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VIRGINIA RACING COMMISSION

Appeal Hearing on the matter of Trainer Dean Eckley

April 11, 2014

10700 Horsemens Road

New Kent, VA 23124

Commencing at 9:30 a.m.

In Attendance

Commission Members:

J. Sargeant Reynolds, Jr., Chairman
D.G. Van Clief, Jr., Vice Chairman
Carol G. Dawson
Stran Trout

Commission Staff:

Bernard J. Hettel, Executive Secretary
David S. Lermond, Jr., Deputy Executive Secretary
Kimberly C. Mackey, Office Administrator
C. Richard Harden, DVM, Equine Medical Director

Attorney General's Office
Joshua E. Laws, Esquire

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I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
JACK REMY	12	19	-	-
Rich Harden	26	54	-	-
Dean Eckley	71	73	86	86

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E X H I B I T S (Cont.)

COMMISSION EXHIBIT NO. 12

Affidavit of Dean Eckley

COMMISSION EXHIBIT NO. 13

Affidavit of Sandra Morrey

COMMISSION EXHIBIT NO. 14

Letter from Ms. Nelson to Bernie Hettel - 1/24/14

COMMISSION EXHIBIT NO. 15

Notice of Hearing

1 MR. REYNOLDS: Good morning, everybody. I'm
2 Sarge Reynolds, chairman of the Virginia Racing
3 Commission. Welcome. I guess I call this meeting to
4 order. The first thing I'd like to do is get some
5 tentative meeting dates for the Racing Commission
6 coming up so we can get through the public notice
7 part, and at least have them on the calendar.

8 If we need to cancel those meetings, we will, but
9 I at least just wanna have a couple of the dates, in
10 case we have some major breakthrough, which I would
11 like to see. So if that's okay with you, let's
12 tentatively schedule a couple dates.

13 First date I'm looking at is maybe April 21st or
14 22nd. Will that get us within ten days?

15 MR. LAWS: If the notice goes out today.

16 MR. REYNOLDS: Can you do that?

17 MR. LAWS: Yeah. I can do that today.

18 MR. REYNOLDS: Jim or Stephanie, do you have
19 any preferences for the 21st or the 22nd?

20 MS. NIXON: Either day is fine with me.

21 MR. REYNOLDS: Jim?

22 MR. WEINBERG: That's fine.

23 MR. REYNOLDS: What's good for you?

24 MR. VAN CLIEF: Whatever is most practical.
25 I'm happy either way.

1 MR. REYNOLDS: Monday or Tuesday, nobody cares?

2 MR. TROUT: No. That's fine either day.

3 MR. REYNOLDS: Okay. Let's go with Monday,
4 April 21st. What I'm hoping, is that we can have a
5 breakthrough and come down here and get something
6 resolved. If we don't, probably, we will cancel the
7 meeting, but I want to at least have it on the books.

8 MR. TROUT: Ten a.m.?

9 MR. REYNOLDS: Yes, if that works with
10 everybody. The next meeting we'll probably have
11 regardless of what is going on is the week of May
12 5th. I think everybody saw an e-mail on that, and I
13 think everybody was available pretty much that week.
14 I would like to shoot for the 6th, 7th or 9th. I
15 cannot be here on the 5th. Does anybody have a
16 preference for the 6th, 7th or 9th of May?

17 NOTE: There is no objection.

18 MR. REYNOLDS: Hearing no objections, let's go
19 with the 7th at ten o'clock. I don't need a motion
20 for that, do I?

21 MR. LAWS: No.

22 MR. LERMOND: Do you want to check and make
23 sure Bernie is there?

24 MR. REYNOLDS: Bernie, are you there?

25 MR. LAWS: I think we're gonna call him.

1 MR. REYNOLDS: We'll let Bernie know. That's
2 that. Let's get on to the hearing.

3 MS. BOUZEK: Is the one on the 21st at ten
4 o'clock also?

5 MR. REYNOLDS: Yes. Okay. So we're done with
6 all that.

7 We will have a hearing, and I apologize it has
8 taken us months and months. Looks like finally, the
9 weather has cooperated. I thank you for coming in
10 today. I want to turn it over to Josh to handle the
11 legal part of this process.

12 MR. LAWS: For the record, my name's Josh Laws
13 L-A-W-S, from the attorney general's office. I'm
14 counsel for the Commission. I'm gonna try to run
15 this hearing as smoothly as I can.

16 Ms. Nelson, could you go ahead and identify
17 yourself for the record and spell your name?

18 MS. NELSON: Sure. My name is Krysia Nelson.
19 The first name is spelled K-R-Y-S-I-A. I'm
20 representing Dean Eckley. You have my card.

21 MR. LAWS: Could you tell how you spell your
22 name as well for the court reporter and tell her who
23 you are and who you work for?

24 MR. REMY: Jack Remy. I'm a steward for the
25 Virginia harness meet.

1 MR. LAWS: Okay. What I want to do at this
2 point, I'll tell everyone how the hearing is gonna
3 go, and then we'll go ahead and enter exhibits into
4 the record for the commissioners to use in
5 determining the case.

6 First, we'll give it over to Ms. Nelson. If she
7 wants to make an opening statement, she can. I don't
8 think the stewards plan on making an opening
9 statement. I imagine we'll just go ahead into
10 testimony, unless you'd like to make an opening
11 statement. Then Ms. Nelson will have the opportunity
12 to call any witness if she wants, ask questions, the
13 Commission is gonna ask questions, I can ask
14 questions, the stewards can ask questions.

15 The stewards will be able to make their
16 testimony. Ms. Nelson can ask questions, the
17 Commission can ask questions, I can ask questions,
18 and Doc Harden and Bernie in the same manner, if
19 necessary.

