KRS 230.290(2).[12]

But the General Assembly did not stop there. It framed these specific grants of power with an "unusually expansive statement of legislative purpose for KRS Chapter 230." *Jamgotchian*, 488 S.W.3d at 611. Specifically, the General Assembly has declared its intent "to vest in the racing commission ***forceful control*** of horse racing in the Commonwealth 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) (emphasis added). This unusually broad power was granted "in the interest of the public health, safety, and welfare." *Id.* Its purpose is "to regulate and maintain horse racing … free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing … so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth." *Id.*[13]

"To facilitate implementation and fulfillment of [its] statutory purpose, the State Racing Commission was given broad rule-making, enforcement and adjudicatory authority." *Compton v. Romans*, 869 S.W.2d 24, 27 (Ky. 1993). Indeed, "[o]ne can scarcely conceive of a broader statutory grant of regulatory authority." *Id.* And "[t]his has been the Commission's charge since it was first established in 1906." *Jamgotchian*, 488 S.W.3d at 611. Both state and federal courts have

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[12] Other aspects of the Commission's regulatory authority are prescribed elsewhere, *e.g.*, KRS 230.320(1) (regulatory authority to discipline licensees "in the interest of honesty and integrity of horse racing"); KRS 230.802(2)(b) (regulatory authority over Standardbred Breeders Incentive Fund), but those statutes are not relevant here, other than to further show the broad grant of authority to the Commission.

[13] That the Commission's control over horseracing is complete—and exclusive—is further shown by KRS 230.360, which bars every "city, county, or other political subdivision of state government" other than the Commission from "mak[ing] or enforc[ing] any local laws, ordinances, or regulations on the subject of horse race meetings."

repeatedly affirmed this broad understanding of the Commission's statutory authority. *See, e.g.*, *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, 423 S.W.3d 726, 737–38 (Ky. 2014) (quoting KRS 230.215(2) and noting the Commission's "forceful control of horse racing in the Commonwealth and the wagering thereon" to conclude it acted within its statutory authority by issuing regulations to allow pari-mutuel wagering on historical horse races); *Ky. Horse Racing Comm'n v. Motion*, 2019 WL 1441854, at *6 (Ky. App. 2019) (noting the Commission "is vested with expansive powers");[14] *Redmond v. The Jockey Club*, 244 F. App'x 663, 664 (6th Cir. 2007) (acknowledging the Commission's "broad power over horse racing activities").

Kentucky's highest court has even expounded on the Commission's far-reaching authority in the context of the Kentucky Derby, specifically the disqualification of the first-place horse from the 94th running of that race:

> The Kentucky State Racing Commission is more than an administrative agency having the quasi-judicial function of finding the facts and applying the law to the facts. The Commission was created for the purpose of maintaining integrity and honesty in racing; the promulgation and enforcement of rules and regulations effectively preventing the use of improper devices, the administration of drugs or stimulants, or other improper acts for the purpose of affecting the speed or health of horses; and the promotion of interest in the breeding of and improvement of the breed of thoroughbred horses. The Commission is vested with extensive authority over all persons on racing premises for the purpose of maintaining honesty and integrity and orderly conduct of thoroughbred racing. On the basis of the statutes heretofore referred to, the Commission is charged with the duty of protecting substantial public interest ….

Ky. State Racing Comm'n v. Fuller, 481 S.W.2d 298, 301 (Ky. 1972). The General Assembly has exclusively charged the Commission with overseeing the safety, honesty, and integrity of horse racing in Kentucky, and has vested it with expansive authority to carry out that charge. Any regulation directed to those ends is necessarily within the Commission's authority and should be

[14] Motions for discretionary review are pending at the Kentucky Supreme Court, so this opinion is not yet final.

upheld. *Appalachian Racing*, 423 S.W.3d at 736 (regulations are valid subordinate rules when within the framework of the policy defined by the legislation).

