

**FRANKLIN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION No. 10-CI-01154**



**THE KENTUCKY HORSE RACING COMMISSION;  
THE KENTUCKY DEPARTMENT OF REVENUE;  
APPALACHIAN RACING, LLC;  
CHURCHILL DOWNS INCORPORATED;  
ELLIS PARK RACE COURSE, INC.;  
KEENELAND ASSOCIATION, INC.;  
KENTUCKY DOWNS, LLC;  
LEXINGTON TROTS BREEDERS ASSOCIATION, LLC;  
PLAYERS BLUEGRASS DOWNS, INC.; and  
TURFWAY PARK, LLC**

**JOINT PETITIONERS**

**vs.**

**THE FAMILY TRUST FOUNDATION OF  
KENTUCKY, INC., d/b/a THE FAMILY  
FOUNDATION**

**RESPONDENT**

---

**OPINION AND ORDER**

This matter came before the Court for a bench trial on January 8, 2018, thru January 11, 2018. The sole issue before the Court is whether the Exacta System of historical horse racing constitutes pari-mutuel wagering and thus does not violate the gambling laws of the Commonwealth found in KRS Chapter 528. After having reviewed the pleadings of the parties and considered the testimony of the witnesses, as well as the exhibits that were placed into evidence, the Courts issues the following Opinion:

**CASE HISTORY**

This case was originally filed with this Court on July 21, 2010, as a *Petition for Declaration of Rights* by Joint Petitioners the Kentucky Horse Racing Commission (“the Commission”); the Kentucky Department of Revenue (“the Department”); Appalachian

Racing, LLC; Churchill Downs, Inc.; Ellis Park Race Course, Inc.; Keeneland Association, Inc.; Kentucky Downs, LLC; Lexington Trots Breeder Association, LLC; Players Bluegrass Downs, Inc.; and Turfway Park, LLC. The Commission is a government agency created pursuant to KRS Chapter 230 and is charged with regulating horse racing and pari-mutuel wagering on horse racing within the Commonwealth of Kentucky. The Department is the regulatory agency charged with regulating the administration and enforcement of all tax laws in the Commonwealth, pursuant to KRS Chapter 131. Appalachian Racing, LLC, Churchill Downs, Inc., Ellis Park Race Course, Inc., Keeneland Association, Inc., Kentucky Downs, LLC, Lexington Trots Breeder Association, LLC, Players Bluegrass Downs, Inc., and Turfway Park, LLC (collectively “the Associations”), are entities licensed by the Commission to conduct horse racing and pari-mutuel wagering in the Commonwealth. The Family Foundation is a corporation that opposes expanded gambling in the Commonwealth and joined this matter as an intervening respondent.

Originally, the Joint Petitioners sought a declaration that certain administrative regulations, amended by the Commission, were a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering of horse racing under KRS Chapter 230. *Petition for Declaration of Rights* at 5. They further sought a declaration that the licensed operation of “instant racing” machines, as authorized by the amended regulations, does not contravene the statutory prohibitions on gambling contained in KRS Chapter 528. *Id.* at 5-6. Finally, a declaration was sought regarding the determination made by the Department that revenue generated by wagering on “instant racing” is subject to the pari-mutuel tax, as set forth in KRS 138.510, was a valid exercise of the Department’s statutory authority. *Id.* at 6.

The Exacta System, also known as “instant racing,” was created for wagering on historical horse races. The regulations define historical horse races as “any horse race that: (a) was previously run at a licensed pari-mutuel facility located in the United States; concluded with official results; and concluded without scratches, disqualifications, or dead-heat finishes.” 801 KAR 1:001, Section 1 (30). The historical horse races are then presented to an individual player via a caricature video and the individual player may place a bet. *Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc.*, 423 S.W.3d 726, 730 (Ky. 2014). Prior to placing a bet, an individual bettor is given statistical information about the individual horses, but bettors are not provided information regarding the specific race or the names of the individual horses. *Id.*

On December 29, 2010, the Court entered its Opinion and Order finding that: (1) the regulations are a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering on horse racing in the Commonwealth; (2) the licensed operation of pari-mutuel wagering on historical horse races does not contravene the statutory prohibitions on gambling found in KRS Chapter 528; and (3) the Department’s determination that revenue generated by pari-mutuel wagering on historical horse races is subject to the pari-mutuel tax, as set forth in KRS 138.510, is a valid and lawful exercise of its statutory authority.