20 MR. REYNOLDS: Can you all hear us on the
21 phone?

22 MR. ECKLEY: Yeah. I can hear you.

23 MS. NELSON: Can we identify who is on the
24 phone?

25 MR. LAWS: Sure. Mr. Eckley, can you hear me?

1 MR. ECKLEY: Yes, sir.

2 MR. LAWS: Could you go ahead and state your
3 name and spell it for the record, please?

4 MR. ECKLEY: Dean Eckley. D-E-A-N. Last
5 name's spelled E-C-K-L-E-Y.

6 MR. LAWS: Anyone else on the call? Anyone
7 else on the call?

8 MR. HICKMAN: George Hickman.

9 MR. LAWS: Mr. Hickman, could you spell your
10 name for the record, please?

11 MR. HICKMAN: G-E-O-R-G-E -- H-I-C-K-M-A-N.

12 MR. LAWS: What's your position?

13 MR. HICKMAN: I am the presiding judge.

14 MR. LAWS: Thank you. Meaning you are a
15 steward; is that right, Mr. Hickman?

16 MR. HICKMAN: Excuse me?

17 MR. LAWS: Were you a steward? I'll ask you
18 under oath, but never mind. I think we're having
19 some connection issues. I'll speak louder and move
20 closer to the microphone when it's time.

21 At this point, I'll identify some records, and
22 then we'll make a motion to put them in the record.
23 Exhibit No. 1 is the pharmacological report dated
24 November 7, 2013 from Dr. Harden.

25 Exhibit No. 2, two pages, it's the Colonial Downs

1 steward ruling, Ruling No. 013-063.

2 Exhibit 3 is two pages; it's the HFL Sports
3 Science testing laboratory Number 1187 documents.

4 Exhibit 4 is two pages; it's UPS tracking
5 information, tracking detail for 1Z53YW478493526510.

6 Exhibit 5 is three pages; it's a copy of the UPS
7 label and tracking information for tracking detail
8 1Z53YW478492951900. For the Exhibit 5, the tracking
9 detail is 1Z53YW478492951900.

10 Exhibit 6 is the typed statement from Sandra
11 Morrey [ph].

12 Exhibit 7 is the chain of custody form.

13 Exhibit 8 is seven pages; it's the comprehensive
14 ruling report for Dean Matthew Eckley.

15 Exhibit 9 is two pages; it's the Hathaway Major
16 Ratings Report for Dean M. Eckley.

17 Exhibit 10 is two pages; it's news from
18 the New Jersey Office of the Attorney General,
19 release date of May 6, 2008.

20 Exhibit 11 is six pages; it's a January 14, 2014
21 letter from Ms. Nelson sent to Bernie Hettel.

22 Exhibit 12 is three pages; it is the affidavit of
23 Dean Eckley.

24 Exhibit 13 is three pages; it's the affidavit of
25 Sandra Morrey.

1 Exhibit 14 is one page; it's a January 24, 2014
2 letter sent from Ms. Nelson to Bernie Hettel.

3 Exhibit 15 is one page; it's a notice of meeting
4 that was on the table as you walked into the room
5 today.

6 would one of the commissioners like to make a
7 motion to put these documents into the record?

8 MR. VAN CLIEF: So moved.

9 MS. DAWSON: So moved.

10 MR. LAWS: Is there a second?

11 MR. TROUT: Second.

12 MR. LAWS: All those in favor?

13 NOTE: The Commission votes aye.

14 MR. LAWS: Ms. Nelson, any objection?

15 MS. NELSON: No, but if I may stand up and get
16 one of those notices?

17 MR. LAWS: Oh, absolutely.

18 The stewards, any objection?

19 NOTE: There is no response.

20 MR. LAWS: Without objection, those exhibits
21 are entered into the record, and they are officially
22 part of the record.

23 At this point, we'll go ahead and turn it over to
24 Ms. Nelson to present Dean Eckley's case and his side
25 of the story. Whenever you're ready, Ms. Nelson.

1 MS. NELSON: I have no opening statement. I'll
2 reserve my comments for closing.

3 MR. LAWS: Okay. Did you have any witnesses
4 that you wanted to call?

5 MS. NELSON: The burden of proof is on the
6 stewards, I believe, so if they want to put on their
7 case, then I'll have an opportunity to respond after
8 that.

9 MR. LAWS: Okay. I was gonna let the
10 commissioners ask questions of your client, if they
11 wanted to. Do you have any objection to doing that
12 first, or would you rather go second?

13 MS. NELSON: I think that it would be more
14 appropriate for that to transpire after the stewards
15 have put on their evidence, because I think
16 otherwise, we're just gonna have to come back to him
17 anyway.

18 MR. LAWS: I agree. Could you go ahead and sit
19 up here and I'll put you under oath?

20 NOTE: The witness is sworn.

21 JACK REMY, called as a witness by the
22 Commission, first being duly sworn, testifies as
23 follows:

24 DIRECT EXAMINATION

25 BY MR. LAWS:

1 Q Remember, try to speak up, if you can. Can you
2 tell me your name and your position with --

3 A Jack Remy. I'm associate judge for the
4 Virginia Racing Commission. George Hickman is the
5 presiding judge.

6 Q Okay.

7 A And Kevin Gumm, he's on there, too.

8 MR. LAWS: Kevin, are you on the line?

9 MR. GUMM: Yes, I am.

10 MR. LAWS: Can you tell me your name and your
11 position, please?

12 MR. GUMM: Sure. Kevin Gumm. K-E-V-I-N --
13 G-U-M-M -- associate judge, Virginia Racing
14 Commission.

15 MR. LAWS: Thank you.

16 Q Sir, if you could, could you tell me how you
17 got involved in this case?

18 A Well, Doc Harden, he come to us and he told us
19 they had a positive test for Aranesp, and he got the
20 report from the lab in Lexington, Kentucky, and we
21 notified Mr. Eckley. It's a serious drug. It's a class
22 two penalty A. It's a very serious drug to be giving a
23 horse.

24 Q Once Dr. Harden gave you that information, what
25 did you do?

1 A We notified Mr. Eckley and we told him about
2 it. Then when the meet was over, Doc, he called him, and
3 then they came and the second trainer come and they sent
4 off the split sample. I wasn't here. Doc Harden was
5 here, so Doc can tell you more about it than I can.

6 Q When you said you notified Mr. Eckley, how did
7 you notify him; by phone or e-mail?

8 A Yeah. We just called him.

9 Q Did you actually have the opportunity to speak
10 to him?

11 A No. We had a hearing in Richmond, Virginia
12 about -- what was that?

13 MS. NELSON: In December.

14 A In December.

15 Q When you called and notified him, did you speak
16 to him or did you leave a voice mail?

17 A It wasn't me. It was probably George or Don.

18 Q Okay. Fair enough. You mentioned earlier
19 there was a hearing in December. Were you involved in
20 that hearing?

21 A Yes, I was.

22 Q Can you tell me what happened at that hearing?

23 A Well, I had a hearing with him, and they wanted
24 to take it to the Commission, so we had to write a
25 ruling. So we wrote our ruling, which was five years and

1 a \$10,000 fine.

