FILED
Court Administrator

JUN 23 2011

By ______ Deputy

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: CIVIL

Court File No. 62-cv-11-5203

Judge: Kathleen Gearin

In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota

MINNESOTA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION'S NOTICE OF MOTION AND MOTION TO INTERVENE OR FILE AMICUS CURIAE BRIEF

I. PARTY

The Minnesota Horsemen's Benevolent and Protective Association ("MHBA") is the organization that represents thoroughbred race horse owners and trainers in the State of Minnesota. Their members are presently participating in the race meet being held at Canterbury Park.

II. INTERVENTION OR APPROVAL TO SUBMIT AN AMICUS CURIAE BRIEF IS WARRANTED

A. Under Minn. R. Civ. P. 24.01, MBPA is Entitled to Intervene as a Matter of Right

As a preliminary matter, MHBPA has standing to intervene as a representative of its members whose interests are at stake in this action. *See, e.g., Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011).

The right of intervention is well-recognized under both principles of law and equity. *See Faricy v. St. Paul Inv. & Sav. Soc*, 110 Minn. 311, 125 N.W. 676 (1910). Minn. R. Civ. P. 24.01 permits intervention in this action as a matter of right if MHBA's members claim an interest relating to the subject matter of the action and MHBPA is so situated that it may not be able to adequately protect that interest without being a party. Minn. R. Civ. P. 24.01.

Minnesota courts construe and apply Rule 24 liberally to encourage intervention. *Nash* v. *Wollan,* 656 N.W.2d 585, 591 (Minn. App. 2003). Courts apply Rule 24 liberally to further its purpose of protecting nonparties from having their interests adversely affected by litigation conducted without their participation. *See Id.*

MHBPA's right to intervene is governed by a four-factor test:

1. Timely application for intervention;
2. An interest relating to the property or transaction which is the subject of the action;
3. Circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and
4. A showing that the party is not adequately represented by the existing parties.

Luther v. Luther, 596 N.W.2d 278, 280-81 (Minn. App. 1999).

III. FACTS

1. The Governor's filing in this Court has indicated that he believes that regulatory functions that are paid for by existing or standing appropriations still need to be shut down.
2. The personnel performing some of these functions, such as the staff of the Minnesota Racing Commission, have been given lay-off notices.
3. MHBPA members are licensed and have prepaid for the regulatory services in question. The racetrack involved has also prepaid all of its card club regulatory expenses and for the stewards, veterinarians and drug testing. This money has been paid to the Racing Commission, which deposited the funds, which then, by operation of Minnesota Statute 240.155, subdivision 1, are appropriated back to the Racing Commission.

4. MHBPA members expend enormous amounts of money in order to race their horses at race meets like the one at Canterbury Park.
5. Choosing one facility at which to race excludes the possibility of racing at other facilities during that time. Transport of horses is very expensive and time consuming.
6. If the race meet is suspended due to the inability of the Minnesota Racing Commission to perform regulatory services, the 2011 race meet will be destroyed, MHBPA members will suffer great damage and the reputation of the Minnesota race meet will be permanently blemished and future race meets will be jeopardized.
7. Members of the MHBPA have prepaid for government regulatory services prior to the beginning of this race meet.

IV. ACTION REQUESTED

MHBPA requests to intervene in the Attorney General's Petition for the purpose of seeking an order that would include authority for a Special Master, if appointed, to consider and make recommendations on allowing the continued funding of regulatory activities that are already funded and/or subject to a statutory standing appropriation.

V. LEGAL ISSUE

Shutting down the racing and card club activities is unnecessary because the funds for these activities have already been appropriated by the Legislature.

VI. ARGUMENT AND AUTHORITIES

The Minnesota Constitution provides that "[n]o money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const. Art. XI § 1. The Minnesota Racing Commission is self funded by license fees and other assessments (see Minn. Stat. § 240.155, subd. 1. The language of Minn. Stat. § 240.155 subd. 1, includes a perpetual appropriation. Therefore, even without a budget beyond June 30, 2011, absent amending or

repeal of Minn. Stat. § 240.155 subd. 1, the legislature has appropriated these funds to cover all of the government costs of the card club. The statutory steps to ensure the Minnesota Racing Commission activities are properly regulated have also been taken.