The Family Foundation appealed this Court’s December 29, 2010, Opinion and Order to the Kentucky Court of Appeals. The Court of Appeals agreed with this Court that a justiciable issue existed, however, the Court of Appeals vacated the judgment and remanded the case to this Court for discovery to be conducted. *Id.* at 732. Thus, the Court

of Appeals did not address the three questions originally presented to this Court as it believed the questions could not properly be addressed without adequate discovery. *Id.*

On discretionary review, the Supreme Court of Kentucky agreed with the Court of Appeals that in order to properly evaluate whether the operation of “instant racing” machines violate the gambling prohibitions of KRS Chapter 528, discovery was necessary. *Id.* However, the Supreme Court of Kentucky directly addressed the issues regarding the validity of the regulatory changes and the Commission’s statutory authority to regulate pari-mutuel wagering on horse racing in the Commonwealth and the Department’s statutory authority to amend 103 KAR 3:050 to collect taxes on money wagered on “instant racing.” The Supreme Court of Kentucky affirmed this Court’s finding that the regulatory changes adopted by the Commission were a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering on horse racing in the Commonwealth. *Id.* at 738. The Supreme Court of Kentucky disagreed with this Court regarding the authority of the Department and found that the Department exceeded its authority when it amended its regulations to allow revenue generated by pari-mutuel wagering on historical horse races to be subject to the pari-mutuel tax. *Id.* at 741. The Supreme Court of Kentucky then remanded the case to this Court for discovery to be conducted and a determination of whether ““the licensed operation of pari-mutuel wagering on historical horse races, as authorized by the Regulations...contravene[s] the statutory prohibitions on gambling contained in [KRS] Chapter 528, because it is an authorized form of pari-mutuel wagering exempted pursuant to KRS 436.480”” *Id.*

Since the remand from the Supreme Court of Kentucky, extensive discovery has been conducted over a period of four (4) years cumulating in the bench trial conducted in

January of 2018. From this bench trial the Court makes its Findings of Fact and Conclusions of Law.

### **INTRODUCTION TO THE LAW OF PARI-MUTUEL WAGERING**

In its December 29, 2010, Opinion and Order, this Court stated that “the essential element of a pari-mutuel wagering system is that the patron does not wager against the Association. Stated differently, the Association must not have a financial interest in the outcome of the bet, beyond the uniform deduction allowed by law.” (December 29, 2010, Opinion and Order at 12.) Kentucky does not have a set statutory definition of pari-mutuel wagering. The regulations implementing KRS Chapter 230 state:

“Pari-mutuel wagering,” “mutuel wagering,” or “pari-mutuel system of wagering” each means a system or method of wagering approved by the commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons.

810 KAR 1:001, Section 1 (48).

In *Appalachian Racing, LLC*, the Supreme Court of Kentucky highlighted the similarities between the definition of the similar “French pool” or “Paris mutual” wagering system and the definition of pari-mutuel wagering found in 15 U.S.C. § 3002(13) of the federal Interstate Horse Racing Act, 15 U.S.C. § 3001, *et seq. Appalachian Racing, LLC*, 423 S.W.3d at 737. In *Commonwealth v. Kentucky Jockey Club*, the Court defined “French pool” or “Paris mutual” wagering:

In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 percent of the wages as his commission. But in selling ordinary pools on horse races the

seller does not operate a ‘machine or contrivance used in betting.’  
Neither does he bet on a horse race.

38 S.W.2d 987, 991 (1931). The federal Interstate Horse Racing Act defines pari-mutuel wagering as “any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator.” 15 U.S.C. § 3002(13).

