

COMMONWEALTH OF KENTUCKY  
PUBLIC PROTECTION CABINET  
KENTUCKY HORSE RACING COMMISSION  
ADMINISTRATIVE ACTION NO. KHRC-16-TB-003 & 004

MICHAEL ANN EWING and  
NINA HAHN

COMPLAINANTS

v.

**MOTION TO DISMISS**

KENTUCKY HORSE RACING COMMISSION

RESPONDENT

Comes the Complainants, Michael Ann Ewing (“Ewing”) and Nina Hahn (“Hahn”) who move to dismiss this action.

**FACTS**

Ewing has been a licensed trainer in Kentucky since 2010. Before that, she was an assistant trainer in California for several years. Prior to the incident at issue, she has never had a medication rule infraction of any kind.

Among the horses in Ewing’s barn is a Thoroughbred filly named COVERT GEM (the “Filly”). The Filly was bred and is owned by Lochness Inc., an entity wholly owned by Ms. Nina Hahn (“Hahn”).

On November 28, 2015, Enrique Ortega (“Ortega”), a groom employed by Ewing, loaded the Filly onto a van in Lexington to be taken to Churchill Downs to run in the sixth race, a Maiden Special Weight race with a winner’s share of the purse of \$33,000, which the Filly won. Ortega rode with the Filly to Louisville, unloaded her, led her to the paddock, assisted in saddling her, accompanied her to the test barn after the race, loaded her on the van for her return trip to Lexington, and accompanied her there.

During this time and for a few days preceding it, Ortega had a severe cold. The evening before the race, he took Nyquil cold remedy and the day of the race, he took Dayquil cold remedy.

Following the race, the Filly's post-race *urine* sample collected in the Churchill Downs detention barn tested positive for Dextrophan in a screen performed by LCG labs. Dextrophan is a metabolite of a medication called Dextromethorphan, a common, *non-narcotic*, antitussive (cough suppressant). It is one of the most commonly used human medications and is present in many over-the-counter cold medications. It is present in Nyquil and Dayquil, the medications used by Ortega the night before and the day of the race.

Dextromethorphan is sometimes used in horses for the treatment of a compulsive biting behavior known as "cribbing." As a result of this permissible use, it is classified as a Category 4 medication by the Association of Racing Commissioners International, a category for *therapeutic medications* that would be expected to have less potential to affect performance than those in Class 3, which is defined by the ARCI as drugs that may or may not have generally excepted medicinal use in the racing horse, but the pharmacology of which suggests less potential to affect performance than drugs in class 2. In summary, ARCI Class 4 medications are generally accepted therapeutic substances not shown to have the potential for significant effects on behavior or performance of horses in competition.

At Complainants' demand, a urine split-sample was tested at Industrial Labs on February 26, 2016. This test also was positive for Dextrophan. The concentration was estimated to be miniscule, approximately 15 ng/ml after enzyme hydrolysis. The specific gravity of the urine recorded by LCG was 1.020. The pH was not recorded by either lab, although it can affect the urine level observed.

Although blood was collected after the race, at the time of the notice of charge of an administrative rule violation and through the end of the Stewards hearing, there was no charge based upon the presence of any substance in the blood of the Filly, no report provided to the Complainants about any finding of any substance in the Filly's blood (in fact the only report received from the KHRC lab noted that there was a finding in urine only) nor was there any evidence introduced by the KHRC to the Stewards of the presence of Dextrophan in the Filly's blood sample which was also collected after the sixth race at Churchill Downs on November 28, 2015. As such, no split blood sample was ever tested and Complainants were never put on notice of any need to request a split sample of the blood.

Prior to the Steward's Hearing, counsel for the Filly's owner requested and received the packet of scientific details related to the positive urine test. This was provided to an expert, Steven Barker, MS, PhD, Emeritus Professor, Department of Comparative Biomedical Sciences, School of Veterinary Medicine, Louisiana State University, Director, EMSL (1987-2016), State Chemist. LSRC (1987-2016). He provided an expert opinion introduced into evidence at the hearing stating that the extremely low level of the Dextromethorphan metabolite Dextrophan found in the Filly's urine was, to a scientific certainty, insufficient to cause any effect on the Filly's behavior or performance. What is more, this low level was more likely than not caused by inadvertent environmental exposure (had the medication been intentionally given, more would have been necessary to have any affect and, therefore, a higher level of the metabolite would have been present).

As set forth above, consistent with Dr. Barker's conclusion that the source of extremely low level of Dextrophan detected (15 ng/ml urine) was an inadvertent and inconsequential contamination, it is known that the Filly was handled by a groom who was using Nyquil and

Dayquil, medications that are known to contain Dextromethorphan, the metabolite of which is Dextrorphan.<sup>1</sup>

That was the state of the record in this case when, at the conclusion of the approximately three (3) hour Stewards Hearing on June 22, 2016, it was the Complainants' understanding that all evidence to be considered by the Stewards in making their determination of the alleged rule violations had been submitted and the record in the case was closed.

After the close of the hearing, apparently because the Stewards shared some of the substance of the testimony with the KHRC Equine Medical Director Dr. Mary Scollay, she requested that a blood sample then in the possession and control of the KHRC which was taken from the Filly after the race in question be tested for Dextrorphan and Dextromethorphan by LCG laboratory. Dr. Scollay did not provide notice to either of the Complainants of this request. Dr. Scollay received the results on July 22, 2016. Ewing and Hahn were notified of the results (and, that the test had even been requested) only on August 17, 2016. At that time, Dr. Scollay submitted the test results to the Stewards as "evidence" against Ewing and Hahn. It should have exonerated them, as addressed below, but instead the Complainants were advised by the chief Steward Barbara Borden that the additional testing actually formed a basis for the Stewards Ruling against the Complainants.

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<sup>1</sup> In a prior case before the Commission, and at the suggestion of its Equine Medical Director, Dr. Mary Scollay, allegations against a trainer named Danny Miller were dismissed because environmental contamination could have produced a Morphine positive test result in that matter. The concentration in that case was 75-135 ng/ml, far more than the 15 ng/ml of Dextrorphan concentration herein. Morphine is an ARCI Class 1 narcotic analgesic drug with the highest potential to affect the performance of a horse. There is no known medicinal use for Morphine in the horse. It is a DEA Schedule 2 narcotic. Drugs such as Morphine have the highest potential to have a significant impact on a horse than the relatively innocuous medication ARCI Class 4 therapeutic medication Dextromethorphan, which was not detected in the blood or urine of the Filly. The chance of its metabolite, Dextrorphan, having any effect on the performance of the horse, as the testimony of Dr. Barker established, is nil. Nonetheless, the proceedings against Miller were dismissed at Dr. Scollay's behest because she found that the presence of up to ten to twenty times as much Morphine was more likely consistent with contamination than intentional administration while the Complainants herein received unequal and harsh treatment for a far, far less serious therapeutic substance found to be present in the urine of the Filly in a fraction (only 10-20 percent) of the concentration of ARCI Class 1 Morphine found in the horse trained by Miller.

That test result revealed that *no* Dextromethorphan (the pharmacologically active parent compound) was found in the Filly's blood, only the inert metabolite Dextrorphan. Three days later, on August 20, 2016, the Stewards Ruling issued a ruling suspending Ewing for one month, fining her \$500, disqualifying COVERT GEM from her first place finish and ordering Hahn to forfeit the \$33,000.00 purse. The ruling was based on the Stewards stated holding that the Filly's urine contained "dextrorphan (Class B Drug)."

As will be discussed below, Dextrorphan is NOT a "Class B Drug." The Stewards Ruling erred in stating that it was categorized as such. This error is indicative of the Stewards misunderstanding of the evidence and flawed misapplication of the administrative regulation to punish the Complainants. Dextromethorphan, the pharmacologically active parent compound, is a Class B Drug, but it was not present in the Filly in any amount under any test, including the improper post-hearing blood test. Thus, the sanctions issued by the Stewards were based upon the test results reporting an unclassified innocuous, metabolite of therapeutic substance as being present in the Filly's urine and was not based upon any finding or report from the lab of any properly categorized and banned substance.

These appeals from Ewing and Hahn followed.

## ARGUMENTS

### I. APPLICABLE LAW

As was stated in *Barry v. Barchi*, 443 U.S. 55, 64 (1979), a trainer has "a property interest in [her] license sufficient to invoke the protection of the Due Process Clause." Therefore, the license cannot be taken or suspended without providing both procedural and substantive due process.

In trial-type hearings, an agency is required to follow the procedures set forth in the Administrative Procedures Act found in KRS chapter 13B, and its own procedural regulations. It must also act in a manner that is consistent with the procedural requirements of the Due Process Clause of the United States Constitution.

“Procedural due process in the administrative setting ... has been widely understood to encompass a ‘hearing, the taking and weighting of evidence if such is offered, a finding of fact based on the evidence, [and] the making of an order supported by substantial evidence ....” *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (citing *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969)). “The purpose of a ‘trial-type hearing’ ... is to permit the development of all relevant evidence that will assist the administrative body in reaching its decision. In such a hearing, as we view it, the parties must have an opportunity to subject all evidence to close scrutiny to determine its trustworthiness. A trial-type hearing implies the opportunity for full rebuttal, and the opportunity to impeach witnesses.” *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591-92 (Ky. 1982).

In addition to procedural due process, the agency must provide substantive due process. “The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process.” Comment, *Developments in the Law—The Constitution and the Family*, 93 Harv.L.Rev. 1156, 1166 (1980). See *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986)); *Stratford v. State–House, Inc.*, 542 F.Supp. 1008, 1014 (E.D.Ky.1982), *aff’d*, 722 F.2d 742 (6th Cir.1983). Among these substantive rights is the right not to be subject to “arbitrary or capricious” action by a state either by legislative or administrative action. *Curto v. City of Harper*

*Woods*, 954 F.2d 1237, 1243 (6th Cir.1992); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir.), cert. denied, 464 U.S. 815, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983); *Stratford v. State-House, Inc.*, 542 F.Supp. 1008, 1014 (E.D.Ky.1982), aff'd, 722 F.2d 742 (6th Cir.1983).

The three-part test for determining the arbitrariness of an administrative agency decision concerns whether the agency's action was within the scope of its granted powers, whether the agency provided procedural due process, and whether the decision was supported by substantial evidence. See *Commonwealth, Revenue Cabinet v. Liberty Nat'l Bank of Lexington*, 858 S.W.2d 199, 201 (Ky.App. 1993) (citing *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964)). If the decision of the administrative agency fails to meet any of these standards, it must be considered to be arbitrary. *Id.* at 201.

Finally, all people charged with a violation of state regulations are entitled to equal protection of the law. "The Equal Protection Clause prohibits state and local governments from treating similarly situated persons differently." *Rector v. Denver*, 348 F.3d 935, 949 (10th Cir.2003) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

## **II. DEXTROMETHORPHAN IS IMPROPERLY CLASSIFIED AND DEXTROPHAN IS NOT CLASSIFIED AT ALL**

### **A) The Dextromethorphan Test Was Negative and Dextrorphan Is Not A Class B Drug**

The Stewards' Ruling seeks to punish Ewing and disqualify the horse and forfeit the purse based on a finding of Dextrorphan, which the Stewards Ruling refers to as a "Class B drug." This is facially incorrect.

Attached hereto as Exhibit A are the KHRC classification schedules. Class B does not include Dextrophan at all – no class does so. Perhaps the Stewards confused it with Dextromethorphan, which is a Class B drug. The Filly DID NOT test positive for Dextromethorphan, the banned substance, only Dextrophan.

While the Commission presented evidence that Dextromethorphan metabolizes into Dextrophan, the fact remains that had the Commission intended to ban the metabolite as well as the drug, it could easily have done so by listing the metabolite in the schedule. It has done so with many other metabolites. It did not do so with Dextrophan. Therefore, on its face, only Dextromethorphan is a Class B Drug and nothing in the schedules allows for punishment for the presence of the metabolite Dextrophan, no matter how similar in appearance they may appear on the page. They are not the same substance.

To be clear, the banned drug can be tested for directly and no inferences about its use or presence need be based on presence of the metabolite. Indeed, the split sample test report presented as evidence at the hearing stated that the banned substance Dextromethorphan can be tested for in blood, just not urine. Likewise, Dextromethorphan was specifically targeted for identification by the KHRC and was directly tested for in the blood sample sent to the laboratory in this case. The result was then presented to the Stewards after the close of evidence. That test was negative for Dextromethorphan.

The Stewards Ruling is facially incorrect in stating that Dextrophan is a “Class B Drug.” It is not banned at all. The banned Class B Drug Dextromethorphan was not found in the Filly’s blood. The Ruling must be vacated for punishing Ewing and disqualifying Hahn’s Filly and ordering the forfeiture of the purse for a positive test result for a permitted therapeutic substance, and a negative test for a related, but clearly different banned substance.



## **B) Dextromethorphan Is Not Properly Classified At All**

Moving past the dispositive fact that no Dextromethorphan was detected in the Filly, this therapeutic medication (Dextromethorphan) is improperly classified. The classification schedules are based on 810 KAR 1:018, section 2, subsection (2) (c), which provides:

(2) Except as otherwise provided in Sections 4, 5, 6, and 8 of this administrative regulation, while participating in a race, a horse shall not carry in its body any drug, medication, substance, or metabolic derivative, that:

- (a) Is a narcotic;
- (b) Could serve as an anesthetic or tranquilizer;
- (c) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse; or
- (d) Might mask or screen the presence of a prohibited drug, or prevent or delay testing procedures.

The only other permissible classification of a medication falls under 810 KAR 1:018, section 2, subsection (3), which allows classification of therapeutic medications as follows:

Therapeutic medications shall not be present **in excess of established threshold concentrations** set forth in this administrative regulation or in 810 KAR 1:040.

The classification schedule is permitted by and must comply with these regulations. They allow for “zero-threshold” classification only of narcotics, anesthetics, tranquilizers, masking agents, or stimulants, depressants or substances that affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse. *Therapeutic medications can only be banned by the Commission after it first sets a minimum threshold concentration above which punishment may be imposed.*

Neither the banned substance, Dextromethorphan, nor the metabolite, Dextrorphan, qualify for inclusion on any schedules based on these regulations. They are not narcotics, anesthetics, tranquilizers, masking agents, or stimulants, depressants or substances that affect the circulatory,

respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse. Therefore, they cannot be punished based on a “zero-threshold” policy or classification. Dextromethorphan *is* a therapeutic medication, and can only form the basis of a charge of an administrative rule violation by the Commission after it first establishes a minimum threshold concentration (the law requires such a threshold to be reasonably and rationally related to the purpose of the laws) which must be exceeded as established by quantitative testing results for the Stewards to have any basis for any administrative enforcement action. The failure to set a reasonable threshold, rationally related to preserving the integrity of racing, not only violates the enabling regulations, but also fails to give participants fair notice of when therapeutic medications can be used, what withdrawal times need to be maintained, and what concentrations of such therapeutic medications are allowed in post-race samples collected by the KHRC. Again, keeping in mind, these are actual therapeutic and properly used permitted medications and they have little to no potential to affect racing performance as they do not fall within any of the “zero-threshold” categories.

The Commission must follow its own regulations governing what it may regulate and under what circumstances (a properly set, reasonable threshold concentration permitted that is rationally related to protecting the integrity of racing) such a restriction upon use may be imposed. It has failed to do so. Dextromethorphan is not properly classified, and Dextrorphan is not classified at all.

### **C) The Current Class B Definitions Are Inconsistent With the Enabling Regulations**

Not only has the Commission seemingly ignored its own regulations governing when and under what circumstances the use of particular medications may be restricted or banned, it deviates from these regulations in the broad definitions of the classes, themselves. For example, “Class B

Drugs” are defined by KHRC 40-01, Kentucky Horse Racing Commission Uniform Drug, Medication, and Substance Classification Schedule, as follows:

Class “B” Drugs are those that may have a legitimate therapeutic indication in the equine athlete, but also have a high potential to influence performance based on their presence in Classes 2 or 3 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances. Also in Class “B” are drugs which may have a lower potential to influence performance based on their residence in Class 4 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances, but that have not been approved for use in the horse by the United States Food and Drug Administration and recognized therapeutic alternatives to these drugs are widely available. Potential contaminant substances are included in this category to provide flexibility pending the outcome of an investigation into the origin of the positive test.

