

P.O. Box 2460
443 Mechem Drive
Ruidoso, New Mexico 88355
Telephone: 575-257-3070

Fax: 575-257-3171
gmitchell@zianet.com
www.gmitchelllaw.com

November 16, 2021

Denise Chavez
DeniseM.Chavez@state.nm.us

Richard Bustamante
New Mexico Racing Commission
4900 Alameda NE – Suite A
Albuquerque, New Mexico 87113

Re: *New Mexico Racing Commission Proposed Rule Changes at November Meeting*

Dear Mr. Bustamante, Ms. Chavez and Members of the New Mexico Racing Commission:

I, Gary C. Mitchell, attorney for the New Mexico Horsemen's Association [hereinafter NMHA], advise you of NMHA's position on certain proposed rule changes under consideration by the New Mexico Racing Commission [hereinafter NMRC] at its November 18, 2021 meeting.

I preface the NMHA's statement and objections with the following:

First, we are involved in extensive litigation. It is always best to attempt to resolve litigation by coming together and reasoning through open dialog. The NMHA has never refused to discuss resolution of all issues via settlement negotiations. In fact, we have extended deadlines in a good faith attempt to seek resolution.

Second, many of the proposed rule changes have a direct impact on the NMHA, in particular NMHA's contributions, NMHA's monetary viability to continue to care and protect the gaming monies and the removal of the NMHA to participate in certain activities, which by nature, custom, practice and necessity, the NMHA has advocated for their members [for example, eligibility and conditions, as well as protecting evidence via split sample testing].

Third, it is evident many if not all the proposed rule changes regarding the NMHA are retaliatory and meant to destroy the greatest and largest advocacy group appearing before you.

Fourth, these rule changes that are specific to the owners/horsemen and the NMHA are unnecessary and accomplish nothing relating to a possible resolution of the current issues between the NMRC and the NMHA. In fact, quite the opposite. Said rule changes clearly say to the NMHA the NMRC is not amenable to any resolution other than the total and complete destruction of the NMHA.

Fifth, should the NMRC wish to act in good faith and attempt resolution of the cases we are in litigation over, the NMRC should either not pass the offending rule changes or stay any consideration until good faith negotiations and resolutions have been attempted.

Sixth, passage of the offending rule changes are contemptuous of a District Court order and if the NMRC continues such conduct in the passage of these rule changes, appropriate motions seeking from the District Court orders finding the NMRC in contempt will be filed and litigated. Furthermore, relief will be sought in the Federal Court litigation and complaints will be filed with the New Mexico Ethics Board.

**STATEMENT AND OBJECTIONS TO PROPOSED RULES CHANGES ON BEHALF
OF THE NEW MEXICO HORSEMEN'S ASSOCIATION**

The NMHA has reviewed the rule changes the NMRC proposes. The NMRC proposes certain changes to the following cited rules: They are as follows:

15.2.1.7M
16.47.1.12D
15.2.6.10D
16.47.1.10A
15.2.6.9C
15.2.6.8B
15.2.3C
15.2.3D
15.2.1.9B

I. Introduction:

The New Mexico Horsemen's Association (hereafter "NMHA") objects to certain rule changes proposed by the current New Mexico Racing Commission (hereafter "NMRC"). Most blatant and deliberately retaliatory are the proposed changes to **Subsection C of 15.2.3.8 NMAC and Subsection D of 15.2.3.8 NMAC**. The proposed changes are not necessary, do not fulfill a need and are not in the best interest of horse racing and/or gaming in the State of New Mexico. Indeed, the proposed changes are based upon a series of fabrications and misstatements as part of an illegitimate campaign of retaliation against the NMHA by the present NMRC.

II. Proposed change to Subsection C of 15.2.3.8:

The justification stated by the NMRC for changing this rule is “...*to provide associations greater authority to comply with national requirements for improving and maintaining integrity in horseracing....*”. This stated justification is no justification at all and the change does nothing to “improve and maintain integrity.” In fact, the only change is to weaken oversight and participation regarding integrity in horseracing by removing the NMHA. There is no way in which removing the NMHA improves or maintains integrity, indeed, the reality is such removal will weaken integrity for horseracing in New Mexico. In sum, the truth, which seems to be an illusory concept to this current NMRC, is that this change is but part and parcel of the retaliatory attack on the NMHA and the concerted effort to remove them from their role in serving and protecting horseracing in New Mexico.