In regard to Kentucky’s definition of pari-mutuel wagering, the Supreme Court of Kentucky made two conclusions. First, the Court concluded that

Without a more particular definition provided by statute, we conclude that Chapter 230’s references to pari-mutuel wagering were intended to incorporate the conception of the pari-mutuel wagering described in the federal statutes and the substantially similar common law expression provided by the courts of the Commonwealth, as evidenced in *Kentucky Jockey Club*.

*Appalachian Racing, LLC*, 423 S.W.3d at 737. Second, the Supreme Court of Kentucky concluded that Kentucky’s regulatory definition of pari-mutuel wagering found in 810 KAR 1:001, Section 1 (48) “is consistent with the references to pari-mutuel wagering in KRS Chapter 230.” *Id.* at 738.

Kentucky’s definition of pari-mutuel wagering can thus be broken down into four essential elements:

- (1) a system or method of wagering approved by the Commission;
- (2) in which patrons are wagering among themselves and not against the Association;
- (3) amounts wagered are placed in one or more designated wagering pools; and
- (4) the net pool is returned to the winning patrons.

Further, KRS 436.480 specifically exempts KRS Chapter 528 from applying to authorized pari-mutuel wagering under KRS Chapter 230. *See* KRS § 436.480. Additionally, while this case was pending, the General Assembly of Kentucky amended KRS 528.010(5)(d)(2), which exempts historical racing from the definition of gambling devices.

### **ISSUE BEFORE THE COURT**

The sole issue before the Court is whether the licensed operation of wagering on the Exacta System constitutes a pari-mutuel system of wagering. The Family Foundation states first and foremost that the historical racing machines of the Exacta System are just disguised slot machines and at first glance that argument is persuasive. The machines look like Vegas slot machines, they are advertised as “Vegas style gambling,” and a casual observer would be hard pressed to discern the difference. The Family Foundation also reasons that allowing the machines to operate is bad public policy. Furthermore, the Commonwealth is being shortchanged on revenue as two (2) billion dollars in wagering has produced only eight (8) million dollars in state revenue. Joint Petitioners have countered throughout this very protracted litigation that historical racing is simply an extension of exotic betting and that the Exacta machines are a logical extension of the Commonwealth’s rich racing history.

### **FINDINGS OF FACT**

Based upon the testimony presented at trial and the exhibits made part of the record, the Court makes the following findings of fact:

1. Richard LaBrocca (“LaBrocca”) testified on behalf of the Commission and is the former Senior Director of Engineering for Gaming Laboratories International

- (“GLI”). The Court certified him as an expert witness. (Day 3, 11:38-11:41; *see also* JP Exhibits 1 and 2).
2. Steve May (“May”) testified on behalf of the Commission and is the Commission’s Director of Pari-mutuel Wagering and Compliance.
  3. Dr. Robert Molzon (“Dr. Molzon”) testified on behalf of the Family Foundation and is a math professor at the University of Kentucky.
  4. Robert F. “Skip” Lannert II (“Lannert”) testified on behalf of Ellis Park and Kentucky Downs and serves as Chief Operating Officer of Global Gaming Solutions.
  5. Joint Petitioner’s Exhibit 1 is the Curriculum Vitae of Richard LaBrocca.
  6. Joint Petitioner’s Exhibit 2 is the March 9, 2015, GLI Report containing math models 1005, 1011, 1021, 1027, and 3003.
  7. Joint Petitioner’s Exhibit 3 is the May 11, 2015, GLI Report containing math models 1030, 1031, and 3010.
  8. Joint Petitioner’s Exhibit 4 is the June 11, 2015, GLI Report containing math models 1006 and 1028.
  9. Joint Petitioner’s Exhibit 5 is the June 18, 2015, GLI Report for math model 1033.
  10. Joint Petitioner’s Exhibit 6 is the October 2, 2015, GLI Report containing math models 1032 and 9704.
  11. Joint Petitioner’s Exhibit 7 is the March 15, 2016, GLI Report containing math models 1037 and 9001.
  12. Joint Petitioner’s Exhibit 8 is the June 23, 2016, GLI Report containing math models 1035 and 1200.