This definition of Class B Drugs bears no logical relationship to any of the regulations under which they were enacted. While they properly include medications that can be categorized as narcotics, anesthetics, tranquilizers, masking agents, or stimulants, depressants or substances that are known to affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse and thus may be banned without a minimum threshold, they also include, by their very definition, therapeutic medications without these onerous and known effects; those “drugs which may have a lower potential to influence performance based on their residence in Class 4 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances, but that have not been approved for use in the horse by the United States Food and Drug Administration and recognized therapeutic alternatives to these drugs are widely available” and “[p]otential contaminant substances ... included in this category to provide flexibility pending the outcome of an investigation into the origin of the positive test.” These latter two categories of therapeutic drugs can only be banned by the Commission by regulation after it first sets minimum threshold concentrations that must be exceeded before

enforcement action is taken. This includes substances found on Class 4 of the Association of Racing Commissioners International Uniform Classification of Foreign Substances list defined to include therapeutic medications with a low potential to influence performance. Dextromethorphan is categorized by the ARCI as a Class 4 substance.

In short, the sanctions in this case have been issued for a metabolite of a medication that is not in the category that allows the KHRC to take administrative action based upon the mere presence of the substance in a post-race sample (ARCI Class 1 & 2 substances) and the metabolite is of a therapeutic medication that is improperly classified and for which no reasonable threshold concentration, rationally related to the protection of the integrity of racing, has been established. Without such a threshold concentration being established, the KHRC cannot treat this therapeutic medication as if it poses a significant threat to the integrity of racing and take administrative action against the owner and trainer based only upon a lab finding of its mere presence in a post-race sample. Furthermore, the only classified (whether properly or improperly classified) substance regulated by the KHRC (Dextromethorphan) was not detected in the Filly's urine (and later in an improper and objectionable post hearing testing of the blood, as discussed in detail below) in any amount. No law supports the ruling. It must be vacated and this action dismissed.

### **III. SEVERAL STATUTES AND REGULATIONS WERE VIOLATED**

The sanctions herein also were issued in violation of the Complainants' rights under other governing regulations, their statutory and Constitutional rights. Whether viewed individually, or as a whole, the sanctions are arbitrary and capricious, fundamentally unfair, and deny the Complainants equal protection and due process of the law. Accordingly, these are additional grounds upon which this action must be dismissed.

Beginning with the arguments not based upon Constitutional violations first, the agency has acted contrary to the requirements of the Administrative Procedures Act (KRS chapter 13B), and its own regulations in the conduct of these proceedings against Ewing and Hahn. In particular, the post-hearing/close of evidence decision of the Stewards, the trier of fact at this administrative level, (presumably at the behest of the KHRC Equine Medical Director Dr. Scollay) to have a blood sample from the Filly tested to determine if the pharmacologically active parent compound (Dextromethorphan) of the metabolite detected in the Filly's urine sample was present (it was not) is directly contrary to the express requirements of the "Split Sample Rule," 810 KAR 1:018 Section 12(2)(a) because neither the trainer or owner of the Filly received notice of the test results (positive finding according to the Stewards) and an opportunity to have the "B" or split blood sample tested to challenge the results of the post-hearing improper testing of the Filly's primary, or "A" blood sample. This heavy handed and improper conduct by representatives of the KHRC, made in a desperate attempt by the KHRC to rebut the Complainants compelling argument made at the Stewards hearing<sup>2</sup> cannot be countenanced by this Court. Use of the post-hearing test results as evidence, (as was confirmed by Chief Steward Barbara Borden in separate conversations with both counsel for the Complainants) after the close of the evidence submitted on the record at the Steward's hearing violated numerous provisions of law designed to protect the Complainants' rights and ensure a fair hearing.

Among the procedural rights violated are those found in 810 KAR 1:029, which provides that, "the authority shall ... permit all parties to respond and present evidence and argument on all

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<sup>2</sup> Complainants presented expert testimony to support the argument made at the Stewards' Hearing of this case that if the pharmacologically active parent compound Dextromethorphan was not present in the blood, then the presence of the metabolite *alone* is conclusive proof that there could have been no effect on the performance of the horse in the race, thus no threat to the integrity of racing. In fact, no Dextromethorphan was reported in either the KHRC Lab, LGC, urine or blood report or the split sample lab, Industrial Labs, urine report. No split blood sample was sent to Industrial Labs because the KHRC improperly tested the Filly's primary blood sample and did not afford the Complainants an opportunity to have the split sample tested.

issues involved ....” Gathering evidence after the hearing and presenting it to the Stewards deprived Ewing and Hahn of their right to “respond and present evidence and argument” related to the blood sample, the validity of the test, the chain of custody, or the meaning and implications of the results. In addition, this belated provision of “evidence” deprived the Complainants of their ability to point out that contrary to Dr. Scollay’s intent, the test results were exonerating because the blood was tested for Dextromethorphan, the actual banned substance, and was negative. It cannot seriously be contended that this was proper administrative agency conduct. Clearly it was an abuse of administrative authority and violated the express statutory rights of the Complainants.

In addition, all administrative proceedings are subject to the requirements of the Administrative Procedures Act, including KRS 13B.090. Several different subsections of this statute also have been violated by the Stewards conduct in accepting post-hearing information, provided by the KHRC laboratory and not subject to cross examination or other legal challenge. First among these is subsection (1), which provides that “[i]n an administrative hearing, findings of fact shall be based *exclusively* (emphasis added) on the evidence on the record.” Relying on evidence that is submitted after the record has closed at the conclusion of the hearing violates this requirement that all decisions must be based exclusively on the evidentiary record.

Subsection (2) of KRS 13B.090 provides that “[a]ll testimony shall be made under oath or affirmation. Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.” The laboratory test results constitute a form of testimony from the laboratory officer that is not submitted under oath or affirmation. Therefore, it is admissible only if it would expedite the hearing without substantial prejudice to a party. Here, the hearing was over, so it could not possibly be “expedited” by post-hearing submissions of evidence. Moreover, use of this laboratory test substantially prejudiced

Ewing and Hahn as they were not given any notice, opportunity to explore or argue against the chain of custody, testing methods, results and conclusions cross examine the LGC Lab report's author about the "testimony" in the report provided by the KHRC lab subsequent to the Stewards' Hearing of this matter, and the Complainants were not allowed to present this result to their own experts for analysis, opinion and the submission of rebuttal testimony.

Subsection (3) of KRS 13B.090 provides a party "shall have the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing, and the available documentary or tangible evidence relating to an administrative hearing either in person or by counsel." Pursuant to this rule, all laboratory test results and findings – the entire urine test packet – were requested and provided to counsel for the Complainants. The Complainants' experts then prepared their opinions based on this identified evidence. Gathering additional evidence after this production and, indeed, after the hearing, bypasses these requirements and deprived the Complainants of a fair hearing.

Subsection (4) of KRS 13B.090 allows "[o]bjections to evidentiary offers" to be "made by any party and shall be noted in the record." Offering evidence after a hearing is concluded prevented the Complainants from offering objections, much less ones that are noted in the already-closed record.

Since the post-hearing evidence offered related to blood testing, its offer also implicated sections 11 and 12 of 810 KAR 1:018, which required the Commission to notify the trainer and owner of a positive test result within 5 days of its receipt (section 11 subsection 6 provides that "[w]ithin five (5) business days of receipt of notification by the commission laboratory of a positive finding, the commission shall notify the owner and trainer orally or in writing of the positive finding") and provide them the right to have a split sample tested by another laboratory.

Section 12 provides that “A trainer or owner of a horse receiving notice of a positive finding may request that a split sample corresponding to the portion of the sample tested by the commission laboratory be sent to the split sample laboratory. The party requesting the split sample shall select a laboratory solicited and approved by the commission to perform the analysis. ... The request shall be made in writing and delivered to the stewards within three (3) business days after the trainer or owner of the horse receives oral or written notice of the positive finding by the commission laboratory. ... A split sample so requested shall be shipped as expeditiously as possible”). In *March v. Florida Dep’t of Business Regulation, Div. of Pari-Mutuel Wagering*, 629 So.2d 290 (Fla.App. 1993), the court vacated a sanction against a trainer after a drug positive where the Division of Pari-Mutuel Wagering (“Division”) had failed to allow a trainer to test a split sample of urine. In doing so, the Court stressed the importance of an administrative agency complying strictly with all regulations governing proceedings before it:

As stated in *Kibler v. Department of Professional Regulation*, 418 So.2d 1081, 1084 (Fla. 4th DCA 1982):

The adherence to rules and statutes by the very agency charged with their enforcement is especially necessary if the public and the parties regulated are to maintain respect and confidence in the decisions rendered by the agency. It is one thing to seek the revision or removal of unnecessary or burdensome rules and regulations. But to ignore such rules while they remain in force is to invite disrespect and will ultimately result in a breakdown of the system.

In this case, the laboratory results were returned to Dr. Scollay on July 22, 2016. Thus, the commission was required by its own regulations to notify Ewing and Hahn of this result no later than July 29, 2016. It failed to do so. The first notice of this result came by e-mail on August 17, 2016, when it was improperly submitted to the Stewards after the close of the record. The Ruling came 3 days later. This belated notice and improper submission prevented the Complainants from obtaining a test of the split sample as was their right.



What is more, no chain of custody information was provided to Ewing and Hahn. The Commission was required to prove a valid chain of custody before it could use evidence (even if it had been timely introduced at the hearing). *Mollette v. Kentucky Personnel Bd.*, 997 S.W.2d 492, 495 (Ky.App. 1999) (while the chain of custody need not be perfect, there must be “persuasive evidence that ‘the reasonable probability is that the evidence has not been altered in any material respect’”). Here, the Commission failed to meet its burden to establish the blood sample’s chain of custody – or allow Claimants to examine or challenge it.

The above specifically articulated procedural rule violations constitute a clear violation of the Complainants’ procedural due process rights. As set forth above, in the context of a “trial-type hearing” due process requires a party be given the opportunity to develop all relevant evidence and test its validity through cross-examination, rebuttal evidence, and impeachment. Allowing a party to submit evidence after a hearing has concluded undermined the fundamental fairness of the hearing and deprived Ewing and Hahn of their fundamental procedural due process rights; they were given no opportunity to develop evidence related to the blood test, or test its validity and meaning through cross-examination, expert testimony, or impeachment.

Likewise, the Complainants were deprived of the opportunity to point out that the test actually exonerated them as none of the regulated substance (although we argue above that it was improperly classified) Dextromethorphan was detected by the KHRC lab. The post hearing development of additional evidence improperly interpreted and improperly relied upon by the Stewards actually represents substantial evidence in support of the Complainants’ argument made at the Stewards’ hearing that the performance of the Filly could not have been affected during the running of the race, and there could be no threat to the integrity of racing in Kentucky, unless the pharmacologically active parent compound, Dextromethorphan, was present. It was not.

Complainants were not afforded the opportunity to persuade the Stewards, by presentation of expert testimony in support of its interpretation of the post-hearing evidence, improperly interpreted by the Stewards as damning, as actually substantial evidence supporting the Complainants' argument that the absence of Dextromethorphan in the blood actually proved that the Filly ran in the race free from any potential effect upon her performance.

The Stewards, and presumably the KHRC Equine Medical Director, Dr. Scollay, clearly over-stepped the boundaries of proper administrative procedure when the decision was made to continue the investigation after the Stewards' hearing to develop and improperly rely upon new evidence against the Complainants when the record was closed. These repeated and intentional violations of both the Administrative Procedures Act and the Commission's own regulations offend the Complainants statutory and constitutional rights to a fair hearing and require the Ruling be vacated and this action be dismissed.

**IV. THE "ABSOLUTE INSURER RULE" VIOLATES DUE PROCESS, KRS 230.240, AND KRS 13B.090**

These procedural and regulatory violations become all the more egregious when one considers the context of this matter. Effective in 2006, the Commission enacted a new version of 810 KAR 1:018 section 15. This regulation purported to make a trainer an "insurer" of the condition of his or her horses:

**Section 15. Trainer Responsibility.**

- (1) A trainer shall be responsible for the condition of a horse in his or her care.
- (2) A trainer shall be responsible for the presence of a prohibited drug, medication, substance, or metabolic derivative, including permitted medication in excess of the maximum-allowable concentration, in horses in his or her care.

This 2006 version of the rule was a considerable change from its earlier iteration, which created a rebuttable presumption of trainer responsibility for a positive drug test, but allowed the trainer to prove his or her actual factual innocence. Previously, the regulation provided, in part:

If the commission determines that a horse had been administered a medication, drug, substance, or metabolic derivative thereof in violation of Section 1 or 2 of this administrative regulation, a licensed trainer, assistant trainer, groom, stable watchman, or other person having the immediate care and custody of a horse governed by the provisions of this administrative regulation shall be subject to disciplinary action **if he does not establish that he had:**

- (a) Not been negligent by failing to exercise a high degree of care in safeguarding the horse from tampering....

Under the original rule, an innocent trainer could avoid punishment upon proving her actual innocence. Under the current rule, she cannot.<sup>3</sup> She will be punished even if wholly innocent. In fact, a trainer will be punished even if she proves beyond question that a nefarious third-party intentionally drugged the horse for the sole purpose of harming her.

This rule and versions like it have been referred to as an “absolute insurer rule,” because, like a traditional insurer, liability does not depend on any responsibility or fault for the occurrence – the “positive” report of a violation of the administrative regulations related to the use and presence of permitted and prohibited medications and substances. The prior version of the rule is sometimes referred to as a “rebuttable presumption rule” because the violation still depends on some level of fault or responsibility in using or administering the substance (or at least not guarding against it,) but the positive test result creates a rebuttable presumption of such fault.

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<sup>3</sup> As will be discussed below, Dr. Scollay, as the Equine Medical Director, has used her authority to selectively obviate the harshness of this insurer rule by dismissing a proceeding against trainer Danny Miller after a positive test for Morphine, a Class I narcotic analgesic, because the amount found suggested possible environmental contamination. No such action was taken for Complainants herein despite the medication being a lower level classification, the amount found being far less in the Filly, and affirmative proof of inadvertent contamination and the lack of impact on the horse’s behavior or performance. Selecting favored trainers and deviating from the absolute insurer rule for them and not others violates the Complainants’ constitutional rights to equal protection and due process under the law.

### **A) Kentucky Statutes Do Not Authorize An Absolute Insurer Rule**

Whatever else may be said about the Constitutionality of the “absolute insurer rule” (which is discussed below), Kentucky’s statutory scheme does not allow it to be created by regulation; a statutory change would be necessary. “It is axiomatic that the grant of the power to make regulations does not authorize an administrative agency to adopt regulations which are contrary to legislative policy as expressed in the statutes.” *Kentucky Alcohol Beverage Control Board v. Anheuser-Busch, Inc.*, 574 S.W.2d 344, 345 (Ky.App. 1978).

The statute under which the Commission is to create drug and medication regulations, KRS 230.240 (emphasis added), provides that the “racing commission shall promulgate administrative regulations for effectively preventing the use of improper devices, and restricting or prohibiting **the use and administration of drugs or stimulants** or other improper acts to horses prior to the horse participating in a race.”

Both of these operative verbs, “use” and “administration,” require an affirmative and intentional act.<sup>4</sup> Likewise, 810 KAR 1:018 section 1 defines “administer” to mean “to apply to or cause the introduction of a substance into the body of a horse.” “Use” is not separately defined, but the rules define violations by reference to the word “administer.” For example, section 2, subsection (5) refers to a drug positive being *prima facie* evidence that the substance was “administered”. A trainer does not “use” or “administer” a substance if the horse ingests it from the environment, be it a poppy seed in the feed, contamination of water by substances present in the environment, or by inadvertent contamination by someone who happens to have a cold treated by Dayquil/Nyquil. In this case, the evidence was undisputed that Ewing did not “use” or

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<sup>4</sup> According to dictionary.com, “use” means, among other similar definitions, “to employ for some purpose; put into service; make use of; to avail oneself of; apply to one’s own purposes.” “Administer, on the other hand, means “to bring into use or operation.”

“administer” either Dextromethorphan or Dextrophan to the Filly. Therefore, the statute could not have been violated. It follows that if the statute could not have been violated, neither could any regulations created and necessarily beholden to that statute.

Strict liability as an insurer of the condition of a horse punishes trainers more broadly than when they “used” or “administered” banned substances.<sup>5</sup> Therefore, these new regulations go too far by creating liability and sanctions in excess of what the enabling statute allows.

This current regulatory scheme also violates Kentucky’s Administrative Procedures Act, found in KRS chapter 13B. In particular, KRS 13B.090 (7) places the burden of proof on the Commission to show the grounds necessary to suspend Ewing’s license or to disqualify the Filly and order a forfeiture of the purse. That section provides that “The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted.”