Regardless of the looming shut down, the MRC has adequate authority and full, legislatively-authorized funding to continue operating for the foreseeable future, including through the present race meet. Furthermore, having paid for these services, the licensees are entitled to receive them. By accepting this money, the state has entered into an implied contract which they would now be violating. Many people, in reliance on this contract, moved their operations to Minnesota for the race season and they will be seriously damaged. Furthermore, with the state's knowledge and approval, the track has entered into interstate agreements regarding sending and receiving simulcast races with other states, pursuant to M.S. 240.13, subd. 6 and the Interstate Horse Racing Act of 1978, U.S.C. Title 15, §§3001-3007. Shut down would require the licensee to breach these contracts and would negatively affect interstate commerce. Lastly, the Minnesota State College System MNSCU is apparently going to be allowed to continue operations because of its "statutory and practical financial autonomy." The racing and card club activities are clearly autonomous practically because they are self-funded, and also statutorily because of the statutory appropriation.

Even if the funding is not currently appropriated for card club and racing activities, title to this money is never vested in the state and does not rightfully belong to the general revenue fund of the state and Article XI, Section I of the Minnesota Constitution is therefore inapplicable.

The Minnesota Constitution provides that "[n]o money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const. Art. XI § 1. The purpose of this prohibition was intended to prevent the expenditure of the people's money

without their consent first had and given. *State ex rel. Nelson v. Iverson*, 145 N.W. 607 (Minn. 1914). In *State v. Iverson*, the Minnesota Supreme Court held Article XI, Section 1 to be inapplicable to the issuance by the State Auditor of a warrant on the state treasury for the distribution of the gross earnings tax imposed upon and collected from suburban railroad companies, as authorized by law. 145 N.W. 607, at 67. In *Iverson*, a railroad company was subject to the payment of a gross earnings tax, in lieu of other taxes, as provided by law. The tax was paid to the state treasurer and by the governing statute became the property of and was distributed to the municipalities and taxing districts through which the line of railroad extended. The statute provided that the money was to be apportioned by the State Tax Commission to the different municipalities as nearly as may be in accordance with the earnings of the company in each. The county auditor reported the percent of the state tax assessed in these municipalities, and then demanded the State Auditor issue a warrant on the state treasury for the amount of the earnings tax due that county. The State Auditor refused to issue the warrant, arguing that Article 9, Section 9 (now Article 11, Section 1) of the Minnesota Constitution required a legislative appropriation of the money before he could take such action. *Id.* at 70.

The Court held that the statute imposing the tax and providing for its apportionment, construed in the light of the obvious intention of the Legislature, did not vest title to the money raised in the state, and the money did not belong to the general revenue fund of the state. Therefore, Article XI, § 1 did not apply. The court reasoned that the Legislature, "by the statute imposing this tax expressly and in so many words require[d] that it be apportioned and distributed," and any further legislation upon the subject would "amount to nothing more... than a repetition of the purpose already declared [by the Legislature]." The Court also declared that the situation would have been different had the statute justified the conclusion that the tax, upon

payment, becomes the property of the state, and a part of its general revenue fund. *Id.* at 70.

Minnesota Statute § 240.155, subd. 1, does not simply require perpetual, it expressly states that the funding *is* appropriated. (cite). The remaining funding collected for licensing fees pursuant to 230.10 is placed in a special fund separated from the general fund. With regard to these funds, the legislature, by statute in so many words required that this funding be apportioned and distributed only toward activities regulated by the MRC. Therefore, as in *Iverson*, any further legislation upon the subject would amount to nothing more than a repetition of a legislative purpose already declared.

The holding in *Iverson* has been consistent with other state supreme courts interpreting Constitutional provisions identical to Article XI, § 1. In *State v. Pape*, the court held that funds collected by statute from assessments on private forest lands for fire protection are not "public funds" controlled by (a Constitutional provision nearly identical to Article XI Section 1), but are trust funds to be retained and disbursed by the state forester without deposit in the state treasury and without further appropriation. 103 Wash. 319 (Wash. 1918). The statute required the state forester to pay the assessments if a private landowner would or could not do so, but did not explicitly provide for an appropriation for the state forester to pay these funds. The relator provide funds to the state forester, arguing that an appropriation had to be made. The Court rejected this argument, and was "firmly convinced that, under the action in question, the state forester is but an agent designated by the law to carry out the legislative will. It was the manifest intent of the Legislature to provide for adequate protection of the forest lands from fire against the negligence or willfulness of any forest landowner, and to compel the reimbursement of such cost, to the limit specified by the person so protected." The Court found that it was unnecessary for the statute to explicitly provide for an appropriation, and stated, "[i]t is sufficient if the

legislative intent to make an appropriation clearly appears expressly or by implication from the terms of the statute. No arbitrary form of expression is dictated by the Constitution, and none should be required. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation."

