

NO. 02-08-00176-CV

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IN THE COURT OF APPEALS  
FOR THE SECOND DISTRICT OF TEXAS

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LAINIE WHITMIRE

Appellant-Appellant,

V.

NATIONAL CUTTING HORSE ASSOCIATION,

Defendant-Appellee.

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On Appeal From The 236<sup>TH</sup> Judicial District Court  
Fort Worth, Tarrant County, Texas  
The Honorable Thomas Lowe, Presiding Judge  
(No. 236-220623-06)

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BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

Appellant filed suit complaining of the outcome of competition qualification and disciplinary proceedings conducted by the NCHA in 2004 and again in 2006 and 2007 that resulted in denial of Appellant's privileges to compete as an of amateur and non-professional and the revocation of her NCHA membership. (CR 2). Appellant asked the trial court to reinstate her NCHA membership and to grant her the privilege to compete as a non-professional. (CR 92). She also made tort claims based on facts, events and circumstances alleged to have occurred in connection with NCHA's enforcement of its rules in 2004. (CR 100-103). The NCHA asserted that all of Appellant's claims were barred by the Texas doctrine of judicial non-intervention in the affairs of private associations and were further without any basis in fact. (CR 16). The NCHA sought to have Appellant's claims dismissed, both by way of special exception and motion for summary judgment. (CR 16, 153, 387). The trial court granted summary judgment in favor of the NCHA on all of Appellant's claims, except the claims for false imprisonment and intentional infliction of emotional distress related to events occurring in 2004 which were severed from this case so that the summary judgment could become final. (CR 1275). Appellant has now appealed the claims upon which summary judgment was granted.

## STATEMENT OF FACTS

### a) Chronology of the Case

The summary judgment record establishes the following chronology critical events in this matter:

- Aug. 5, 2003      Appellant applies for the privilege to compete as an amateur in the NCHA. In the application, Appellant states:  
                         "[Lainie Whitmire] agrees to become familiar with and be bound by the rules of the National Cutting Horse Association" and "expressly agrees to have all disputes related to compliance with or violation of these rules resolved by the procedures provided in the rules." (CR 174; 198)
- Aug. 23, 2008      Appellant is given notice of concerns relating to her horse training activities as they pertain to potential disqualification of her amateur and non-professional status. (CR 200)
- Nov. 1, 2004        Appellant is given notice of a November 15, 2004 hearing to consider issues raised relating to her amateur and non professional status in the NCHA. (CR 202)
- Nov. 15, 2004      A hearing is held before a committee comprised of seven NCHA members. Appellant appeared with her attorney, Clark Brewster. **Appellant and her attorney agree that she is bound by NCHA rules.** Appellant's amateur status is revoked and her non-professional status suspended indefinitely by unanimous vote of the committee. Appellant is given an opportunity to appeal those decisions.  
(CR 204-205; 210)
- Jan 4, 2005         Appellant takes an appeal from the November 15, 2004 NCHA committee decisions. (CR 176-177)
- Jan. 19, 2005      **2005 Settlement Agreement is reached -- Appellant agrees to withdraw all appeals, agrees to revocation of her amateur and non-professional status and agrees to 6 months membership suspension.** (CR 299)
- Apr. 13, 2005      Appellant's attorney Clark Brewster writes her a letter advising Appellant on NCHA rule changes that would be required if she desired to regain amateur or non-professional status in the NCHA.  
(CR 1031-1032)

- Fall-Spring '05 - '06 Following membership reinstatement, Appellant makes repeated applications for reinstatement of non-professional status. **All applications contain express and specific agreement to be bound by NCHA rules.** Those requests were denied by the NCHA. (CR 177; 301-303; 307)
- March 2, 2006 Appellant's attorney, James Walker, writes letter to the NCHA requesting a specific procedure for review of Appellant's application for non-professional status and appeal of Appellant's competition status. (CR 306).
- Apr. 15, 2006 At Appellant's request, the NCHA Non Professional Committee considers her new application for non-professional status. Committee unanimously denies her application and recommends 1 year membership suspension for false statements made in that application. Appellant requests a review of those decisions by the NCHA Executive Committee. (CR 178; 310-311)
- July 7, 2006 Appellant is given notice of August 21, 2006 hearing before the NCHA Executive Committee on Appellant's request to appeal denial of non-professional status and consider her membership suspension. (CR 178)
- Aug. 21, 2006 Hearing is held on Appellant's appeal of non professional status decision and to consider recommended membership suspension held before 15 members of the NCHA Executive Committee. **Appellant again agrees to be bound by NCHA rules.** Appellant represented by attorney James Walker at hearing. Walker also acknowledges validity of 2005 Settlement Agreement. (CR 178; 323; 340-341)
- Aug. 28, 2006 NCHA Executive Committee unanimously denies Appellant's appeal concerning her non-professional status and suspends Appellant's membership for one year. **Appellant is given notice of right to appeal but takes no appeal from the Executive Committee's suspension of her membership.** (CR 179; 313-314)
- Oct. 10, 2006 Suit is filed by Appellant. (CR 2)
- Sept. 6, 2007 Appellant is given notice that a hearing will be held on November 19, 2007 in which the NCHA will review her membership status pursuant to Art. II of the NCHA Constitution, which provides for review and revocation of membership privileges. Appellant is requested to appear at hearing. (CR 376-380)
- Nov. 19, 2007 Hearing is held before the NCHA Executive Committee on Appellant's membership status. Appellant does not appear at hearing. (CR 179; 384)

Nov. 26, 2007 NCHA Executive Committee unanimously votes to revoke membership status of Appellant. (CR 382-385)

Dec. 14, 2007 Appellant does not appeal revocation of membership status by Executive Committee. (CR 1054)

**b) The Association and its Rules**

The NCHA is a Texas non-profit corporation with its principal place of business in Fort Worth, Texas. (CR 173). The NCHA is organized and operated to encourage, promote, advertise and develop the cutting horse as a unique equine athlete. (CR 182). To that end, the NCHA has promulgated rules to allow its members to compete in cutting horse competitions in various competitive classes. (CR 173-174). The competitive classes include professional, non-professional and amateur. (CR 3; 981-989). The non-professional and amateur classes exist to permit persons to show their own horses if they qualify under NCHA rules which limit these classes of riders based on various qualifications including present and past experience as horse trainers. (CR 981-989). The competitions are held throughout the year, with its three major competitions being held in Fort Worth, Texas. (CR 3;409-413).

The NCHA operates pursuant to its Constitution and By-Laws. (CR 173). Under Article II of its Constitution, the NCHA has promulgated certain rules and which govern the operation of the organization. (CR 173). Each member of the NCHA, as part of his membership application, agrees to follow and be bound by the rules of the NCHA. (CR 173-174).

The Constitutional provisions and rules of the NCHA that are pertinent to this matter include the following:

## **Constitution Article II**

### **MEMBERSHIP; RULES AND REGULATIONS**

Membership in the Association is a privilege, not a right, application for which shall be made on forms and by fees and procedures prescribed from time to time by the Association. Membership, or application therefore, may be terminated or rejected by the Executive Committee or Board of Directors for cause detrimental to the interest of the Association, or to its programs, policies, objectives or the harmonious relationship of its members, as determined by the Executive Committee or the Board of Directors. Termination or application rejection proceedings under this paragraph shall be conducted under the Association's disciplinary procedures for notice, hearing and temporary suspension; the effect of termination or rejection may be the denial of the privileges of the Association, as set forth in the Association disciplinary procedures. The categories of membership in the Association, and the fees, benefits, qualifications and guidelines for each category, shall be set forth in the Association's Official Handbook of Rules and Regulations, as such handbook may be amended from time to time (hereinafter referred to as the "Rules and Regulations"). Each member of the Association hereby acknowledges the Executive Committee's authority to promulgate and amend the Rules and Regulations, subject only to the Board of Directors' right to approve the Rules and Regulations or any amendments thereto. (*emphasis added*).

(CR 182).