2 Q That was the penalty as the result of the
3 ruling?

4 A That's what the judges all came up with.

5 Q At the hearing itself, you said they wanted to
6 go to the Commission; is that right?

7 A Yeah. Right away.

8 Q So at the hearing, how long did the hearing
9 take?

10 A Five minutes. They didn't even want to -- they
11 just wanted to take it to the Commission.

12 Q Okay. Did they present a case at all to you
13 guys?

14 A No. No.

15 **BY MR. REYNOLDS:**

16 Q How did you all come up with the fine and the
17 suspension? Was that done in five minutes or had you all
18 already been thinking about the penalty?

19 A No. We talked about it. I talked to him. She
20 left the room, and Dean, and I told them what do they
21 want to come up with, and this is what they came up with.

22 You know, there were circumstances. Earlier in
23 the meet, we had a Banamine positive on him, and the week
24 before, we had one that was right at the borderline. We
25 told him you're close on your Banamine, and a week later

1 we had a Banamine positive.

2 After they got the Aranesp positive, Doc. Harden
3 and the Commission searched the barn and grooms' corners,
4 and they found one of his grooms, Seth Fogelson [ph],
5 they found needles and syringes in his backpack. That's
6 how we came up with the fine. He was thrown off the
7 ground and fined \$250.

8 **BY MR. LAWS:**

9 Q You say, "he". You mean Seth Fogelson?

10 A Seth Fogelson. Yeah. He worked for Dean.

11 **BY MR. REYNOLDS:**

12 Q Is the fact that you find syringes alone
13 grounds for dismissal?

14 A Yeah. They aren't allowed to have them on the
15 grounds.

16 Q Doesn't matter what's in it? The syringes --

17 A Needles and syringes. They didn't find any
18 injectables, but the intent was there, as long as they
19 have them on the grounds.

20 **BY MR. LAWS:**

21 Q when you speak, can you try not to talk into
22 your hands?

23 A Sorry.

24 Q That's all right. Anything else?

25 **BY MR. TROUT:**

1 Q Couple questions. When the decision was made
2 at that time about the penalties, is that one that comes
3 out as a conclusion of what the group of judges or
4 stewards --

5 A Yeah, and it's in line with the RCI recommended
6 penalties and model rules.

7 Q This was three people --

8 A Yeah. Three of us.

9 Q -- that got together? Probably in a closed
10 meeting, was it?

11 A Yeah.

12 Q And came to this conclusion and then reported
13 the conclusion out --

14 A Um-hmm.

15 Q -- as the decision of that group, so that would
16 be the official decision of the stewards or of the
17 judges?

18 A Yeah. Of all three of us.

19 Q Okay.

20 A They were notified at the hearing.

21 Q That's the normal procedure to do that?

22 A Yeah.

23 Q So it wasn't anything abnormal up to that
24 point, at least as far as the procedure?

25 A Yeah.

1 **BY MR. REYNOLDS:**

2 Q was Mr. Eckley on the grounds when this whole
3 thing happened? I noticed in reading everything, a lot
4 of times, he appoints other trainers and he's not
5 actually here.

6 A well, I can't answer that for him. He'll have
7 to answer.

8 **BY MR. LAWS:**

9 Q when you say was he here for the whole thing,
10 you mean the meeting or?

11 A He's a trainer. He's responsible for the
12 stable and his horse.

13 MR. LAWS: When you say was he here, are you
14 talking about the meeting in December?

15 MR. REYNOLDS: I'm talking about when the
16 violation occurred.

17 **BY MR. LAWS:**

18 Q Do you know the answer to that?

19 A I couldn't tell you. He's the trainer. It's
20 the trainer's responsibility.

21 MR. REYNOLDS: I understand. Okay.

22 MR. LAWS: Any questions?

23 MS. DAWSON: I have one question.

24 **BY MS. DAWSON:**

25 Q You said earlier that you think it was George

1 Hickman who called Mr. Eckley?

2 A I'm not for sure. You can ask George. George,
3 did you know --

4 MR. LAWS: Hold on. Hold on.

5 A But this happened right at the end of the meet
6 and we were getting ready to leave, and Doc and Bernie,
7 they took care of a lot of the stuff. We weren't here
8 when the split sample was shipped off or nothing. We
9 weren't involved in that.

10 Q I was trying to determine, you can correct me
11 if I'm wrong, but he did indicate that he didn't know
12 anything about this early on? I'm just trying to find
13 out.

14 MR. TROUT: We'll get it out along the way
15 here, probably. If we have somebody who actually did
16 something or was a party to a conversation, we'd
17 rather hear it from them, than something that might
18 be indirect, or as they say in law, hearsay. So
19 you're right, particularly if the source is
20 available.

21 MR. LAWS: Any other questions for the witness
22 or the commissioner?

23 MS. NELSON: May I cross-examine?

24 MR. LAWS: Yeah.

25 **CROSS-EXAMINATION**

1 BY MS. NIXON:

2 Q Mr. Remy, you mentioned that the barn was
3 searched after the positive --

4 A Yes.

5 Q -- and that needles and syringes were found in
6 Mr. Fogelson's backpack?

7 A Yes.

8 Q And you mentioned that Mr. Fogelson was
9 sanctioned for that; is that correct?

10 A Yes. He was -- he had a hearing and he was
11 fined.

12 Q Okay, and was that violation part of the
13 consideration for the stewards' imposition of the
14 sanction on --

15 A No.

16 Q It was not?

17 A No.

18 Q Okay.

19 MR. LAWS: I'm sorry. Try to let her finish
20 the question before you answer.

21 Q And was the matter of the needles and the
22 syringes being found, was that raised at the stewards'
23 hearing for Mr. Eckley?

