In the Matter of:

A Complaint Under the *Competition Act*

by the Fort Erie Live Racing Consortium

Concerning Unfair Trade Practices

of the Woodbine Entertainment Group

AFFIDAVIT OF JAMES AINSLEY THIBERT

(Sworn March 1st, 2023)

 I, JAMES AINSLEY THIBERT, of the town of Fort Erie, in the Regional Municipality of Niagara, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chief Executive Officer of the Fort Erie Live Racing Consortium and as such have knowledge of the matters hereinafter deposed to. Where the items deposed to are based on information and belief, I do verily believe that information to be true and accurate throughout.

1- Overview

The Fort Erie Live Racing Consortium.

2. The Fort Erie Live Racing Consortium (FLRC) is a community based not-for-profit corporation created to promote, maintain and grow the Thoroughbred racing and traditions in the Town of Fort Erie.

3. The FELRC is one of the largest tourism business operations in Niagara, is unique in its governance, and has a 125-year history. Its mission is to provide world class racing and broadcast facilities for the three hundred and fifty to four hundred owners, trainers, jockeys, and small business operators and supports approximately 125 service and administration jobs at the Fort Erie racetrack. Further, there is a sizeable secondary economic impact in that there is approximately $12 million spent annually, expended mostly locally in food supplies, feed supplies, farriers, veterinary services, emergency services, transportation, security services, etc. Evets such as the Prince of Wales Stakes are broadcast in prime-time TSN nationally and simulcast services broadcast every race; all bringing market awareness on an international basis to Fort Erie, the Niagara Region and Ontario Racing Inc.

4. FELRC officially took over operations of the Fort Erie racing operations on July 1, 2010, but efforts to save the track began long before that date. The Fort Erie Racetrack started to face an uncertain future in 2008, when Nordic Gaming, who operated the track at that time, announced that they would stop racing at the end of that season due to dwindling slot revenue at the Fort Erie racetrack site. A last-minute deal was struck between Nordic Gaming, the Fort Erie Economic Development and Tourism Corporation, and the Horsemen’s Benevolent and Protective Association (the HPBA) to secure one more season. It was at this time that the FELRC was formed.

5. The Consortium, consisting of representatives of the Fort Erie Economic Development and Tourism Corporation, the HBPA, the Town of Fort Erie, and representative of the employee groups, put forth a proposal to the Ontario Racing Commission (now part of the Alcohol and Gaming Commission of Ontario), to lease the track from Nordic Gaming and take over management of live racing. Nordic Gaming agreed to host racing in 2009, while the FELRC prepared to take over operations during the 2010 season.

6. In the early years, 2010 to 2014, FELRC started to explore new avenues to build up the product line, one of them being a three-year pilot project that included hosting quarter horse races. New attractions were put in place to draw bigger crowds, such as twilight Tuesdays and the Tiki Bar. There was a positive progression until 2012 when the provincial government announced that the Ontario-wide Slots at Racetrack Program would be ending and that Fort Erie slots, along with others, would be closed completely. This decision left Fort Erie Racetrack without a secondary funding source and not enough government support to operate racing. Without the funding from slots (OLG) or some sort of similar funding, no racetrack in Ontario would have sufficient revenues from racing alone to maintain the horse racing industry in Ontario.

7. A Blue-Ribbon Panel of the Province of Ontario, designed to review the status of racing in the Province, was formed by the government of the day. Fort Erie faced instability until 2014 when the provincial government announced a three-year funding agreement to support Fort Erie racing. The importance of horse racing to rural communities like Fort Erie was then finally recognized and some stability was given to Fort Erie’s horse people. In the same year, the Fort Erie Racetrack property was sold by Nordic Gaming to Buffalo based buyers, CMP Properties, however, racing continued to be operated by FELRC who continued to lease the property.

8. In 2016, the future of racing in Fort Erie finally became more secure with the announcement of a five-year funding deal by the provincial government. In 2018, Ontario Racing was reconstituted, and a 19-year funding agreement was established with Ontario Lottery and Gaming, securing a long-term future for racetracks across the province. In 2019, Premier Doug Ford recognized that Ontario racetracks needed more and stabilized funding for the long term.