NCHA Rule 8.d.5:

"A Non-Professional in this Association is a person who has not received direct or indirect remuneration to work in any manner in the following activities on the premises of a cutting horse training operation: showing, training or assisting in training a cutting horse or cutting horse rider. For purposes of this rule, a cutting horse training operation is any facility where cutting horses are trained. Any person who has shown, trained, or assisted in training a cutting horse or cutting horse rider or trained horses astride in any equine discipline for direct or indirect remuneration shall be considered a professional by this Association, with the exception of those who have been granted a change of status since January 1, 1997, from professional to non-professional. A Change of Status from Professional to Non-Professional will be allowed to have the benefit of being a non-pro without restrictions beginning with the 2003 Point Year." (*emphasis added*) (CR 1000)

NCHA Rule 9.2.C:

"All non-professional and amateur card holders will be reviewed annually at the time application for renewal is made. Said application to be on a form supplied by the Association and returned to it along with the applicant's annual dues and processing fee as above provided. A non-professional and/or amateur card may be revoked at any time. However, the holder of a card so revoked shall have the right to appeal and a subsequent hearing before the Non-Professional Committee. The

burden of proof of eligibility shall be upon the applicant or card holder." (*emphasis added*) (CR 1009).

NCHA Rule 9.3:

"Any person who has shown, trained, or assisted in training a cutting horse or cutting horse rider or trained horses astride in any equine discipline for direct or indirect remuneration shall be considered a professional by this Association, with the exception of those who have been granted a change of status since January 1, 1997, from professional to non-professional. A Change of Status from Professional to Non-Professional will be allowed to have the benefit of being a non-pro without restrictions beginning with the 2003 Point Year. To clarify Standing Rule 9.3 and Non-Pro Rule 9.a.3., these rules will be amended as follows: 'Persons from other equine disciplines who have not trained horses or horse riders for direct or indirect remuneration since January 1, 1997, may be granted Non-Professional status.'" (*emphasis added*) (CR 1009).

NCHA Rule 38:

"Any member may be disciplined, fined, placed on probation or suspended from the Association, and any member or non-member may be denied all privileges of the Association by the Executive Committee or hearing Committee or Grievance Committee whenever it shall have been established by a preponderance of the evidence that such member or non-member has violated any rule of the Association." (CR 194).

NCHA Rule 38(a):

"When anyone shall be accused of any rule violation, he/she shall be given not less than fifteen (15) days notice of a time and place for an appeal hearing of such accusation by the Executive Committee, or by a Hearing Committee appointed by the NCHA President, at which time and place he shall have the opportunity, in person or by counsel, to be heard and to present evidence in his own behalf and to hear and refute evidence offered against him. An appeal is a "denovo" proceeding and could result in a new finding concerning whether or not there was a violation of a rule(s) and either an enhancement or decrease in the punishment imposed by the Grievance Committee. Any appeal will require a deposit of \$1,000.00 which is refundable only if the appeal is successful." (CR 194).

NCHA Rule 38(e):

"The decision of the Executive Committee or Hearing Committee shall be final and binding on all parties." (CR 194).

The foregoing provisions of the NCHA Constitution and By-Laws of the NCHA and the rules and regulations of the NCHA were in effect during the years 2003 through 2006. (CR 174; 980-1026).

**c) Appellant joins the NCHA and repeatedly agrees to abide NCHA by rules**

On August 5, 2003, Appellant, who was a member in the NCHA, made application for NCHA amateur status (CR 174; 198). In that application and in connection with her NCHA membership, Appellant expressly agreed to become familiar with the NCHA rules, to be bound by the rules, to have all disputes related to compliance with or violations of those rules resolved by the procedures provided in the rule, and that decisions by the NCHA committees shall be final and binding on all parties. (CR 198). Furthermore, this agreement to abide by the rules of the NCHA, including to have all disputes resolved as provided for in those rules, was made by Appellant on at least the following occasions: (1) at the November 15, 2004 committee hearing (CR 210); (2) in her 2005 Amateur/Non-Professional Application (CR 302); (3) in her Amended 2006 Non-Professional Application (CR 307); (4) and in the August 21, 2006 Executive Committee hearing (CR 323).

**d) Appellant is given notice of concerns about her qualifications for amateur and non-professional status**

In 2004, questions were raised concerning Appellant's potential violation of the NCHA's rules relating to horse training by a non-professional member as they effect her ability to compete as an amateur or non-professional. (CR 175). Each provision of the constitution and by-laws of the NCHA and the rules and regulations of the NCHA were consistently applied in dealing with any and all inquiries of Appellant's actions. (CR 175). Specifically, on August 23, 2004,

Appellant was provided with notice that there were concerns about her qualifications to compete as an amateur and non-professional and she was given an opportunity to respond to these concerns as prescribed by NCHA rules. (CR 200).<sup>1</sup> A hearing committee was empanelled pursuant to the NCHA rules to review Appellant's competitive status and conduct an investigation of those matters. (CR 176). The committee consisted of seven persons who are members of the NCHA Non-Professional Committee. (CR 208). On November 1, 2004, Appellant was given notice that questions concerning her competitive status would be considered in a hearing before the NCHA committee on November 15, 2004. (CR 202). Appellant was invited to attend with counsel and participate in that hearing. (CR 202).

e) **The November 15, 2004 hearing is held on Appellant's competitive status**

On November 15, 2004, the seven person NCHA hearing committee convened a hearing to consider and determine whether Appellant was qualified to compete as an amateur and non-professional under NCHA rules. (CR 204-205). Appellant appeared at the hearing represented by attorney Clark Brewster. (CR 208). During that hearing Appellant and her attorney agreed she was bound by NCHA rules and to have all disputes resolved in accordance with the rules of the NCHA. (CR 210). During the hearing, Appellant and her counsel were given the opportunity to present evidence and examine witnesses. (CR 176; 210-272) Further, Appellant's counsel submitted a position paper to the hearing committee citing to NCHA Rules 8.d.5 and 9.3 (rules he understood to be at issue)

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<sup>1</sup> The court should be aware that an NCHA member seeking amateur or non-professional status carries the burden to establish entitlement to that status under NCHA rules. (CR 1009).

and outlining Appellant's position.(CR 282-286). The hearing committee unanimously ruled that Appellant's amateur status in the NCHA was permanently revoked and that her non-professional status was temporarily revoked subject to further proceedings. (CR 204-206).

A procedure for appeal of those rulings by the hearing committee is provided by NCHA Rule 38. (CR 176-177; 194-195). Appellant requested an appeal hearing to receive a "de novo" review of the hearing committee's findings by a newly empanelled appeals committee consisting of persons who did not sit on the November 15, 2004 hearing committee. (CR 176-177). An appeal hearing was duly granted and scheduled to be held on January 19, 2005. (CR 177).

f) **A settlement is reached and Appellant accepts membership suspension and revocation of non-professional and amateur status.**

On January 19, 2005, the originally scheduled date set for the appeal hearing, Appellant, by and through attorney Clark Brewster, entered into a 2005 Settlement Agreement with the NCHA whereby Appellant withdrew all appeals and agreed that her amateur and non-professional status were revoked. (CR 177;299). Appellant further agreed to a six month suspension of her NCHA membership. (CR 299). The agreement was reduced to writing in a January 19, 2005 letter from counsel for the NCHA (the "2005 Settlement Agreement") which provides:

"As a resolution to the pending investigation and disciplinary proceedings of the NCHA the non-professional status and amateur status of Lainie Whitmire, it is the understanding that the following agreement has been reached between you and I on behalf of our respective clients:

1. All pending investigations and appeals are hereby cased.
2. Ms. Whitmire's NCHA membership is suspended effective immediately, with reinstatement at the expiration of six months.
3. Ms. Whitmire's status as a non-professional member is revoked, and she is deemed non-qualified for non-professional status under the present NCHA rules.
4. Ms. Whitmire's status as an amateur member is revoked, and she is deemed non-qualified for amateur status under the present NCHA rules.

Should the NCHA rules change in the future this proceeding will not prejudice Ms. Whitmire's ability to qualify for various designations as they may in the future exist." (emphasis added) (CR 299).