The current regulation violates KRS 13B.090 (7), as it replaces the Commission’s burden of proof to show that Ewing either “used” or “administered” Dextromethorphan to the Filly, with strict liability for the presence of its metabolite in a urine sample. Ewing is being punished even though she did not use or administer any banned substance at all and the Commission has tried to eliminate the necessity to prove otherwise. Further, Ewing is now precluded from introducing evidence of her freedom from responsibility for the condition of the horse or the introduction of evidence of conduct that would clearly identify the source of the offending substance and perhaps even the party culpable for the administration of exposure of the substance to the Filly.

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<sup>5</sup> It is no doubt for this reason that until recently, Kentucky regulations have not sought to impose punishment without fault, but have operated under a “rebuttable presumption” scheme under which a drug positive created a factual presumption of the use or administration of the substance in violation of the law, but the accused could prove factual innocence as a defense. This long-standing scheme was overstepped in 2006, when the commission sought to impose strict liability under an “absolute insurer” scheme, where its enabling statute still required use or administration of the medication before punishment could be meted out.

Prior challenges to the trainer responsibility regulations have passed legal muster under this provision of the Administrative Procedures Act only because they dealt with the prior version of the regulation which created only a presumption of the use or administration of the banned substance from a drug positive, but this could be rebutted by evidence of innocence. For example, in *Deaton v. KHRA*, 172 S.W.3d 803 (Ky.App. 2004), Thoroughbred trainer William Deaton argued that the prior version of this statute, which provided that a positive test result created a rebuttable presumption of a violation, violated KRS 13B.090 by shifting the burden of proof to the trainer to disprove the violation instead of having it remain on the authority to prove it. The Court rejected this argument, but only because the presumption was rebuttable:

The circuit court affirmed [the agency's ruling], reasoning that **the regulations did not amount to "burden shifting" but created an affirmative defense**, and that the evidence showed Deaton did not exercise reasonable care, much less a high degree of care, in safeguarding the horse.

...

It is important for our analysis to review the administrative regulations involved. 810 KAR 1:008, Section 3, states, in part: "A licensed trainer shall bear primary responsibility for the proper care, health, training condition, safety, and protection against the administration of prohibited drugs or medication of horses in his charge." 810 KAR 1:018, Section 1 provides, in part: "(1) While participating in a race, a horse shall not carry in its body any medication, drug, substance, or metabolic derivative, that: ... (b) Could serve as a ... tranquilizer...." 810 KAR 1:018, Section 3(3) provides, in part:

If the commission determines that a horse had been administered a medication, drug, substance, or metabolic derivative thereof in violation of Section 1 or 2 of this administrative regulation, a licensed trainer, assistant trainer, groom, stable watchman, or other person having the immediate care and custody of a horse governed by the provisions of this administrative regulation shall be subject to disciplinary action if he does not establish that he had:

(a) Not been negligent by failing to exercise a high degree of care in safeguarding the horse from tampering....

**This last section creates a presumption the trainer has to rebut. It does not change the burden of proof in 810 KAR 1:018, Section 3(3), or even KRS 13B.090 (7).** In a similar case involving harness racing (governed by Title 811 of

the KAR), a panel of this Court dealt with similar regulations. *Allen v. Kentucky Horse Racing Authority*, Ky.App., 136 S.W.3d 54 (2004), involved a harness race at the Red Mile Racetrack in Lexington and a horse named CR Commando. Urine tests after two races revealed flunixin (an anti-inflammatory drug) in CR Commando's urine and the purse money in both races was ordered returned and the owner/trainer fined. 811 KAR 1:090, Section 5 also creates a presumption:

If the post-race test or tests prescribed in Section 1 of this administrative regulation disclose the presence in a horse of any medication, stimulant, sedative, depressant, local anesthetic, or any foreign substance except as provided by Sections 14 and 15 of this administrative regulation, in any amount, it shall be presumed that the substance was administered by the person having control, care, or custody of the horse.

...  
We believe the reasoning of the *Allen* Court in upholding the presumption in 811 KAR 1:090, Section 5 for harness racing would apply to the presumption created by 810 KAR 1:018, Section 3(3) as to thoroughbred racing.

*Id.* at 805, 806 (emphasis added)

The reasoning of *Deaton* (and *Allen*, discussed therein) no longer applies. The current law does not create a presumption of a violation, rebutted with evidence that the trainer acted reasonably, with the burden of proof remaining on the Commission throughout. It creates strict liability for the trainer upon a positive finding, replacing the agency's burden of proof as to the "use" or "administration" of the banned substance with strict liability for its presence.

The new version of the trainer responsibility rule exceeds what the enabling statute allows and violates the Administrative Procedures Act. For this additional reason, the regulation must be declared improper in that it exceeds the statutory authority granted to the KHRC and the Steward's Ruling, clearly relying upon this improper administrative regulation, must be vacated.

#### **B) The Absolute Insurer Rule Now Also Conflicts With Other Regulations**

Not only is the new "absolute insurer rule" – the "zero tolerance rule" – not authorized by the enabling statute, it is internally inconsistent with other regulations. For example, 810 KAR 1:018, section 2, subsection (5) provides (emphasis added):

(5) It **shall be prima facie evidence** that a horse was administered and carried, while running in a race, a drug, medication, substance, or metabolic derivative thereof prohibited by this section if:

- (a) A biologic specimen from the horse was taken under the supervision of the commission veterinarian promptly after a horse ran in a race; and
- (b) The commission laboratory presents to the commission a report of a positive finding.

“*Prima facie* evidence’ means evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence.” *State v. Gilbert*, 475 P.2d 797, 798 (Wash.App. 1970). It is inconsistent for subsection 15 of this same regulation 810 KAR 1:018 to make a trainer an absolute insurer of the condition of the horse, punishable for the presence of a drug in its system even in the absence of fault or “use” or “administration” of that drug, when section 2 of the regulation makes the presence of the drug is merely *prima facie* evidence (evidence which stands only until contradicted or overcome by contrary evidence) of the presence, use or administration of that drug. It is either rebuttable -- *prima facie* evidence under section 2 – or it is irrebutable – the absolute insurer rule of responsibility under section 15.

Consistent with innocence being a defense as section 2, subsection 5 of 810 KAR 1:018 directly states, Kentucky’s Class “B” Drug definitions provide:

Potential contaminant substances are included in this category to provide flexibility pending the outcome of an investigation into the origin of the positive test.

Implicit in this classification definition is the notion that the outcome of the “investigation into the origin of the positive test” will or could make a difference in whether punishment is warranted. This is inconsistent with the new section 15 removing innocence as a defense.

As stated in *Stewart v. KHRC*, 2013 WL 1003534 at \*4 (Ky.App. March 15, 2013), statutes and regulations are unconstitutionally vague if, when read together, do not give proper notice of what is and is not allowed:



The void-for-vagueness doctrine emanates from the due process provisions of the United States and Kentucky Constitutions. *Commonwealth v. Kash*, 967 S.W.2d 37, 42 (Ky.App.1997), citing *Raines v. Commonwealth*, Ky.App., 731 S.W.2d 3, 4 (1987). Whether a statute is unconstitutionally vague must be assessed in the context of the particular conduct to which it is being applied. *Doe v. Staples*, 706 F.2d 985, 988 (6th Cir.1983), citing *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).

Our Kentucky Supreme Court addressed a void-for-vagueness argument in *State Board for Elementary and Secondary Education v. Howard*, 834 S.W.2d 657, 662 (Ky.1992), and stated:

In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement.

Further, we note that when considering the vagueness challenge to administrative regulations, the regulation must be considered in its entirety and not piecemeal. See *Alliance for Kentucky's Future, Inc., v. Environmental and Public Protection Cabinet*, 310 S.W.3d 681, 689 (Ky.App.2008). See also *Commonwealth v. Kash*, 967 S.W.2d 37, 44 (Ky.App.1997) (“Under the doctrine of *in pari materia*, statutes having a common purpose or subject matter must be construed together.”) (Internal citations omitted).

Read together, the regulations are void for vagueness, as they are unclear whether affirmative evidence of innocence as to the use or administration of a drug is a defense. The statutes allow for regulations concerning the use or administration of drugs, section 2 of 810 KAR 1:018 provides that a drug test positive is merely *prima facie* evidence of its administration and, consistent with this, Class B drugs include potential contaminants so that an investigation into their origin can be conducted. Yet, Ewing’s unrebutted and unchallenged proof of innocence and the origin of the positive report for the unclassified metabolite Dextrorphan was deemed irrelevant based on the inconsistent and harsh subsection 15 of 810 KAR 1:018, seemingly making actual innocence irrelevant and a drug positive report unrebuttable, not mere *prima facie* evidence of a violation.

Similarly, as is discussed above, but equally applicable to an analysis of the vagueness of the regulations as applied herein, Dextrorphan is not listed as a banned or otherwise regulated substance, while Dextromethorphan (although improperly classified) is intended to be banned by the KHRC regulations. Dextromethorphan was tested for, but was not found in any of the samples of blood or urine. Thus, Ewing is being punished for a metabolite, not the drug, when the drug was not present. Nothing in the regulations gives Ewing notice that she may be punished for a metabolite that does not appear on the schedules, based on an assumption that it equates to the presence of a drug when the targeted test (after the metabolite had been detected in the Filly's urine sample) for Dextromethorphan was actually negative.

**C) This Rule Violated Ewing's and Hahn's Substantive Due Process Rights**

Not only does this "absolute insurer rule" exceed the statutory mandate of KRS 230.240, and violate the requirements of KRS 13B.090 (7), it is internally inconsistent with other provisions of the regulations governing drug positives and it violates the substantive due process rights of the Complainants.

Trainer responsibility rules such as this have a long and varied history in the law because they deprive a trainer of an important right, her license and the related right to earn a living even if the trainer has done nothing wrong and even if the trainer has gone above and beyond what the reasonably prudent person would do to try to ensure compliance with the rules. As a result of this inherent unfairness, a law similar to the one now at issue was struck down as unconstitutional in *Mahoney v. Byers*, 48 A.2d 600 (Md. 1946):

[n]o facts or circumstances surrounding the stabling, care and attention given the horse after its arrival at [the track] is to be considered. [The trainer's] reputation as a clean, straight, decent jockey and trainer, which he [has] enjoyed for years, and which was attested to by many witnesses of high standing, is not [under the irrefutable presumption rule] to be considered in determining guilt or innocence. In fact, the Commission attested to [the trainer's] fine record, as will appear from

the remarks made by its Chairman contained in the record. All this, like so much chaff, is to be blown away as waste in the machinery set up under this [rule]. **This irrebutable presumption destroyed the right of [the trainer] to offer evidence to establish his innocence. If this is “just,” then the term “unjust” is without meaning.**

*Id.* at 603 (emphasis added). Likewise, in *Brennan v. Ill. Racing Bd.*, 42 Ill.2d 352, 354-55, 358 247 N.E.2d 881 (1969) (emphasis added), it was held that “[u]nder the police power reasonable requirements may be imposed, of course, to protect the public against fraud and deceit, but they may not be arbitrary, and they must bear a **real and substantial relation to the public welfare**. Whether the means employed have such a relationship and are essentially reasonable is a question which is subject to review by the courts” and “a statute creating a presumption which operates to deny a fair opportunity to rebut it contravenes due process of law.” The Court concluded that “[n]o question is presented of the power to prohibit the administering of drugs or stimulants to horses, or to require reasonable measures to be taken for protection against such acts. But making the trainer an absolute insurer, at the peril of losing his license regardless of how innocent he may be, is arbitrary and unreasonable” and that “[a]dministrative convenience is not a constitutional substitute for the rights of individuals.”

While it is true that several courts have upheld “absolute insurer” rules under certain circumstances (where otherwise allowed by the statutes of the jurisdiction), even those courts have done so with reservations. For example, in *Berry v. Michigan Racing Com’r*, 321 N.W.2d 880, 882 (Mich.App. 1982) (emphasis added), the court noted that if the law in question required some measure of culpability, the creation of an irrebutable factual presumption of responsibility based on a drug positive was constitutionally impermissible: “Due process forbids the adoption of an irrebutable presumption as to which the presumed fact does not necessarily follow from the proven fact **and where the state has a reasonable alternative means of making the crucial**

**determination.** *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-645, 94 S.Ct. 791, 798-799, 39 L.Ed.2d 52 (1974); *Vlandis v. Kline*, 412 U.S. 441, 452, 93 S.Ct. 2230, 2236, 37 L.Ed.2d 63 (1973).”<sup>6</sup>

Likewise, in *Sandstrom v. California Horse Racing Board*, 189 P.2d 17 (Cal.1948), cert. denied, 335 U.S. 814 (1948), a powerful dissent stated that under this rule “as innocent person may be condemned and punished without evidence that he did, or intended to do, or permitted to be done, any wrong whatsoever. In fact, this result could be obtained even if it were conclusively shown that such innocent person did everything possible to prevent the violation of such rule or was overpowered by a wrongdoer and rendered helpless while the unlawful act was being consummated. **The exercise of vigilance, diligence, care, precaution, and fidelity to duty honestly and faithfully performed is of no avail. The suspended axe falls and the innocent victim is decapitated. ‘oh [justice], what crimes are committed in thy name.’”**

*Battles v. Ohio State Racing Association*, 230 N.E.2d 662, 666 (Ohio App. 1967), found that strict liability laws were permissible for medications that had an effect on the horse’s performance. For other banned substances, strict liability was unreasonable; actual innocence must be a defense:

[I]t is in the public weal to impose, under the provisions of Rule 311, upon an owner or trainer, regardless of scienter, the liability of license suspension when the presence of a narcotic, stimulant, depressant, chemical or drug, which may directly affect the racing ability of the horse, is discovered. It would also appear, and we also conclude, that it is not in the public weal to impose such liability because of the discovered presence in a urine sample of a drug or chemical not proved to have a direct effect on such racing ability, unless scienter is proved.<sup>7</sup>

<sup>6</sup> Herein, the “presumed fact” that Ewing “used” or “administered” Dextromethorphan to the Filly does not follow from the presence of Dextrophan in the urine. Likewise, there is a “reasonable alternative” means of making this actual determination that bear a “**real and substantial relation to the public welfare,**” the creation of a rebuttable presumption or setting appropriate, scientifically based, threshold concentrations that will exclude amounts that might be found in a horse from innocent contaminations that have no ability to affect a horse’s behavior or performance.

<sup>7</sup> While phrased in Constitutional terms, *Battles’* holding is consistent with Kentucky’s regulatory scheme found in 810 KAR 1:018 section 2. Zero-threshold, zero-tolerance bans are permitted for narcotics, anesthetics, tranquilizers,

To accommodate the concerns in the due process cases, while protecting racing, many jurisdictions struck a balance. One manner adopted to address these concerns was to expand the rule to require a trainer to guard against another person administering drugs to the horses in his/her care, but also to modify the trainer responsibility rule to create a rebuttable presumption of a rule violation upon a positive test result. Under this scheme, true innocence could still be proven and provide a defense, but the agency or commission need not affirmatively prove an intentional act.

As stated above, until 2006, Kentucky was just such a jurisdiction (and pursuant to both KRS 230.240 and subsection 2 of 810 KAR 1:018 should still be). As a result, cases in Kentucky have upheld the prior version of the responsibility rule because it created a rebuttable presumption (a drug positive was merely *prima facie* evidence, just like section 2 of 810 KAR 1:018 still provides) and true innocence could still provide a defense. The ability to rebut the presumption was critical to the constitutionality (and to compliance with the statutes). For example, *Deaton, supra*, found the prior version of the rule to be Constitutional (and to not run afoul of KRS 13B.090) because it was a rebuttable presumption. Likewise, in *Allen v. KHRA*, 36 S.W.3d 54 (Ky.App. 2004), the court addressed the prior version of these statutes which created a rebuttable presumption. In upholding its Constitutionality, the Court cited and quoted *Casse v. New York State Racing & Wagering Bd.*, 70 N.Y.2d 589, 523 N.Y.S.2d 423, 517 N.E.2d 1309 (1987), which also addressed a version of this rule (in New York) which contained the rebuttable presumption.

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masking agents, or stimulants, depressants or substances that affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse (whether or not they also are therapeutic), precisely as *Battles* held was Constitutionally permissible for performance enhancing drugs. Therapeutic medications which do not fall within these performance enhancing categories can only be banned after the Commission first sets a minimum threshold concentration above which punishment may be imposed and culpability is found (or at least no evidence is offered to rebut the *prima facie* evidence presented by a drug positive), just as *Battles* held was Constitutionally required.