24 A Not really. We knew about it, but we had
25 already had a Banamine positive, and more or less, what

1 Seth did doesn't have nothing to do with Dean, I don't
2 think.

3 Q Okay. So the matter of the Banamine positive,
4 that wasn't raised at the stewards' meeting, either?

5 A No, because he knew about that. He'd already
6 been fined. He paid the fine.

7 Q Okay, but that wasn't part of the decision to
8 --

9 A No. It goes with it, because you know, if you
10 have like more than one or two positives during a year,
11 your fines go up.

12 Q Okay, but at the stewards' hearing in December,
13 that was not raised as an additional consideration? That
14 wasn't --

15 A No, no.

16 Q Okay, and there was nothing that you all
17 provided in writing with regards to the December
18 stewards' meeting about the Banamine positive, correct?

19 A No. That's a done deal. It had already
20 passed.

21 Q Okay.

22 A This is separate.

23 Q Okay, and out of curiosity, because this is the
24 first that I'm hearing about Mr. Fogelson's situation.
25 when did that stewards' meeting take place?

1 A That was before. After he got caught with
2 syringes, we fined him \$250. He also had an altercation
3 with a track superintendent; he was fined \$250 for that.
4 I think the management of Colonial Downs asked him to
5 leave. He was asked to leave the grounds.

6 Q Okay, but so this happened during the meet
7 then, which would have been in October?

8 A Yeah.

9 Q Okay, and --

10 A Had to be late. I'm not for sure of the date.

11 Q Okay, and none of that was part of this
12 determination?

13 A No. It doesn't have nothing to do with Dean.

14 Q Okay. You also stated in your summary of what
15 happened at the stewards' meeting that, I believe the
16 phrase you used was that we wanted to just take it to the
17 Commission. Are you saying that we didn't present any
18 argument whatsoever?

19 A Well, it seemed like to me, soon as you got
20 there, you didn't even want to hear about the ruling or
21 anything; you just wanted to take it to the Commission.
22 That's what I felt.

23 Q Are you saying that we didn't raise the issue
24 of the lost B sample, of the absence of the B sample
25 results?

1 A No. You never raised that with me. You
2 talking about the split samples?

3 Q Correct.

4 A I don't know.

5 Q You do not recall --

6 A I don't recall you saying anything about it.

7 Q You don't recall the recitation of the rule
8 that requires, that prohibits the stewards from taking
9 action in the absence of the receipt of the B sample
10 rules? You do not recall that?

11 A We still have to write a ruling regardless, you
12 know. That's why we're here.

13 MR. LAWS: You have to answer her question. Do
14 you remember her bringing that up or not?

15 A I think I do, yeah, but the whole time,
16 I knew the way she was talking, she was gonna take it to
17 the Commission and have the Commission hear it. I
18 mentioned to her we still have to write a ruling so we
19 got something to go by. That's why we're here.

20 Q So to be clear, are you saying that you do not
21 remember whether there was discussion about the absence
22 of the B sample results, or are you saying you remember
23 it clearly and it is your position that we didn't raise
24 that?

25 A No. Go ahead.

1 MR. LAWS: I'm sorry. which one?

2 A Go ahead and raise that. I was just learning
3 about that myself, you know, about the split sample.
4 See, I don't work here -- once we meet, we leave and go
5 on to another track. I had just learned about that
6 myself, too, you know, about the split sample.

7 Q Okay, but you have testified giving these
8 commissioners a summary of what happened at the stewards'
9 hearing, and in that summary, you said we didn't say
10 anything except we wanted to take it to the Commission,
11 and what I'm trying to determine is whether your
12 testimony is that you either remember that we made an
13 issue about the missing B sample or --

14 A I recall I think you did. Yeah.

15 Q Okay. Thank you.

16 MR. LAWS: Anything else, Ms. Nelson?

17 MS. NELSON: No.

18 MR. LAWS: Okay. At this point, any other
19 questions from the commissioners?

20 NOTE: There is no response.

21 MR. LAWS: Thank you for your testimony today.
22 We will go ahead and talk to Mr. Hickman now.

23 MR. REMY: You talk to George and Kevin. They
24 weren't at the hearing, but they can tell you about
25 it.

1 NOTE: The witness stood down.

2 MR. LAWS: Got you. Mr. Hickman, can you hear
3 me? Mr. Hickman, can you hear me? Nope. Kevin, are
4 you still on the line? The line is still connected.
5 Is it muted?

6 MS. NELSON: Dean, are you still on the line?

7 MR. LAWS: The line is open. The minutes are
8 still running.

9 MS. NELSON: Are they muted?

10 MR. LAWS: I don't know. Dean, are you muted?
11 George, did you mute your line? Can anyone hear me?

12 MS. NELSON: He just texted he can hear you.
13 We can't hear you.

14 MR. LAWS: Dean, we can't hear you. Can you
15 press a numeric button on your phone?

16 MR. REYNOLDS: I think we should reinitiate the
17 call.

18 MR. LAWS: what we're gonna do, folks, everyone
19 on the line, Kevin, George and Dean, if you can hang
20 up and call back in, and we'll try to get you where
21 we can hear you.

22 NOTE: There is a recess from 9:49 a.m.
23 until 10:16 a.m.; thereafter, the hearing continues
24 as follows:

25 MR. LAWS: This testimony is really crucial.

1 I think we need to go forward. Dean Eckley is on the
2 phone. He's the only one we can get on the phone.
3 He needs to be able to hear what's going on, so we'll
4 keep him on the line, then we'll just go forward. If
5 we need to call Hickman or Kevin, I'll use this
6 phone.

7 For the record, this is a De Novo hearing. In
8 any event, I think the exhibits that we have for the
9 stewards and any questions that we have, we've
10 already asked, so I think we can go ahead and go
11 forward with the rest of the hearing today. So we'll
12 go ahead and talk to Dr. Harden next. Dr. Harden, if
13 you'll go ahead and come to the table.

14 NOTE: The witness is sworn.

15 RICH HARDEN, called as a witness by the
16 Commission, first being duly sworn, testifies as
17 follows:

18 DIRECT EXAMINATION

19 BY MR. LAWS:

20 Q Speak loudly, if you could, so Mr. Eckley can
21 hear you. Can you tell me your name and your position
22 with the Racing Commission, for the record?