The NCHA authorized the terms contained in the 2005 Settlement Agreement. (CR 425). The 2005 Settlement Agreement covered all outstanding issues between Appellant and the NCHA that existed at that time. (CR 299). There is no provision in the 2005 Settlement Agreement whereby Appellant would receive automatic reinstatement to non-professional status at any time. (CR 299). Finally, by agreeing to settle this matter, Appellant did not waive her right to qualify for various designations in the event that she qualified for those designations as a result of any future changes to those rules. (CR 299). The suspensions and competitive status revocations provided for in the Settlement Agreement were put into effect. (CR 407-408). After her 6 month membership suspension elapsed, Appellant participated in NCHA competitions in the open class.(CR 413).<sup>2</sup>

Consistent with the terms of the 2005 Settlement Agreement, Appellant's membership was suspended for six months. (CR 407). In April of

2005, four months after the suspension commenced and two months before the end of that suspension, Appellant's counsel wrote her a letter instructing her on NCHA rule changes that would be necessary if Appellant was to obtain reinstatement to amateur or non-professional status in the future. (CR 1031-1032). At the end of the six month membership suspension, Appellant was reinstated to membership status and resumed her participation in NCHA competitions as a rider in the open class. (CR 407-411). Appellant also applied for reinstatement of her non-professional status after reinstatement of her membership. (CR 177; 301-303). In each of her applications for reinstatement of non-professional status, Appellant affirmed that each statement that she has made in such application was true and again agreed to be bound by the NCHA rules and to have any dispute related to the application of those rules resolved in accordance with NCHA procedures. (CR 301-303). Appellant's requests for re-instatement of non-professional status were denied by the NCHA because she failed to meet the requirements for non-professional status. (CR 177).

Again, in February of 2006, Appellant sought non-professional status with the NCHA consistent with the April 2005 recommendation of her counsel. (CR 307). That request was also denied because Appellant did not meet the requirements for non-professional status. (CR 310-311).

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<sup>2</sup> The NCHA open class is for all NCHA members, including professionals. (CR 997) During this time, Appellant made no complaints to the NCHA about not being allowed to compete as a non-professional. (CR 407-411).

**g) Following agreed suspension, Appellant is given additional consideration on her request for reinstatement of non-professional status**

In March of 2006, Appellant requested (by letter from her attorney) that a new application for non-professional status submitted with the letter be reviewed directly by the NCHA Non-Professional Committee and that any adverse decision be reviewed by the NCHA Executive Committee. (CR 306). The letter contains a request for a specific procedure for the NCHA to use to process, evaluate and appeal Appellant's application for non-professional and amateur status. (CR 306). The NCHA rules provide for initial review of an application by NCHA staff for non-professional status, not a review by the entire Non-Professional Committee. (CR 991). However, the NCHA accommodated Appellant's extraordinary request to have her application reviewed by the entire Non-Professional Committee. (CR 308). Further, NCHA rules do not require, and Appellant did not request, any hearing in connection with the Non-Professional Committee's review of that application. (CR306). Accordingly, on April 15, 2006, the NCHA Non-Professional Committee considered Appellant's Application for Non-Professional Status. (CR 310). The Committee unanimously denied non-professional status for Appellant and recommended a one year suspension of Appellant's NCHA membership based on false statements made in that application. (CR 311).

As requested in her attorney's March 2006 letter, the April 15, 2006 decisions of the NCHA Non-Professional Committee were scheduled for review by the NCHA Executive Committee. (CR 178). The NCHA gave Appellant notice that such hearing would be held on August 21, 2006. (CR 178).

**h) The August 21, 2006 hearing is held on Appellant's non-professional status and membership issues**

On August 21, 2006 a hearing was held before the NCHA Executive Committee at the request of Appellant to appeal the denial of her application for non-professional status and to challenge the recommendation of a one year membership suspension. (CR 178; 314). The NCHA Executive Committee reviewing these matters consisted of 15 people from geographic areas throughout the United States (the members were persons different from those who sat in the November 15, 2004 hearing and different from the Non-Pro Committee that ruled on April 15, 2006). (Cr 316). As a preliminary requirement to begin the hearing, Appellant and Appellant's counsel agreed on the record "to have all disputes related to compliance with or violation of [NCHA] rules resolved by [NCHA] procedures." and "to abide by [NCHA Committee] decisions with the context of the rules." (CR 323). The NCHA Executive Committee considered all issues during the hearing in which Appellant was represented by counsel. (CR 318-373) At that hearing, no mention was made by Appellant or her counsel of any alleged agreement whereby Appellant would be automatically reinstated to non-professional status six months after the suspension provided for in the 2005 Settlement Agreement. (CR 318-373). In fact, Appellant's counsel acknowledged the validity of the 2005 Settlement Agreement at that hearing by stating "I'm not denying that it [the 2005 Settlement Agreement] was binding." (CR 340-341). The denial of NCHA non-professional status was unanimously affirmed by the Executive Committee. (CR 313-314). The Executive Committee further unanimously held that Appellant was also suspended from NCHA membership for a period of one year. (CR 313-314).

Appellant was informed of her right, as provided by NCHA rules, to appeal the

decision of her one year membership suspension to a separate independent appeals committee. (CR 314).

**i) Appellant does not appeal her membership suspension**

Despite being informed of her right to appeal in accordance with the appeals procedures provided under the NCHA rules, Appellant took no appeal from the NCHA Executive Committee's action suspending her membership for one year.(CR 179). Instead, Appellant filed this lawsuit on October 10, 2006 complaining primarily of the NCHA's denial of her non-professional status and suspension of her NCHA membership. (CR 2). The Original Petition filed by Appellant contains no allegations of any Alleged Oral Agreement for Appellant's Automatic Reinstatement to non-professional status. (CR 2-15).

**j) On November 19, 2007 Appellant receives additional hearing on extended membership suspension**

On September 6, 2007, the NCHA gave Appellant notice that it would consider indefinite termination of her membership in the NCHA based on her conduct and further notified Appellant that a hearing would be held on those matters on November 19, 2007. (CR 376-380). Appellant was invited to attend the hearing with her counsel. (CR 454). A hearing was held on November 19, 2007 before the NCHA Executive Committee. (CR 382). Appellant did not attend that hearing. (CR 384). The NCHA Executive Committee unanimously ruled to deny Appellant's membership renewal unless and until certain conditions are met. (CR 384-385). Appellant did not appeal the Executive Committee ruling as provided by NCHA rules. (CR 1054).

## I. SUMMARY OF ARGUMENT

### a) Summary Judgment was required because Texas law prohibits judicial intervention in the affairs of a private association

The doctrine of judicial non-intervention provides that a private association, such as the NCHA is allowed to develop, interpret and enforce its own rules without court intervention so long as it does not act arbitrarily. Texas Courts in general, and this court particularly, have consistently applied this doctrine and refused to substitute the judgment of a court for the judgment of a private association. Substitution of the judgment of the court for the judgment of a private association is precisely the relief that Appellant requested in the trial court. All such relief was properly denied by the trial court as a matter of law.

Appellant agreed to be bound by the rules of the NCHA as part of her membership in the NCHA and in her applications for amateur and non-professional status. Further, as part of her participation in the NCHA hearing process, Appellant repeatedly agreed to be bound by the NCHA rules for dispute resolution procedures and that all decisions of the NCHA in those matters would be final and binding. The summary judgment evidence establishes that the NCHA followed all procedures and processes provided for in its rules when it considered matters concerning the competitive status and membership status of Appellant.

The claims by Appellant against the NCHA for declaratory judgment, breach of contract, fraud, negligent misrepresentation and violation of due process arise from disciplinary proceedings by the NCHA in which it considered Appellant's activities and rules violations that occurred in 2004 through 2007. Appellant was afforded notice of each of those hearings and was invited to attend

with counsel. Hearings were held on November 15, 2004 (before 7 members of the NCHA Non-Professional Committee) and on August 21, 2006 (before 15 members of the NCHA Executive Committee none of whom participated in the previous hearings) in which her amateur, non-pro and membership status were considered. Appellant was also given notice and the opportunity to appear at such hearings, be represented by counsel, present evidence, question witnesses and was provided appropriate rights to appeal. The NCHA's revocation of Appellant's amateur and non-professional status and suspension of her membership were actions taken after hearings conducted by the NCHA which were participated in by Appellant and her counsel. The loss of amateur and non-professional status as well as the membership suspensions received by Appellant are all prescribed by the rules of the NCHA. Appellant was provided an opportunity to appeal each of the status revocations and suspensions levied against her.