The ability to rebut the presumption was important to its legitimacy. That portion of *Casse* quoted in *Allen* is as follows:

Moreover, the trainer responsibility rule is a practical and effective means of promoting these State interests—both in deterring violations and in enforcing sanctions. The imposition of strict responsibility compels trainers to exercise a high degree of vigilance in guarding their horses and to report any illicit use of drugs, medications or other restricted substances by other individuals having access to their horses. Additionally, **the rebuttable presumption of responsibility facilitates the very difficult enforcement of the restrictions on the use of drugs and other substances in horse racing.** Indeed, it would be virtually impossible to regulate the administering of drugs to race horses if the trainers, the individuals primarily responsible for the care and condition of their horses, could not be held accountable for the illicit drugging of their horses or for the failure either to safeguard their horses against such drugging or to identify the person actually at fault. It is not surprising, therefore, that trainer responsibility rules have been upheld, almost without exception, in other jurisdictions.

*Allen* at p. 62 (quoting *Casse* at p. 1312) (emphasis added).

No Kentucky case has addressed the new version of the regulations, which removed actual innocence as a defense. Given the statutory mandate for regulations concerning the “use” or “administration” of medications, the regulations cannot create a sanction where there is no evidence of either “use” or “administration;” affirmative action and culpability are required. Therefore, Kentucky’s rule has the effect of creating an unconstitutional irrebutable presumption of culpability, not an arguably permissible strict liability in the absence of fault. It is, therefore, unconstitutional under legal precedent.

Even if the culpability portions of KRS 230.240 are ignored, under *Battles, supra*, the law is unconstitutional because strict liability is imposed for a drug positive even if the drug has no effect on racing performance or horse behavior and even if affirmative evidence shows that the amount found in the horse has no capability of causing any affect at all. Dextromethorphan is just such a drug; it is therapeutic and not performance enhancing. While the police power allows “reasonable requirements” to be imposed on medication usage “to protect the public against fraud

and deceit” (*Brennan, supra*), creating strict liability with no threshold concentration reasonably imposed and rationally related to the protection of integrity of racing is arbitrary and does not bear a “real and substantial relation to the public welfare” when the drug at issue and/or in the amount in question has no impact on that welfare, no ability to affect performance, and its presence can well be innocent. As discussed above, this also violates the regulatory requirements under which non stimulant, non-narcotic, therapeutic drugs may be scheduled, but only after the Commission properly sets a minimum threshold for finding a violation.

In fact, the jurisprudence reluctantly allowing “absolute insurer rules” (where the enabling statutes permit or require it), should be reconsidered in light of scientific advances. It was one thing to allow such a harsh rule when there were few alternatives, such as when laboratory testing detecting concentrations of substances detected in micrograms/milliliter of fluid (micrograms are one millionth of a gram *i.e.*  $10 \times 10^{-6}$ th power), was incapable of accurately quantifying the concentration of a substance present in the urine or blood, or when it was not sensitive enough for minute amounts to be detected (in other words, a “positive” test meant that the drug was present in some significant amount and a reasonable assumption could be made that the presence of the substance had an effect on the performance of the horse but quite another when concentrations are routinely measured in picograms, one trillionth of a gram ( $10 \times 10^{-12}$ th power) or one million times more sensitive than when the concept of the absolute insurer rule was developed by racing regulators in the middle of the twentieth century. That antiquated assumption, when certain threshold concentrations are being imposed by regulation in the *low picogram levels* without reliable scientific evidence to support any pharmacological effect at such levels, is no longer supportable or valid. In those cases in the early days of drug testing, when micrograms were the unit of measure detected, many innocent contamination cases would never be reported to the

administrative agency because the amounts involved would never be detected by the laboratories. However, science has advanced to the point where very miniscule and irrelevant trace amounts are now detected and can be measured, inconsequential concentrations of substances can be detected at levels of measurement a million times smaller (picograms are one million times smaller than micrograms) than when racing regulators developed the absolute insurer rule. As a result, innocent trainers are facing increasing risk for sanctions due to trace levels of substances detected resulting not from nefarious activity, but from proper therapeutic administration weeks, if not months, prior to testing *or* from substances commonly found in the environment, including illicit, yet ubiquitous Class 1 drugs such as Cocaine, (with a 50 nanograms/milliliter threshold in Kentucky and most states) to the active non-narcotic therapeutic ingredients found in over the counter cough and cold remedies.

*Battles, supra*, is far more in keeping with the notions of fundamental fairness underlying the Due Process Clause, in light of the present state of the sciences in general and drug testing instrumentation in particular. Administrative agencies have no excuse for not setting reasonable, scientifically supported thresholds rationally related to the statutory mandate (to protect the integrity of racing), before a sanction can be imposed, particularly where therapeutic medications are involved, as herein. These well considered thresholds will ensure that the public welfare is protected, and will screen out many inconsequential concentrations of therapeutic medications with long elimination periods and low concentration reported findings resulting from innocent contamination cases, thereby protecting trainers' important right to a license. These reasonable, scientifically supported thresholds rationally related to the articulated statutory purpose, *i.e.* to protect the integrity of racing, also are required by 810 KAR 1:018 section 2, subsections (2) (c) and (3) before administrative action can be taken by the KHRC.



The Commission's failure to take steps to screen out environmental or inadvertent and inconsequential contamination, while eliminating the innocent trainer defenses, has created a system that is unfair, that violates the due process rights of trainers and owners and that fails to follow the statutory mandate that only the "use" and "administration" of banned substances be punished. It also clearly violates the express regulatory mandate for setting thresholds for non-narcotic, non-stimulant therapeutic medications. "Administrative convenience" is not an excuse for not complying with the law. The Commission's failure to do what the law requires means that it has failed to create "reasonable requirements..." "...to protect the public against fraud and deceit," but unreasonable regulations unrelated to the purpose of the rules; they are unconstitutional.

#### **V. THE RULING AND SANCTIONS VIOLATE EQUAL PROTECTION**

As is set forth above, "[t]he Equal Protection Clause prohibits state and local governments from treating similarly situated persons differently." *Rector*, 348 F.3d at 949.

The ruling and sanction in question violates Ewing and Hahn's right to equal protection in two ways. First, the Commission has set minimum threshold concentrations for certain banned and therapeutic substances. In other words, the mere presence of the drug or metabolite in a horse's blood or urine will not result in punishment, but the substance must exceed a minimum concentration or threshold level. Setting these threshold concentrations is permissible (and required), as it helps ensure that punishments will only be meted out for violations that actually have the ability to affect the integrity of racing and subvert the public welfare and will screen out innocent cases when pharmacologically irrelevant and inactive trace concentrations of substances are detected by the laboratories and when concentrations of substances are detected that are clearly the result of environmental contamination cases. What is not permissible, however, is to set these

thresholds for certain medications, but not others where it can be and has been demonstrated by qualified expert testimony, as in this case, that the amount in question has no impact on equine performance or behavior. To set some thresholds, but not others, may be expedient for the KHRC, but its selection of which thresholds to set and which cases to prosecute without threshold concentrations being set is arbitrary and capricious, and violates the equal protection clauses of the U.S. and Kentucky constitutions because two similarly situated people – both facing a positive result for a medication in miniscule and inconsequential amounts – will face different outcomes.

In addition, it has come to the Complainants' attention that the Commission has addressed the unfairness of the "zero tolerance, zero threshold" medication rules by dismissing cases against trainers for drug positives in amounts the Equine Medical Director finds are consistent with contamination. In the 2009 KHRC Case Number: 09-12001A, Trainer Danny Miller was the subject of a Morphine positive report with a concentration of between 75ng/ml (the amended lab report from the KHRC laboratory at the time, the Florida racing laboratory at the University of Florida at Gainesville) and 136.79 ng/ml of urine, the split sample report of the Louisiana State Racing Commission laboratory at Louisiana State University, in Baton Rouge. Morphine is an ARCI Class 1, DEA Schedule 2 controlled substance with the highest potential to affect the performance of a horse in competition. Dr. Scollay's express recommendation, contained in an e-mail letter dated February 16, 2010 12:44 p.m. to the Executive Director of the KHRC, its staff veterinarian and its Chief Steward, was that the case be dismissed (and it was) because, "The amended report identifies a revised concentration of morphine of 75ng/ml in urine. This concentration is consistent with concentrations associated with environmental contamination." The Danny Miller case is one example of the KHRC basing a dismissal of a case based upon the positive lab report for one a narcotic analgesic, DEA Schedule 2 drug with the highest potential to

affect the performance of a horse and pose a threat to the integrity of tracing in Kentucky. It is expected that there are others which, unbeknownst to the public, have been similarly dismissed.

Such conduct by the KHRC is arbitrary and capricious. By dismissing the charges in the Miller case, despite the potentially egregious effect on the integrity of racing and the KHRC's statutory duty to protect the perception of integrity in racing in the Commonwealth, based upon the recommendation of the KHRC Equine Medical director, the KHRC cannot now completely disregard the substantial and unrebutted scientific evidence submitted by qualified expert witnesses on the record in the Complainants' hearing before the Stewards, establishing with a high degree of scientific certainty that the positive report in this case was the result of environmental contamination, demands equal protection of the law and dismissal of the charges against Ewing and Hahn. Any other result violates the Complainants' constitutional rights to equal protection under the law. This Court cannot countenance the KHRC's arbitrary and capricious conduct in dismissing cases against some trainers on the basis of lab findings "consistent with concentrations associated with environmental contamination" in the most potentially egregious context (Morphine, an ARCI Class 1 narcotic analgesic, found in a relatively high concentration *i.e.* 5-10 times higher (75-137 ng/ml urine)) than the concentration (15 ng/ml urine) of the innocuous metabolite Dextrorphan subject case. To prosecute this case which is also entirely consistent with contamination, even in the most innocuous of contexts (this case involving a trace level of an uncategorized metabolite of a Class 4 therapeutic substance) is the epitome of arbitrary and capricious conduct by a Kentucky administrative agency and should not be tolerated by this Court. The law requires equal administration of the law for all, not for some, but not for others.

#### **CONCLUSION**

In this case, a groom with a cold took Nyquil and Dayquil and, as a result, the Filly tested

positive for a trace amount of the metabolite of the cough suppressant therein. The evidence presented at the hearing was un rebutted that the Filly's positive test result for Dextrorphan was solely the result of an unintended and innocent environmental contamination from Dextromethorphan in an amount that was insufficient to have any impact on the horse's behavior or performance. No one "used" or "administered" Dextromethorphan to the Filly at all and the integrity of racing and betting was in no way impacted.


Not satisfied with having the Stewards address the issues presented by the evidence on the record at the Stewards' Hearing of this matter, according to the Chief Steward presiding over the case, Ms. Barbara Borden, the Kentucky Equine Medical Director, Dr. Scollay, a consultant to the KHRC, requested a blood test, failed to inform the Complainants that she had done so, failed to notify the Complainants of the results within 5 business days, failed to provide them with the right to test a split sample, and after the close of the hearing provided this newly-created evidence to the Stewards for consideration, together with her interpretation of the data (Dr. Scollay did not attend or testify at the Stewards' Hearing of this matter nor did any other expert witness to offer rebuttal evidence to the Complainants' experts) and upon which the Stewards admittedly relied in making their decision thereby depriving Complainants of the right to address this newly created evidence in any way.

Ironically, had the Complainants been afforded their right to challenge the post hearing blood test, it would have argued that in fact the blood test performed actually exonerated the Complainants, as it found no Dextromethorphan in the Filly at all. The Complainants were denied their right to do so. They could not argue then as they argue now that Dextrorphan is not a Class B Drug. The Stewards erred in holding otherwise. *Dextromethorphan is* a class B Drug, but was not found in the Filly.

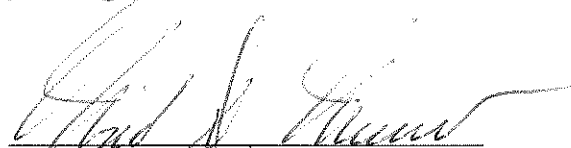
An innocent trainer is facing a month-long suspension of her license, and a fine, and an innocent owner is facing a purse forfeiture and the Filly's disqualification from the race because a permitted metabolite was found in her urine, when the banned substance was tested for, but negative. The conduct of the Stewards and the KHRC in these proceedings is not fair or reasonable and is contrary to law. The conduct of the Stewards and the KHRC in no way protect the integrity of Kentucky racing (in fact it damages the perception of fairness and integrity of racing in the Commonwealth) nor does it protect the public against fraud or deceit. The conduct of the Stewards and the KHRC clearly demonstrate their willingness to demonstrate arbitrary, capricious and fundamentally unfair and unequal treatment of the Complainants before the Commission. The conduct of the Stewards and the KHRC in these proceedings demonstrates its willingness, in the guise of expediency, to undertake unfair, improper and unreasonable promulgation and enforcement of administrative regulations in a manner inconsistent with legal requirements by which they are bound.

For the reasons given herein, this action must be dismissed.

Respectfully submitted,



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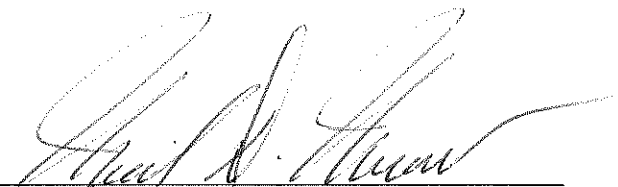
**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing was served by U.S. Mail, postage prepaid, and electronic mail (as a courtesy) this *7<sup>th</sup>* day of October, 2016, upon the following:

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\_\_\_\_\_  
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**KENTUCKY HORSE RACING COMMISSION  
UNIFORM DRUG, MEDICATION, AND  
SUBSTANCE CLASSIFICATION SCHEDULE  
KHRC 40-01 (December 2013)**



Class "A" Drugs are those that have no legitimate therapeutic indication in the equine athlete and have not been approved for use in the horse by the United States Food and Drug Administration. Their potential to influence performance is high based on their presence in Classes 1, 2 or 3 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances. Many of the Class "A" Drugs are not approved for use in any species by the United States Food and Drug Administration.

Acecarbromal	Bethanidine	Chloroprocaine	Dilorazepam	Fluopromazine
Acetophenazine	Biperiden	Chlorproethazine	Dimeflin	Fluoresone
Adlnazolam	Biriperone	Chlorpromazine	Diprenorphine	Fluoxetine
Alcuronium	Bitolterol	Chlorprothixene	Dixyrazine	Flupenthixol
Alfentanil	Bromazepam	Cimeterol	Dopamine	Fluphenazine
Alphaprodine	Bromfenac	Citalopram	Doxapram	Flupirtine
Alpidem	Bromisovalum	Clobazam	Doxefazepam	Flurazepam
Alprazolam	Bromocriptine	Clocapramine	Doxepin	Fluspirilene
Alprenolol	Bromperidol	Clomethiazole	Droperidol	Flutoprazepam
Althesin	Brotizolam	Clomipramine	Enciprazine	Fluvoxamine
Amisulpride	Bupivacaine	Clonazepam	Endorphins	Gallamine
Amitriptyline	Buprenorphine	Clorazepate	Enkephalins	Gepirone
Amobarbital	Buspirone	Clothiapine	Epinephrine	Glutethimide
Amoxapine	Buspropion	Clotiazepam	Erthryl tetranitrate	Guanadrel
Amperozide	Butabarbital	Cloxacolam	Erythropoietin	Guanethidine
Amphetamine	Butalbital	Clozapine	Estazolam	Halazepam
Amyl nitrite	Butanilcaine	Cobratoxin	Ethamivan	Haloperidol
Anileridine	Butaperazine	Cocaine	Ethchlorvynol	Haloxazolam
Anilopam	Butoctamide	Codeine	Ethinamate	Hemoglobinglutamers
Apomorphine	Camazepam	Conorphone	Ethopropazine	Hemopure
Aprobarbital	Cannabinoids, Synthetic	Conotoxin	Ethylisobutrazine	Hexafluorenium
Arecoline	Captodiame	Corticaine	Ethylmorphine	Hexobarbital
Azacylonol	Carazolol	Crotetamide	Ethylnorepinephrine	Homophenazine
Azaperone	Carbidopa	Cyamemazine	Etidocaine	Hydrocodone
Barbital	Carbromol	Cyclandelate	Etifoxin	Hydromorphone
Barbiturates	Carfentanil	Cyclobarbital	Etizolam	Hydroxyamphetamine
Bemegrde	Carphenazine	Darbepoietin	Etodroxizine	Ibomal
Benperidol	Carpipramine	Decamethonium	Etomidate	Imipramine
Benzazepam	Chloral betaine	Demoxepam	Etorphine HCl	Inositol Trispyrophosphate
Benzactizine	Chloral hydrate	Dermorphin	Fenarbamate	Irbesarten
Benzocetamine	Chloraldehyde	Desipramine	Fenfluramine	Isapirone
Benzodiazepines	Chloralose	Dextromoramide	Fentanyl	Isocarboxazid
Benzphetamine	Chlordiazepoxide	Dezocine	Fluanisone	Isomethadone
Benztropine	Chlorhexidol	Diamorphine	Fludiazepam	Isoproterenol
Benzylpiperazine	Chlormezanone	Dichloralphenazone	Flunitrazepam	Ketazolam
	Chloroform	Diethylpropion		Ketorolac
		Diethylthiambutene		
		Dihydrocodeine		