II- Background

9. The horse racing industry in Ontario is divided into three types: thoroughbred, standardbred and quarterhorse racing. There are 12 standardbred tracks throughout Ontario but only two thoroughbred tracks; Woodbine, which is operated by the Woodbine Entertainment Group (WEG) and Fort Erie Racetrack which is operated by the Fort Erie Live Racing Consortium (the FELRC). Woodbine is located in the city of Toronto and is said to be the “Premium” track. The Fort Erie racetrack is located in Fort Erie and is classified, by industry standards, as a ”Signature” track. Woodbine draws its clientele from a much larger and more proximate population base and pays approximately 12 times the annual amount of purses that Fort Erie pays. As a result of these favourable features, Woodbine is able to get more horses to race and stall at its facility. Woodbine has a clearly dominant position in the marketplace.

10. Historically, both tracks were established and run by Ontario Jockey Club. The Jockey Club then became The Woodbine Entertainment Group which sold the Fort Erie racetrack property in 1997. The Fort Erie racetrack property changed hands twice before being taken over by a community-based, not-for-profit Corporation (the Fort Erie Live Racing Consortium) in 2010.

11. From the very beginning in the early 1900s and up to 2017, horses and horsemen were free to race anywhere they chose. Thoroughbred horses were stabled at Fort Erie and Woodbine racetracks, and a small number of outfits stabled at their farms. If a horse was stabled at a farm, it would ship in to train and race at either Fort Erie or Woodbine. Some horses did occasionally leave Ontario to race in the U.S. but during the Ontario live racing season, most came back.

 12. As most trainers preferred to keep their stock together, they had stalls at either Woodbine or Fort Erie. As Woodbine was designated the “A” track, the higher quality outfits generally stayed at Woodbine where daily purses were approximately four times that of Fort Erie. This funding level was dictated by the Ontario Government funding model. Up until 2016, if a Woodbine horse was not competitive racing at Woodbine, it would ship down to Fort Erie to race, but, more often than not, return to Woodbine thereafter.

III- WEG Predatory Behaviour

i) WEG’s Restrictive Horse Ship Out Policy

13. Starting in 2017, Woodbine took steps to restrict horses shipping out of Woodbine to race at Fort Erie. Attached hereto and marked as “Exhibit A” to this my Affidavit is a copy of a notice issued by WEG concerning their restrictive horse ship out policies. At the time, Woodbine justified this policy by saying that they wanted the lesser quality horses to move to Fort Erie so they could stall better horses at Woodbine. Even though Woodbine purported to have a waiting list for stalls, the reality was that Woodbine had a surplus of stalls and, by virtue of their ship out restrictions, the lesser value horses were forced to stay and stall at Woodbine. To take advantage of the favourable number of horses stalled at Woodbine, Woodbine began writing lower end races to compete with the races offered by Fort Erie. Woodbine did this even though their daily funding levels were designed to be at least four times that of Fort Erie for horses that would traditionally be competing at Fort Erie.

14. In the years 2017 to 2021 Woodbine continued to implement policies that restricted horses that were stabled at Woodbine from racing at Fort Erie. Some shipping was allowed but it was limited in amount and circumstances.

15. Woodbine has always been considered the premier thoroughbred track in Ontario, mostly based on the fact that the majority of horses were of high value and “race conditions” of purses reflected that. In 2022, Woodbine’s policy was made even more restrictive, essentially eliminating any horse stabled at Woodbine from racing at Fort Erie in the months May through September (85 per cent of Fort Erie’s season). In addition, Woodbine boosted purses at the lower end of their scale by 20 per cent, ensuring that there was at least a 35 per cent premium to race at Woodbine over Fort Erie for the same quality of horse. However, purses were not raised in a similar fashion on race types that Fort Erie did not offer, typically the higher value races.