The summary judgment evidence establishes that the NCHA afforded Appellant more process than is required by either the NCHA rules or Texas law. The evidence further establishes that Appellant's claims relating to her membership suspension in August of 2006 and November of 2007 are barred by her failure to exhaust her administrative remedies by appealing such membership suspensions. Accordingly, the trial court correctly entered judgment as a matter of law in favor of the NCHA on all of Appellant's claims relating to NCHA processes, procedures and disciplinary actions.

b) **The "procedural defects" alleged by Appellant pre-date the 2005 Settlement Agreement and are not supported by the record**

In an effort to escape the broad scope of the judicial non-intervention doctrine, Appellant attempts to create fact issues based on alleged failures by the NCHA to follow its own rules in this process. Most of the "procedural defects" alleged by Appellant occurred in proceedings that pre-dated the January 19, 2005 Settlement Agreement between the parties. Appellant's claims, even though unfounded, were compromised and released as a part of that agreement and are moot. The validity and effect of the 2005 Settlement Agreement were acknowledged on separate occasions by two different counsel representing Appellant in the NCHA proceedings. Appellant acted in accordance with the terms of the 2005 Settlement Agreement, accepted the benefits of that agreement and cannot now go behind the agreement to claim she was denied process before the 2005 Settlement Agreement was made. Accordingly, the allegations of procedural defects in any proceedings pre-dating the 2005 Settlement Agreement are barred as a matter of law.

Further, Appellant's claims of "procedural defects" that allegedly occurred after the 2005 Settlement Agreement are refuted by the summary judgment record. The record shows that the NCHA acted in accordance with its rules and that Appellant was not only afforded the process provided for in the NCHA rules, but also that the NCHA even provided Appellant, at her request, additional hearings and considerations that exceed those provided for in the rules. There is

no basis for Appellant's allegations of procedural defects and the doctrine of judicial non-intervention bars all of these claims as a matter of law.

**c) The Alleged Oral Agreement for Automatic Reinstatement claim fails as a matter of law**

The summary judgment evidence shows that the NCHA authorized the terms of the 2005 Settlement Agreement and Appellant accepted those terms. Appellant agreed to revocation of her amateur and non-professional status to and a six month membership suspension. The validity of the 2005 Settlement Agreement was also confirmed by two different counsel representing Appellant in the NCHA proceedings. First, in April of 2005 (4 months after revocation of her amateur and non-professional status) Appellant's then counsel Clark Brewster instructed her on NCHA rule changes that would be required before Appellant could be reinstated to non-professional or amateur status. Additionally, at an April 21, 2006 hearing before the NCHA Executive Committee, a hearing held over one year after Appellant's amateur and non-professional status was revoked, Appellant's then counsel James Walker in her presence acknowledged that the 2005 Settlement Agreement was binding. The summary judgment evidence establishes that Appellant acted in accordance with the terms of the 2005 Settlement Agreement for well over a year. Appellant made multiple applications from the fall of 2005 through the Spring of 2006 seeking reinstatement of her non-professional status within the NCHA, all of which were denied. Appellant's action in accordance with the terms of the 2005 Settlement Agreement establish her assent to such agreement and she is bound by that agreement.

Despite this undisputed evidence, Appellant claims that there was a separate oral agreement that provided Appellant would be reinstated to non-

professional status after her six month membership suspension had run. (the **"Alleged Oral Agreement for Automatic Reinstatement"**). The Alleged Oral Agreement for Automatic Reinstatement is found nowhere in the 2005 Settlement Agreement, is contrary to the terms contained in the 2005 Settlement Agreement and must fail for several reasons. First, the summary judgment evidence establishes: (i) the NCHA Executive Committee must approve all agreements of this nature; (ii) the only terms of settlement approved by the NCHA Executive Committee are contained in the 2005 Settlement Agreement; and (iii) the NCHA Executive Committee did not authorize any modifications to the terms of the 2005 Settlement Agreement. The summary judgment evidence further shows that no one had authority to enter into any Alleged Oral Agreement for Automatic Reinstatement on behalf of the NCHA and that alleged modification to the Settlement Agreement was never accepted or ratified by the NCHA. There is no legal presumption of authority by any NCHA agent to enter into the Alleged Oral Agreement for Automatic Reinstatement as suggested by Appellant.

Further, as shown above, counsel for Appellant acknowledged that the 2005 Settlement Agreement was binding in a hearing before the NCHA Executive Committee specifically convened at the request of Appellant to consider her competitive status and membership status. No mention was made at that time of any Alleged Oral Agreement for Automatic Reinstatement. If such an Alleged Oral Agreement for Automatic Reinstatement existed, it would certainly have been asserted at that time. Further, Appellant acted in accordance with the terms of the 2005 Settlement Agreement for well over a year. No mention was made by Appellant during that time of any Alleged Oral Agreement for Automatic

Reinstatement. If reinstatement was to be automatic, Appellant would not need to make repeated applications for non-professional status and would have demanded reinstatement of that status as provided for in the alleged agreement. Instead, Appellant accepted the NCHA's continued rejections of her application for non-professional as provided for in the 2005 Settlement Agreement. Finally, Appellant's own testimony indicates her knowledge that NCHA rule changes would be required for her to seek reinstatement of non-professional status.

Appellant's actions are completely consistent with the terms of the 2005 Settlement Agreement, inconsistent with any Alleged Oral Agreement for Automatic Reinstatement and belie the existence of any Oral Agreement for Automatic Reinstatement. Such an agreement did not exist, so it was never asserted. In fact, even in her Original Petition in this matter, Appellant makes no mention of any such Alleged Oral Agreement for Automatic Reinstatement.

**d) The trial court was required to grant summary judgment on Appellant's fraud and misrepresentation claims**

Finally, Appellant asserts that the trial court erred in granting summary judgment on her fraud and misrepresentation claims relating to the Alleged Oral Agreement for Automatic Reinstatement to non-professional status. This point of error, which is based solely on the alleged absence of such claims from the NCHA's Motion for Summary Judgment is without merit for several reasons. First, such claims are specifically referenced in the NCHA's Motion for Summary Judgment. Second, such claims are a mere restatement of Appellant's breach of contract claim. As a matter of law, Appellant cannot assert independent tort claims based on the same facts and seek the same relief as her breach of contract claim.

For these reasons, the trial court properly granted summary judgment on those claims.

## II.

### ARGUMENT

A. **The Trial Court was required to grant summary judgment in favor of the NCHA on Appellant's claims relating to NCHA rules, processes and disciplinary actions**

As shown above, the summary judgment evidence establishes that the NCHA acted in accordance with its rules and regulations in making determinations of Appellant's membership status and making decisions concerning Appellant's qualifications to compete as an amateur or non-professional. Appellant was afforded notice of concerns about her qualifications to compete as an amateur or non-professional, and of her entitlement to NCHA membership, an opportunity to respond to such concerns and appear at hearings covering those matters, the opportunity to be represented by counsel at all hearings and an opportunity to appeal any adverse decisions made against Appellant. This is more than what is required by the NCHA rules and Texas law. The NCHA has performed in accordance with its rules and regulations and Texas law and was properly granted judgment as a matter of law on all of Appellant's claims relating to the process, procedure and disciplinary actions of the NCHA.

1) *The Texas Doctrine of Judicial Non-Intervention*

Texas courts will not interfere with the internal management of voluntary association so long as the governing bodies of such associations do not substitute legislation for interpretation and do not overstep the bounds of reason or violate public policy or the laws of this state while doing so.