13. Joint Petitioner's Exhibit 9 is a draft of the October 8, 2014, GLI Report.
14. Joint Petitioner's Exhibit 10 is the December 31, 2014, GLI Report.
15. Joint Petitioner's Exhibit 11 is an Expert/Forensic Report prepared by Richard LaBrocca on March 2, 2016.
16. Joint Petitioner's Exhibit 12 is the March 18, 2015, request of Corey Johnsen, President of Kentucky Downs, to use the Exacta System for pari-mutuel wagering on historical horse races and offer wagers for math models 1005, 1011, 1021, 1027, and 3003.
17. Joint Petitioner's Exhibit 13 is the Transcript of the March 23, 2015, meeting of the Kentucky Horse Racing Commission at which Kentucky Downs' request to use the Exacta System for pari-mutuel wagering on historical horse races was approved.
18. Joint Petitioner's Exhibit 14 is the supplemental request of Kentucky Downs made on June 19, 2015, to offer wagers for math models 1006, 1028, 1030, 1031, 1033, and 3010.
19. Joint Petitioner's Exhibit 15 is the Transcript of the June 29, 2015, meeting of the Kentucky Horse Racing Commission at which Kentucky Downs' supplemental request to use math models 1006, 1028, 1030, 1031, 1033, and 3010 was approved.
20. Joint Petitioner's Exhibit 16 is the supplemental request of Kentucky Downs made on October 15, 2015, to offer wagers for math models 1032 and 9704.
21. Joint Petitioner's Exhibit 17 is the Transcript of the October 26, 2015, meeting of the Kentucky Horse Racing Commission at which Kentucky Downs' supplemental request to use math models 1032 and 9704 was approved.

22. Joint Petitioner's Exhibit 18 is the supplemental request of Kentucky Downs made on October 24, 2016, to offer wagers for math models 1035, 1037, 1200, and 9001.
23. Joint Petitioner's Exhibit 19 is the transcript of the November 1, 2016, meeting of the Kentucky Horse Racing Commission at which Kentucky Downs' supplemental request to use math models 1035, 1037, 1200, and 9001 was approved.
24. Joint Petitioner's Exhibit 20 is the October 26, 2016, request of Ellis Park to transition to use the Exacta System.
25. Joint Petitioner's Exhibit 21 is the amended request of Ellis Park to transition to the Exacta System made on November 29, 2016.
26. Joint Petitioner's Exhibit 22 is a letter dated November 30, 2016, by Marc Guilfoil approving Ellis Park's request to transition to the Exacta System.
27. Joint Petitioner's Exhibit 23 is the April 13, 2017, request of Ellis Park to offer wagers on two previously approved math models, 1037 and 9704.
28. Joint Petitioner's Exhibit 24 is the April 20, 2017, letter from Deputy Executive Director Jamie Eads approving Ellis Park's April 13, 2017, request to offer wagers on math models 1037 and 9704.
29. Joint Petitioner's Exhibit 25 is the May 22, 2015, Daily Report for Kentucky Downs.
30. Joint Petitioner's Exhibit 26 is the October 19, 2015, Daily Report for Kentucky Downs.
31. Joint Petitioner's Exhibit 27 is the October 20, 2015, Daily Report for Kentucky Downs.
32. Joint Petitioner's Exhibit 28 is the July 15, 2016, Daily Report for Ellis Park.

33. Joint Petitioner's Exhibit 29 is the Curriculum Vitae of Robert F. "Skip" Lannert II.
34. Joint Petitioners Exhibit 30 is the December 15, 2015, Report prepared by Robert F. "Skip" Lannert evaluating if the wagers on historical horse races at Kentucky Downs using the Exacta System is pari-mutuel.
35. Joint Petitioner's Exhibit 31 is the March 2, 2015, Encore Tote System User Manual for the System for Pari-mutuel Betting on Historical Horse Races (Racing Based Games).
36. Joint Petitioner's Exhibit 32 is the August 7, 2017, and August 8, 2017, email between Dr. Molzon and Stanton Cave.
37. Joint Petitioner's Exhibit 33 is the August 15, 2017, email between Dr. Molzon and Mr. Cave with attached answers by Dr. Molzon on questions one (1) through eleven (11) posed by Mr. Cave.
38. Joint Petitioner's Exhibit 34 is the August 15, 2017, email between Dr. Molzon and Mr. Cave discussing pari-mutuel wagering.
39. Joint Petitioner's Exhibit 35 is the August 5, 2017, email between Dr. Molzon and Mr. Cave discussing the definition of pari-mutuel wagering.
40. Defendant's Exhibit 1 is the Affidavit of Richard LaBrocca from October 17, 2016.
41. Defendant's Exhibit 2 is the Encore Racing Based Games math par sheets, pool pay rules, game rules, and paytables.
42. Defendant's Exhibit 3 is the Affidavit of Richard LaBrocca from January 22, 2016.
43. Defendant's Exhibit 4 is (1) the Encore Gaming Race Database Overview on Race Based Gaming System for the Central Determinant Translator from May 15, 2014;