16. In order to get Woodbine to eliminate their shipping restrictions, Fort Erie agreed to try to work with Woodbine on their “conditions” of racing, so that a horse of a certain caliber would find its race at either track, but not both and so that a horse would stable at the appropriate track. “Race conditions” relate to the value of horses entering races, the distance of the race, the past successes of the horse entering the races, claiming prices, allowances and purse sizes of any given race. Many meetings were held regarding this issue, but Woodbine was unwilling to give up any of the races which run head-to-head with Fort Erie races. The past several years the average horse value at WEG has declined and WEG is running races at levels which have been traditionally held at Fort Erie resulting in a slow but sure decline in the Fort Erie market.

ii) WEG’s Restrictive Horse Claiming Policy

17. In thoroughbred racing, a key means of maintaining integrity of racing is the “claiming” race. Claiming races are run regularly and, in those races, horsemen may claim horses entered in a race at a set price. The price is tied to the purse and establishes a value for the horse claimed. In 2021 Woodbine saw that Fort Erie horsemen were claiming horses from races at Woodbine at a number slightly elevated over past years. This number was no more than 2 per cent of Woodbine’s horses. Before shipping restrictions, many of these claims happened at Fort Erie when the Woodbine horse shipped to Fort Erie to race. A meeting was convened with representatives of Woodbine, Fort Erie, Ontario Racing and the HBPA on this matter. Woodbine wanted to eliminate a Fort Erie horsemen’s ability to claim at Woodbine. At that meeting Woodbine’s counsel advised that they were within their right to do so, but the AGCO must approve all rules of racing and would have a say on this matter. Fearing failure before the AGCO in 2021, Woodbine backed off on implementing this rule. However, Woodbine tried, but was unsuccessful, getting it through the AGCO in 2022. Attached hereto and marked as “Exhibit B” to this my Affidavit is a copy of a submission I made on behalf of the FELRC in early 2022 to the AGCO on this issue.

18. A foremost objective of Ontario Racing, the OLG, and the AGCO is to maintain the integrity of the horse racing industry. Most revenues are derived from off-track wagering. In off-track wagering, people doing the wagering cannot see first-hand the horses being entered, but they must be assured of the integrity of the racing industry. The claiming race is a principal means of assuring fairness in the racing industry. However, because WEG has the funds available to do so, they compete for horse supply by inflating the purses. In, for example, a $10,000 claiming race, WEG will offer a purse which is much higher than that which can be offered at Fort Erie. Because the industry, including the HBPA, relies on the fact that the horse price and its relation to the purse establishes the claiming value, in any given instance the purses should be similar at both WEG and Fort Erie for similar race conditions.

iii) WEG Generated Scheduling Conflict for Triple Crown Races

19. The Triple Crown Races, being the King’s Plate (formerly the Queen’s Plate), the Prince of Wales Stakes (the POW) and the Breeders’ Stakes, are three stakes races for Canadian bred horses. They are the most noteworthy Canadian racing events because they have the highest purses for Canadian bred horses and are really big attractions for both racing enthusiast and the casual fan alike. Significantly, these races attract the very highest value Canadian bred horses and Fort Erie, with its world-class level track, does so annually at the Prince of Wales Stakes.

 20. Traditionally the Queen’s Plate was held in late June or early July, the POW mid-to-late July and the Breeders in August. With the advent of covid and the disruption of racing at the beginning of 2020, all three races were backed up by approximately eight weeks with the POW being held in the middle of September. In fact, when Woodbine put out the schedule for the races, without Fort Erie’s input, it forced the POW to be just 16 days after the King’s Plate, instead of its traditional 21 to 24 days afterwards. This scheduling was problematic for Fort Erie because Fort Erie shares several of the top Jockeys and other racing staff with Woodbine, particularly for big races, and Fort Erie avoids running the POW on a weekend, when Woodbine races. This is also problematic for horses which are going to be entered in the POW because the tight schedule does not permit the most competitive horses which ran in the Kings plate enough recovery time to race in the POW. Also, if Fort Erie is forced to run the POW on a weekday afternoon in September it is very limited in its ability to attract fans to the track and the powers that be at WEG know this. It should be noted that these schedule changes were brought about during the covid crisis which delayed the start of horse racing season and caused everything to get pushed back on the calendar/schedule.