*Burge v. American Quarter Horse Association*, 782 S.W.2d, 353 (Tex. App. - Amarillo 1990, - no writ); *Lawrence v. Ridgewood Country Club*, 635 S.W.2d, 665, (Tex. App - Waco 1982, writ ref'd n.r.e.); *Texas Thoroughbred Breeders Breeders Assn. v. Donner*, 202 S.W.3d 213 (Tex.App. - Tyler 2006, no pet.); *Juarez v. Texas Ass'n of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 280 (Tex. App. - El Paso 2005, no pet.).

The scope and purpose of this doctrine of non-intervention was described in this Court's holding in *Harden v. Colonial Country Club*, 634 S.W.2d 56, (Tex. App. - Fort Worth 1982, writ ref'd. n.r.e.) where this Court stated:

"[c]ourts are not disposed to interfere with the internal management of a voluntary association. The right of such an organization to interpret its own organic agreements, its laws and regulations, after they are made and adopted, is not inferior to its right to make and adopt them. And a member, by becoming such, subjects himself, within legal limits, to his organization's power to administer, as well as to its power to make, its rules. To say that the courts may exercise the power of interpretation and administration reserved to the governing bodies of such organizations would plainly subvert their contractual right to exercise such power of interpretation and administration . . . . Without such latitude of action, associations organized to promote the legitimate welfare of its members would be deprived of the power to do so." [quoting *Brotherhood of Railway Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. Civ. App. - Galveston 1937, writ dism'd)]. *Harden*, 634, S.W.2d at 59.

The Texas policy of nonintervention also extends to an association's disciplinary procedures because members "impliedly agree to abide by the rules when they decide to join a voluntary association." *Campbell v. American Psychological Association*, 68 F.Supp. 2d 768, 779 (W.D. Tex. 1999).

In *Harden*, this Court upheld the trial court's summary judgment in favor of the Defendant association and recognized the sound public policy behind this doctrine of judicial non-intervention which it explained as follows:

"If the courts were to interfere every time some member or group of members had a grievance, real or imagined, the nonprofit, private organization would be fraught with frustration at every turn and would founder in the waters of impotence and debility."

*Harden*, 634 S.W.2d at 60.

Other Texas courts have similarly used this rule of law to grant judgment as a matter of law in favor of private associations in actions brought by their members. (See *Burge*, 782 S.W.2d at 354 -- summary judgment in favor of private association affirmed on member's claims challenging revocation of horse registration; *Campbell*, 66 F.Supp. at 768 -- summary judgment granted in favor of private association on member's claims challenging membership termination; *Juarez*, 192 S.W.3d at 274 -- appeal dismissed for lack of jurisdiction over member's challenge of membership suspensions by private association; *Lawrence*, 635 S.W.2d at 665 --- summary judgment in favor of private association affirmed on member's claims challenging membership suspension; and *Texas Thoroughbred Breeders*, 202 S.W.3d 213 -- appeal dismissed for lack of jurisdiction over member's challenges to revocation of horse accreditation by a private association.

The NCHA, as a private association, is protected by the laws that provide such an association the right to self-governance. (CR 155). Accordingly, Appellant has no grounds to complain of the substance of the NCHA rules or the consequences associated with violating those rules. As stated by the

*Campbell* Court:

"Pursuant to the APA's legal right to interpret its rule and discipline its members, the evidence establishes that Campbell and APA simply had a genuine dispute over the interpretation of the APA's ethics principles and those principles applied to Campbell's particular uncontradicted conduct..." *Campbell*, 68 F. Supp. 2d at 780.

Appellant in this case asked the trial court, and is now asking this Court, to intervene and set aside the NCHA's interpretation of its own rules and its decisions on disciplinary actions that should be meted out for such violations pursuant to those rules. (Appellant's brief at p. 39-41). Appellant's complaints amount to no more than a disagreement with the way in which the NCHA has interpreted and applied its rules. Appellant objects to the result of the NCHA process and wants the Court to "interpret" the NCHA rules and the evidence presented at the NCHA's proceedings to support her position. (Appellant's Brief at p. 39-41). This is precisely the type of "substitution of judgment" that Texas law prohibits. See Texas Thoroughbred Breeders, 202 S.W.3d at 224; and Juarez 172 S.W.3d at 279. By the precedent to which the Court is cited, the relief requested by Appellant is improper under Texas law and was properly dismissed by the trial court as a matter of law.

*Hatley v. American Quarter Horse Association* 552 F.2d 646 (5<sup>th</sup> Cir. 1977) is the only case cited to by Appellant in which judgment was not granted in favor of a private association as a matter of law. The facts of that case show that the *Hatley* ruling is inapplicable to the present case. In *Hatley* Plaintiff sued the Defendant private association on due process grounds for the association's refusal to provide Plaintiff with a hearing on an issue related to the registration of a horse. The United States Court of Appeals for the Fifth Circuit ruled in favor of Plaintiff on that due process issue stating, "The Executive Committee

decision to refuse registration without a hearing violated Texas due process law." *Hatley* 552 F.2d at 657. The ruling of the *Hatley* Court is based upon failure of a private association to provide a hearing to its member. The record in this case in this case establishes that Appellant was not only given a hearing, but given multiple hearings and rights of appeal. (See Section II.A.2 below) There was no absence of hearing in this case and *Hatley* is inapplicable.

Appellant acknowledges that broad scope of the judicial non-intervention doctrine and admits that she can only complain of the NCHA's actions if such actions are contrary to its own rules. (Appellant's Brief at p. 31). As shown below, the summary judgment record established that the NCHA rules were applied to Appellant as she requested and her claims were properly dismissed as a matter of law by the trial court.

2) *The NCHA followed its rules and Texas law in dealing with issues concerning the membership and competitive status of Appellant*

The July 19, 2005 Settlement Agreement controls all actions that occurred prior to that date. Any alleged rule violations preceding that agreement are moot. Further, Texas law prohibits the remaining rule violations asserted by Appellant.

The cases cited above hold, without exception, that the courts will not intervene with the right of a voluntary club or association to make and interpret its own rules so long as a member is given there is notice of any claims, an opportunity to be heard and the association does not violate its own rules in administering its process. The cases uniformly hold that the private association's right to interpret its own charter by-laws and rules after they are made is not

inferior to its right to make and adopt them and that an individual, such as Appellant, by becoming a member submits herself to the association's power to administer as well as make its rules. See *Harden* 634 S.W.2d at 59. The summary judgment record establishes that the NCHA met this standard and is entitled to judgment as a matter of law.

Specifically, the summary judgment evidence establishes that: (i) concerns relating to Appellant's qualifications to compete as an amateur or non-professional and to be an NCHA member were raised (CR 175); (ii) Appellant was given notice of those concerns relating to her qualifications and an opportunity to be heard (CR 200); (iii) hearings were held on those issues (CR 176-177; 204-206; 178; 315); (iv) Appellant received notice and opportunity to be heard at those hearings (CR 202; 178); (v) Appellant appeared at hearings with her counsel and was allowed to present evidence and examine witnesses (CR 208;316); (vi) Appellant received discipline as a result of her conduct (CR 204-206; 313-314; 382-385); (vii) Appellant was given the opportunity to appeal the findings of the various NCHA committees (CR 204; 314; 382-383); and (viii) the disciplinary actions were prescribed by NCHA rules. (CR 175). Accordingly, the record establishes the NCHA acted properly and in accordance with its rules and regulations in dealing with Appellant. The rulings on those matters by the NCHA are final and binding. (CR 194). Appellant had no basis to challenge those actions in court and the trial court correctly granted judgment as a matter of law on those claims.

3) Appellant's alleged "procedural errors" are without merit

Appellant claims that the NCHA failed to follow its rules in three aspects. First, Appellant claims that no written complaint was received as

required by NCHA Rule 37. Second, she alleges that the NCHA put the burden on Appellant to prove entitlement to non-professional status in violation of these rules. Third, Appellant asserts that she was wronged because she did not receive evidence in advance of the hearings. The summary judgment record shows that most of these complaints arise from proceedings predating the Settlement Agreement and are moot. The November 15, 2004 proceeding predated the 2005 Settlement Agreement between the parties which disposed of all issues relating to that proceeding and charges considered in that proceeding (CR 299). As shown in greater detail below, the trial court correctly found the 2005 Settlement Agreement to be valid. Since Appellant settled all matters relating to that November 15, 2004 proceeding, she cannot now complain of an alleged procedural irregularities in that proceeding. The record further shows that all of Appellant's allegations of "procedural defects" are without support.