III. Proposed change to Subsection D of 15.2.3.8:

The stated justification for this rule change is “...*to further ensure compliance with the legislative required mandate for the Commission to regulate the size of purses.*” However, this proposed rule change highlights the dishonest if not corrupt true goal of the NMRC, which is to silence and remove the NMHA so the NMRC can continue questionable, if not illegal, activities unabated and without the objections of the NMHA. The change as proposed does nothing to regulate the size of purses. It is simply a portion of the string of fictitious lies and false statements created by commissioners. The funds distributed post-races are what is at issue, specifically the eliminating of direct payment of certain contributions from the race winnings to NMHA. The size of the purses will not change, in fact, and to be clear, since the NMRC started implementing this practice, without the rule changes, there have been zero (0) increase in purse sizes.

IV. The changes are not practical, not necessary, serve no proper goal and are in violation of New Mexico law:

It is clear that actions by the NMRC in proposing these changes are only to silence and eliminate the NMHA in response to the NMRA raising concerns about the propriety/legality, or lack thereof regarding the conduct of the NMRC. Therefore, these proposed rule changes should be rejected for the following reasons:

- i. The claim that they will somehow increase purse size is false. The NMHA contributions/deduction at issue, occur post-race, post purse split from winning. No funds have ever been taken from a “purse” so as to decrease the purse shared by the various racers. If a purse was one million dollars, under the prior system in

place, the racing participants split the million, and THEN, out of a given racer's share, he or she had certain payments/deductions made for contributions to the NMHA. Now that NMRC has targeted the NMHA deduction, the only change is to interfere with their membership contributions, not a single purse has increased at all under the NMRC's actions and newly implemented contemptuous policy against the NMHA.

Further, and critical to note, the de-funding of the NMHA will result in their inability to provide the roughly \$400,000 in services they provide, free, at no charge, each and every year (from these very member deductions/contributions). It is ironic to note, that if the NMRC is successful in removing the NMHA from its important role, the NMRC will have to pay a new third party to come in, administer and conduct these functions. This will no doubt cost much more than the \$400,000 the NMHA spends to accomplish this task. Here, the NMRC seeks to eliminate the NMHA funding, which will eliminate the NMHA from providing \$400,000 in services, at absolutely no charge to the NMRC, the State or the taxpayers. The irony is to replace the NMHA, which will be required if the NMRC's illegal plan succeeds, the NMRC will need to acquire an amount anywhere from \$500,000 to \$800,000 in funding for each and every fiscal year to address what the NMHA has done on a pro bono basis for decades. This is truly ironic given that one the other proposed rule changes included with the two at issue here, is to Subsection A of 16.47.1.10 NMAC. This rule change seeks to eliminate the continuing education program for trainers, for the unbelievable reason "*...because the State of New Mexico Racing Commission currently lacks the resources...*"

Therefore, the NMRC, on one hand is so lacking in funds that it can no longer provide the very minimal support required to fund the trainers' education program, that it is willing decimate and ultimately kill this program and at the same time destroy the NMHA funding and face the financial exposure of replacing the NMHA, who has been a fastidious steward of horseracing funds, to the tune of \$500,000 to \$800,000 per year. The result of these changes? There will be no increase in purse size! There will be no maintaining of racing integrity! And, in fact, clearing the \$500,000 - \$800,000 replacement costs will come from either additional funding from taxpayers, or more likely, as is the NMRC's real goal, the REDUCTION of purse size as the first step in the destruction of horse racing in the State of New Mexico.

- ii. The NMRC proposed rule changes fly in the face of a Court order. On August 6, 2021, the District Court entered its "Order Granting Appellant New Mexico

Horsemen's Association's Motion to Stay Decision of the New Mexico Racing Commission During the Pendency of This Appeal." The Court ordered that the NMRC order impacting funding of the NMHA, 20210COMM-11 is "hereby stayed." In other words, the Court has already said to the NMRC do NOT proceed with your current action. The response to the Court's Order by the NMRC is to attempt to change an administrative rule. This rule is not a law, the legislature makes laws and the Court interprets laws. Therefore, the NMRC now on notice and additional legal actions will immediately arise should these rule changes be made!