Lenperone	Methylphenidate	Pentobarbital	Pyrrithyldione	Tiapride
Levamisole/Tetramisole	Methyprylon	Pentylene-tetrazol	Quazipam	Tiletamine
Levomethorphan	Metocurine	Perazine	Quetiapine	Timiperone
Levorphanol	Metomidate	Periciazine	Racemethorphan	Tofisopam
Lithium	Metopon	Perlazine	Racemorphan	Topirimate
Lobeline	Mexazolam	Perphenazine	Raclopride	Torseimide
Lofentanil	Mldazolam	Phenaglycodol	Remifentanil	Tramadol
Loflazepate, Ethyl	Mirtazepine	Phenazocine	Remoxipride	Tranvlycypromine
Loprazolam	Modafinil	Phencyclidine	Reserpine	Trazodone
Lorazepam	Molindone	Phendimetrazine	Rilmazafone	Triazolam
Lormetazepam	Moperone	Phenelzine	Risperidone	Tribromethanol
Loxapine	Morphine	Phenmetrazine	Ritanserin	Tricaine
Mabuterol	Mosaprimine	Phenobarbital	Ropivacaine	Trichloroethanol
Maprotiline	Muscarine	Phentermine	Secobarbital	Trichloroethylene
Mazindol	Nalbuohine	Physostigmine	Selegiline	Triclofos
Mebutamate	Nalorohine	Picrotoxin	Sertraline	Trifluomeprazine
Meclofenoxate	Nefazodone	Piminodine	Snake Venoms	Trifluoperazine
Medazepam	Nefopam	Pimozide	Spiclomazine	Trifluoperidol
Melberone	Nikethamide	Pinazepam	Spiperone	Trifluoromazine
Meparfynol	Nimetazepam	Piopamperone	Succinylcholine	Trihexyphenidyl
Mepazine	Nitrazepam	Ploqualine	Sufentanil	Trimethaphan
Meperidine	Nordiazepam	Piperacetazine	Sulfondiethylmethane	Trimipramine
Mephenoaloxone	Norepinephrine	Piperocaine	Sulfonmethane	Tubocurarine
Mephentermine	Nortriptyline	Pipotiazine	Sulfuridazine	Tvbamate
Mephenvtoin	Nvldrine	Pipradrol	Sulpiride	Urethane
Mephobarbital	Olanzapine	Piquindone	Sultopride	Valnoctamide
Meprobamate	Oxazepam	Piritramide	Talbutal	Venlafaxine
Mesoridazine	Oxazolam	Pracepam	Tandospirone	Veralipride
Metaclazepam	Oxprenolol	Prilocaline	Temazepam	Vercuronium
Metaraminol	Oxycodone	Procaterol	Tetrabenazine	Viloxazine
Metazocine	Oxymorphone	Prochlorperazine	Tetracaine	Vinbarbital
Methachloline	Oxyperitine	Propanidid	Tetrazepam	Vinlital
Methadone	Pancuronium	Propiomazine	Thebaine	Yohimbine
Methamphetamine	Papaverine	Proionylpromazine	Thialbarbital	Zolazepam
Methaqualone	Paraldehyde	Proiram	Thiamylal	Zoloidem
Metharbital	Paramethadione	Propofol	Thiethiviperazine	Zopiclone
Methixene	Pargvline	Propoxycaine	Thiopental	Zotepine
Methohexital	Paroxetine	Prothipendyl	Thiopropazate	Zuclopenthixol
Methotrimeprazine	Pemoline	Protokylol	Thiopropazine	
Methoxamine	Pemfluridol	Protriptyline	Thioridazine	
Methoxyphenamine	Pentaerythritol	Proxibarbital	Thiothixene	
Methyl dopa				
Methylene Dioxypyrovalene (MDPV)				
Methylhexaneamine				

Class "B" Drugs are those that may have a legitimate therapeutic indication in the equine athlete, but also have a high potential to influence performance based on their presence in Classes 2 or 3 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances. Also in Class "B," are drugs which may have a lower potential to influence performance based on their residence in Class 4 in the Association of Racing Commissioners International Uniform Classification of Foreign Substances, but that have not been approved for use in the horse by the United States Food and Drug Administration and recognized therapeutic alternatives to these drugs are widely available. Potential contaminant substances are included in this category to provide flexibility pending the outcome of an investigation into the origin of the positive test.

2-Aminoheptane	Brompheniramine	Dihydroergotamine	Gabapentin	Mercaptopurin
Acebutolol	Bumetanide	Diltiazem	Glycopyrrolate	Mercumalilin
Acepromazine	Butorphanol	Dimethisoquin	Guanabenz	Mersalyl
Acetanilid	Butoxycaïne	Diphenhydramine	Heptaminol	Metaproterenol
Acetophenetidin	Caffeine	Diphenoxylate	Hexocyclium	Metaxalone
Albuterol	Candesartan	Dipyridamole	Homatropine	Methantheline
Alclofenac	Captopril	Disopyramide	Hydralazine	Methapyrilene
Aldosterone	Carbachol	Dobutamine	Hydrochlorthiazide	Methdilazine
Ambenonium	Carbamezapine	Doxylamine	Hydroflumethiazide	Methotrexate
Ambroxol	Carbinoxamine	Dyphylline	Hydroxyzine	Methscopolamine
Aminophylline	Carisoprodol	Edrophonium	Indomethacin	Methsuximide
Aminopyrine	Carteolol	Enalapril	Infliximab	Methylatropine
Amiodarone	Carvedilol	Ephedrine	Ipratropium	Methylchlorthiazide
Amisometradine	Celecoxib	Ergotamine	Isoetharine	Methysergide
Amlodipine	Chlormerodrin	Esmolol	Isometheptene	Metamide
Amrinone	Chlorothiazide	Etamiphylline	Isopropamide	Metolazone
Anisotropine	Chlorpheniramine	Etanercept	Isosorbide dinitrate	Metoprolol
Antipyrine	Chlorthalidone	Ethacrynic acid	Isoxicam	Mexilitine
Apazone	Chlorzoxazone	Ethoheptazine	Isradipine	Mibefradil
Aprindine	Clenbuterol	Ethosuximide	Ketamine	Midodrine
Atenolol	Clidinium	Ethotoin	Labetalol	Milrinone
Atropine	Clofenamide	Felodipine	Lidocaine	Minoxidil
Baclofen	Clonidine	Fenbufen	Loperamide	Moexipril
Benazepril	Colchicine	Fenclozic acid	Loratidine	Nabumetone
Bendroflumethiazide	Cyclizine	Fenoldopam	Losartan	Nadolol
Benoxaprofen	Cyclobenzaprine	Fenoprofen	Mecamylamine	Nandrolone
Benzocaine	Cyclothiazide	Fenoterol	Meclizine	Naphazoline
Benzthiazide	Cycrimine	Fenspiride	Medetomidine	Natriptan
Bepidil	Detomidine	Flecainide	Mefenamic acid	Neostigmine
Betaxolol	Dextromethorphan	Floctafenine	Meloxicam	Nicardipine
Bisoprolol	Dextropropoxyphene	Flufenamic acid	Mepenzolate	Nifedipine
Boldenone	Diazepam	Flumethiazide	Mephesisin	Niflumic acid
Bretylum	Diazoxide	Flunarizine	Mepivacaine	Nimesulide
Brimonidine	Diffunisal	Flurbiprofen	Meralluride	Nimodipine
Bromhexine		Formoterol	Merbaphen	Nitroglycerin
Bromodiphenhydramine				Orphenadrine

Oxaprozin  
Oxcarbazepine  
Oxymetazoline  
Oxyphenyclimine  
Oxyphenonium  
Penbutolol  
Pentazocine  
Phenacetamide  
Phenoxymethylamine  
Phensuximide  
Phentolamine  
Phenylephrine  
Phenylpropanolamine  
Phenytoin  
Pindolol  
Pirbuterol

Piretanide  
Piroxicam  
Polythiazide  
Prazosin  
Primidone  
Procainamide  
Procaine  
Prochlorperazine  
Promazine  
Promethazine  
Propafenone  
Propranolol  
Propylhexedrine  
Pseudoephedrine

Pyridostigmine  
Pyrilamine  
Quinidine  
Ractopamine  
Ritodrine  
Rivastigmine  
Rizatriptan  
Rofecoxib  
Romifidine  
Salmeterol  
Scopolamine  
Sibutramine  
Sotalol  
Spironolactone  
Stanozolol  
Strychnine  
Sulindac

Sumatriptan  
Telmisartan  
Tenoxicam  
Terbutaline  
Terfenadine  
Testolactone  
Testosterone  
Tetrahydrozoline  
Theobromine  
Theophylline  
Thiophenamide  
Tiaprofenic acid  
Timolol  
Tocainide  
Tolazoline  
Tolmetin  
Trandolapril

Tramterene  
Tridihexethyl  
Trimeprazine  
Trimethadione  
Trielennamine  
Triprolidine  
Valsartan  
Vedaprofen  
Verapamil  
Xylazine  
Xylometazoline  
Zolmitriptan  
Zomeprazole  
Zonisamide

Class "C" Drugs are those that have a therapeutic indication in the horse and have a low potential to influence performance based on their presence in Classes 4 and 5 of the Association of Racing Commissioners International Uniform Classification of Foreign Substances.

Acclomethasone	Cyclomethylcaine	Flucinolone	Methandriol	Proparacaine
Acenocoumarol	Cyproheptadine	Fludrocortisone	Methandrostenolone	Salicylamide
Acetaminophen	Danazol	Flumethasone	Methazolamide	Salicylate
Acetazolamide	Dantrolene	Flunisolide	Methocarbamol	Sulfasalazine
Acetylsalicylic acid	Dembroxol	Flunixin	Methylergonovine	Thiosalicylate
Amincinide	Deoxycorticosterone	Fluocinolone	Methylprednisolone	Tranexamic acid
Aminocaproic acid	Desonite	Fluocinonide	Methyltestosterone	Trenbolone
Beclomethasone	Desoximetasone	Fluoroprednisolone	Metoclopramide	Triamcinolone
Benoxinate	Dexamethasone	Fluoxymesterone	Mometasone	Trichlormethiazide
Betamethasone	Dibucaine	Fluprednisolone	Montelukast	Zafirlukast
Bethanechol	Dichlorphenamide	Flurandrenolide	Naepaine	Zeranol
Budesonide	Diclofenac	Fluticasone	Naproxen	Zileuton
Butacaine	Diflorasone	Urosemide	Norethandrone	
Butamben	Diflucortolone	Guaifenesin	Nortestosterone	
Calusterone	Digitoxin	Halcinonide	Oxandrolone	
Camphor	Digoxin	Halobetasol	Oxymetholone	
Chlorophenesin	Dipyron	Hexylcaine	Oxyphenbutazone	
Chloroquine	Dromostanolone	Hydrocortisone	Paramethasone	
Cinchocaine	Dyclonine	Ibuprofen	Pentoxifylline	
Clibucaine	Eltenac	Isoflupredone	Phenylbutazone	
Clobetasol	Ergonovine	Isoxsuprine	Pramoxine	
Clocortolone	Ethoxzolamide	Ketoprofen	Prednisolone	
Clormecaine	Ethylaminobenzoate	Letosteine	Prednisone	
Cortisone	Ethylestrenol	Meclofenamic acid	Probenecid	
	Etodolac	Medrysone		
	Fexofenadine			
	Firocoxib			

Class "D" Drugs include those therapeutic medications for which concentration limits have been established by the racing jurisdictions as well as certain miscellaneous agents such as dimethylsulfoxide (DMSO) and other medications as determined by the regulatory bodies.

Anisindione  
Cifostazol  
Cimetidine  
Cromolyn

Dicumarol  
Dimethylsulfoxide  
Dimethylsulphone  
Diphenadione

Famotidine  
Lansoprazole  
Mosiprostol  
Nedocromil

Nizatidine  
Omeprazole  
Phenindione  
Phenprocoumon

Pirenzapine  
Polyethylene glycol  
Ranitidine  
Warfarin

# Kentucky Horse Racing Commission

## Enforcement Case Report

Case Number: 09-12001A                      Race Date: 11/20/2009                      Location: Churchill Downs  
Suspect: Danny L. Miller, Trainer                      Horse: Archmani                      Race: 3    Horse: 7    Finish: 2  
Sample Number: 559554                      Drug: Morphine                      Class: A  
Groom: Ramon Rodriguez                      Owner: Frank Calabrese

### Narrative:

On December 26, 2009 I was notified by State Steward John Veitch that sample number 559554 tested positive for the drug morphine. Steward Veitch advised the sample was collected following the third race at Churchill Downs on November 20, 2009 from the horse Archmani. The trainer of the horse was Danny L. Miller.

Investigator Kolioutas and I attempted to contact the stall office at Churchill Downs and Keeneland to locate Miller if he was stabled at those facilities. No contact was made due to what appeared to be telephone problems at Churchill Downs. We proceeded to the test barn and received a copy of the treatment sheet from Nov. 20, 2009 and observed the horse was treated with Lasix and Amacar by Dr. Eric French prior to the race. A copy of the sample ticket was collected and it showed the sample was collected by test barn employee Burnis Caudill. The witness and groom for the horse are listed as Ramon Rodriguez.

Investigator Kolioutas and I advised Steward Veitch the trainer could not be located. Veitch stated he believed the trainer had moved his operation to Florida for the winter.

On December 27, 2009 Investigator Dan Hyland travelled to the Sports Spectrum and inquired about Miller and Dr. French's whereabouts. Hyland was advised by security at the stable gate Miller and French were not on the grounds. Hyland stated Miller was assigned stables in barn eight at Churchill Downs, according to a stall roster produced by security at the stable gate. Hyland proceeded to Churchill Downs in an attempt to locate Miller. Hyland stated barn eight was empty and added all horses were to be gone from the grounds by December 28, 2009.

I telephoned Miller on December 29, 2009. During this conversation Miller denied the use of morphine on the horse and stated he had no idea how the horse received the drug. Miller stated he had not asked the vet to administer the drug. According to Miller the horse raced on Lasix and the adjunct Amacar. Miller added the horse also received the drug Phenylbutazone in accordance with the rules. When

**EXHIBIT B**

asked about the groom Ramon Rodriguez, assigned to the horse, Miller stated he worked for him and had travelled to Florida with him. Miller stated he was currently at Gulfstream Race Course in Florida. Miller added he was initially stabled at Churchill Downs but needed more stalls and was moved to the Sports Spectrum. Miller stated the horse was shipped in to race that day and was shipped by Sallee van service.

I then spoke to Dr. Eric French via telephone. During this conversation Dr. French advised he was currently at Oak Lawn Park in Arkansas. When asked if he had Morphine for use on his truck he stated he did not use the drug and did not carry the drug on his truck. Dr. French seemed stunned the drug would be used and said he would not use the drug on horses. Dr. French added this was the first time he had worked on Miller's horses and stated the horse received Bute the day before the race and received Lasix and Amacar the day of the race. Dr. French informed me that Miller suffered from a heart condition and had a pace maker and may be on some heart medication.

I then proceeded to the test barn and spoke to, Burnis Caudill, the employee who collected the urine sample from the horse. An interview was arranged for December 30, 2009 at Turfway Park.

An interview was conducted with Mr. Caudill. I asked Mr. Caudill if he was taking any medication for pain and he advised he was. Caudill added he was on a Fentinal patch for pain and had been for three to four years. Caudill stated he was on the patch for chronic pain from a traffic accident years before. Caudill said the patch is the only pain medication he is taking.