23 A My name is Rich Harden -- H-A-R-D-E-N. I'm the
24 equine medical director for the Virginia Racing
25 Commission.

1 MR. LAWS: Mr. Eckley, can you hear me?

2 MR. ECKLEY: Yes.

3 MR. LAWS: Can you hear Dr. Harden's testimony
4 and answers?

5 MR. ECKLEY: Barely.

6 MR. LAWS: Okay. If at any point you can't
7 hear something, can you speak up and we'll ask him to
8 repeat it?

9 MR. ECKLEY: Yes, sir.

10 MR. LAWS: All right. Thanks.

11 Q Dr. Harden, can you tell me how you became
12 involved in this case?

13 A Well, during the course of the race meet, my
14 function is to oversee live racing, oversee drug testing.
15 In the process of drug testing, we had a test return back
16 from Mr. Eckley with a Darbepoetin, and I turned the
17 information over to the stewards and went from there.

18 Q When you say a test came back, what did it come
19 back positive for?

20 A Darbepoetin.

21 Q And what is that?

22 A It's a synthetic hormone or semi-synthetic
23 hormone that occurs naturally in animals. This one, I
24 think is produced from guinea pigs, but I'm not entirely
25 sure of the pharmacological origin of it, but basically,

1 it mimics the hormone in the body that's produced by the
2 kidneys that stimulates the production of red blood
3 cells.

4 So when it is administered exogenously, that is,
5 given a shot to supplement a horse's natural level, it
6 produces a lot more red blood cells and it enhances the
7 horse's stamina, and hence, the horse's performance.

8 Q You said the tests results. Is that what we
9 marked as Exhibit 3, the HFL Sports Science document? I
10 can show it to you.

11 A No. I've got it right here. Yes.

12 Q Okay. So once you received this document, what
13 did you do?

14 A Well, I notified the stewards of the positive
15 finding. Primarily, we operated through the senior
16 steward or presiding judge as they're called in the
17 harness industry, so that would have been Mr. Hickman.

18 Q That's George Hickman?

19 A Yes. George Hickman.

20 Q You heard testimony this morning, and as you're
21 aware, that the stewards held a hearing and issued a
22 ruling; is that correct?

23 A Yes.

24 Q Then at some point -- strike that. At what
25 point did you become involved with the split sample

1 testing?

2 A Mr. Hickman called Mr. Eckley and said that
3 there was a positive, and he advised Mr. Eckley to call
4 Mr. Hettel, Bernie Hettel, executive secretary of the
5 Racing Commission, if he chose to send off a split sample
6 or not.

7 MS. NELSON: If I may interrupt and just
8 object. I mean I know that the rules of evidence
9 don't apply and that you all aren't actually a Court,
10 but I would object to Dr. Harden testifying about
11 what he thinks other people said.

12 We have an affidavit from Mr. Eckley as to how
13 this information was communicated to him and what
14 happened, so I think that to the extent that any of
15 that is relevant, and I'm not even sure that that
16 part is, I think it would be cleaner to not have
17 someone testifying about what they think somebody
18 else said in a phone conversation.

19 MR. LAWS: I understand.

20 Q So Dr. Harden, at some point, did you -- how
21 did you find out or -- strike that. Did you become aware
22 there was a request to test a split sample?

23 A Yeah. Mr. Hettel told me that there was a
24 request to send a split sample a lab, and I contacted
25 several laboratories to determine their competency to

1 test the sample.

2 I had two labs that were available to test the
3 sample; one was in Pennsylvania and one was in New York.
4 We gave Mr. Eckley the option to determine which lab he
5 wanted the split sample to be tested at.

6 He indicated he wanted to do the test at Ithaca,
7 which is the New York Racing and Wagering Board
8 laboratory. That's in Ithaca, New York. Mr. Hettel
9 arranged an appointment to meet him to retrieve the split
10 sample from the freezer and submit the sample.

11 Q Were you present when the sample was retrieved
12 from the freezer?

13 A Yes.

14 Q Beginning that morning when you got to the
15 Commission, can you tell me what happened?

16 A We had arranged with Mr. Eckley -- when I say
17 we, I mean collectively Mr. Hettel and myself -- to meet
18 here at Colonial Downs at eight o'clock the morning of
19 November 14th, as I recall, and the sample is locked in
20 the test barn freezer here on the grounds of Colonial
21 Downs.

22 At eight o'clock, Mr. Hettel and I were here.
23 At approximately 8:30, no one had shown up to meet us, so
24 Mr. Hettel called Mr. Eckley, and here again, I guess I'm
25 speaking hearsay.

1 I was sitting right beside Mr. Hettel, but my
2 understanding of that phone call was that Mr. Eckley had
3 a personal emergency of some nature; he could not be
4 there. He had arranged with Seth Fogelson to be his
5 representative to meet and witness retrieval of the
6 sample.

7 Q And Bernie Hettel had a conversation on the
8 phone with Mr. Eckley; is that right?

9 A Yes, and in my presence. I was there.

10 Q Did Bernie tell you what he talked about with
11 Mr. Eckley?

12 A Yes.

13 Q So as a result of that information, what did
14 you and Bernie do?

15 A We waited further for Mr. Fogelson to show up.
16 He showed up, I want to say maybe 9:15, recalling from my
17 memory. We went to the test barn. We retrieved the
18 sample. We packaged the sample in a shipping container.

19 I've got one that's similar to the one that was
20 used. This has a styrofoam container inside it. We
21 packaged the sample. We sealed it with evidence tape.
22 We sealed the package with evidence tape, and this was
23 completed at 9:43. I'm sorry, 9:43, according to the
24 chain of custody form.

25 Q Okay, and once that was done, what happened

1 next?

2 A Then we were gonna take this box to the
3 shipper. I had anticipated that we would use FedEx,
4 because the FedEx office is right next to the Commission
5 office at the airport, and the most convenient to all of
6 us. Mr. Eckley insisted that he had an account with UPS
7 and he preferred that we use UPS.

8 Q When you say Mr. Eckley insisted, how did you
9 know that? Who told you that?

10 A This was on the phone call that he had with
11 Mr. Hettel.

12 Q Okay, and why did he want to use UPS?

13 A Here again, it's my understanding from
14 witnessing that phone call, was that he said he had an
15 account with UPS. It was easier for him to use UPS
16 rather than FedEx, and so that was the choice.