- iii. The rule changes further curtail and will stop the benevolent works of the NMHA. The "starter's fee" of \$5.00 is used to fund benevolent works the NMHA provides to its membership, some of whom are either sitting members of the NMRC and/or their families. In particular, the NMHA has kept this money in a separate account, used it for such benevolent purposes as defraying the cost of prescription drugs, medical and medically related expenses. Since 1966, the NMHA has given millions of dollars toward benevolent acts to care for its members, especially health-care benefits. The NMRC, with passage of these new rules, will not only act in an illegal manner, an unethical manner, but now, in an immoral manner.
- iv. These proposed rule changes are arbitrary and capricious, in that they serve no legitimate interest or goal. To be clear, they are proposed as part of a much larger series of trends and patterns of abusive conduct by the NMRC directed towards silencing critics, in this case the NMHA.

V. Conclusion as to the proposed Subsection C of 15.2.3.8 NMAC and Subsection D of 15.2.3.8 NMAC rule changes:

In sum:

- The proposed rule changes are unnecessary and right no wrong;
- The factual basis for the proposed rule changes are false if not completely fabricated by this NMRC;
- The proposed rule changes will harm, as it is intended, the NMHA;
- The proposed rule changes serve no legitimate legal or economic ends;
- The proposed rule changes are in violation of a standing Court order;
- The proposed rule changes are retaliatory as regards the NMHA;
- The proposed rule changes will result in the need to spend hundreds of thousands of dollars per year to obtain the services the

NMHA will no longer be able to provide and which it has provided for decades at no charge to the State, the NMRC or New Mexico race tracks.

VI. 15.2.1.7M

NMRC attempts to redefine a race meeting. The Commission defines a “Meeting” as the entire period of consecutive days that an association which is issued a racetrack license is authorized by the commission to conduct live racing and simulcasting. The Commission shall determine the beginning and end dates of the race meet as well as the dates in which live racing will be conducted with the determined consecutive days. Here, immediately noted is the fact the NMRC is attempting to avoid and evade the statutory requirements of *NMSA § 60-2E-27. Gaming operator licensees; special conditions for racetracks; number of gaming machines; days and hours of operations.*

It is patently obvious the NMRC intends to shorten actual live race meets by its proposed rule change because simulcasting equates to running a meet and therefore, compliance with the statute.

The Commission inserts simulcasting within its proposed changes which means every track can simulcast year round. This appears to be an attempt on the part of the NMRC to decouple live horse racing from simulcasting, which I will note has taken place in other jurisdictions and ultimately will allow race tracks, once their licenses are no longer dependent on the existence of live racing, to eliminate, or at best, extremely limit the amount of live racing from their casino operations. The NMHA opposes this proposed action by the NMRC. The proposed rule change will provide an open door to the decoupling as well as the continuous shortening of meets with live racing in New Mexico. The fear the NMRC is attempting to end horse racing as New Mexicans know it, is clearly evident by this rule change.

VII. 16.47.1.12 (D)

This rule impacts jockeys who have medical conditions which require prescribed, prohibited or controlled substances. On first blush, this proposed rule appears a good thing until the jockey tries to obtain a licensed physician, physician assistant or nurse practitioner to certify there is no impact. First, Doctors fear liability guaranteeing a certain performance. Second, such a certification is very expensive. Third, most competent and ethical doctors or licensed medical providers will provide no such guarantee, except the patient must rely on the information provided by the issuing pharmacy and follow all guidelines within the massive document we receive considering the effects of a certain prescription. Such a guarantee or “certification” is an invitation for a lawsuit against the doctor or medical provider. No lawyer would ever

recommend a Doctor, Physician's Assistant (PA) or Nurse Practitioner (NP) provided this "certification".

More appropriately and the better rule is the jockey to submit the pharmacy warnings regarding the prescription and that document controls.

The bottom line is the jockeys are still going to have to forego appropriate medicine. The NMHA must oppose this proposed rule change as the requirement of a Doctor's certification is at best burdensome, as well as costly and impractical. On the other hand, if a physician is the team Doctor for the Houston Astros or other professional sports team and receives a six figure salary, he or she may consider providing a "certification", however, most jockeys do have their own private, exclusive "team" Doctor.