- (2) the Encore Gaming Math and Outcome Generation System Overview on Race Based Gaming System for the Central Determinant Translator from May 16, 2014; and (3) the Encore Gaming Parimutuel Pool Overview on Race Based Gaming System for the Central Determinant Translator from May 15, 2014.
44. Defendant's Exhibit 5 is the September 26, 2014, Application of Kentucky Downs to the Kentucky Horse Racing Commission to add ninety-six (96) new Encore Racing Based Games terminals to its facility.
45. Defendant's Exhibit 6 is the October 24, 2014, email between Susan Speckert, General Counsel for the Kentucky Horse Racing Commission and Patrick Neely of Encore Gaming discussing an amended report by GLI, and the January 14, 2015, email between Ms. Speckert and Mr. Neely about a GLI letter.
46. Defendant's Exhibit 7 is the specifications for Math Model 1200 including the game themes associated with Math Model 1200, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
47. Defendant's Exhibit 8 is the specifications for Math Model 1035 including the game themes associated with Math Model 1035, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
48. Defendant's Exhibit 9 is the specifications for Math Model 1030 including the game themes associated with Math Model 1030, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
49. Defendant's Exhibit 10 is the June 3, 2014, letter from Kentucky Downs to the Kentucky Horse Racing Commission supplementing its original application to offer wagering on historical horse races.

50. Defendant's Exhibit 11 is the specifications for Math Model 1006 including the game themes associated with Math Model 1006, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
51. Defendant's Exhibit 12 is the specifications for Math Model 1031 including the game themes associated with Math Model 1031, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
52. Defendant's Exhibit 13 is the February 3, 2015, report of findings for twenty-one (21) new Encore Tote System Games for use with the Encore Tote System v1.0.34 from Christine M. Gallo, Vice President of Technical Compliance and Quality Assurance of GLI, to Ms. Speckert, General Counsel for the Kentucky Horse Racing Commission.
53. Defendant's Exhibit 14 is the specifications for Math Model 1033 including the game themes associated with Math Model 1033, methods for picking horses, wager amount, game features, ways to win, and pool split/seed pool/minimum pay.
54. Defendant's Exhibit 15 is a collection of invoices from GLI to the Kentucky Horse Racing Commission including payments made by the Kentucky Horse Racing Commission to GLI.
55. Defendant's Exhibit 16 is a video display of the Exacta System in use at Kentucky Downs.
56. Defendant's Exhibit 17 is the Curriculum Vitae of Dr. Robert Molzon.
57. Defendant's Exhibit 18 is the August 31, 2017, Report on Encore Games prepared by Dr. Robert Molzon.