17 Q Okay. Did you make a label for FedEx or were
18 you going to do that?

19 A Well, I had presumed FedEx because of its
20 location. I had a FedEx label already prepared. We did
21 not have a UPS label prepared.

22 Q So you found out that Mr. Fogelson -- strike
23 that. Mr. Eckley wanted to use UPS, so once Mr. Fogelson
24 got there, you, Bernie and he went to UPS; is that
25 correct?

1 A That's correct.

2 Q Did you all go in one car or in separate cars?

3 A Mr. Hettel and I drove together and carried the
4 package with us, and Mr. Fogelson followed in his car.

5 Q Which UPS store did you go to?

6 A We used the UPS store in Mechanicsville, which
7 is on Highway 360.

8 Q So once -- who got to the UPS store first; you
9 or Mr. Fogelson?

10 A Well, we were immediately in front of him, but
11 we arrived --

12 Q About the same time?

13 A Yeah.

14 Q Okay. So once you got there, what happened?

15 A We go into the UPS store to ship the package
16 and indicated that we wanted to put it on Mr. Eckley's
17 account, and the store owner said, well, that Mr. Eckley
18 would have to provide a label with his account number in
19 order to ship it on that account.

20 At this point, Mr. Fogelson made a phone call
21 and Mr. Fogelson produced a laptop computer, and he was
22 typing in his computer and talking on the phone. We
23 presume it was to Mr. Eckley, but I don't know to whom
24 that phone call was.

25 Q Okay.

1 A After a few minutes, Mr. Fogelson asked Mrs.
2 Morrey --

3 Q Who is Mrs. Morrey?

4 A Mrs. Morrey is the store owner and manager of
5 the UPS store.

6 Q Go ahead, sir.

7 A So he asked Mrs. Morrey if she could fax the
8 shipping information, i.e., the address to the laboratory
9 to someone to prepare the label to fax back to go on the
10 package.

11 I gave Mrs. Morrey a piece of paper with the
12 laboratory address on it, and I have a photocopy that
13 Mrs. Morrey gave me back of that piece of paper, which
14 she faxed. It's important to understand the phone number
15 that that was faxed to, because it was faxed to this
16 number.

17 MS. NELSON: I'm sorry. Dr. Harden, are you
18 looking at something that I have a copy of?

19 DR. HARDEN: It would be on Mrs. Morrey's
20 affidavit.

21 **BY MR. LAWS:**

22 Q To make this quick, I believe you're referring
23 to Paragraph Three of Page One of the affidavit, where it
24 says Mr. Fogelson wanted to use his UPS shipper number,
25 so he asked me to contact a gentleman at (330) 407-6341

1 to fax a shipping label to ship a package to New York?

2 A That's correct. Those two phone numbers are
3 somewhat significant to us. The cell phone number, the
4 gentleman that she called to get the fax number, that
5 cell phone belongs to Dr. Frank Pellegrini in Aurora,
6 Ohio. He's the vice president veterinarian for a company
7 called Freedom Health, LLC. So this is the phone number
8 that Mrs. Morrey called to arrange the fax. This wasn't
9 known to me at the time. I presumed she was calling
10 Mr. Eckley.

11 Q That phone number, that 330 number, did you
12 call that phone number?

13 A After we found out that the shipment had gone
14 awry, I did call the number, and Mrs. Frank Pellegrini
15 answered and give us her husband's phone number at
16 Freedom Health.

17 Q So that morning after Mrs. Morrey called to get
18 the fax number, what happened?

19 A Then she -- the gentleman, according to her
20 affidavit, the gentleman she spoke to gave her a fax
21 number to have her fax the shipping information, the
22 address.

23 Q Let me cut you off. I apologize for
24 interrupting. I'm not asking you to tell me what she
25 did. I'm asking what you witnessed that morning. what

1 happened after she called that number to get the fax
2 number to send the label?

3 A She in fact sent a fax to this phone number,
4 and that phone number is the fax machine at Freedom
5 Health, LLC, in Aurora, Ohio.

6 That fax was actually sent at 10:52 that
7 morning, according to the fax transmission report that
8 Mrs. Morrey provided me a couple of days later.

9 MS. NELSON: Excuse me. So have I seen a copy
10 of that document?

11 Q Do you have that document with you?

12 A Yes.

13 Q Can you --

14 MS. NELSON: But that has not been previously
15 provided to me.

16 MR. LAWS: Yeah. I have not seen it.

17 A That's the fax transmission from the UPS store
18 that Mrs. Morrey gave me Monday morning when I go back
19 to -- or on Friday when I go back to ascertain what
20 happened to the shipment.

21 MR. LAWS: Can I see that when you're done with
22 that?

23 MS. NELSON: Sure. Just looking at something.

24 **BY MR. LAWS:**

25 Q Dr. Harden, in the affidavit that Mrs. Morrey

1 signed and the statement that she gave earlier, she
2 listed the fax number as (303) 562-1445. Did you have a
3 conversation with her about whether that number was
4 accurate?

5 A She had transposed the first two numbers. It's
6 330, rather than 303 in the area code.

7 Q Okay.

8 A But the 330 is the number that's on the fax
9 transmission report.

10 Q Okay. Then go ahead and tell me what happened
11 then.

12 A So at approximately 11:00 o'clock, we'd been in
13 the store maybe for 45 or 50 minutes. I don't recall if
14 it was Mrs. Morrey or if it was Seth Fogelson; one or the
15 other indicated that everything was in order with the
16 address, and that the fax -- the label to ship the
17 package would be arriving by fax in a very few minutes.

18 Q Okay.

19 A At that point, then --

20 MS. NELSON: I'm sorry. I was handing that to
21 him. How did she determine that -- you were saying
22 the label was expected to come, but how do we know
23 that?

24 DR. HARDEN: Either Mrs. Morrey through the
25 phone call she was having or Seth Fogelson. Seth had

1 been on and off of the phone several times that we
2 were there, and I honestly can't say who commented
3 that the fax was ready, but it became evident to all
4 of us that the fax was -- the label would be arriving
5 by fax shortly.

6 At that point, Mr. Hettel and I and Seth
7 Fogelson, we signed and completed the chain of
8 custody form, and that was at 11:03.

9 Then the three of us proceeded to leave the
10 store. Mr. Fogelson got in his car and drove off,
11 and Mr. Hettel and I go in our car and drove off.