*I spoke to Dr. Scollay about the medication Mr. Caudill was taking. Dr. Scollay stated she had spoken to Dr. Sams and was assured there had been no contamination of this sample. Dr. Scollay added these are two different drugs and would appear different during testing.*

# UF UNIVERSITY of FLORIDA

College of Veterinary Medicine  
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352-846-1052 Fax

December 23, 2009

Lisa Underwood, Executive Director  
Kentucky Horse Racing Commission  
4063 Ironworks Pkwy, Building B  
Lexington, KY 40511

RE: Report of Finding

<u>Tag Number</u>	<u>Laboratory Number</u>	<u>Specimen</u>	<u>Final Weight</u>
559554	A369706-KHU	Horse Urine	71.0 g
<u>Collected From</u>	<u>Date Collected</u>	<u>Date Received</u>	<u>Seal</u>
Churchill Downs	11/20/2009	11/21/2009	INTACT

Sample 559554 has been analyzed by liquid chromatography-mass spectrometry (LC-MS) and found to contain the following:

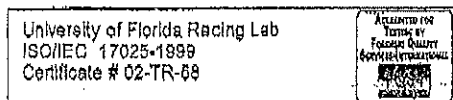
**morphine found in urine**

morphine (a narcotic analgesic and Class A drug) - the concentration of morphine is 120 ng/mL

Urine specific gravity = 1.038; pH = 7.1

Richard A. Sams, Ph.D.  
Director

Margaret H. Wilding  
Associate Director





## KENTUCKY HORSE RACING AUTHORITY

DETENTION BARN				TIME	
NAME	KY. LIC. NO.	HORSE	RACE	IN	OUT
EL. GARCIA	22720	NEXT MAY	1	12:54	1:22
J.S. GONZALEZ	22315	" "			
RAF. FLORES	23375	STREET SHOES LARRY	1	12:53	1:21
H. ESTRADA	25484	" "			
J. MARTINEZ	24415	" "			
ANG. QUINTO	22622	UNREACHABLE STAR	2	1:21	1:57
ANT. OCAMPO	22609	" "			
EVAN BRAUN	23261	HERE COMES BEN	2	1:20	1:51
F. TORRES	22920	" "			
LUIS ORTIZ	24963	" "			
D. SCHUMAN	8405	MISLEADER	3	1:48	2:53
AD. HYLKOD	8149	" "			
R. RODRIGUEZ	22668	ARCHMANS	3	1:47	2:23
B. NAVARRE	25220	TURFISTE	4	2:17	2:53
RECH. KNOX	22804	" "			

C.D.  
TRACK

NOV. 20, 09  
DATE

Robert B. Mansour  
SECURITY OFFICER



CHURCHILL DOWNS GRDN/Nu Yale Dry Cleaners Environmental Dry Cleaner

Table with columns: Win, Place, Show, No. Handwritten numbers: 260, 580, 4140.

Claiming \$10,000

Purses \$15,000. For Fillies And Mares Three Years Old And Upward, Three Year Olds, 122 Lbs; Older, 124 Lbs Non-winners Of Two Races Since September 20 Allowed 2 Lbs A Race Since Then Allowed 4 Lbs. Claiming Price \$10,000 (Races where entered for \$8,000 or less not considered). Seven Furlongs

Track Record: Alanan(5) 1:16 lbs; 1:20.50 [5-6-01]

Race 1: 8-1 Red. Owner: James D. Slack. Silks: Royal blue, royal blue 'JS' on yellow ball, royal blue bars on yellow sleeves, royal blue cap. Trainer: Adolfo Macias. Sal Gonzalez, Jr. (10-1-10) 12.50%. Race results table with columns: Date, Race, Class, Distance, Time, Jockey, etc.

Race 2: 8-1 White. Owner: Byron N. King. Silks: Gold, black horse head, black bars on sleeves, gold cap. Trainer: Jeff Barkley. Jon Court (60-8-1-10) 31.67%. Race results table with columns: Date, Race, Class, Distance, Time, Jockey, etc.

Race 3: 9-2 Blue. Owner: Frank Vozel. Silks: White, red circled 'V', red diamonds on sleeves, red cap. Trainer: David R. Vance. Julien R. Leparoux (59-1-9-4) 40.68%. Race results table with columns: Date, Race, Class, Distance, Time, Jockey, etc.

Race 4: 20-1 Yellow. Owner: Danielle Obert and David Eppard. Silks: Black and white quarters, red sleeves, red cap. Trainer: Danielle Obert. Fabio A. Arguello, Jr. (24-1-2-1) 16.67%. Race results table with columns: Date, Race, Class, Distance, Time, Jockey, etc.

Race 5: 4-1 Green. Owner: John Castro and Hugh H. Robertson. Silks: Pink, purple 'CR' and sash, purple chevrons on sleeves, pink cap. Trainer: Hugh H. Robertson. Jesus L. Castanon (64-7-10-11) 43.75%. Race results table with columns: Date, Race, Class, Distance, Time, Jockey, etc.

CD: 11/20/2009-3

Printed on 11/18/2009 at 0:29:24 AM

RACE 3 CONTINUED ON NEXT PAGE

RACE CONTINUED

**6-7-2** Owner: Middle Fl Farm (Maureen Hyland)  
 Silks: Red, blue 'MH' on white ball, blue stripes on sleeves, red cap  
 Trainer: Angel Hyland (2-1-0-1) 100.00%  
**MISLEADER (L)** 118  
 B.I.3 Manfee - Miss Vallant by Vallant Nature - Bred in Kentucky by Charger 6 Ventures (Mar 26, 2006)  
 04Nov09 5 CD ft 6f34 2292 4629 1:1299 31 [E] Clm 5000 78 3 3 1hd 11 16 144 Borel CH 118 bl 3.80 Misleader(4)Shimery(2)Bank Candy(1) speed, cleared, held 11  
 18Oct109 4 Kee ft 6f34 2250 4624 1:1084 31 [E] Clm 7500 64 11 3 1hd 32 714 Martinez H 118 bl 34.70 One That Got Away(1)Flatter Me Rogee(Corried) 3 wide, tired 11  
 01Oct109 6 TP ft 6f34 2253 4616 1:0498 31 [E] Clm 5000cnd 70 5 3 42 42 31 33 Borel CH 117 bl 3.00 Southern Swinger(3)Storm Selgen(Misleader(1) 4w bid flattened but 7  
 17Sep09 3 TP ft 6f34 2193 46 1:0580 31 [E] Clm 12500 (12.5-10.5) 35 5 2 43 43 66 6181 Mens H 116 bl 6.40 Mylonemymaker(Alpha Tammy(3)Carolina Tripper(1) 3 path, stopped 6  
 05Sep09 8 Hoo ft 5f30 2140 4490 1:0380 31 [E] Clm 12500 (12.5-10.5) 58 4 2 42 44 45 5113 Mojca O 115 bl 5.80 Shore Dreaze Hero(2)Insure(2)Blue Satin Sash(7) 4 path, faded 6  
 04Jul09 5 CD ft 6f100 2221 4611 1:1185 31 [E] Clm 10000 (15-10)nw3/4 82 6 1 3ok 1hd 13 114 Hernandez, Jr. B J 116 bl 15.20 Misleader(1)Whisperwill Creek(Little Springer(1) 1 wtd 3 w, cleared, held 9  
 25Jun09 9 CD ft 6f100 2184 4550 1:1267 31 [E] Clm 7500nw2/L 85 1 1 12 134 14 113 Mens H 115 bl 7.30 Misleader(1)Just Amore(8)Talknonthrun(1) safely led throughout 11  
 Workouts: 14 Nov 09 Cdt 3F ft :37.20b 5/9 15 Aug 09 TP 6F ft 1:02.40b 14/19 28 Jul 09 TP 6F ft 1:02.20b 1/6 31 May 09 Cdt 4F ft :47.20b 1/9

**7-4-1** Owner: Frank C. Calabrese  
 Silks: White, white 'FC' on black diamonds, black diamonds on sleeves, black cap  
 Trainer: Danny L. Miller (5-0-1-1) 40.00%  
**ARCHMANI (LA)** 120  
 Dk B/I Br/T Arch - Lalafly by Allen's Prospect - Bred in Kentucky by Joe King (Feb 10, 2005)  
 17Oct09 3 Kee ft 6f34 2339 4642 1:2377 31 [E] Clm 16000-c 85 1 5 31 32 63 88 Lanerie C J 120 bLA 12.20 Pish Posh(1)Awesome Exchange(1)Mick's Gr(1) forwardly placed, held 11  
 Claimed from Diamond F Ranch for \$16,000 - Tomlinson Michael - Trainer  
 09Sep09 7 TP ft 6f34 2242 4629 1:3084 31 [E] Clm 12500 (12.5-10.5) 74 8 5 7 510 2hd 17 2hd Court JK 118 bLA 3.00 No Image(4)Archmani(1)Holo Star(1) 6 wide run, missed 8  
 23Aug09 8 Hoo ft 6f25 2250 46 1:1080 31 [E] Clm 12500 (12.5-10.5) 77 4 6 65 65 66 443 Prescott R A 118 bt 1.80 Bsin Bonn(4)Ktchin Son(1)Fueled by moon(1) 1/2 Spah turn, some gain 6  
 05Aug09 7 Hoo ft 6f25 2280 46 1:10 31 [E] Alw 23500nw1/x 81 2 4 51 42 31 43 Prescott R A 120 bt 3.20 Trippi Dippedy Do(1)Chapelle(1)Highly Rituals couldn't sustain bid 5  
 05Jul09 6 CD sy 6f34 2294 4669 1:1912 31 [E] Clm 16000-c 80 7 8 812 75 47 314 Castanon J L 123 bLA 3.30 No Image(1)Mylonemymaker(8)Archmani(5) bothered start 8  
 Claimed from Galvin Ferguson for \$15,000; Kenneally Eddie - Trainer  
 18Jun09 1 CD sy 6f34 2260 4619 1:1081 31 [E] Clm 15000 (15-10)nw3/L 78 4 5 65 54 32 12 Lanerie C J 123 bLA #1.80 Archmani(1)Flatterwithglitter(1)Little Springer(1) 4 wtd 3 w, cleared 6  
 04Jun09 5 CD sy 6f100 2272 4720 1:1305 31 [E] Clm 15000 (15-10)nw2/L 76 6 7 56 54 21 12 Lanerie C J 120 bLA 4.90 Archmani(3)Puls(1)Gift For Spacious Sides(1) stumbled start, 5 wide 7  
 Workouts: 7 Nov 09 Cdt 4F ft :49.40b 6/22 11 Oct 09 CD 5F ft 1:01.20b 1/37 3 Oct 09 CD 5F ft 1:03.40b 3/20 1 Aug 09 CD 4F ft :50.20b 1/4/5

**8-20-1** Owner: Corral 703, LLC (Erin Ladd)  
 Silks: Green, white diamonds, gold and white halved sleeves, green cap  
 Trainer: Erin Ladd (1-0-0-0) 0.00%  
**IMPOSSIBLE BEAUTY (L)** 120  
 Ch.m.5 Jambalaya Jazz - A Par Tea by Formal Dinner - Bred in Kentucky by Bala Gula Stable (Mar 10, 2004)  
 06Nov09 3 CD ft 6f34 2293 4629 1:1527 31 [E] Alw 4800nw1/x 61 0 3 3 55 55 5163 McKee J 120 L 70.90 On a Roll(1)Pish Posh(1)Leaf's Lun(1) forwardly placed, tired 6  
 11Sep09 6 TP ft 6f34 2226 4561 1:1130 31 [E] Clm 15000 (15-10)nw2/L 42 6 7 89 89 716 819 Lebron V 118 32.20 Sweet Gladys(3)Haybelle Stew(Savannah) no threat, 4 wide 9  
 28Mar09 10 TP ft 6f34 2499 1:1349 1:3937 31 [E] Aoc 4000nw2/x-N 41 1 2 2hd 33 611 620 Laurente G 118 43.50 Queen Stephanie(3)Extr Findings(Sissy Shpper) early speed, retreated 6  
 28Feb09 3 TP ft 6f34 2491 1:1425 1:4069 31 [E] Clm 10000 (15-10)nw2/L 63 1 5 57 54 58 411 Laurente G 113 7.30 Handlthetruth(1)Sunshine On Tap(Victory Frolic(1) inside early 6  
 07Feb09 7 TP ft 6f34 2248 4711 1:1434 31 [E] Alw 2400nw2/L 65 6 1 4 86 56 453 Laurente G 119 A 74.90 Blue Diablon(Jade's Quest(1)Latst Scoop(1) 6 wide into turn 7  
 01Jan09 8 TP ft 6f34 2236 4521 1:1742 41 [E] Alw 2400nw2/L 61 5 2 79 710 54 412 Laurente G 119 A 55.80 Time Files(1)Latst Scoop(1)One Is Enough(1) 6 wide 1/4 pl 7  
 11Dec08 3 TP ft 6f34 2256 4718 1:1308 31 [E] Clm 7500nw2/L 57 6 1 106 95 85 753 Laurente G 118 fLA 8.10 Black Sable(1)Hy Dream(1)Miss Shaltow(1) 7 path in, moved up 12  
 Workouts: 3 Nov 09 Ttc 6F ft 1:05.40b 11/14 22 Aug 09 Ttc 3F ft :39.60b 20/26 16 Aug 09 Ttc 3F ft :37.6 3/9 31 May 08 Ttc 4F ft :50.80b 8/16

**9-10-1** Owner: Gail N. Crowley  
 Silks: Black, silver cross, silver bars on sleeves, black cap  
 Trainer: Owner (1-0-0-0) 0.00%  
**EVEN TEMPO (L)** 120  
 B.m.5 Stephen Got Even - Saratoga Rhythm by Saratoga Six - Bred in Kentucky by Martha Burleson & Lyn Burleson (Apr 27, 2004)  
 06Nov09 1 CD ft 6f34 2246 4674 1:1272 31 [E] Clm 10000 65 8 2 63 42 33 461 Tolentino P 120 L 16.20 Art World(June's Best(4)Blue Satin Sash(1) bid 5 wide, flattened 10  
 09Oct09 3 Kee ft 6f34 2289 4621 1:1082 31 [E] Clm 25000 74 4 9 105 91 85 873 Mojca, Jr. R 120 L 71.00 Dana's Bell(1)Fortheboys(atthebar(1)Sisters Five(1) 4 wide, no factor 10  
 16Sep09 5 TP ft 6f34 2247 4560 1:1098 31 [E] Clm 8000 (8-7)-c 80 8 4 44 34 43 433 Arguello, Jr. F A 118 LA 2.60 Holly(the Durd)Devil's Lil Bit(2)Dancers Dip(1) 4 path, laced bid 8  
 Claimed from Dream Walkin Farms, Inc. for \$8,000; Cain S. Joe - Trainer  
 08Aug09 4 Etp fm 6f34 2157 4410 1:0259 31 [E] Clm 7500-c 70 5 4 108 104 75 74 Court JK 122 EA #2.00 Flashy Dream(1)st and Away(1)Heavenly Surprise(1) no threat, 3 wide 11  
 Claimed from Texas Toyco, LLC and Hickerson; Deron for \$7,500; Talley Jeff - Trainer  
 19Jul09 3 Etp yl 6f34 2244 4621 1:0787 31 [E] Clm 10000(10-9) 71 7 9 107 104 67 32 Lebron V 120 LA 6.50 Golden Thiel(1)Apple Pandowry(Even Tempo) stabled 1/4 pl 10  
 12Jun09 1 CD ft 7f34 2393 4781 1:2579 31 [E] Clm 7500 76 7 2 43 44 42 13 Leparoux JR 120 LA #1.10 Even Tempo(1)Tapitsonthe(1)Menfrecent(1) slow pace, in time 7  
 30May09 3 CD ft 6f100 2232 4538 1:1025 31 [E] Clm 16000 67 1 3 53 54 47 410 Sterling, Jr. L J 120 LA 7.70 Bu's Vindict(1)Mylonemymaker(1)Filter Me Rose(1) angled out, evenly 7  
 Workouts: 14 Nov 09 Ttc 4F ft :51.40b 11/15 29 Sep 09 Ttc 3F ft :36.40b 21/7 9 Sep 09 Ctt 3F gd :37.20b 1/1 25 May 09 Cdt 4F gd :50.5 4/7