58. The Exacta System is a system approved by the Commission to offer wagering on historical horse racing.
59. The Exacta System is currently in operation at Kentucky Downs and Ellis Park.
60. The Exacta system utilizes a “Triple Race Method” or “Three Race Method” for wagering on historical horse racing. (LaBrocca, Day 1, 10:45:25-10:45:31; *see also generally* March 9, 2015, GLI report, JP Exhibit 2).
61. After the patron’s wager is placed, the system selects three historical horse races at random from the Exacta System’s database of historical horse races, limited to ten runners per race, and presents them to the patron. (LaBrocca, Day 1, 10:47:58-10:48:08; JP Exhibit 2, p. 6).
62. After the patron places his wager, a “takeout” amount is removed from the wager, and that amount goes to the Association. (LaBrocca, Day 1, 10:57:57-10:58:01). (Takeout is “the total amount of money, excluding breakage and any amounts allocated to a seed pool, withheld from each pari-mutuel pool, as authorized by KRS 230.3615 and 810 KAR Chapter 1.” 810 KAR 1:001, Section 1 (75)).
63. The remaining amount of the patron’s wager is placed into a pool. (LaBrocca, Day 1, 10:58:03-10:58:08).
64. The patron is then given an opportunity to handicap the race or chose a built in function of the Exacta System which uses the “off odds” order of the horses. (LaBrocca, Day 1, 10:47:10-10:47:24; JP Exhibit 2, p. 6).
65. The “off odds” are the pari-mutuel odds that represent the amount a patron will win if his chosen horse wins, as set at the time that the horses left the staling gate. (LaBrocca, Day 1, 10:47:37-10:46:52).

66. After the order of finish is selected by the patron, three cartoon like replays of the finish of the races are displayed on the terminal. (LaBrocca, Day 1, 10:50:21-10:50:36: “What the player will see at that point is three displays of the finishing of those three races, so you will be able to see horses cross the line in the order they cross the line with the proper sequencing of distance and finish order”; JP Exhibit 2, p. 6).
67. The selections made by the patron are then compared to the results of the three random historical horse races to determine the payout amount for the patron. (LaBrocca, Day 1, 10:50:37-10:50:45).
68. All Exacta System titles that share the same game theme, denomination, and payout percentage share the same pari-mutuel pool. (JP Exhibit 2, p. 5).
69. The initial seed pool (also referred to as the “threshold”) sets the initial value of the pool. (LaBrocca, Day 1, 11:19:55-11:19:59). (Initial seed pool is “a nonrefundable pool of money funded by an association in any amount sufficient to ensure that a patron will be paid the minimum amount required on a winning wager on an historical horse race.” 801 KAR 1:001, Section 1 (33)).
70. If the balance of the pool is above the threshold, the winning patron will receive either par or all of the net pool depending on the accuracy of the patron’s selections. (LaBrocca, Day 1, 11:21:30-11:21:45; 11:24:25-11:24:45). (Net pool is “the total amount wagered less refundable wagers and takeout.” 801 KAR 1:001, Section 1 (44)).

71. However, if the amount of the pool is below the threshold, the winning patron will be paid out a guaranteed minimum amount pursuant to the rules of the game. (LaBrocca, Day 1, 11:22:00-11:22:12).
72. All payouts on winning wagers come from the pool, not any separate account of the Association. (LaBrocca, Day 1, 11:05:05-11:06:03, 11:20:18-11:21:55).
73. As required by 810 KAR 1:001, Section 1 (48), the Commission approved the Exacta System.
74. Prior to any approval of the use of the Exacta System by the Commission, GLI issued reports for the Commission and made recommendations to the Commission. (JP Exhibit 2; JP Exhibit 3; JP Exhibit 4; JP Exhibit 5; JP Exhibit 6; JP Exhibit 7; JP Exhibit 8; JP Exhibit 15; JP Exhibit 17; JP Exhibit 19).
75. On March 18, 2015, Kentucky Downs submitted its application to use the Exacta System and on March 25, 2015, the Commission approved Kentucky Downs use of math models 1005, 1011, 1021, 1027, and 3003. (Day 3, May, 4:08:41-4:09:15; JP Exhibit 12; JP Exhibit 13).
76. Following the Commission's initial approval of the Exacta System, the Exacta System has come before the Commission three additional times.
77. On June 29, 2015, the Commission approved Kentucky Downs use of math models 1006, 1028, 1030, 1031, 1033, and 3010. (JP Exhibit 14; JP Exhibit 15).
78. On October 26, 2015, the Commission approved Kentucky Downs use of math models 1032 and 9704. (JP Exhibit 16; JP Exhibit 17).
79. On November 1, 2016, the Commission approved Kentucky Downs use of math models 1035, 1037, 1200, and 9001. (JP Exhibit 18; JP Exhibit 19).