12 **BY MR. LAWS:**

13 Q Okay. The chain of custody form has been
14 marked as Exhibit 7. Is that the chain of custody form
15 you've been referring to (Indicating)?

16 A Yes.

17 Q Okay. On the chain of custody form itself, it
18 references a laboratory and shipping address. Let me
19 know when you have that document in front of you.

20 A Yes.

21 Q Did you fill this document out? Is this your
22 handwriting?

23 A Yes, it is.

24 Q You filled out the reference laboratory and
25 shipping address; is that right?

1 A Yes.

2 Q Further down the page where it says
3 verification of retrieval, verification of indicia and
4 verification of packaging and verification of shipping,
5 it has commission rep and then initials. Did you fill
6 out each one?

7 A Yes. Those are my initials.

8 Q Did Seth Fogelson fill out the horseman rep
9 initials?

10 A Yes.

11 Q Did you witness him sign those?

12 A Yes.

13 Q Did you see the label before you left the UPS
14 store?

15 A The label that was to be faxed in, no, sir. I
16 did not.

17 Q This chain of custody form, this was prepared
18 in accordance with the Virginia Administrative Code; is
19 that right?

20 A That's correct.

21 Q You've read the portion of the code where it
22 talks about the chain of custody form; is that correct?

23 A Yes.

24 Q Okay, and did you think you met the
25 requirements of the Virginia Administrative Code when you

1 filled out this chain of custody form?

2 A Yes, I did.

3 Q So after you left the UPS store that day, did
4 you have any other communication with Seth Fogelson or
5 Dean Eckley?

6 A No, sir.

7 Q That day?

8 A No, sir.

9 Q Of course, as is the subject of this case, at
10 some point, you became aware that there was a problem
11 with the split sample; is that right?

12 A Yes.

13 Q what was that problem?

14 A It was the following morning, Friday morning
15 when the sample should have arrived at the laboratory
16 in New York, I got a call from Dr. Maylin, said he
17 received the package, but that it did not contain the
18 sample.

19 Q Did he tell you what it contained?

20 A Yes. This is indeed the package that was
21 shipped to New York. Dr. Maylin sent this package back
22 to us later. So this sample arrived in New York on
23 Friday morning and it contained --

24 Q Friday, November 15th?

25 A Yes.

1 Q All right.

2 A It contained a bottle of wasine, which is a
3 poultry warmer that is readily purchasable at many farm
4 supply stores. In fact, the tractor supply company in
5 Mechanicsville approximately a mile from the UPS store
6 sells this for \$7.99.

7 Q Is there anything else in the package?

8 A There were some crumbled newspapers, which were
9 folded up just as padding or as whatever, and the
10 newspaper is the Richmond-Times Dispatch, dated Thursday,
11 November 14th, 2013.

12 Q Okay. So that Friday morning, Dr. Maylin
13 called you and you found out the package didn't have the
14 split sample. What did you do at that point?

15 A I went directly to the UPS store and spoke to
16 Mrs. Morrey to inquire of her what happened or if she had
17 any insight as to where our package was.

18 Q What did she tell you?

19 A She --

20 Q Strike that. Did anyone go with you to the UPS
21 store?

22 A On Friday, no.

23 Q So what did she tell you when you got there?

24 A She pulled the UPS records and gave me the
25 tracking number for the package, and then she said that

1 shortly after we had left, that Mr. Fogelson came back in
2 to the store, requested to buy a -- this is hearsay, but
3 it is recorded in Mrs. Morrey's --

4 MS. NELSON: I think we can --

5 Q If she told you, you can tell.

6 A Okay. Anyway, she told that Mr. Fogelson came
7 back shortly after we left and asked to buy a box of
8 similar size to the one we had just shipped. He took
9 this box, left the store, came back (Indicating) --

10 MS. NELSON: I'm gonna object to him pointing
11 to that box and saying he took that box.

12 Q Okay. He took the box he received from
13 Ms. Morrey that morning?

14 A Yes.

15 Q And did what with it?

16 A And left. He returned very shortly with that
17 package, with that, with a box, which is this box.

18 MR. LAWS: Objection noted. It is similar.

19 A He returned --

20 MR. LAWS: We don't need to argue about that.
21 Go ahead.

22 A He returned with a box, and he had a label that
23 was generated to the New York laboratory, which he
24 provided for the package that was subsequently mailed and
25 received at the laboratory.

1 Q The second package, the label for the second
2 package, Ms. Morrey told you that -- did she say whether
3 she provided the label for the second package?

4 A No. She was insistent that Mr. Fogelson
5 provided that label for the second package. It was
6 interesting, because it had been such a hassle prior to
7 that, you know. When we were there to ship the package
8 originally, he said I don't have any way to generate a
9 label, and so that's why we went through this faxing back
10 and forth situation.

11 Q With the first package, why did he not just pay
12 to have the UPS place -- did he say why he didn't pay to
13 have the UPS place make a label?

14 A He said he didn't have any money.

15 Q Okay.

16 A Mr. Fogelson said he didn't have any money to
17 pay for shipping it himself.

18 Q Okay. What I marked as Exhibit 4 and Exhibit
19 5, are those the documents Ms. Morrey provided to you,
20 the tracking documents for the two packages?

21 A The Exhibit 4 and Exhibit --

22 Q These documents (Indicating).

23 A These were actually printed off of the UPS
24 website. I printed those documents after I was given the
25 tracking numbers. I printed the documents to try to

1 determine where our package was.

2 Q Got you. So that morning with Ms. Morrey,
3 after she told you that Mr. Fogelson came back and mailed
4 a second package, what happened?

5 A She then gave me the tracking numbers for both
6 packages. She advised me that I did have authority to
7 pursue tracking on both packages because my name was on
8 both labels of the packages and --

9 Q when you say your name was on both labels, what
10 does that mean?

11 A On the label as shipper, it had my name listed.
12 This is the label that was sent that Mr. Fogelson put on
13 the package that was sent to New York.

14 Q what I marked as Exhibit 5?

15 A Okay. Yes.

16 Q Okay. So then what happened?

17 A well, I began to try to piece together what had
18 happened. I determined by the tracking number that the
19 box that we dropped off at 11:03, that a label arrived
20 for that box, and that box was scanned into the UPS store
21 at 11:16.