A. The Commission validly exercised its authority to promulgate the regulations governing horse racing.

The Commission has properly exercised its authority to promulgate regulations assigning discretionary tasks to the stewards and making certain determinations unappealable. The General Assembly authorized the stewards' positions but left prescribing their duties to the Commission. KRS 230.240(1). The Commission has done so by granting the stewards "immediate supervision, control, and regulation of racing at each licensed race meeting on behalf of … the commission." 810 KAR 1:004 § 3. Thus, the Commission generally carries out its mandate to ensure safety, honesty, and integrity in thoroughbred horse racing through the stewards. *See Veitch v. Ky. Horse Racing Comm'n*, No. 2012-CA-001610-MR, 2013 WL 5765130, at *1 (Ky. App. Oct. 25, 2013) ("The [Commission] utilizes the board of stewards to carry out this legislative mandate.").

Among the stewards' powers are "[d]etermining all questions, disputes, protests, complaints, or objections concerning racing which arise during a race meeting and enforcing the determinations," 810 KAR 1:004 § 3(2), and "[i]nterpreting and enforcing 810 KAR Chapter 1 and determining all questions pertaining to a racing matter not specifically covered by these administrative regulations," *id.* § 3(4). The stewards are specifically authorized to determine fouls and disqualifications in races. 810 KAR 1:016 §§ 12–13. All this ensures that races are run safely, fairly, and honestly. Thus, the stewards are "specifically charged with determining the official winner of the race." *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 946 (6th Cir. 1990), *overruled in part on other grounds by Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 217 n.4 (6th Cir. 1992).

Although the stewards have broad discretion, they also are highly experienced and

equipped to carry out their regulatory role. A steward must have attended the stewards' accreditation program at the University of Louisville or University of Arizona, and have passed the examinations required by those programs. 810 KAR 1:004 § 1(1)(a), (b). A steward also must demonstrate significant ongoing experience in the racing industry, either as a racing official or horse racing participant. *Id.* § 1(2). The Commission also retains ultimate control over the stewards, who are "responsible only to the commission and may be replaced by the commission at any time for failure to perform their duties to the satisfaction of the commission." *Id.* § 2(3).

That these regulations fall well within the Commission's regulatory authority cannot reasonably be questioned. Vesting this authority in highly qualified individuals—the stewards—serves the Commonwealth's legitimate interest in ensuring public confidence in horse racing and that the rules of racing are observed at *all* race meets. *See Jamgotchian*, 488 S.W.3d at 612 ("As the General Assembly's statement of purpose for KRS Chapter 230 indicates, the public acceptance of thoroughbred racing continues to be a legislative concern and continues to require the oversight of the gambling that makes racing an industry rather than a hobby."); *see also White v. Turfway Park Racing Ass'n, Inc.*, 718 F. Supp. 615, 618–19 (E.D. Ky. 1989), *aff'd*, 909 F.2d 941 (6th Cir. 1990) ("It is common knowledge that at formal horse races there are persons in attendance who are charged with the duty of determining which horses are the winners under the terms and conditions under which a race is being conducted." (quoting *Finlay v. E. Racing Ass'n*, 30 N.E.2d 859, 861 (Mass. 1941)). Importantly, it also serves the Commonwealth's interest in keeping races safe, since the stewards are charged with enforcing the many rules directed to protecting horse and rider (as they did in this case). *See* KRS 230.215(2) (noting Commission's broad authority is granted "in the interest of the public health, safety, and welfare").

The Commission has determined that the stewards are best situated to make certain

discretionary calls incident to each race. On that basis, the Commission relies on the stewards' professional judgment and tasks them with resolving all fouls, objections, and complaints, *see generally* 810 KAR 1:017, and determining the official order of finish. The stewards thus are the Commission's legitimately chosen means of executing the regulations that make horse racing—and wagering thereon—fair, honest, and safe. Those functions go to the core of the Commission's statutory authority "to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane." KRS 230.215(1).

Of course, the Wests have not challenged all of the Commission's regulations as exceeding its authority.[15] Instead, the Wests have directed this element of their Complaint at 810 KAR 1:017 § 4, which makes the stewards' determinations of all matters occurring during and incident to the running of a race, as well as whether to disqualify a horse, final and not subject to appeal. This provision protects the stewards' judgment calls as referees of a sport—the "in-game" determinations as they decide the official outcome of a race. It also protects the Commission's entrustment to them with literal stewardship of thoroughbred horse racing in the Commonwealth and is an acknowledgement of the superiority of their professional, informed judgment.