80. On November 30, 2016, and additionally in April 2017, the Commission approved Ellis Park's request to conduct historical horse racing using the Exacta System. (JP Exhibit 20; JP Exhibit 21; JP Exhibit 22; JP Exhibit 23; JP Exhibit 24).
81. 810 KAR 1:001, Section 1 (48) requires patrons to wager "among themselves and not against the association."
82. When a patron places a wager using the Exacta System, the association's "share" or "takeout" is taken immediately "off the top," and the amount wagered is placed in the corresponding pool. (LaBrocca, Day 1, 10:57:57-10:58:01; 11:29:40-11:29:42; 11:00:45-11:00:48).
83. All money wagered is placed into a pool, and all payouts to winning patrons come from the pool. (LaBrocca, Day 1, 11:25:30-11:25:53).
84. An association never has a financial interest in the outcome of any wager because once a pool is opened with an initial seed amount, only players contribute to or receive funds from the pool because associations do not add or withdraw money from the pool. (LaBrocca, Day 1, 11:29:23-11:29:37; 2:01:57-2:02:23).
85. 810 KAR 1:001, Section 1 (48) requires that the "amounts wagered are placed in one or more designated pools."
86. It is not disputed that all "amounts wagered are placed into one or more designated pools." (LaBrocca, Day 1, 10:58:15-10:58:18; 11:00:45-11:00:48; 11:05:05-11:05:45; 1:51:10-1:15:22; May, Day 3, 4:20:20-4:22:36; Lannert, Day 4, 9:32:05-9:32:19; Molzon, Day 4, 3:26:15-3:27:04; 3:36:10-3:36:15).
87. 810 KAR 1:001, Section 1 (48) requires that "the net pool is returned to the winning patrons."

88. 810 KAR 1:001, Section 1 (44) defines “net pool” as “the total amount wagered less refundable wagers and takeout.”
89. LaBrocca testified that the Exacta System is designed so that “the net pool is going to be paid out many times over.” (LaBrocca, Day 1, 12:00:01-12:00:03; 1:52:33-1:52:55).
90. Lannert testified that the Exacta System returns the net pool to patrons. (Lannert, Day 4, 9:34:20-9:34:25).
91. May testified that each pool in operation has paid out the net pool and the daily wagering reports demonstrate that the pari-mutuel pools fluctuate based on the outcome of patrons’ wagers. (May, Day 3, 2:00-2:45; 4:20:20-4:22:36).
92. Pari-mutuel wagering does not require patrons to wager on the same horse races, nor does it require reciprocity among patrons, or for a pool to remain open for a specified period of time. *See* 810 KAR 1:001, Section 1 (48).
93. Similar to the Exacta System design, it is typical in pari-mutuel wagering for pools to be paid out to various patrons over time.
94. LaBrocca explained, “[w]hen patrons are wagering amongst themselves into the same pool they are affecting the other wagers who come after them by either increasing the funding of the pool, as every wager is going to do, and at some cases when there is a win, decreasing the number...thereby affecting other future players.” (LaBrocca, Day 1, 3:04:08-3:04:33).
95. The approved version of the Exacta System does not use fixed or static prizes. (LaBrocca, Day 2, 3:55:55-3:56:52).

96. Dr. Molzon agreed that the approved version of the Exacta System does not use fixed prizes. (Molzon, Day 4, 3:57:11-3:38:05; 4:45:55-4:47:17; JP Exhibit 33).

### CONCLUSIONS OF LAW

After consideration of the above findings of fact, which are based upon the exhibits and testimony presented at trial and made part of the record, the Court renders the following conclusions of law:

1. The only issue before the Court is whether the licensed operation of wagering on the Exacta System constitutes a pari-mutuel system of wagering.
2. KRS 436.480 expressly provides that “KRS Chapter 528 shall not apply to pari-mutuel wagering authorized under the provisions of KRS Chapter 230.” KRS § 436.480.
3. KRS 230.215 authorizes the Commission to license operations for wagering on horse racing as long as the racing is pari-mutuel. *See* KRS § 230.215.
4. In *Appalachian Racing, LLC*, the Supreme Court of Kentucky held that the Commission has the authority to promulgate regulations for wagering on historical horse racing and that such regulations made by the Commission are valid. 423 S.W.3d at 741.
5. 801 KAR 1:001, Section 1 (48) defines “pari-mutuel wagering,” “mutuel wagering,” or “pari-mutuel system of wagering” as  
  
a system or method of wagering approved by the commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons.