21. In an effort to cure the problem in 2021 and to benefit both tracks and the horse people, Fort Erie asked Woodbine to move the King’s Plate back one week earlier so that the Prince of Wales race could run on Labour Day. This request was ignored at Woodbine and WEG issued the 2021 dates without Fort Erie’s input. Because the POW is Fort Erie’s biggest day of racing, traditionally attracting a crowd four to five times its average, putting the race on a weekday afternoon in September significantly adversely affects its attendance and on track wagering. One option Fort Erie had was to move the Prince of Wales back to its customary July date but that would change the traditional race order and racehorse training regime making it tantamount to the unheard-of move of the Kentucky Derby from May to September. It should also be noted that, with the passing of the Covid pandemic, the Triple Crown in the United States was restored to its original May through June schedule. The appropriate date for the Prince of Wales, if not the traditional July date, is the mid to late part of August so that it can be run during the more highly successful track times (4 to 8 p.m.).

iv) Wagering

22. One of the key performance indicators for the racetrack is rural economic impact. The POW race run in July was one, if not the largest, tourist attraction date of the tourism season. Hotels, motels, restaurants, etc., were always dependent on the success of POW Day.

23. Since the formation of Ontario Racing Inc. by the provincial government, all wagering in the province goes directly to Woodbine. In turn, the other tracks all receive fixed funding allocations. Woodbine uses this to justify their notion that all races be run at Woodbine as their average wagering per race is four to five times that of Fort Erie. While the reality is that Woodbine’s average purse is at least four times that of Fort Erie because wagering commissions on a race pay less than half of the purse, this means that the net loss per race at Woodbine far exceeds Fort Erie. No racetrack in Ontario (and in reality, North America other than a couple of tracks) would be profitable on race track commissions alone and every track requires government subsidy which is generally a share of slots, casino, or other gaming based incomes. Woodbine gets all of these plus the wagering which means that the government subsidies to WEG are used to compete against Fort Erie

v) WEG’s Actions Effect on Fort Erie’s Key Performance Indicators

24. In addition to the revenue that wagering impacts, The Provincial Government, through the OLG, monitors the performance of horse racing and its tracks. Some of its key measurements are wagering, unique horses, number of tickets sold on track (an attempt to measure attendance at the races) and employment. Woodbines rules to restrict the movement of horses and the placement of the Triple Crown races all have a negative impact on Fort Erie’s performance in these measurements.

vi) Ontario Racing (OR)/Ontario Racing Management Inc. Control

26. Ontario Racing Inc. is the Ontario government body overseeing racing for all three breeds of horse racing in Ontario: thoroughbred, standardbred and quarterhorse. Ontario Racing controls the funding provided by the Province to the various tracks including WEG/Mohawk.

27. By agreement between OR and the Province, Ontario Racing Management Inc, a wholly owned subsidiary of WEG, administers all aspects of OR. All staff at Ontario Racing Management are Woodbine employees and, through Ontario Racing Management Inc., are seconded to OR but remain on the WEG payroll. The Board of OR has no input into staffing of OR. In fact, the present Executive Director of OR was appointed by WEG without even consulting OR’s Board or its independent Chairman.

vii) Rural Ontario

28. The actions that WEG has taken are designed to put more racing at Woodbine and less at Fort Erie and have the effect of reducing the economic activity in rural Ontario and increasing it in Toronto. While this is not really a complaint specific to Fort Erie, it brings about a downturn in economic activity for all of the horse racing industry outside of Toronto. The economic impacts such as increased global expenditures and job creation are key performance indicators established by OR and are tied to the revenue provided by the Province. Rural economic impact is a key performance indicator and one which the Ontario government has been most concerned about.

viii) Government Funding

29. While the total level of funding WEG receives from the province (OLG) cannot be established for certain, the WEG Thoroughbred Horse Account received $27.3 million in direct funding. WEG also receives a sizable “rent” for the slots/casino on site (formerly known as “Slot at Racetrack Program”) as well as all the revenues from pari-mutuel wagering in Ontario which generates approximately $140,000,000 in commissions. The majority of these commissions are generated by foreign races.

IV - Conclusion

30. The above enumerated activities of WEG appear to have been undertaken for the sole purpose of demolishing any meaningful competition in the thoroughbred racing industry in Ontario. Because Fort Erie is the only competition, all these activities on the part of WEG have had a negative and often devastating effect on Fort Erie’s ability to function and have very adversely impacted Fort Erie’s wagering, horse availability and attendance over time. Each one of these adversities saps Fort Erie’s vitality and that of the horsepeople. They diminish Fort Erie’s capacity to fully recover and to be able to invest the people, funds and time in order to build a sustainable operation which, in turn, is able to invest back into the community and industry.