**10-10-1** Owner: Robert S. Dibona  
 Silks: Green, white hoops, white sleeves, white cap  
 Trainer: John Fahey III (2-0-0-0) 0.00%  
**HANDLETHE TRUTH (LA)** 1137  
 Ch.m.5 Yas It's True - Token's Pride by Zlizzal - Bred in Florida by Cashel Stud (Mar 13, 2004)  
 13Nov09 3 CD ft 6f34 2452 1:1415 1:4750 31 [E] Clm 5000-c 68 11 2 21 21 23 45 1 Albarado R 120 LA #1.00 Mike's Honey Bunny(4)Kickin N Screamin(1)Early Hatch(1) 3 path, tired 12  
 Claimed from Full Thrt Racing LLC for \$6,000; Romans Dale L. - Trainer  
 16Oct109 1 Kee ft 6f34 2496 1:1357 1:4571 31 [E] Clm 10000 74 1 1 11 1hd 63 86 6 Mens H 120 LA 4.70 Magical Prize(1)it's a Miracle(Uzzy Gets Even(1) inside, tired 11  
 26Jun09 1 CD ft 6f34 2457 1:0973 1:3679 31 [E] Clm 16000 71 3 5 36 47 49 412 Hernandez, Jr. B J 122 LA 6:30 Disperso(1)Serna's Gold(1)Flatter Me Rogee(1) bid between foes, faded 7  
 21May09 5 CD ft 6f34 2488 1:1276 1:3678 31 [E] Clm 15000 (15-10)nw3/L 80 6 1hd 24 1hd 3nt 1hd Albarado R 121 LA 2.40 Handlethetruth(1)Art World(Affir to Remember(1) stiff drive, prevailed 7  
 06May09 1 CD sy 6f34 2475 1:1343 1:4059 31 [E] Clm 15000 (15-10)nw3/L 72 4 2 21 1hd 2hd 2 Albarado R 121 LA 3.30 Etheardcherthing(Handlethetruth)Dncng Lydia(1) long drive, gave way 6  
 26Mar09 7 TP ft 6f34 2468 1:1274 1:3984 31 [E] Clm 15000 (15-10)nw3/L 84 4 2 31 23 26 314 Mens H 122 LA 2.70 Holo Star(1)Hil of Visions(Handlethetruth(1) stalked, faded late 7  
 28Feb09 3 TP ft 6f34 2481 1:1425 1:4066 31 [E] Clm 15000 (15-10)nw2/L 82 5 1 1 11 11 113 Lebron V 118 LA #1.70 Handlethetruth(1)Sunshine On Tap(Victory Frolic(1) near rail, driving 6  
 Workouts: 4 Nov 09 CD 4F ft :49.20b 9/33 28 Sep 09 CD 4F ft :49.40b 21/80 3 Feb 09 TP 6F ft 1:06b 12/12 11 Dec 08 CD 6F ft 1:00b 1/21

CD 11/20/2009-3  
 Probable Favorites 6-5-7-3  
 Printed on 11/19/09 at 11:26:24 AM  
*\* Void Claim Wrong Date*

SUPPLEMENT TO EARLIER RESPONSE

**GENUINE ISSUES OF MATERIAL FACT EXIST THAT ENTITLE ME TO A HEARING.**

When a trainer has a positive finding in his horse, he attempts to ascertain exactly how the substance may have appeared in the horse's system. I have not changed my story, as Respondent, would have you believe. I am exploring various alternatives that have surfaced during my investigation. I would suspect that Respondent, through her due diligence, has determined that the Chief State Veterinarian has admitted that he also has a prescription for Tramadol. See the attached Affidavit of Peggy Pate.

It is also reported in respondent's response that all employees wear gloves in the test barn, this may be the case for the employees obtaining urine from horses being tested, but it is not so for the veterinarians administering to the horses. In addition, the supposition that each water bucket is used by only one horse in a single day is simply not the case. Horses weigh nearly one thousand pounds and the vast majority of them have been administered Lasix, a diuretic, prior to running. After competing they are nearly dehydrated due to the Lasix administration and upon arriving at the test barn horses have a near insatiable thirst for water. Invariably, horses after being given a bath and having blood drawn will forcibly pull their handler to the nearest bucket to quench his thirst and no one is going to stop him if he decides to drink out of the wrong bucket. In addition, many of the stable personnel are unable to speak English, even if they are given instructions on which bucket to use they may well not understand. There is no one monitoring this process. Therefore, to make the supposition that every horse drinks only out of its specific bucket is a fallacy that can be easily verified by interviewing racing commission personnel working in the test barn.

**THE TRAINER BEARS THE ABSOLUTE RESPONSIBILITY FOR THE HORSES UNDER HIS CARE.**

Respondent once again reiterates the Kentucky Horse Racing Commission (KHRC) regulation regarding the trainer's responsibility rule. As I previously mentioned, I fully understand the rule and I have abided by it during my long career as a thoroughbred horse trainer. There are, however, specific instances where the KHRC Equine Medical Director has determined that prohibited substances found in the test sample of horses that had raced were indeed due to contamination and the trainers were exonerated. It is my intention, if I am given the opportunity, to respectfully request that Dr. Scollay explain the delineation. Why is it that I am held to standard of strict liability and how a prohibited substance entered my horse's system is considered by respondent to be irrelevant, yet others are not held to this same strict standard. Apparently, Dr. Scollay has determined that the substance had no pharmacological effect on the horse's performance and I contend that the substance found in my horse's system also had no effect on his performance. See Declaration of Steven A. Barker, Ph.D.

**PRIOR TO A DECISION DENYING ME THE RIGHT TO MAKE A LIVING FOR AN EXTENDED PERIOD OF TIME, I SHOULD BE PROVIDED AN ADMINISTRATIVE HEARING THAT WILL DEFINITELY DETERMINE THE ISSUES.**

The typical steward's hearing does not provide the opportunity to present testimony and evidence before an impartial hearing officer in an effort to resolve the issues fairly and accurately. In most

CHURCHILL DOWNS Chart Results For Friday, November 20, 2009

1st Race		Purse \$12,000		Maiden Claiming \$15,000		Open 2 yo		Track: Fast		1 Mile (Run Up 34 Feet)							
Pgm#	Horse Name (Earnings)	Last Race	Clm Prc	Sex Age	Hgt Med	Eqp	Odds	PP	ST	1/4	1/2	3/4	Str	Fin	Trainer	Jockey	Comments
3	Next May (\$7,200)	04Nov09 CD 1	\$15,000	c 2	121 LA	b	8.20	3	6	41 1/2	34	21 1/2	12	11 1/2	M J Maker	J R Leparoux	bid 3 w, cleared, held angled out, gaining
2	Street Shoes Larry (\$2,400)	27Sep09 TP 3	\$15,000	c 2	121 LA	a	3.90	2	9	7 1/2	62	4nd	21 1/2	21 1/2	A O Montano, Sr.	F C Torres	steadied 5/16, late bid
12	Ridethehighcountry (\$1,200)	04Nov09 CD 1	\$15,000	g 2	121 L	L	5.50	11	10	9 1/2	7nd	7 1/4	4nd	3 1/2	B S Flint	C H Borel	bid between foes, hung
6	Naiche (\$600)	04Nov09 CD 1	\$15,000	g 2	121 L	b	21.20	6	3	5 1/2	41	5 1/2	4 1/2	4 1/2	M O Madrano	J Ocampo	3 w, improved position
14	Yamen (\$360)	12Nov09 CD 3	\$15,000	g 2	121 LA	a	14.30	12	7	10 1/2	10 1/2	9 1/4	6 1/2	5 1/2	A L Reinstedler	F A Arguello, Jr.	pressed, led, gave way
11	Conga King (\$60)	06Nov09 CD 4	\$15,000	g 2	121 LA	b	*1.80	10	4	2 1/2	2 1/2	1 1/2	3nd	6 1/2	R W Werner	M Mena	chased, drifted, faded
10	Bell Buckle (\$60)	04Nov09 CD 1	\$12,500	c 2	119 L	a	8.70	9	1	3 1/2	5 1/2	6 1/2	7 1/2	7nd	R W Radcliffe	J McKee	failed to respond
9	Handeriel (\$60)	17Oct09 Haw 2	\$12,500	g 2	119 LA	a	117.80	8	8	82	9 1/2	82	86	8 1/2	M A Tomlinson	J Riquelme	showed little
1	Eurosteel (\$60)	22Oct09 Haw 2	\$15,000	c 2	121 LA	b	13.80	1	11	11 1/2	11 1/2	11 1/2	9 1/2	9 1/2	J G Cook	T J Thompson	steadily retreated
5	Coachthechip (\$60)	04Nov09 CD 1	\$15,000	g 2	121 L	b	38.00	5	2	6 1/2	8 1/2	10 1/2	10 1/2	10 1/2	K Ralstin	J K Court	hopped start, outrun
8	New Frontier (\$60)	24Sep09 Hth 9	\$15,000	c 2	121 LA	a	126.40	7	12	12	12	12	11 1/2	11 1/2	C L Dickey	J M Johnson	rushed up, stopped
4	Radical Swing (\$60)	18Oct09 Kee 9	\$12,500	g 2	119 L	L	17.60	4	5	1nd	1nd	3rd	12	12	P Huffman	L R Goncalves	

Off Time: 12:42  
 Time Of Race: :23.18 :46.66 1:12.90 1:26.69 1:39.03  
 3 Next May 18.40 7.80 5.80 \$2 Exacta (3-2) (Pool \$83,940)  
 2 Street Shoes Larry 5.60 3.80 \$2 Superfecta (3-2-12-6) (Pool \$30,540)  
 12 Ridethehighcountry 4.60 \$2 Trifecta (3-2-12) (Pool \$54,563)  
 Mutual Pool: \$37,720  
 Winner: Next May, Chestnut Colt by Grand Reward - Quiet Miss Brad in Kentucky (3) Ramsey, Kenneth L. and Sarah K.; (2) 23 Red Stable LLC; (12) Ed Wright Cattle Company and L. T. B., Inc.; (6) Trammell, Joyce, Scalberg, Bonnie and Terry; (14) Chad Winsatt; (11) Richland Hills, Inc.; (10) Heritage Racing LLC and Gray, Hank; (8) Corey Williams; (1) Madis Thoroughbred Group; (5) Kent Ralstin; (6) Oxbow Racing LLC; (4) John D. Gunther  
 Late Scratches: Whyhyndancer, Daddy J U, Debossman; Flashing Green

2nd Race		Purse \$52,000		Allowance Optional Claiming NW3\$ X \$80,000		Open 3 yo's & up		Track: Fast		1 1/16 Miles (Run Up 34 Feet)							
Pgm#	Horse Name (Earnings)	Last Race	Clm Prc	Sex Age	Hgt Med	Eqp	Odds	PP	ST	1/4	1/2	3/4	Str	Fin	Trainer	Jockey	Comments
1	Unreachable Star (\$24,780)	18Oct09 Hoo 7	\$80,000	g 5	122 LA	b	10.50	1	2	1 1/2	1nd	1nd	1 1/4	1 1/2	T Glyshaw	C H Borel	repelled bid, drew off
2	Saratoga Sinner (\$10,400)	15Oct09 Kee 7	\$80,000	c 3	117 LA	a	*1.60	2	1	2 1/2	3rd	2nd	2 1/2	2nd	E Kenneally	J R Leparoux	long drive, held place
4	Here Comes Ben (\$5,200)	18Oct09 Kee 7	\$80,000	c 3	119 L	b	2.00	4	6	5 1/2	4 1/2	4 1/2	3 1/2	3 1/2	C Lopresti	K J Desormeaux	bid 4 wide, weakened
5	Strike Impact (\$2,600)	26Sep09 Prid 6	\$80,000	g 5	120 L	b	15.00	5	3	3 1/2	2nd	3 1/2	4 1/2	4 1/2	P J Dupuy	R J Desormeaux	bid between foes, hung
3	Antrim County (\$1,239)	24Oct09 Kee 8	\$80,000	g 6	120 LA	b	2.70	3	4	4 1/2	5 1/2	5 1/2	5 1/2	5 1/2	W B Calhoun	M Mena	well placed, flattened
6	Truth Rules (\$1,077)	17Jun09 Hth 7	\$80,000	g 4	120 LA	a	13.40	6	5	6	6	6	6	6	H P Zito	S Bridgman	no factor

Off Time: 1:09  
 Time Of Race: :24.60 :49.57 1:13.35 1:37.04 1:43.43  
 1 Unreachable Star 23.00 6.60 3.60 \$2 Daily Double (3-1) (Pool \$34,791)  
 2 Saratoga Sinner 3.20 2.20 \$2 Exacta (1-2) (Pool \$82,764)  
 4 Here Comes Ben 2.80 \$2 Superfecta (1-2-4-5) (Pool \$23,733)  
 Mutual Pool: \$99,618  
 Winner: Unreachable Star, Bay Gelding by Unloosedan - Starovertheriver Bred in Indiana  
 Owners: (1) Loosen Up Stable; (2) Summerplace Farm; (4) Chase, Brandon L. and Marianne; (5) Chester J. Miller; (3) Carl R. Moore Management LLC; (6) Robert V. LaPenta  
 Claimed: (2)-Rememberyouplace by David L. Walters - Trainer: Richard Estvanko  
 Claimed: (5)-Popsicle Toes by Everett Bray - Trainer: Clifford Wilkinson  
 Winner: Misdleader, Bay Filly by Henilee - Miss Valiant Bred in Kentucky  
 Owners: (6) Middle H. Farm; (7) Frank G. Calabrese; (9) Galen L. Crawley; (2) Byron H. King; (10) Robert S. Gibson; (3) Frank Vozzi; (1) James D. Slack; (4) Obert, Danielle and Eppard, David; (5) Castro, John and Robertson, Hugh H.; (8) Corral 703 LLC

3rd Race		Purse \$15,000		Claiming \$10,000		F & M 3 yo's & up		Track: Fast		7 Furlongs (Run Up 34 Feet)						
Pgm#	Horse Name (Earnings)	Last Race	Clm Prc	Sex Age	Hgt Med	Eqp	Odds	PP	ST	1/4	1/2	Str	Fin	Trainer	Jockey	Comments
6	Misleader (\$9,000)	04Nov09 CD 5	\$10,000	f 3	118 L	b	4.30	6	1	1 1/4	1nd	1nd	1st	A Hyland	C H Borel	stiff drive, prevailed
7	Archman (\$3,000)	17Oct09 Kee 3	\$10,000	f 4	120 LA	b	*2.70	7	9	6 1/2	2 1/2	2 1/2	2 1/2	D L Miller	E T Baird	stumbled start, dented
9	Even Tempo (\$1,500)	06Nov09 CD 1	\$10,000	m 5	120 L	L	17.00	9	5	5 1/2	4 1/2	3 1/2	3 1/2	G L Crawley	P Tolentino	bid 4 w, held show
2	Rememberyouplace (\$750)	16Oct09 Kee 4	\$10,000	f 3	118 LA	b	4.00	2	7	10	9 1/2	4nd	4 1/2	J Barkley	J K Court	circled 5 w, late gain
10	Handlethetruth (\$450)	13Nov09 CD 3	\$10,000	m 5	113 1/2 LA	a	7.30	10	4	3 1/2	3 1/2	5 1/2	5 1/2	J Fahay III	F Lenclud	angled in, flattened
3	Yokes (\$175)	11Nov09 CD 5	\$10,000	f 4	120 L	a	7.60	3	2	4nd	5 1/2	6 1/2	6 1/2	D R Vance	J R Leparoux	mild bid, weakened
1	Lady Seattle (\$75)	31Oct09 Kee 3	\$10,000	f 4	122 LA	f	22.90	1	6	9th	10	7 1/2	7 1/2	A Macias	S Gonzalez, Jr.	passed thing rivals
4	Bellafina (\$75)	06Nov09 CD 1	\$10,000	m 5	120 LA	f	68.20	4	3	2nd	6nd	9 1/2	8 1/2	D Obert	F A Arguello, Jr.	chased 2 w, tired
5	Popsicle Toes (\$75)	18Oct09 Kee 2	\$10,000	f 4	120 L	a	4.50	5	8	7 1/2	8 1/2	8 1/2	9 1/2	H H Robertson	J L Castanon	broke slowly, empty
8	Impossible Beauty (\$75)	06Nov09 CD 3	\$10,000	m 5	120 LA	a	89.80	8	10	8 1/2	7 1/2	10	10	E Ladd	G Laurente	middle move, used up

Off Time: 1:37  
 Time Of Race: :23.34 :47.24 1:12.23 1:25.55  
 6 Misleader 10.60 5.80 4.40 \$2 Pick 3 (3-1-6) (Pool \$17,575)  
 7 Archman 4.40 3.00 \$2 Daily Double (1-6) (Pool \$14,637)  
 9 Even Tempo 7.60 \$2 Exacta (6-7) (Pool \$105,921)  
 Mutual Pool: \$121,477  
 Winner: Misleader, Bay Filly by Henilee - Miss Valiant Bred in Kentucky  
 Owners: (6) Middle H. Farm; (7) Frank G. Calabrese; (9) Galen L. Crawley; (2) Byron H. King; (10) Robert S. Gibson; (3) Frank Vozzi; (1) James D. Slack; (4) Obert, Danielle and Eppard, David; (5) Castro, John and Robertson, Hugh H.; (8) Corral 703 LLC