VIII. 15.2.6.8

Here, the veterinarians who are in the same position as jockeys and will have the same issues with this proposed rule change, except most veterinarians are older and not in the same shape as jockeys, thus taking a prescribed drug is not unusual. If the veterinarian offends the Commission, a racing official, a trainer or owner beware a drug test and removal. The proposed rule change clearly demonstrates how tyrannical the NMRC has become. Should the NMRC not like an out-spoken veterinarian, given this proposed rule change, the NMRC will have the perfect opportunity to remove and again chill the free speech of veterinarians. Given this proposed rule change, the chance of any veterinarian being authorized to practice on the tract by obtaining a physician's "certification" of his or her personal and professional performance while taking prescribed medication is diminished.

IX. 15.2.6.D. (10)

The NMRC proposed rule eliminates the option of split samples necessary to make a case. Here, all that is needed, it appears, is the certificate of analysis from the official laboratory regarding the post-race test which shall be considered prima facie evidence that the specific drug substance etc. is in the horse's body while participating in a race. Again, the NMHA opposes. The bottom line, are we really to believe there will be actual effort, with fidelity, to collect and preserve a sample sufficient for testing by the owner or trainer? The rule should be, if there is an insufficient sample for there to be a split sample, then no finding and case dismissed. The proposed rule constitutes a major Due Process violation or at least an issue of fairness.

X. 16.47.1.10A

Trainers will no longer have to have continuing education. Should you be off for six months [not run a horse] then you must retest or interview before the board of stewards. The NMHA has no position on this proposal. However, it is ironic the major reason for this rule change appears to

be the NMRC's lack of funding and clearly demonstrates a lack of foresight on behalf of the commission in implementing their overall mission and duty to citizens of New Mexico.

XI. 15.2.6.9. C

Eliminates the New Mexico Horsemen's Association from having any participation in setting eligibility conditions that prohibit the use or presence of drug substances or medications. Here, this proposed rule changes nothing but retaliation by the NMRC against the NMHA and will be used as further evidence and demand for damages in our lawsuit. The new rule would do away with the vital and extremely important participation and consent of the NMHA. The retaliation is clearly blatant given the key change is "as agreed to with the acknowledged horsemen's organization" being struck. This proposed action by the NMRC is a direct attack on a primary responsibility of the NMHA, i.e., to protect the horsemen of this state.

XII. 15.2.3.8 C. (4) (b)

The Horsemen are removed from any consideration of conditions based on a participating horse's use or non-use of a drug substance or medication. The new rule would do away with the vital and extremely important participation and consent of the NMHA. Here, the retaliation blatant and evidenced in the language "as agreed to with the acknowledged horsemen's organization" being struck. Again, this is a direct attack on a primary responsibility of the NMHA to protect the horsemen of this state.

XIII. 15.2.1.9 B. (9)

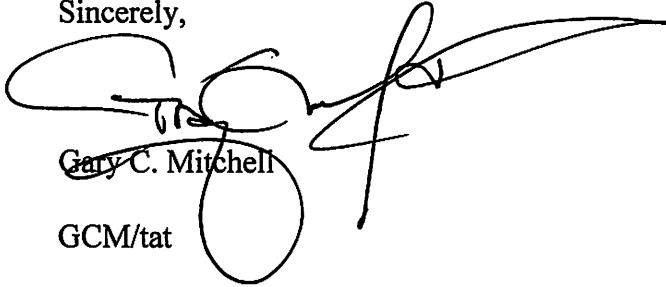
This proposed rule change increases the fee for appeal from \$500 to \$1000. The fee was outrageous as well as onerous to begin with, and now the NMRC seeks to double it with no ability for an individual to recoup the funds should the appeal be successful. The increase presents a real and palatable economic hardship to those trainers and owners of modest means with a small number of horses in their care. Horse racing in New Mexico should be welcoming the owner/trainer of one horse just as much as they welcome the owner/trainer of one hundred horses. After all, it is New Mexico horseracing and New Mexico citizens involved. However, the NMRC appears to have forgotten its people as well as our industry's grass roots beginnings and now prefers to cater to the rich and powerful.

XIV. CONCLUSION

The Horsemen oppose the rule changes as noted above. Most importantly, the vast number of the proposed rule changes is designed to retaliate against the NMHA. The changes restrict contributions to the NMHA, as well as reduce or prohibit the participation of the NMHA as an advocate for their members, and while the commission continues its on-going attempt to destroy the NMHA as the largest benevolent organization supporting horseracing in New Mexico.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary C. Mitchell', with a large, sweeping flourish extending to the right.

Gary C. Mitchell

GCM/tat

Cc: NMHA