B. The Wests have not sufficiently alleged any legal basis to invalidate the no-appeal rule in 810 KAR 1:017 § 4.

The no-appeal rule is not new,[16] and the Kentucky Court of Appeals has expressly held that 810 KAR 1:017 § 4 was "enacted pursuant to the [Commission's] plenary authority to issue administrative regulations, the authority for which is granted in KRS 230.215(2)." *March*, 2015

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[15] In fact, the Wests have expressly challenged only 810 KAR 1:017 § 4 as exceeding the Commission's statutory authority. *See* Compl. ¶¶ 130–138. But that provision is only one of several making the stewards' disqualification determination based on an objection or foul unappealable. Two other provisions also make that determination unappealable. *See* 810 KAR 1:029 § 2(9); 810 KAR 1:025 § 21(4). Those provisions are independent bars to an appeal of the stewards' decision and are thus independent grounds for the Commission's denial of the attempted appeal. The Wests' failure to challenge these regulations as exceeding the Commission's statutory authority should thus be fatal to this aspect of their claims.

[16] *See* note 3 above.

WL 3429763, at *2. In that case, the court applied the regulation to bar judicial review, holding that the "dismissal must stand" because the "disqualification is final and non-appealable" and "non-reviewable." *Id.* The court also held that the Commission "applied the ***correct rule of law*** in dismissing March's appeal of [the] disqualification." *Id.* (emphasis added). Thus, whether the no-appeal rule exceeds the Commission's authority has already been decided by a Kentucky court.

This Court has also applied the Commission's authority to make the stewards' decisions concerning disqualifications unappealable. *See White*, 718 F. Supp. at 618. In *White*, the Court addressed 810 KAR 1:016 § 16 (later § 17), the regulation making the "decision of the stewards as to the official order of finish for pari-mutuel wagering purposes … final," and stating that "no subsequent action shall set aside or alter the official order of finish for the purposes of pari-mutuel wagering." *Id*. The Court concluded not only that the rules barred any challenge, but also that deciding the winner of a race is "a determination … that is inappropriate for a federal court to make." 718 F. Supp. at 618; *see also id.* at 620 ("[T]he court would be deciding … the final order of finish of that race. Such a determination is clearly one which the stewards should make, not a federal district court."). Instead, the call is "more appropriately left to the agency which the Commonwealth has designated as the decisionmaker in such matters." *Id.* at 621. Implicit in *White* is that the no-review rule is a proper exercise of the Commission's authority.

As discussed above, the regulatory authority granted to the Commission is extremely broad, not limited or confined. *See* KRS 230.260(8); KRS 230.370; *see also Bobinchuck v. Levitch*, 380 S.W.2d 233, 236 (Ky. 1964) ("The Kentucky Racing Commission was properly invested by the legislature with authority under the police powers of the state to make and enforce rules for the conduct of horse racing in Kentucky…."); *Louisville and Jefferson Cnty. Bd. of Health v. Haunz*, 451 S.W.2d 407, 407 (Ky. 1969) (authority to "make appropriate rules and regulations and do all

things reasonable or necessary" was a grant of "broad powers").

The Wests' claim that the Commission exceeded its statutory authority also fails because the General Assembly has expressly given it "***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) (emphasis added). "Plenary" means "[c]omplete in all respects; unlimited or full." *American Heritage Dictionary* (5th ed. 2011). Thus, the Commission may, by administrative regulation, employ its expressly plenary power to grant the stewards authority to determine disqualifications without further review.

Again, the Wests consented to these rules. Participation in racing in Kentucky "is a privilege and not a personal right." KRS 230.215(1); *see also March*, 2015 WL 3429763, at *3 (noting the privilege in the context of finality of the stewards placing and disqualification decisions). Racing participants agree to and are "bound by the Rules of Racing." *White*, 718 F. Supp. at 621; *see also March*, 2015 WL 3429763, at *2 (holding that a horse owner is not entitled to a hearing on disqualification "as he acknowledged by being a licensee under the [Commission's] rules and regulations"). As the regulations plainly state: "A licensee shall be knowledgeable of this administrative regulation and, by acceptance of the license, agrees to abide by this administrative regulation." 810 KAR 1:025 § 21(1). The Wests' license applications further demonstrate their consent.

