IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NATIONAL HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ARIZONA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ARKANSAS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
INDIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
ILLINOIS HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
LOUISIANA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
MOUNTAINEER PARK HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
OKLAHOMA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
OREGON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,
PENNSYLVANIA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, AND
WASHINGTON HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

JERRY BLACK; KATRINA ADAMS; LEONARD COLEMAN; MD NANCY COX; JOSEPH DUNFORD; FRANK KEATING; KENNETH SCHANZER; the HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC.; the FEDERAL TRADE COMMISSION; REBECCA KELLY SLAUGHTER, in her official capacity as Acting Chair of the Federal Trade Commission; ROHIT CHOPRA, in his official capacity as Commissioner of the Federal Trade Commission; NOAH JOSHUA PHILLIPS, in his official capacity as Commissioner of the Federal Trade Commission; and CHRISTINE S. WILSON, in her official capacity as Commissioner of the Federal Trade Commission,

Defendants.

No. 5:21-cv-00071-H

RESPONSE BY DEFENDANTS JERRY BLACK, KATRINA ADAMS, LEONARD COLEMAN, NANCY COX, JOSEPH DUNFORD, FRANK KEATING, KENNETH SCHANZER, AND HORSERACING INTEGRITY AND SAFETY AUTHORITY, INC. TO PLAINTIFFS' NOTICE OF ACTIVITY BY THE HORSERACING INTEGRITY AND SAFETY, INC. AND FEDERAL TRADE COMMISSION

Defendants Jerry Black, Katrina Adams, Leonard Coleman, Nancy Cox, Joseph Dunford, Frank Keating, Kenneth Schanzer, and the Horseracing Integrity and Safety Authority, Inc. ("Authority") hereby respond to Plaintiffs' Notice of Activity by the Horseracing Integrity and Safety Authority, Inc. and Federal Trade Commission. ECF No. 70 ("Notice").

Plaintiffs contend that "recent actions" by the Authority and the Federal Trade Commission ("FTC") "negate any argument that the case is not ripe for adjudication or that Plaintiffs lack standing." Notice 2-3. But the Notice actually confirms the opposite conclusion: This challenge is not justiciable. Far from promulgating final, enforceable regulations that have any legal effect, the Authority and FTC have published merely (in Plaintiffs' own words) a "*proposed* regulation for the racetrack safety program" and a "*proposed version* of the anti-doping and medication control regulation." *Id.* (emphases added). As stated in the press release that Plaintiffs attached, the draft racetrack safety standards the Authority has proposed remain subject to FTC "review, public comment and final approval," and the Authority "continue[s] to evolve and refine" draft anti-doping and medication control standards, which have not yet even been submitted to the FTC. *Id.*, Ex. C, at 1.

The FTC's recent notice of the proposed racetrack safety rule reinforces that the rulemaking process is nascent and ongoing: the agency must still "evaluate the proposed racetrack safety rule for its consistency with the specific requirements, factors, standards, or considerations in the text of the Act as well as the [FTC's] procedural rule"; expressly "seeks public comment on whether the [FTC] should approve or disapprove the proposed rule"; and reiterates that the draft rule may "take effect only if approved" and promulgated by the agency. 87 Fed. Reg. 435, 435, 444 (Jan. 5, 2022) (Notice, Ex. D). Plaintiffs themselves stressed the tentative nature of the regulatory framework in a comment submitted to the FTC the day after filing their Notice in this Court, arguing that it is "impossible" at present to know "whether [the proposed racetrack safety

standards] are consistent with HISA" given "the yet-to-be-submitted anti-doping and medication rules" and related issues that "remain unexamined." Letter from Eric J. Hamelback, CEO of The Nat'l Horsemen's Benevolent and Protective Ass'n, to Hon. Lina Khan, Chair, FTC 2 (Jan. 19, 2022).[1]

Indeed, Plaintiffs' Notice underscores that the regulatory scheme is even less certain now than it was last year. Plaintiffs emphasize that "the Authority announced its proposed implementation for the anti-doping and medication control program." Notice 3. But Plaintiffs omit that those draft standards were based on the involvement of the U.S. Anti-Doping Agency ("USADA"). *See id.*, Ex. E, at 1. Just a few weeks ago, "the Authority and [USADA] announced they were suspending negotiations for USADA to implement the Authority's anti-doping and medication control program." *Id.* at 3 n.6; *see id.*, Ex. G ("After months of negotiations, we have been unable to enter an agreement in line with the requirements of the Act[.]"). The Authority thus intends to enter into an agreement with another organization "to act as the anti-doping and medication control enforcement agency under [the Act] for services consistent with the horseracing anti-doping and medication control program." 15 U.S.C § 3054(e)(1)(B). Accordingly, the "proposed version of the anti-doping and medication control regulation" that Plaintiffs cite and reproduce, Notice 3; *see id.*, Ex. F, will be reconsidered and revised given that establishment of the anti-doping and medication control enforcement agency is a necessary antecedent to the development and proposal (and implementation) of various standards, *see, e.g.*, 15 U.S.C. §§ 3054(e)(1)(E), 3055(c)(4)(A), (g)(3)(A), 3057(b)(1). Even assuming the FTC ultimately approves and promulgates prospective rules, Plaintiffs' assumptions about their content, their

[1] https://www.regulations.gov/comment/FTC-2021-0076-0017.

effective date, and the alleged future harm they may impose require just as much—if not more—conjecture today as when briefing closed.

Plaintiffs also point out that "the FTC issued its procedural rule governing how rules proposed by the Authority shall be submitted to the FTC." Notice 2. But that new (procedural) rule only illustrates that adjudicating Plaintiffs' claims before the FTC has a chance to administer the Act in the context of a concrete (substantive) rule would deprive the Court of valuable agency guidance by "necessarily prematurely cut[ting] off [the agency's own] interpretive process." *Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005). For example, the FTC's rule undermines Plaintiffs' central assertion that the Act necessarily relegates the agency to a "purely ministerial" function of "rubberstamping" Authority recommendations. ECF No. 23 ¶ 82; ECF No. 38, at 17; *see* 86 Fed. Reg. 54,819, 54,822 (Oct. 5, 2021) (Notice, Ex. B) (requiring an "adequate basis for the [FTC's] review" by insisting that the Authority provide, *inter alia*, "sufficiently detailed" analysis of why a proposed standard is "warranted and if so, what provisions the rule should contain"; a discussion of "any problems the proposed rule or modification is intended to address and how the proposed rule or modification will resolve those problems"; and an explanation of "how the proposed rule or modification will affect covered persons, covered horses, and covered horseraces").

Respectfully submitted,

/s/ Pratik A. Shah

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January 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2022, I served the foregoing document upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ Pratik A. Shah
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