Also of note considering the Governor's reasoning for exempting state universities from a shutdown, the *Pape* Court compared the moneys to student fees and rents obtained through the state university, which were held in a previous case (Johnson v. Clausen 51 Wash. 548) to not be 'state finances' under the act in question, although the university was a state institution.

In *Board of Regents of Higher Ed. V. Judge* 168 Mont. 433 (Mont. 1975), the court held that the legislative appropriation power extends beyond the general fund (which it was held to be limited to in a previous Montana case) and encompasses all public operating funds of state government. However, the court emphasized that the power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement or contract.

Under the circumstances of that case, the university funds were considered public operating funds. The horse racing statute calls for perpetual appropriation (for most of the activities at the track and in the card club), and the funding comes from private sources. Thus, these are private funds received by state government which are restricted by law, trust agreement or contract.

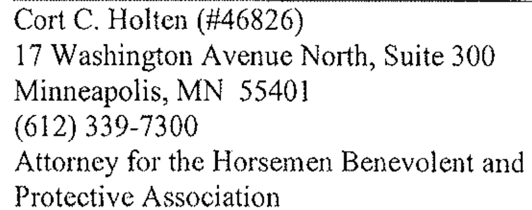
The Governor also recognized the binding power of a statute mandating continuing appropriation in his response to the petition of the Attorney General. The Governor based his power to spend federal funds on Minnesota Statute § 4.07, a continuing appropriation enacted by the Legislature authorizing the Governor to spend federal funds received by the State.

VII. REQUEST FOR RELIEF

The MHBPA requests that, if a Special Master is appointed in this matter, the order include a provision that the Special Master may consider and make recommendations on the continuation of regulatory activities that are already funded and are subject to a statutory continuing appropriation or are subject to special revenue accounts dedicated to those functions. The Minnesota Racing Commission has indicated that it agrees with the statements and conclusions of this Petition (see attached).

DATED: June 23, 2011

CHESTNUT CAMBRONNE, P.A.



By: ______________________________

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2010 Minnesota Statutes

240.155 REIMBURSEMENT ACCOUNTS AND PROCEDURES.

Subdivision 1. **Reimbursement account credit.** Money received by the commission as reimbursement for the costs of services provided by veterinarians, stewards, and medical testing of horses must be deposited in the state treasury and credited to a racing reimbursement account, except as provided under subdivision 2. Receipts are appropriated to the commission to pay the costs of providing the services.

Subd. 2. **General fund credit.** Money received by the commission as reimbursement for the compensation of a steward who is an employee of the commission for which a general fund appropriation has been made must be credited to the general fund.

History: 1Sp1985 c 10 s 84; 1991 c 233 s 92; 1995 c 254 art 1 s 73; 1Sp2003 c 1 art 2 s 72

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MINNESOTA RACING COMMISSION

RESOLUTION OF THE MINNESOTA RACING COMMISSION

WHEREAS, as of June 20, 2011, the Legislature of the State of Minnesota and the Governor have yet to agree on a state budget for the biennium beginning on July 1, 2011; and

WHEREAS, if laws appropriating money are not enacted prior to July 1, 2011, agencies performing executive functions that are (1) not "core or essential services," which (2) require money from the state treasury pursuant to a legislative appropriation (Article XI, Section 1, Constitution of the State of Minnesota), will not be able to spend money on these non-core, unappropriated services; and

WHEREAS, because of this, it has been suggested that the licensed horse racing and card club activities in Minnesota would be required to cease all operations; and

WHEREAS, in response to this situation, the Minnesota Racing Commission adopts the following:

FINDINGS OF FACT

1. That the Minnesota Racing Commission is required by law, pursuant to Minnesota Statutes, section 240.03, to perform certain functions and provide numerous services related to horse racing and card club activities in Minnesota.

2. That one of the powers and duties of the Minnesota Racing Commission is to impose fees on the racing and card club industries sufficient to recover the operating costs of the Commission and, if appropriate, when the Legislature is not in session, adjust those fees or create new ones with the approval of the Commissioner of Management and Budget.

3. That the Commission has the power and the duty to require racing licensees, in addition to paying general costs, to pay for the costs of providing the services of stewards, drug testing and veterinarian and that, once collected, these fees are appropriated to the Commission by an act of the Legislature under Minnesota Statutes, section 240.155, subdivision 1.

4. That the Commission has the power and duty to require the card club licensees to pay for all of the Commission's costs, including personnel costs for regulating the card clubs and that, once collected, these fees are appropriated to the Commission, pursuant to an act of the Legislature under Minnesota Statutes, section 240.155, subdivision 1.

5. That the Commission has the power and the duty to require class A and class B licensees to pay racetrack, horse racing, simulcasting and card club fees intended to cover all of the operating costs of the Commission.