The allegations concerning an alleged failure to have a written complaint relate solely to the November 15, 2004 proceeding. (Appellant's Brief at p. 24-25). As shown above, Appellant's complaints predating the 2005 Settlement Agreement are moot and cannot be maintained. Further, the summary judgment record makes clear that Appellant was given notice of the issues relating to her qualifications to hold amateur and non-professional status (CR 202). No objection to the lack of any "written complaint" was made by Appellant or her counsel at that November 15, 2004 hearing. (CR 207-272). In fact Appellant had received a letter providing her notice of the issues to be addressed at the hearing date and the date of that hearing. (CR 202). Appellant's counsel was fully apprised of the issues and even submitted a position paper outlining Appellant's position on those issues and

referencing the operative NCHA rules (Rules 8.d.5 and 9.3). (CR 282-286). It is therefore undisputed that Appellant and her counsel were fully apprised of the horse training issues being questioned and their effect on Appellant's competitive status that were to be addressed at that hearing as well as the rules applicable to such issues. (CR 202; 282-286). Appellant suffered from no lack of notice on those matters. Additionally, if Appellant felt there was some irregularity in the November 15, 2004 proceedings, she could have appealed that ruling. Appellant opted to forego that appeal. (CR 299).

Second, Appellant makes the groundless argument that the NCHA violated its rules by putting the burden of proof on Appellant. Appellant's eligibility to enjoy the privilege of non-professional status is governed, in part, by NCHA Rules 8 and 9. (CR 980-994; 997-1011; 1014-1026). This fact was recognized and acknowledged by Appellant's counsel. (CR 282-286). It is undisputed that NCHA Rule 9.2.c places the burden of proof on Appellant to establish the right to non-professional status in the NCHA (CR1009). Any suggestion that another burden of proof was applicable in that proceeding is not supported by the NCHA rules.

Third, Appellant complains that she was not provided with the evidence to be presented against her in advance of the August 21, 2006 hearing. Appellant cites to no NCHA rule that requires the NCHA to provide Appellant with evidence in advance of a hearing because no such rule exists. Appellant's references to testimony by NCHA committee members concerning their opinions on such rules are irrelevant. The express wording of the rules controls and no NCHA rule provides for evidence to be made available in advance of any hearing.

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During the hearing on August 21, 2006, and the NCHA submits long before, Appellant became fully aware of all evidence that had been considered at that hearing. (CR 318-373). At that hearing, Appellant's counsel addressed each piece of evidence considered at that hearing with no complaint that he had not received that evidence before the hearing. (CR 342-347). At that hearing, neither Appellant nor her counsel mentioned anything about needing additional time to respond to the evidence. (CR 318-373). To the contrary, in the August 21, 2006 hearing, while referencing the evidence considered by the committee at that hearing, Appellant's counsel stated:

"We're here this morning, and I wrote Mr. Goins a letter asking him, you know, for the evidence to see what we were dealing with and, you know, he sent me Kathy Starr's memo. But I've never seen any of this stuff before. I don't know that Lainie has ever seen any of this stuff before, you know. And that's fine, we'll deal with it this morning. I don't mind." (*emphasis added*) (CR 366).

Further, Appellant received written and oral notification of her right to appeal and by appealing the August 21, 2006 decision could have received a "de novo" hearing concerning her loss of NCHA membership within 21 days after that decision. (CR 372-373; 382-383). Had Appellant exercised her right to appeal, Appellant could have presented any evidence she wished a "de novo" appeal of the decision. If Appellant needed an extension of time to gather such evidence, she could have requested such an extension. In fact, Appellant had made such requests for extension of time in connection with prior NCHA proceedings and those requests were granted by the NCHA (CR 177). Appellant failed to take any of these steps in connection with the August 21, 2006 ruling.

Appellant attached three affidavits to her Motion to Reconsider the Ruling on Motion for Summary Judgment to support her claim that she did not train horses for remuneration. (CR 1220-1225). Those affidavits were not produced to the trial court by Appellant in her opposition to the NCHA's Motion for Summary Judgment and such evidence was not asserted by Appellant until she filed her Motion to Reconsider the Summary Judgment Rulings. The affidavits, which were objected to by the NCHA because Appellant improperly attempt to incorporate into the summary judgment evidence after a ruling on the summary judgment motion by the trial court, were apparently obtained in November of 2006. (CR 1250-1251). The record shows that Appellant made no attempt to present those affidavits to the NCHA in any appeal proceeding. She could have done so, but chose not to follow that course and instead skipped the appeal process and filed suit. (CR 177; 2). Those affidavits were never presented to or considered by the NCHA in that process. (CR 1251). Since they were not, they are irrelevant to the NCHA's decision making process in those proceedings. The only reason to present them was to have the trial court retry those NCHA proceedings. Such request violates the non-intervention doctrine and were properly rejected by the trial court.

The summary judgment record establishes that, despite the knowledge of Appellant and her counsel concerning the evidence before the NCHA, Appellant failed to produce any evidence at the August 21, 2006 proceeding (or any subsequent appeal hearing) to refute her horse training activities. (CR 315-373). Complaints concerning evidentiary matters in NCHA proceedings that were not brought before the NCHA are improper before this Court.

4) Appellant's claims relating to her membership suspension are barred by her failure to exhaust administrative remedies

The claims arising from and relating to Appellant's membership suspensions of August 28, 2006 and November 26, 2007 were also properly dismissed because Appellant failed to exhaust her administrative remedies. When an association's bylaws and constitution provide for a process by which action may be taken against a member, the member must participate in and complete the internal administration process. See *Juarez v. Tex. Ass'n of Sporting Officials*, El Paso Chapter, 172 S.W.3d 274, 280 (Tex. App. -- El Paso 2005, no pet.) The summary judgment evidence shows that: (i) Appellant's membership was suspended by the NCHA Executive Committee (CR 313-314; 382-385); (ii) the NCHA rules provided Appellant a right to appeal those decisions and she was specifically and repeatedly given notice of that right in the presence of her lawyer (CR 314;382-383); and (iii) Appellant failed to appeal those decisions (CR 179;299; 1054). Under the foregoing precedent, all claims relating to the suspension of Appellant's membership in the NCHA were properly dismissed as a matter of law for Appellant's failure to exhaust her administrative remedies.

Appellant argues that her requests for a conference with the NCHA Executive Committee after suit was filed evidence her attempts to have the August 21, 2006 decision reconsidered and that these letters constitute an administrative appeal. (Appellant's Brief at p. 18-19). This claim, based on correspondence from Plaintiffs' counsel prefaced with the title, "Privileged and Confidential TRE 408 Settlement Communication" (CR 1178-1179) are not probative of any issues in this case. The request for a settlement conference made

by Appellant's counsel after this suit was filed and outside of the appeal timelines set forth in the NCHA rules is a far cry from adhering to the NCHA's appeal process.

The letters informing Plaintiff of the committee rulings and the rule governing appeals clearly state the procedure for appealing a decision of a disciplinary committee. (CR 314; 382-383). Within 21 days of such a ruling, a person wishing to appeal the ruling must file a notice of appeal and a \$1,000.00 appeal bond (CR 204; 314; 382-383). Appellant had knowledge of these rules and had availed herself of those procedures in the past. (CR 176-177). Despite this knowledge, Appellant failed to follow NCHA procedures and filed suit instead. (CR 2).

For the foregoing reasons, Appellant's claims that she exhausted her administrative remedies in connection with her membership suspensions are without merit and were properly rejected by the trial court.

**B. The trial court was required to grant summary judgment on the alleged oral agreement for automatic reinstatement**

*1) The parties entered into a binding 2005 Settlement Agreement*

The summary judgment evidence establishes the 2005 Settlement Agreement entered into on January 19, 2005 is binding and enforceable. Specifically, the record shows: (i) the NCHA Executive Committee must approve all agreements of this nature (CR 421-422); (ii) NCHA counsel was given authority to settle this matter on the terms contained in the 2005 Settlement Agreement (CR 421-422); and (iii) the only terms the NCHA Executive Committee agreed to are the terms stated in the January 19, 2005 letter (CR 424-426).