Finally, the mere unappealability of an agency decision does not render it, or the regulation allowing it, outside the agency's authority.[17] Kentucky's broad grant of authority to the Commission as the governing body of a sport necessarily includes the power to insulate some determinations from judicial review—those concerning what occurred in a race and its official

[17] For example, federal law acknowledges administrative decisions may be unreviewable. 5 U.S.C. § 701(a).

outcome. And there is no constitutional bar on the practice, because there is no state or federal guarantee to appeal an administrative agency's action. *See Bd. of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978) ("There is no appeal to the courts from an action of an administrative agency as a matter of right."); *Taylor v. Duke*, 896 S.W.2d 618, 621 (Ky. App. 1995) ("an appeal from an administrative decision is a matter of legislative grace and not a right"); *McKane v. Durston*, 153 U.S. 684, 687–88 (1894) (no constitutional right to appeal, even in a criminal prosecution); *see also Holton v. Indiana Horse Racing Comm'n*, 398 F.3d 928, 929 (7th Cir. 2005) (holding no constitutional right to appeal a stewards' decision).

III. Because Kentucky law grants the Wests no right to appeal the disqualification determination, KRS Chapter 13B is not applicable.

Without explanation, the Wests incorrectly rely on KRS Chapter 13B. Because Kentucky law creates no due process right to notice and an administrative hearing, KRS Chapter 13B is inapplicable, and any cause of action based on it fails as a matter of law. The Wests follow a strained logic to assert that KRS 13B.150 has any application to this case: because the Commission cited *March* in denying the Wests' appeal, and *March* references KRS 13B.150, they assert KRS Chapter 13B is somehow relevant. *See* Compl. ¶¶ 105–107. It is not. *March* references KRS 13B.150 only because the appellant there appealed a jockey suspension along with the disqualification. The hearing officer in *March* found the owner had no standing to contest the suspension and that no appeal is available from the stewards' decision to disqualify a horse. The hearing officer therefore recommended that the Commission dismiss the action. The Commission, Franklin Circuit Court, and the Kentucky Court of Appeals all affirmed that recommendation. *March*, 2015 WL 3429763, at *1.

KRS Chapter 13B grants "only procedural rights and shall not be construed to confer upon any person a right to hearing not expressly provided by law." KRS 13B.020. Entitlement to a

hearing or judicial review under KRS Chapter 13B must be found in other law. But the only authority for a hearing or judicial review that the Wests cite is KRS 13B.150. *See* Compl. ¶¶ 107–08, 118, 132, 140, 144–45. That statute outlines the process for judicial review under KRS Chapter 13B and cannot give rise to substantive rights.[18] And nothing in the Commission's regulations or enabling statutes provides for an administrative hearing to contest the stewards' determination of fouls, objections, or disqualifications before the final results of a race are declared official. In fact, the regulations and statutes provide the opposite: summary determination by the stewards before declaring the results official, and no right to appeal that determination. The Kentucky Court of Appeals has held in this exact context that a horse owner "[i]s not entitled to a Stewards' hearing" or an appeal of a disqualification determination. *March*, 2015 WL 3429763, at *2.

Moreover, KRS 13B.140 provides for judicial review of an agency's final orders, and KRS 230.330 provides specifically for appeals of the Commission's final orders. But again, KRS 13B.140 cannot give rise to ***substantive*** rights. And both KRS 13B.140 and 230.330 apply only after the issuance of a ***final order*** at the conclusion of an administrative hearing before the full Commission, which is not at issue here. In their Complaint, the Wests incorrectly call the Stewards' determination a "final order."[19] *See*, *e.g.*, Compl. ¶¶ 34, 37, 40, 91, 103, 132. This characterization of the disqualification determination is an improper legal conclusion assuming the legal nature of the decision and implying legal consequences—appealability under KRS 13B.150. The Court need not accept such conclusory legal assertions. *Deters*, 130 F. Supp. at 1053.

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[18] Even if KRS Chapter 13B had any relevance to the Wests' original action in this Court, KRS Chapter 13B requires that any appeal must be instituted in the circuit court of venue as provided in the agency's enabling statutes. *See* KRS 13B.140(1). The Commission's enabling statute specifically requires that licensees and aggrieved applicants must appeal final orders to the Franklin Circuit Court—not federal court. *See* KRS 230.330.