6. The Supreme Court of Kentucky concluded that Kentucky’s regulatory definition of pari-mutuel wagering found in 810 KAR 1:001, Section 1 (48) “is consistent with the references to pari-mutuel wagering in KRS Chapter 230.” *Appalachian Racing, LLC*, 423 S.W.3d at 738.
7. It is evident to the Court that the Exacta System was designed to align with the requirements of 810 KAR 1:001, Section 1 (48).
8. Based on the foregoing findings of fact, the Court concludes that the Exacta System is a “pari-mutuel system wagering” as defined under 810 KAR 1:001, Section 1 (48) and authorized under the provisions of KRS Chapter 230:
  - (1) The Exacta System is a system of or method of wagering that has been approved by the Commission.
  - (2) In the Exacta System, patrons are wagering among themselves and not against the Association.
  - (3) In the Exacta System, wagers are placed in one or more designated wagering pools.
  - (4) In the Exacta System, the net pool is returned to winning patrons.
9. Therefore, as KRS 436.480 exempts pari-mutuel wagering authorized by the Commission, the Exacta System is not prohibited by KRS Chapter 528.
10. Despite the design of the Exacta System devices resembling “Vegas style slot machines,” the Court finds that the design of the device is merely for entertainment purposes and comports with the requirements of 810 KAR 1:001, Section 1 (48).

**FINAL JUDGMENT**

The arguments raised by the Respondent, the Family Foundation, are noble, moral, and altruistic, however, the arguments advanced by the Family Foundation fail as the Exacta machines are structured to operate in accordance with the pari-mutuel system of wagering. Furthermore, the Legislature has determined that historical racing machines are not gambling devices as long as they comport with pari-mutuel wagering.

**WHEREFORE**, based on the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ADJUDGED** that the Exacta System is a pari-mutuel system of wagering legally permitted under Kentucky law.

This order is final and appealable and there is no just cause for delay.

**SO ORDERED** this 24<sup>th</sup> day of October, 2018.



---

**THOMAS D. WINGATE**  
**Judge, Franklin Circuit Court**

**CERTIFICATE OF SERVICE**

24 I hereby certify that a true and correct copy of the foregoing Order was mailed, this day of October, 2018, to the following:

**Hon. Jay E. Ingle**  
**Hon. William A. Hoskins**  
**Hon. Christopher F. Hoskins**  
Jackson Kelly PLLC  
175 East Main Street, Suite 500  
Lexington, Kentucky 40507

**Hon. Stanton L. Cave**  
Law Office of Stanton Cave  
P.O. Box 910457  
Lexington, Kentucky 40591-0457

**Hon. John L. Forgy**  
Kentucky Horse Racing Commission  
4063 Ironworks Parkway, Building B  
Lexington, Kentucky 40511

**Hon Richard W. Bertelson, III**  
Office of Legal Services for Revenue  
P.O. Box 423  
Frankfort, Kentucky 40602-0423

**Hon. William M. Lear, Jr.**  
**Hon. Shannon Bishop Arvin**  
Stoll Keenon Ogden, PLLC  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507-1801

**Hon. Sheryl G. Snyder**  
**Hon. Jason Renzelmann**  
Frost Brown Todd, LLC  
400 West Market Street, 32<sup>nd</sup> Floor  
Louisville, Kentucky 40202

**Hon. Samuel D. Hinkle, IV**  
**Hon. Brad S. Keeton**  
Stoll Keenon Ogden, PLLC  
200 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202-2828

**Hon. Carmine G. Iaccarino**  
Public Protection Cabinet  
500 Mero Street, 5<sup>th</sup> Floor  
Frankfort, Kentucky 40601

  
**Amy Feldman, Franklin County Circuit Court Clerk**