Further, Appellant's counsel recognized the validity of the 2005 Settlement Agreement on more than one occasion. First, in April of 2005 Appellant's then counsel Clark Brewster wrote her a letter instructing her on rule changes that would need to occur if she ever wished to seek reinstatement to amateur or non-professional status; no mention of any oral Alleged Oral Agreement for Automatic Reinstatement is mentioned in that letter. (CR 1031-1032).<sup>3</sup> Second, in the April 21, 2006 hearing before the NCHA Executive Committee, a hearing held over one year after the 2005 Settlement Agreement was made, Appellant's then counsel James Walker in her presence acknowledged that the January 19, 2005 Settlement Agreement was a binding agreement. (CR 340-341).

Finally, Appellant did not compete in NCHA competitions during the six month term of the membership suspension provided for in the 2005 Settlement Agreement. (CR 407-408). After the term of the membership suspension, and consistent with the 2005 Settlement Agreement, Appellant was reinstated to membership status and resumed competing in NCHA competitions in the open class. (CR 407-410). Appellant's actions show her acceptance of the terms of the 2005 Settlement Agreement, including complete revocation of her amateur and non-professional status. *See United Concrete Pipe Corporation v. Spin-Line Company*, 430 S.W.2d. 360, 364 (Tex. 1968). The foregoing evidence establishes as a matter of law that the Settlement Agreement is binding.

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<sup>3</sup> This instruction from Appellant's counsel was completely consistent with the express language of the 2005 Settlement Agreement that states: "Should the NCHA rules change in the future this proceeding will not prejudice Ms. Whitmire's ability to qualify for various designations as they may in the future exist."

In an attempt to escape the terms of the 2005 Settlement Agreement, Appellant's seeks to create some fact issue based on an Affidavit submitted by former NCHA President, Don Bussey. This argument is also without support in the record and was properly rejected by the trial court. The Affidavit of Don Bussey referred to by Appellant was submitted in accordance with the Court's ruling to clarify whether there existed any other writings related to the January 19, 2005 Settlement Agreement. (CR 1173). In his Affidavit, Mr. Bussey makes clear that no such other document existed and that he reviewed and approved the terms contained in the January 19, 2005 Settlement Agreement. (CR 1199-1200).

Mr. Bussey's clear deposition testimony is not contradicted by the Affidavit. Specifically, Mr. Bussey made the following statements in his deposition:

**Q.** I'll show you Exhibit 105 (the January 19, 2005 Settlement Agreement). Was Mr. Goins authorized to make that settlement offer in the Whitmire case?

**Mr. Walker:** Objection, form.

**Q.** Do you know whether or not Mr. Goins was authorized by the NCHA to make that settlement offer?

**A.** Yes.

**Q.** Was he?

**A.** Yes.

(CR 424).

\* \* \* \* \*

**Q.** What I'm asking you now is, whatever you may have said before, is how do you know that Mr. Goins had authority to send out this letter marked as Exhibit 105?

**A.** Because he presented it to us and said he was willing to settle the case, and this is the condition under it; would we be willing to accept it.

**Q.** Who would "us" be?

**A.** Executive board, and it could be the executive officers.

(CR 425)

The foregoing uncontroverted summary judgment evidence establishes that the NCHA approved only the terms contained in the 2005 Settlement Agreement. Contrary to Appellant's contentions, there is no fact issue raised by the Bussey Affidavit. In fact, that affidavit makes clear that Mr. Bussey was familiar with terms contained in the 2005 Settlement Agreement and approved only those terms on behalf of the NCHA (CR 1199-1200).

2) *The Alleged Oral Agreement for Automatic Reinstatement was properly rejected as a matter of law*

In a final attempt to escape the binding effect of the January 19, 2005 Settlement Agreement, Appellant asserts that the NCHA's counsel entered into the Alleged Oral Agreement for Automatic Reinstatement, an alleged oral agreement between counsel for the NCHA and Appellant's counsel that Appellant would be automatically reinstated to non-professional status after her six month membership suspension. (Appellant's Brief at p. 41-49). This claim fails as a matter of law under the record in this case and was properly rejected by the trial court.

In order to establish her Alleged Oral Agreement for Automatic Reinstatement claim against the NCHA, it is Appellant's burden to show that the agreement was made by an authorized agent of the NCHA acting within the

course and scope of his authority or that such agreement was ratified or approved by the NCHA. See *2616 South Loop v. Health Source Home Care*, 201 S.W.3d. 349, 356 (Tex. App. - Houston [14<sup>th</sup> Dist.] 2006, no pet.); *Herider Farms - El Paso, Inc. v. Criswell*, 519 S.W.2d, 473, 477 (Tex. App. - El Paso 1975, writ ref'd. n.r.e.). The record establishes that Appellant failed to present any competent summary judgment evidence to meet this standard.<sup>4</sup> In fact, the record establishes that the only agreement authorized by the NCHA is the 2005 Settlement Agreement. (CR 425).

Despite the uncontroverted summary judgment evidence establishing that the only terms agreed to by the NCHA are contained in the 2005 Settlement Agreement, Appellant asks this Court to ignore the 2005 Settlement Agreement and enforce the Alleged Oral Agreement for Automatic Reinstatement. Appellant first asserts that the NCHA failed to plead lack of authority as an affirmative defense to the Alleged Oral Agreement for Automatic Reinstatement and, therefore, such claim cannot be asserted by the NCHA. Appellant's assertion is not supported by Texas law. In fact, the argument made by Appellant was specifically addressed and dismissed in *Cleere vs. Blalock*, 605 S.W.2d 294, 296 (Tex. App. - Dallas, 1980, no writ) where the court stated:

"In the absence of a written executed agreement, he (Defendant) did not have to plead the lack of authority of his agent. In fact, the one relying on the authority of an agent is generally required to plead the facts relating to that contention." See *F. M.*

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<sup>4</sup> Appellant claims that the no evidence portion of the NCHA's Motion for Summary Judgment challenging the Alleged Oral Agreement for Automatic Reinstatement is defective because it fails to identify the elements of that claim being challenged by the NCHA. (Appellant's Brief at p. 42). The record establishes this assertion to be without merit because in its motion the NCHA specifically identified that there was no evidence on either: (i) authority of any NCHA agent to enter into any such agreement; or (ii) that the NCHA ratified or consented to any such agreement. (CR 388).

*Stigler, Inc. v. H.N.C. Realty Co.*, 595 S.W.2d 158, 163 (Tex.Civ.App.- Dallas 1980, writ filed); *Hotel Longview v. Pittman*, 276 S.W.2d 915, 919 (Tex.Civ.App. - Texarkana 1955, writ ref'd n.r.e.). (*emphasis added*).

Accordingly, Appellant's assertion that the NCHA was required to affirmatively plead lack of authority in order to challenge the Alleged Oral Agreement for Automatic Reinstatement is without merit.

Appellant next asserts that Texas law creates a presumption that NCHA counsel had authority to enter into the Alleged Oral Agreement for Automatic Reinstatement (Appellant's Brief at p. 42). Appellant cites to the case of *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 619 (Tex. App. - Fort Worth 2003, pet.denied) in support of her position. Appellant's argument is without merit and should be rejected.

The *Westlake* case in fact held that the counsel for Westlake did not have apparent authority or actual authority to enter into a binding 2005 Settlement Agreement on behalf of the Town. *Westlake* 111 S.W.3d at 628-630. There is no presumption of apparent authority for an attorney of record to make such an agreement. *Westlake*, 111 S.W.3d at 630. Further, the *Westlake* opinion does not support any presumption of actual authority on behalf of NCHA counsel to enter into the Alleged Oral Agreement for Automatic Reinstatement for several reasons. First, the presumption of actual authority referred to in *Westlake* only applies to matters in litigation. *Westlake*, 111 S.W.3d. at 629. The alleged agreement in this case was made at a time when this case was not in litigation, but

was rather in proceedings before the NCHA.<sup>5</sup> Secondly, the presumption of actual authority is rebutted when proof is presented that the client did not authorize the attorney to enter into the agreement. *Id.* Such undisputed summary judgment evidence, by way of Mr. Bussey's testimony, is present in the summary judgment record. (CR 421-422). Accordingly, Appellant's presumption of authority argument is not supported by the law or the record in this case and the Agreement for Automatic Reinstatement fails as a matter of law.