[19] The Wests make much of a short media statement by chief state steward Borden several hours after the disqualification. *See* Compl. ¶¶ 11–19, 92–93, 96, 112, 124. They even go so far as to claim that this statement "announc[ed] … the entry of a Final Order." *Id.* ¶ 112. But a public statement to the media is just that—a media statement. It is an unofficial act and a far cry from a "final order" as contemplated by KRS Chapter 13B or KRS 230.330.

The Stewards did not issue a "final order." Instead, they determined that a foul occurred and disqualified Maximum Security as a result. *See* 810 KAR 1:017 § 4(1)(b)–(c) (stewards "[d]etermine all objections and inquiries based on interference by a horse, improper course run by a horse, foul riding by a jockey, and all other matters occurring during and incident to the running of a race; and … [d]etermine the extent of disqualification, if any, of horses in a race for a foul committed during the race."). Final orders are issued by the full Commission in matters appealed to, or directly reviewed by, it. *See* 810 KAR 1:029 § 2(9) (providing for review of some stewards' rulings); *id.* § 4(9)(c) (Commission to "[i]ssue a ruling in final adjudication of the matter"); *id.* § 4(10) (setting requirements for the "final ruling"). But disqualification determination are exempted from this process. *Id.* § 2(9) (barring review "except as to extent of disqualification for a foul in a race or as to a finding of fact as occurred during an incident to the running of a race"). Instead, the stewards make such disqualification determinations in a summary fashion, without a hearing, in the minutes following a race. This is proper—no hearing is required as no property interest is at stake. *See March*, 2015 WL 3429763, at *3. Thus, the Stewards held no hearing subject to the strictures of KRS Chapter 13B and issued no final order subject to appeal under that chapter. No statute or regulation gives the Wests the right to a hearing, final order, or appeal. Thus, KRS Chapter 13B is wholly inapplicable to this case, and the Wests' claims based on that chapter—including Counts I, III, IV, and V—have no basis in law, and should be dismissed.

IV. Even assuming KRS 13B has any application here, the disqualification determination easily withstands such review.

Even if Kentucky law provided for review of an agency's action absent express statutory authorization, the Wests have not invoked it here. *Twombly*, 550 U.S. at 555 (explaining that Rule 8(a)(2) requires "'a short and plain statement of the claim showing that the pleader is entitled to relief,' to 'give the defendant fair notice of what the ... claim is and the grounds upon which it

rests.'"). Should the Court undertake such review at all, it is limited to review for arbitrariness. *See Allen v. Ky. Horse Racing Auth.*, 136 S.W.3d 54, 59 (Ky. App. 2004) (applying *Am. Beauty Homes v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964)); *March*, 2015 WL 3429763, at *1 (same); *Bobinchuck*, 380 S.W.2d at 237 ("When an administrative agency acts within its jurisdiction, the court's review is limited to determine whether the agency's action was arbitrary."). In deciding whether agency action is arbitrary, the Court should look at three things: "whether the agency's action was within the scope of its granted powers, whether the agency provided procedural due process, and whether the decision was supported by substantial evidence." *Allen*, 136 S.W.3d at 59.

This is not a searching inquiry, and its three requirements are readily met in this case. As discussed above, the Commissions' regulations fall well within its statutory authority. Thus, the determination by the Stewards, under those lawful regulations, is within the scope of the Stewards' and the Commission's granted powers. And the Commission complied with the requirements of procedural due process, because no process was due as explained in Section I above.

And substantial evidence supports the Stewards' decision. "Substantial evidence is … evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons." *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). This is a minimal standard, falling well below the requirement of a preponderance. *See Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 307 (Ky. 1972) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting *Chesapeake & O. Ry. Co. v. United States*, 298 F.

Supp. 734 (W.D. Ky. 1969))).

The Wests acknowledge that the Stewards, in making their determination, "had a lengthy review of the race" and interviewed jockeys. Compl. ¶ 92. The race replays, in particular, constitute substantial evidence to support the Stewards' decision.[20] And the Stewards' determinations of credibility and weight of the evidence are not subject to review. As the Commission's agents, they are "afforded great latitude in [their] evaluation of the evidence heard and the credibility of witnesses." *Aubrey*, 994 S.W.2d at 519; *see also Fuller*, 481 S.W.2d at 308 ("trier of the facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses"). Given the specialized nature of the determination, which requires professional and expert judgement to properly apply the rules in a short post-race review, the videos and rider interviews are necessarily substantial evidence to support the determination. Indeed, other than the Stewards' live view of the race, they are the only evidence that is or could be available.