4th Race		Purse \$4,000		Allowance Optional Claiming NW2\$ RTY X \$100,000		Open 3 yo's & up		Track: Firm		5 Furlongs (Run Up 18 Feet) (Turf) (Run at 22 Feet)						
Pgm#	Horse Name (Earnings)	Last Race	Clm Prc	Sex Age	Hgt Med	Eqp	Odds	PP	ST	1/4	1/2	Str	Fin	Trainer	Jockey	Comments
5	Turflite (\$32,950)	28Oct09 Kee 3	\$80,000	c 3	118 LA	b	4.10	5	1	2nd	2nd	11	11	R E Holthuis	J R Leparoux	cleared 3 w, held sway
3	Hold the Salt (\$10,800)	13Oct09 Hnr 8	\$80,000	g 7	120 LA	f	4.80	3	7	4nd	4 1/2	2 1/2	2nd	J A Dodgen	F C Torres	slow into stride, 4 w
4	Knights Cross (\$5,400)	31Oct09 Kee 7	\$80,000	h 5	120 LA	a	*2.40	4	4	5 1/2	4nd	3 1/2	3 1/2	E Kenneally	K J Desormeaux	5 wide, late rally
6	Duvsen (\$2,700)	06Nov09 CD 8	\$80,000	h 5	120 LA	a	22.00	6	5	7	7	7	7	E Gray	M Mena	between foes, mild gain
1	Bullet From Abroad (\$1,290)	06Nov09 CD 10	\$100,000	g 5	120 LA	b	3.60	1	3	3 1/2	1nd	3nd	5 1/2	H Dimi	E T Baird	pressed inside, faded
7	Ebtide (\$215)	14Oct09 Hoo 7	\$80,000	h 5	120 LA	a	13.50	7	6	6nd	6 1/2	6nd	6 1/2	M A Tomlinson	J K Court	hung wide, no factor
2	Pharosonthelake (\$215)	04Nov09 Dud 8	\$100,000	g 5	120 LA	f	3.90	2	2	1nd	3 1/2	5 1/2	7	J P DWito	R Albarado	very for lead, tired

Off Time: 2:06  
 Time Of Race: :22.17 :45.16 :57.23  
 5 Turflite 10.20 4.80 3.00 \$2 Pick 3 (1-6-5) (Pool \$21,391)  
 3 Hold the Salt 5.80 3.80 \$2 Cent Pick 4 (3-1-6-5) (Pool \$45,404)  
 4 Knights Cross 2.60 \$2 Daily Double (6-5) (Pool \$13,270)  
 Mutual Pool: \$132,596  
 Winner: Turflite, Dark Bay or Brown Colt by Hillitary - Gen Corp Purposes Bred in Kentucky  
 Owners: (5) Halls David Stable LLC; (3) James Dodgen; (4) Windmill Manor Farm; (6) Andrew Farm, Scanton, Connie and Buckley, James; (1) Michael Dimi; (7) Shoop, Diana and Murphy, Ann; (2) B. Jock Racing LLC  
 Claimed: (5)-3-4-6 (Pool \$29,462)  
 Claimed: (5)-3-4-6 (Pool \$68,991)  
 Claimed: (5)-3-4-6 (Pool \$182,40)

5th Race		Purse \$12,000		Claiming NW2 L \$8,000		F & M 3 yo's & up		Track: Fast		7 Furlongs (Run Up 34 Feet)						
Pgm#	Horse Name (Earnings)	Last Race	Clm Prc	Sex Age	Hgt Med	Eqp	Odds	PP	ST	1/4	1/2	Str	Fin	Trainer	Jockey	Comments
2	Touche (\$7,200)	03Oct09 TP 3	\$8,000	f 3	120 LA	b	22.20	2	11	8 1/4	7 1/2	3 1/2	1 1/2	W H Fires	J K Court	swung 5 w, drew clear
3	A. M. Due (\$2,400)	03Oct09 TP 3	\$8,000	f 3	120 LA	a	3.20	3	4	3 1/2	2 1/2	1 1/2	2 1/2	G D Foley	F C Torres	cleared, drifted, caught
9	Stream Kid (\$1,200)	03Oct09 TP 3	\$8,000	f 3	120 L	f	17.60	7	6	7 1/2	6 1/2	5 1/2	5 1/2	W Bradley	T Ferme	got through, up for 3rd
10	Whynotakeachance (\$600)	03Oct09 TP 5	\$8,000	f 3	120 LA	a	65.20	8	12	9nd	9 1/2	7 1/2	4 1/2	R Kahles	F De La Cruz	came 5 w, late gain
5	Proper Prize (\$360)	21May09 CD 9	\$8,000	f 3	120 LA	a	24.60	5	1	2 1/2	3 1/2	4 1/2	5 1/2	R E Holthuis	J McKee	forwardly placed, faded
9	Drew'sgetteagle (\$60)	28Sep09 KD 7	\$8,000	f 4	115 1/2 LA	b	84.40	6	10	10 1/2	11 1/2	9 1/2	6 1/2	R Simpson	F Lenclud	3 w, belated gain
14	Shez a Tease (\$60)	08Nov09 CD 4	\$8,000	f 3	120 LA	bf	15.50	11	5	5 1/2	6nd	8 1/2	7nd	C F Wilkinson	J L Pomplun	chased 4 w, gave way
1	Off She Goes (\$60)	05Nov09 CD 6	\$8,000	f 3	120 LA	b	2.90	4	3	1 1/2	1 1/2	2 1/2	1 1/2	E Kenneally	J R Leparoux	clear pace, tired
11	August Rush (\$60)	17Oct09 Kee 1	\$8,000	f 3	120 LA	a	*2.30	9	2	4 1/2	4 1/2	6 1/2	8 1/2	W A Ward	J L Castanon	contended, faltered
16	Last Chance Buddha (\$60)	08Nov09 CD 4	\$8,000	f 3	120 L	L	88.12	12	7	11 1/2	10 1/2	10 1/2	10 1/2	J R Durbin	P Tolentino	showed little
1	Sheza Justice (\$60)	08Oct09 Hoo 4	\$8,000	f 3	120 LA	b	9.00	3	1	8 1/2	8 1/2	11 1/2	11 1/2	S J Cain	T J Thompson	through after half
12	Pleasant as Palge (\$60)	21Oct09 Hoo 1	\$8,000	f 3	122 LA	a	12.20	10	9	12	12	12	12	S J Cain	J Ocampo	eased, walked off

Off Time: 2:35  
 Time Of Race: :22.65 :46.70 1:13.13 1:26.87  
 2 Touche 46.40 20.00 13.20 \$2 Pick 3 (6-5-2) (Pool \$22,795)  
 3 A. M. Due 6.20 3.80 \$2 Daily Double (6-5) (Pool \$11,992)  
 9 Stream Kid 9.80 \$2 Exacta (2-3) (Pool \$120,755)  
 Mutual Pool: \$158,312  
 Winner: Touche, Chestnut Filly by Tacet - Dellarosa Bred in Kentucky  
 Owners: (2) Donahoe, Patrick D. and Pauline; (3) Steve Vanovich; (9) Bradley, Fred and William and Burns, Brent; (10) Garland Rice, III; (5) Jagoe, Scott and Carman; (8) DJC Stable; (14) Ebert, James and Bowen, Erica; (4) Donworth, Ken and Barry and Kenneally, Eddie; (11) Steven M. Bell; (16) Jerry H. Durbin; (1) Justice Farm; (12) Bruce Murphy

DATE NOV 20 2009 6 559554

SALIX      ADJ

ANIMAL Archmani

COLOR DKB SEX f AGE 4

FINISH Sp RACE 3

TRACK CD

TRAINER D. Miller

SAMPLED BY Michael [Signature] (BLOOD)

SAMPLED BY [Signature] (URINE)

STATE [Signature] (WITNESS)

OWNER X RAMON Rodrigues (WITNESS)

LICENSE NUMBER 22668 (WITNESS)

TATTOO NUMBER I04421

RL252-01

**Mona L Waguespack**

**From:** Steven Barker [sbarker@vetmed.lsu.edu]  
**To:** pcasas@vetmed.lsu.edu; Mona L Waguespack  
**Cc:**  
**Subject:** FW: HI, Rick!  
**Attachments:**

**Sent:** Thu 1/21/2010 1:06 PM

**From:** Richard Sams [mailto:rsams@vetmed.ufl.edu]  
**Sent:** Thursday, January 21, 2010 11:29 AM  
**To:** Steven Barker  
**Subject:** RE: HI, Rick!

Hi Steve -

Thank you for the update on the sample analysis.

The total concentration of morphine in the urine sample was determined to be around 120 ng/mL on our instrumental screen (LC-MS) and confirmation analysis (also LC-MS). The calibrators and controls were all prepared using morphine-3-glucuronide and the internal standard was morphine-3-glucuronide-d3 (Cerilliant).

We used *Patella vulgata* to hydrolyze conjugates and heated the sample at 65 C for 16-24 hours. All calibrators and controls met requirements. Back calculated values for calibrators were within specifications. Morphine and morphine-d3 were the analytes analyzed from the sample extracts.

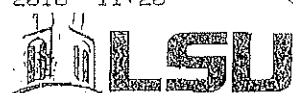
Sincerely,

Rick

Richard Sams, Ph.D.  
Professor and Program Director  
Florida Racing Laboratory  
1200 SW 34th Street

*Repeat using above  
method. JS 1/27/10*

091 68



LOUISIANA STATE UNIVERSITY

School of Veterinary Medicine  
Comparative Biomedical Sciences

Lisa Underwood, Executive Director  
Kentucky Racing Commission  
4063 Iron Works Parkway  
Building B  
Lexington, KY 40511

February 1, 2010

Dear Ms. Underwood,

This is in reference to the urine split sample labeled #559554 (LSU#SS00750) submitted to our laboratory for referee analysis. The urine sample was received in good order and was processed for confirmation of the drug morphine. Analyzed against blanks and positive controls, the sample was confirmed as POSITIVE for the aforementioned compound by gas chromatography/mass spectrometry (GC/MS). The approximate concentration of morphine in the urine sample was 136.79ng/ml.

Data related to these analyses are available on request. Remaining sample will be retained for a period of one year unless otherwise directed. If our laboratory can be of further assistance please contact me at 225-578-3602.

Sincerely,

Steven A. Barker, PhD  
Professor and Director,  
Equine Medication Surveillance Laboratory  
State Chemist, Louisiana State Racing Commission

021



**Scollay, Mary (PPC)**

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From: Scollay, Mary (PPC)  
Sent: Friday, February 12, 2010 3:43 PM  
To: 'Richard Sams'  
Subject: RE: Amended report for morphine

Rick,

I am still awaiting the amended morphine report. Can you please advise of its status? Thank you.

Mary

-----Original Message-----

From: Richard Sams [mailto:rsams@vetmed.ufl.edu]  
Sent: Monday, February 08, 2010 4:15 PM  
To: Scollay, Mary (PPC)  
Cc: Margaret Wilding  
Subject: Amended report for morphine

Dear Dr. Scollay -

Pursuant to a telephone conference call on January 27, 2010 with you, Ms. Wilding, and me, regarding our report for morphine in a test sample collected at Churchill Downs, I am reviewing all records and calculations that were used to generate the estimated morphine concentration that we previously reported. I will issue an amended report to you as soon as I have verified all records and calculations. I anticipate that I will complete this review no later than February 10, 2010.

Please let me know if you have any questions or need any additional information.

Sincerely,

Richard Sams, Ph.D.  
Professor and Program Director  
Florida Racing Laboratory  
1200 SW 34th Street  
PO Box 100117  
Gainesville, FL 32610-0117  
352-392-2238 x 3720

Scollay, Mary (PPC)

From: Richard Sams [rsams@vetmed.ufl.edu]  
Sent: Monday, February 15, 2010 6:28 PM  
To: Scollay, Mary (PPC)  
Subject: Amended morphine report  
Attachments: Finding 559554\_Amended.pdf

Hi Mary -

The attachment is the amended morphine report that you have been anticipating. The scanned document does not show the "Amended" watermark that is very obvious on the original that we are sending to you tomorrow. If you need a better scanned document, we can create that fairly quickly.

I have reviewed the calculations and supporting documentation on this sample and am certain that the calculation is now correct.

I am systematically reviewing the preparation of all other standard solutions and working standard solutions to verify that they were prepared correctly. I have already reviewed a substantial number of them and have determined that the documentation is more than adequate to determine whether the solution was made correctly or that the calculations were correct.

Please let me know if you have any questions or need any additional information.

Sincerely,

Rick

Richard Sams, Ph.D.  
Professor and Program Director  
Florida Racing Laboratory  
1200 SW 34th Street  
PO Box 100117  
Gainesville, FL 32610-0117  
352-392-2238 x 3720

College of Veterinary Medicine  
Racing Laboratory

1200 SW 34th Street  
PO Box 100117  
Gainesville, FL 32610-0117  
352-392-2238 Tel  
352-846-1052 Fax

February 16, 2010

Lisa Underwood, Executive Director  
Kentucky Horse Racing Commission  
4063 Ironworks Pkwy, Building B  
Lexington, KY 40511

RE: Report of Finding

<u>Tag Number</u>	<u>Laboratory Number</u>	<u>Specimen</u>	<u>Final Weight</u>
559554	A369706-KHU	Horse Urine	71.9 g
<u>Collected From</u>	<u>Date Collected</u>	<u>Date Received</u>	<u>Seal</u>
Churchill Downs	11/20/2009	11/21/2009	INTACT

Sample 559554 has been analyzed by liquid chromatography-mass spectrometry (LC-MS) and found to contain the following:

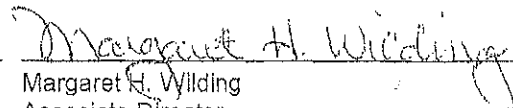
**morphine found in urine**

morphine (a narcotic analgesic and Class A drug) - the concentration of morphine is 75 ng/mL

Urine specific gravity = 1.038, pH = 7.1



Richard A. Sams, Ph.D.  
Director

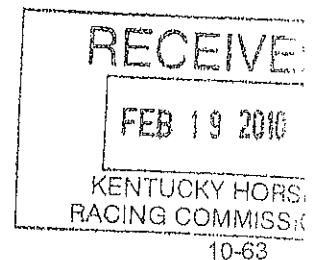


Margaret H. Wilding  
Associate Director

University of Florida Racing Lab  
ISO/IEC 17025-1999  
Certificate # 02-TR-58



Page 1 of 1



*The Foundation for The Gator Nation*

An Equal Opportunity Institution

**Scollay, Mary (PPC)**

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**From:** Scollay, Mary (PPC)  
**Sent:** Tuesday, February 16, 2010 12:44 PM  
**To:** Underwood, Lisa (PPC); Veitch, John (PPC)  
**Cc:** Scollay, Mary (PPC); Peckham, Bryce (PPC)  
**Subject:** Revised report of finding

Please be advised that I am today in receipt of an amended report from the Florida Racing Laboratory for sample number 559554 collected November 20, 2009 at Churchill Downs. The amended report was issued on February 15, 2010 after the Florida Racing Laboratory completed an internal audit (Initiated on January 27, 2010) of this finding. I was notified of the audit by Dr. Rick Sams and Mrs. Margaret Wilding by phone on the afternoon of January 27, 2010.

The amended report identifies a revised concentration of morphine at 75 ng/ml in urine. This concentration is consistent with concentrations associated with environmental contamination:

Camargo C, Lehner AF, Karpiesluk W et al., "Review of Environmental Morphine Identifications: Worldwide Occurrences and Responses of Authorities," Proceedings AAEP 2005 Vol 51, pp. 58-64.

Ginn A, Clark A, Grainger L, "Substances of Dietary Origin: Morphine," Proceedings ICRAV 2001, pp. 355-359.

Sams RA, "Review of Possible Sources of Exposure of Horses to Natural Products and Environmental Contaminants Resulting in Regulatory Action," Proceedings AAEP 1997, Vol 43, pp. 220-223.

I therefore recommend that the reported concentration of morphine at 75 ng/ml in urine be determined to be non-violative and that no administrative action be taken.

Mary C. Scollay, DVM  
Equine Medical Director, KHRC