31. In addition, Fort Erie’s efforts to mitigate or seek compromise (which WEG ignored) have led to intentional and sustained injury in Fort Erie’s racing operation and competitiveness.

32. WEG, by virtue of its relationship with Ontario Racing, has a dominant position in the industry and is clearly abusing that dominance to the detriment of Fort Erie. WEG’s business practices vis-a-vis Fort Erie are unfair and clearly predatorial. In light of its ability to manipulate the thoroughbred racing industry in Ontario, WEG holds a near monopoly in the industry. While this situation is particularly harmful for the continued existence of racing at Fort Erie it is genuinely harmful for the owners, trainers, jockeys and others employed directly and indirectly in the thoroughbred racing industry in Ontario.

33. And I make this Affidavit for the purpose of a complaint under the Competitions Act and for no other or improper purpose.

Sworn before me at the )

Town of Fort Erie, in the )

 Regional Municipality of Niagara )

this 1st day of March, 2023 ) \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 ) James Ainsley Thibert

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 a commissioner etc.

This is Exhibit A to the affidavit of James Ainsley Thibert, sworn this 1st day of March, 2023



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A commissioner etc.

Exhibit A



Race & Stay Program 2022

**Maximizing horses and racing opportunities at Ontario Thoroughbred Tracks**

Due to the short thoroughbred horse supply at Woodbine Racetrack in 2022, any horse that leaves Woodbine Racetrack to race at Fort Erie Race Track will be required to Race and Stay at Fort Erie for the remainder of the Fort Erie meet. These horses will be permitted to return to Woodbine after the completion of the Fort Erie meet in mid-October. There will be no exceptions to this policy except as specifically outlined below.

Woodbine stalls are reserved for horses that race consistently at Woodbine and fill cards on site. Fort Erie stalls are available for horses that will be racing at Fort Erie.

This program does not apply to horses shipping out for any Stakes Race. Further, the Racing Secretary retains the discretion to manage and amend this program in the best interests of our racing program.

Generating field size from the stall inventory at each racetrack is a financial priority for the entire industry. Every race card produces the necessary wagering dollars to support the purse accounts at Woodbine and Fort Erie - collectively $74 million. If we are not maximizing our field sizes at both tracks, we are weakening our product and will continue to risk contributions to the purse accounts.

Should you have questions, please contact the Stall Office or Race Office at any time.

555 Rexdale Blvd. P.O. Box 156 Toronto ON, Canada M9W 5L2 Woodbine.com

Exhibit B

This is Exhibit B to the affidavit of James Ainsley Thibert, sworn this 1st day of March, 2023



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A commissioner etc.

**RE: WEG Claiming Issue**  Thursday, August 12, 2021

**Background:** On August 6/ 2021 FELRC received a letter from Jessica Buckley, the Senior VP of Standardbred and Thoroughbred racing for Woodbine Entertainment Group (WEG) advising they would be imposing a “new claiming condition” out of Woodbine.

WEG alleges this is common practice in other jurisdictions in which they compete, all this caused allegedly by low horse supply. This “new condition” means that no one who is eligible to claim horses under AGCO regulations can claim a horse at WEG, in a claiming race, unless they are already stabled at Woodbine. (i.e. you must have stalls at WEG to claim at WEG).

What that will do is break with the long-standing tradition of free and fair market access to horses and which for racing, is one of the most important means of maintaining integrity in racing. Further, this type of control over stables in Thoroughbred racing, can be exercised in many ways including punitive, which then certainly the track would be intimidating certain horsepeople and certainly directly and negatively affects the horse supply to Fort Erie.

On Monday August 9/2021 Ontario Racing President John Hayes called an intervention/information gathering meeting with Thoroughbred racing parties to address the implications of this attempt to create an unprecedented track policy they knowingly understand the profound damages it would do to Fort Erie, the only other Thoroughbred racetrack in Ontario.

**FELRC Response:**

1. FELRC has identified to Jessica Buckley and to the OR solicitor Katherine Curry that FELRC would prefer WEG not implement their condition in the middle of our racing season and that WEG, which is literally Ontario Racing Management is creating a condition that directly and specifically frustrates FELRC in its ability to meet its contracted performance goals with OR/ OLG and the province.
2. FACTS:
3. This new condition is not a race “condition.”
4. It is a track rule and track rules must be AGCO approved.
5. This action is completely unprecedented in Ontario and its 140 years of TB racing.
6. WEG alleges “other jurisdictions with which they compete” have a similar rule.