The Wests' claim that the video shows the disqualification determination was incorrect, *see, e.g.*, Compl. ¶ 112(f), goes to the Stewards' interpretation and evaluation of the evidence, not whether there was substantial evidence. The Court "may not reinterpret or reconsider the merits of the claim, nor can [it] substitute [its] judgment for that of the agency as to the weight of the evidence." *Parrish v. Commonwealth*, 464 S.W.3d 505, 510 (Ky. App. 2015). "The judicial standard of review of an agency's decision therefore is largely deferential…." *Louisville/Jefferson Cnty. Metro Gov't v. TDC Grp., LLC*, 283 S.W.3d 657, 663 (Ky. 2009). At most, the Wests allege that the record contains some evidence contrary to the Stewards' decision, but a court should uphold the agency's decision "even if there is conflicting evidence in the record and even if [it]

[20] The Wests submitted the replay videos to the Court in support of a premature motion for summary judgment. *See* Notice of Conventional Filing of Exhibit [DE 17]; Conventional Filing [DE 18]. Reference to those videos in this Memorandum does not convert this Motion to one for summary judgment because the Wests' Complaint relies heavily on the video. *See Luis*, 833 F.3d at 626; *see also* Compl. ¶ 112(f) (referring to "video … viewed by the Stewards").

might have reached a different conclusion." *Parrish*, 464 S.W.3d at 509. The Stewards' determination as to the final order of finish, including any disqualifications based on the running of the race, cannot be arbitrary in this context—where there is a determination that the rules of a sport were violated and an admission that the Stewards reviewed the race replay and spoke with race participants.

The Wests also suggest that the Stewards' determination was not supported by substantial evidence because they did not "follow or apply the elements and requirements of [810 KAR 1:016] Section 12." Compl. ¶ 112. Although this claim is also unclear, it appears to suggest that the Stewards' determination was arbitrary because they failed to make express findings of fact as to various aspects of 810 KAR 1:016 § 12, which defines a foul.

First, the Wests' reading of this provision is mistakenly overbroad. For example, they suggest that the Stewards had to find that Maximum Security was not "clear" of other horses. Compl. ¶ 112(a)–(b). Although this concept is stated in Section 12, it is not a prerequisite to disqualify a horse. Instead, the Stewards need only find two things: (1) that a foul occurred (in the form of interference, intimidation, or impediment), and (2) that the foul altered the finish of the race in any way. 810 KAR 1:016 § 12.

Second, the Stewards unquestionably disqualified Maximum Security, and did so for interference. Compl. ¶¶ 13, 92. Implicit in such a determination are findings that a foul occurred and that the foul altered the finish. Kentucky law recognizes such implicit findings. *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 910 (Ky. 2014) (holding that "implicit finding" in part made trial court's order 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 implicit findings justify the disqualification.

Finally, the Kentucky Court of Appeals has reviewed the no-appeal regulation at issue in this case and an almost identical stewards' decision under the *American Beauty Homes* arbitrariness standard. *See March*, 2015 WL 3429763, at *1. There, the court concluded the appeal was barred and that substantial evidence supported the decision. This Court should do the same.

V. "Clear" in 810 KAR 1:016 § 12 is not unconstitutionally vague.

As used in 810 KAR 1:016 § 12, "clear" is not vague. Although the Wests claim the word "clear" is unconstitutionally vague, any due process claim made on this basis fails as a matter of law and should be dismissed for the reasons outlined above. Moreover, "[w]hen a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness." *Doe v. Staples*, 706 F.2d 985, 988 (6th Cir. 1983). "[T]o constitute a deprivation of due process, it must be so vague and indefinite as really to be no rule or standard at all. To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Id*. (quoting *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981)).