Perhaps the best proof that the Alleged Oral Agreement for Automatic Reinstatement did not exist is exhibited through the actions of Appellant and her counsel. Specifically, the record shows:

**1)** In April of 2005, four months after revocation of her amateur and non-professional status, Appellant's then attorney Clark Brewster wrote her a letter outlining changes that would have to be made to the amateur and non-professional rules of the NCHA in order for Appellant to qualify to compete in those classes. (CR 1031-1032). If the Alleged Oral Agreement for Automatic Reinstatement existed, no rules changes would be required;

**2)** In the hearing before the Executive Committee on August 21, 2006, Appellant's counsel acknowledged that the 2005 Settlement Agreement is binding (CR 340-341), but made no mention of the Alleged Oral Agreement for Automatic Reinstatement. (Cr 315-373). Since the purpose of that hearing was to consider Appellant's qualification for non-professional status, any such agreement would surely have been advocated at that time if it existed;

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<sup>5</sup> To the extent that Appellant's claim that the rules relating to cases in litigation apply, the alleged oral Agreement for Automatic Reinstatement would be void as a matter of law. *Knapp Medical Center v. de la Garza*, 238 S.W.3d 767, (Tex. 2007).

**3)** Appellant made repeated requests for reinstatement of non-professional status from the time her six month membership suspension ended in the Summer of 2004 until the Spring of 2006. (CR 301-303;307). Each of those applications was denied. (CR 178, 310-311). Certainly any Alleged Oral Agreement for Automatic Reinstatement and the corresponding entitlement to non-professional status would have been mentioned during this process. It was not.

**4)** Finally, Appellant's own deposition testimony establishes that, consistent with the terms of the 2005 Settlement Agreement, changes in NCHA rules would be required before Appellant could possibly qualify for non-professional status. Specifically, Appellant testified as follows:

**Q.** "Okay. Letters that were sent in connection with your reapplication?"

**A.** Yes, sir. There was a rule change.

**Q.** Okay.

**A.** And so I reapplied.

**Q.** All right. A rule change to what rule?

**A.** The non-pro rule.

**Q.** Okay. And why was that important to you, that there was a rule change?

**A.** I just thought it might open the door and let me reapply. (*emphasis added*) (CR 406-407).

Accordingly, Appellant's own testimony supports the fact that NCHA rule changes would be required for her to qualify as a non-professional and no Alleged Oral Agreement for Automatic Reinstatement existed.

The Alleged Oral Agreement for Automatic Reinstatement never existed, is not supported by the summary judgment record and is a red herring

fabricated in an attempt to avoid summary judgment. In fact, Appellant's Original Petition in this matter makes absolutely no reference to any Alleged Oral Agreement for Automatic Reinstatement, because it did not exist. (CR 2-15).

The record in this case establishes that no enforceable Alleged Oral Agreement for Automatic Reinstatement existed and that the trial court properly granted judgment in favor of the NCHA on that claim as a matter of law.

**C. The Trial Court was required to grant summary judgment on Appellant's fraud and negligent misrepresentation claims**

Appellant claims that the NCHA did not move for summary judgment on her claims for fraud and negligent misrepresentation. (Appellant's Brief at p. 49). This allegation is not supported by the record and should be dismissed by this Court. First, Section III of the NCHA's Motion for Summary Judgment entitled "Grounds for Summary Judgment" specifically states: "... Therefore, under Texas law, all such claims must fail as a matter of law. This would include Appellant's claims for declaratory judgment, breach of contract, fraud, negligent misrepresentations, violation of due process, breach of fiduciary duty and intentional infliction of emotional distress." (*emphasis added*) The fraud and negligent misrepresentation claims were clearly referenced in the NCHA's Summary Judgment Motion.

Further, Appellant's fraud and negligent misrepresentation claims are contained in Counts F and G of her Fourth Amended Petition. (CR 98-101). In those paragraphs Appellant makes the following allegations:

"The NCHA made a material representation to Lainie Whitmire that if she paid her membership dues and abided by the NCHA rules, she would be granted her Non-Professional status and NCHA membership.

The NCHA, acting by and through its legal agents and representatives, including General Counsel Eldridge Goins, further represented that if Mrs. Whitmire accepted a six (6) month suspension of her NCHA membership benefits, and revocation of her amateur status, her NCHA membership and corresponding Non-Professional status would be reinstated at the conclusion of that six (6) month period." (CR 98-99)

"The NCHA made the representation to Lainie Whitmire in the course of its business that if she paid her membership dues and abided by the NCHA rules, she would retain her membership and be granted Non-Professional status. The NCHA, by and through its legal agent, representative and General Counsel Eldridge Goins, further agreed that if Lainie Whitmire accepted a six (6) month suspension of her NCHA membership benefits and also accepted the revocation of her amateur status (by not pursuing her otherwise perfected appeal of this issue), her NCHA membership and corresponding non-professional status would be reinstated at the conclusion of that six (6) month period." (CR 100).

In its motion for summary judgment, the NCHA specifically cited to those paragraphs in Appellant's Petition and requested relief on those claims (CR 167-168). For the foregoing reasons, Appellant's assertions that the NCHA did not move for summary judgment on those claims are without merit.

Finally, Appellant's fraud negligent misrepresentation claims are no more than a restatement of Appellant's breach of oral contract claim and should be dismissed as a matter of law. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). In *Jim Walter Homes* the Texas Supreme Court held that when an action sounds in contract, a party cannot assert independent tort claims based on those same operative facts. In our case, it is undisputed that NCHA counsel never made any representations to Appellant, rather Appellant claims that NCHA counsel allegedly made an oral agreement with Appellant's counsel that Appellant would be automatically reinstated as a non-professional six months after her

suspension. (CR 96-97). Appellant further claims that the NCHA breached that agreement and has sued for breach of contract based upon those facts. (CR 97). Appellant's fraud and misrepresentation claims arise from the exact facts alleged by Appellant as the basis for her breach of oral contract claim and seek the same relief as Appellant's breach of contract claim. (CR 99,100). Such claims are merely contract claims which Appellant attempted to cast as tort claims, are improper under Texas law and were properly dismissed by the trial court as a matter of law.

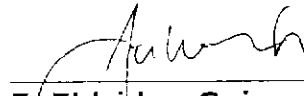
### **III. CONCLUSION**

The trial court correctly granted the NCHA's Motion for Summary Judgment and its judgment should be affirmed. The NCHA should also be awarded its attorneys' fees and costs of court for this appeal.

### **IV. PRAYER**

For all the foregoing reasons, Appellee the National Cutting Horse Association prays that the trial court's judgment be affirmed in all respects and that costs of this appeal be taxed against Appellant.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document, along with the attached Appendix, has been hand-delivered to the following counsel of record on this the 19<sup>th</sup> day of September 2008 to:

James W. Walker  
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**JAMES W. MORRIS, JR.**

## APPENDIX

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|----|--|--------------|
| 1. | January 19, 2005 Settlement Agreement  | CR 299       |
| 2. | April 13, 2005 letter from Clark Brewster to Lainie Whitmire   | CR 1031-1032 |
| 3. | March 2, 2006 letter from James Walker to Eldridge G. Goins, Jr.   | CR 306-307   |
| 4. | April 27, 2006 Report of Non-Professional Committee on Application of Lainie Whitmire                    | CR 310-311   |
| 5. | August 28, 2006 Report of Appeal and Disciplinary Action Regarding Lainie Whitmire                       | CR 313-314   |
| 6. | November 26, 2007 Report of the Executive Committee Regarding the Memberships of Lainie and Ray Whitmire | CR 382-385   |