FELRC has reviewed track rules at tracks in the USA.

By far, the vast majority of states with tracks do indeed have a claiming rule. Where they differ is that their rules are regulated to restrict movement of claimed horses from leaving the State, not going to other tracks within the State. The purpose of the rule is not to lose horse supply to out of the state racing during the racing season in that state.

In any case, we know of NO State that has tracks governed by a single government funded organization, such as Ontario Racing Inc. to support and grow horseracing throughout the State.

1. WEG denotes in its August 6/21 letter that of the 1700 horses they have on site in 2021, 82 horses we’ve claimed, and only 33 of them from Fort Erie trainers. (Fort Erie stables about 330 horses)

The majority of 49 claims must be leaving the province or staying at WEG so very little impact by Fort Erie (33) given this year, 43 horses so far shipped from Fort Erie to race at WEG.

F) WEG has for the past several years imposed a ship-in policy that penalizes WEG trainers who ship to Fort Erie, some of their horses that are stalled at WEG, (unless they cannot run races for that horse condition). The penalty for a WEG trainer who breaches that WEG track stall policy is to lose their stall(s) at WEG.

This was also an unprecedented track policy since horses are bred to race at the highest levels. Then when uncompetitive at various declining levels, until they are not competitive at WEG and so race at Fort Erie hoping to get claimed by Fort Erie.

This is the cycle of life for a Thoroughbred racing in Ontario for the past 120 years and is designed to maximize revenues to horse people who race so that they case have confidence to invest money into Ontario breeders to continue the Thoroughbred breeding, training and racing cycle. Thoroughbred racehorses are athletes. They have careers just like any professional athlete. Fort Erie Racetrack has been a huge part of the early years training and of the latter years racing.

With the introduction of this new Claiming Track policy, if allowed, WEG wants to unilaterally dictate changes to those economics that the entire racing community relies upon in their business planning.

1. At the August 9, 2021, meeting called by OR, legal council for OR, Katherine Curry (also the same legal counsel for WEG) advised those present that no where in the long-term funding agreement or agreement with OLG does it allow OR to direct operations at WEG.

FELRC, when signing on as a founding member of Ontario Racing Inc. understood that tracks remain in control of their own operations subject to the regulatory agencies (i.e. AGCO, CPMA etc.). However, race funding, marketing, performance of racing and all things related to racing industry flows under the auspices of Ontario Racing; 3 breeds, 1 voice. That would also mean no track in the OR family may assault another member’s track through restrictive means; by policy, negative marketing, or by use of their wealth (in large part, Provincial funding).

FELRC believes this “track rule” will have very limited benefit to WEG, but by proportion negatively and significantly impact on Fort Erie horse people, their businesses and the operations of the Fort Erie Race track.

FELRC is advising the WEG formally that we will oppose any efforts by WEG to hinder or hurt Fort Erie.

Fort Erie is advising the HBPA that they need to step up and support their members at Fort Erie from a change created by WEG that clearly and significantly hurts Thoroughbred horse people.

Fort Erie is asking the AGCO to review the implications of this new track policy, as per their usual practice and ensure this one is not implemented because:

A) It’s unprecedented in Ontario.

B) it does damage to horse people at Fort Erie Racetrack.

c) In constrains claiming, which is one of the most important tools in racing to maintain fairness and integrity of Ontario Thoroughbred racing to encourage more people to invest and/or wager.

FELRC is asking Ontario Racing Inc to ensure that no conflict of interest by Ontario Racing Management Inc., or any member track may not be significantly detrimental to another member track. And, to seek clarification from the Premier, that Ontario Racing Inc is indeed, the Governing body for Horseracing in the Province of Ontario.

FELRC is asking Ontario Lottery and Gaming Corporation (OLG) to review the matter with a view to WEG attempting to use its’ huge market position and financial position, (built in large part by Provincial funding), to inappropriate abuse on FELRC (Fort Erie Racetrack), the only other Thoroughbred track in the Ontario market.

Sincerely,

James A. Thibert

Chief Executive Officer, Fort Erie Live Racing Consortium

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