The word "clear" in 810 KAR 1:016 § 12 is not "substantially incomprehensible" nor does it render the section "so indefinite that 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Doe*, 706 F.2d at 988 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Regardless, the Court need not reach this issue because the first sentence of 810 KAR 1:016 § 12, which uses the term "clear," is not at issue here. *United States v. Elkins*, 300 F.3d 638, 647 (6th Cir. 2002) ("Courts should avoid unnecessary constitutional questions."). As discussed above, the Stewards were not required to make a finding whether the

horse was clear. Rather, the Stewards only had to determine (1) that a foul occurred, and (2) that the foul altered the finish of the race. They did so here. *See* Compl. ¶ 92; *see also* Steward's Report [DE 16-4 at 24]. Consequently, Counts IV and VI should be dismissed.

VI. Because the Wests cannot demonstrate a violation of any right secured by the Constitution or by Kentucky law, their 42 U.S.C. § 1983 claims must be dismissed.

The Wests' § 1983 claims fail as a matter of law because "[t]he first inquiry in every section 1983 case is whether there has been the deprivation of a right secured by the Constitution or laws of the United States." *Deters*, 130 F. Supp.3d 1038, 1053. The Wests have identified no protected property interest recognized by contract of Kentucky law and therefore no due process deprivation. Thus, the Court should dismiss the Wests' § 1983 claim and Count VII in its entirety.

That the Wests have failed to allege the deprivation of any protected property interest recognized by Kentucky law necessarily means that the Commission's members, Stewards, and executive director are entitled to qualified official immunity for the performance of their discretionary functions. *See Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 771 (6th Cir. 2005) ("Under well-established qualified immunity doctrine, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). There can be no serious claim that any of the Defendants violated a clearly established statutory or constitutional right when they followed unambiguous regulations validated by state and federal court review to deny an appeal. *See generally March*, 2015 WL 3429763; *White*, 718 F. Supp. 615.

Finally, even assuming that the Wests have sufficiently made a plausible § 1983 claim against the Stewards, the Complaint fails to make any plausible claims against the Commission's executive director or any Commission member. The Wests must plausibly allege, at a minimum,

that these individuals were ***actively*** involved in depriving them of their rights. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 48 (1988) ("To state a claim under § 1983, a plaintiff … must show that the alleged deprivation was committed by a person acting under color of state law."); *King v. Zamiara*, 680 F.3d 686, 706 (6th Cir. 2012) ("Liability will not lie absent active unconstitutional behavior; failure to act or passive behavior is insufficient."). As the Sixth Circuit has explained, under the plausibility standard, "courts may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc*., 650 F.3d at 1050 (6th Cir. 2011). Although it is the Wests' obligation to provide the grounds of their entitlement to relief, *id*. at 555, Count VII of the Wests' Complaint contains nothing more than a formulaic recitation of the elements, which is insufficient to sustain a § 1983 claim. *Twombly*, 550 U.S. at 570. While Count VII incorporates every paragraph of the Complaint, none of those paragraphs include any plausible allegations that the executive director or any Commissioner ***actively*** deprived Plaintiffs of any rights secured by law. This claim therefore fails.

CONCLUSION

This Court should follow the well-established law of *March* and *White*, and dismiss the Wests' attempt to appeal the unappealable and to claim a property interest not recognized by Kentucky law. Because the Wests' fail to state a claim upon which relief can be granted, the Kentucky Horse Racing Commission, its Stewards, members, and executive director, respectfully request that this Court dismiss the Complaint with prejudice, under Rule 12(b)(6).

Respectfully submitted,

/s/ Carmine G. Iaccarino
Carmine G. Iaccarino
Kentucky Public Protection Cabinet
656 Chamberlin Avenue, Suite B
Frankfort, Kentucky 40601
Office: (502) 564-7760

Facsimile: (502) 564-3969
Carmine.Iaccarino@ky.gov

and

John L. Forgy
Shawn D. Chapman
Kentucky Horse Racing Commission
4063 Iron Works Parkway, Building B
Lexington, Kentucky 40511
Office: (859) 246-2040
Facsimile: (859) 246-2039
John.Forgy@ky.gov
ShawnD.Chapman@ky.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2019 a copy of the foregoing was filed through the Court's CM/ECF system and was served on counsel for Plaintiffs Gary and Mary West via the Court's CM/ECF notification system.

/s/ Carmine G. Iaccarino
Counsel for Defendants