6. That all payments to the Commission by licensees are made with the understanding and reliance that the licensees will receive the services for which the payments were made.

7. That the Commission has appointed stewards and judges for the 2011 races meets, which meets are presently underway. Once appointed, those

stewards and judges have the authority and duty to preside over and supervise the racing, to enforce the rules and laws, to settle disputes and to perform any other duties and exercise any other power assigned to them by the Commission under Minnesota Statutes, section 240.16.

8. That card club licensees are required to hold a class B license with card club authorization and to file, for approval by the Commission, a detailed plan that covers all aspects of card playing activities, including security and surveillance. Once the licensee's plan of operation has been approved, the licensee becomes responsible for supervision of card-playing activity.

9. That presently, and for the foreseeable future, the Commission has adequate, legislatively-approved funds to provide at least the minimum services necessary to provide regulatory oversight to allow the continuation of all scheduled race meets and to continue card club activities.

10. That suspending the race meets and card clubs, even temporarily, is unnecessary, especially in light of the fact that the Commission is funded entirely by licensee fees, and any such suspension would not promote the integrity or viability of horse racing in Minnesota.

11. That suspending the scheduled race meets or the card clubs, even temporarily, would be contrary to the basis upon which the Commission collected license fees and other payments.

12. That suspending the race meets, even temporarily, would most likely destroy the 2011 season and imperil future meets.

13. That if race tracks in the State are forced to close, approximately 1700 current employees will be out of work.

14. That in excess of 3,000 individuals participating in horse racing activities at these two tracks (such as horse owners, trainers, grooms, jockeys, and associated workers and professionals) will be out of work due to the closings.

15. That the national reputation for horseracing in Minnesota will be substantially harmed if the tracks are closed. The negative impact of a closing will be far-reaching and lasting; because many horse owners will choose to avoid Minnesota as a future venue for racing their horses.

16. That the race tracks in the State generate many millions of dollars in taxable revenues to the surrounding areas each year, and the closing of the tracks will negatively impact not only area businesses, but rural agribusiness in greater Minnesota. In addition, revenues from racing and card playing generate taxes that go into the general fund (e.g. income taxes, corporate taxes and breeders fund taxes).

17. That the Fourth of July Weekend is the busiest and most important weekend of the racing season. If the tracks are closed that weekend, due to a government shut-down, it will have a devastating financial impact on the tracks and will set back horse racing in the State of Minnesota.

RESOLUTION

Based upon the foregoing Findings of Fact, the Minnesota Racing Commission resolves as follows:

1. WHEREAS, thousands of licensees have already paid the Commission for services relied upon for conducting horse racing and card club activities.
2. WHEREAS, the Commission accepted these license revenues in order to have the funds necessary to perform these services.
3. WHEREAS, shutting down racing will undoubtedly cause trainers and owners to leave Minnesota race tracks to pursue racing opportunities elsewhere, perhaps never to return.
4. WHEREAS, shutting down racing will cause all existing interstate simulcasting contracts to be breached.
5. WHEREAS, shutting down racing and card clubs would cause 1,700 people on the front side of Minnesota race tracks and 3,000 people on the back side to lose their jobs, while vendors and suppliers also will suffer substantial, unnecessary losses.
6. WHEREAS, shutting down racing has the potential to cause millions of dollars of damage to the Minnesota horse racing industry.
7. WHEREAS, adequate, legislatively-appropriated funding and supervision exist to perform the necessary government functions related to conducting a race meet, pursuant to Minnesota Statutes, sections 240.16 and 240.155, subdivision 1.

8. WHEREAS, adequate, legislatively-appropriated funding and supervision presently exist to perform the necessary government functions related to conducting and regulating card club activities, pursuant to Minnesota Statutes sections 240.30, subdivision 9; 240.155, subdivision 1; and 240.30, subdivision 2.

9. WHEREAS, all funds necessary for the Commission to function and operate for the remainder of the racing season have been or will be collected solely from fees generated by licensees and will not be dependent upon general funds.

NOW, THEREFORE, BE IT RESOLVED:

- That all appropriate steps should be taken to pursue the uninterrupted delivery of properly licensed horse racing and card club activities in the event of a continued budget impasse and government shutdown; and
- That the Commission and its staff continue to work with the requisite authorities to point out that this industry is totally self-funded and to demonstrate the substantial and long lasting negative impacts that would result from a cessation of these activities; and
- That the Commission does its best to keep industry leaders informed of progress regarding legislative, executive, or court authorizations of appropriations.

Dated this 20th day of June, 2011, and adopted by unanimous vote of the Minnesota Racing Commission.