22 MS. NELSON: I'm gonna object, because I think
23 the tracking stuff speaks for itself, and Dr. Harden
24 is sort of piecing together a theory. If he wants to
25 express his theory -- but it's not what happened,

1 because the tracking stuff has the information about
2 when a particular box that arrived at a particular
3 location was scanned into the system. So to the
4 extent that he's got some theory about it, we don't
5 need his theory. We've got the times.

6 MR. LAWS: Yeah. Well, I think Ms. Morrey
7 explained what that information means in her
8 affidavit.

9 MS. NELSON: I agree, but what he's saying --

10 MR. LAWS: I understand.

11 MS. NELSON: -- got scanned at -- and it's not
12 necessarily his box. It's potentially -- all that
13 got scanned was his label, and we don't know what box
14 the label was attached to. We know what box arrived
15 in New York, but you know, the problem is that that
16 wasn't his box that arrived in New York.

17 MR. LAWS: Yeah. We know the label for that
18 was attached to that box, but not the original.

19 MS. NELSON: Correct. We don't know what
20 happened to his box, so he can't testify that his box
21 got scanned at a certain time.

22 MR. LAWS: I understand. The label got
23 scanned. I understand the distinction that you're
24 making.

25 Commissioners, do you have you any questions for

1 Dr. Harden?

2 MR. REYNOLDS: I do.

3 **BY MR. REYNOLDS:**

4 Q Dr. Harden, Freedom Health, LLC, that was the
5 fax number that obviously came in. Does the Racing
6 Commission office ever -- is that a testing lab? Do they
7 test for --

8 A No, sir. That's a marketing firm. They sell
9 products for horses.

10 Q So we would never use -- has the racing office
11 ever used them, had any affiliation with them whatsoever?

12 A No, sir.

13 Q So we would not have accidentally -- okay. All
14 right.

15 MR. VAN CLIEF: Can I interject a follow-up to
16 that?

17 MR. LAWS: Please.

18 **BY MR. VAN CLIEF:**

19 Q What kind of products does Freedom Health, LLC
20 primarily sell?

21 A Their primary product is one called Succeed,
22 which is -- I'm not familiar with the product. I think
23 it's some type of pro-biotic or gastrointestinal
24 stimulant, but I'm not familiar with the product, other
25 than what's produced on their website. I have a printout

1 of what they say it is, but.

2 Q Do they sell compounds?

3 A Not to my knowledge. I don't know. It was
4 curious to me though that Dr. Pellegrini himself is a
5 former trainer of Standardbred horses and has been active
6 in Standardbred racing, and it's further curious that Mr.
7 Fogelson's residence is eight miles from Freedom Health,
8 LLC.

9 **BY MR. REYNOLDS:**

10 Q Okay. Did somebody from the racing office --
11 you may have said it earlier, but I just don't remember.
12 Did somebody call up this Ohio place to say it looks like
13 a gentleman by the name of Willie signed for the package?
14 Did anybody from this office ever find out what was in
15 the package?

16 I thought I read they would never find it. Tell
17 me what happened through the Virginia Racing Commission
18 office as far as trying to track down the package that
19 went to Ohio and hopefully what was in it.

20 A We didn't call Freedom Health, LLC. It is my
21 understanding that Mr. Eckley called at some point and
22 they denied any knowledge of the package.

23 Q Why wouldn't we do our own recognizance on that
24 and not rely on Mr. Eckley? Why would we not verify that
25 ourselves?

1 A well, we were -- in the Commission office, we
2 were discussing the situation as it was unfolding,
3 and for one reason or another, I was -- it was said that
4 that was not our position to investigate beyond what was
5 in our doors, so to speak.

6 Q There was never any tracking information on
7 that third package, I guess? we didn't have that because
8 that would have come from the store? You said earlier
9 you left the store before you all verified the shipping
10 label that came in through the fax?

11 A That's correct. Yes.

12 Q All right.

13 **BY MR. VAN CLIEF:**

14 Q I'm a little unclear on what we can and cannot
15 assess in terms of these labels. The package to my left,
16 which is apparently the one that was sent to Ithaca and
17 received there --

18 A Yes.

19 Q -- can we tell from the label or can UPS tell
20 us who acquired and gave them that label? Do we know
21 that? Even though your name is shown as shipper, you say
22 you weren't the shipper. Do we know who was the shipper?
23 Can UPS tell us that?

24 A I was not able to get that from Ms. Morrey.
25 Basically, this was the label that Mr. Fogelson produced,

1 and this label appears to be the bonafied label that we
2 were shipping to New York.

3 Q Is that the label that was on -- than what was
4 received in Ithaca or is that a different label?

5 A This is the label in fact that was received at
6 Ithaca in this box. On this box. I'm sorry.

7 Q That was a label that you assumed was being
8 generated to go on the sample?

9 A Yes.

10 Q But ended up on a chicken warmer?

11 A Yes, sir. Now forgive me for pointing. The
12 label that went on a box that went to Aurora had my name
13 on it, and you know, I can only speculate, you know.

14 **BY MR. LAWS:**

15 Q Did you authorize a person to put your name on
16 it and ship it to Aurora?

17 A No. I authorized, you know, the label to go to
18 Ithaca, New York.

19 Q And you know your name was on that label how?

20 A Mrs. Morrey said my name was on the label, and
21 that authorized me to at least pursue the tracking
22 information with it.

23 MS. NELSON: She did not, however, give you a
24 copy of that label though, did she?

25 DR. HARDEN: No.

1 MS. NELSON: Okay.

2 DR. HARDEN: She offered that to Mr. Fogelson,
3 and he refused, according to her affidavit. She also
4 signified on her affidavit and to me when we were
5 talking, that there were no other boxes sitting in
6 her office that day that were not labeled.

7 There were no persons who received a box that
8 they said was the incorrect box, and she indicated
9 that the box that we had left there had received its
10 label and been put in the outgoing box file prior to
11 Mr. Fogelson coming in and buying the second box.

12 **BY MR. LAWS:**

13 Q So in other words, the package that went to
14 Aurora, Ohio, the label was received by Ms. Morrey, put
15 on the package, and that package was put in the outgoing
16 box before Mr. Fogelson came back?

17 MS. NELSON: That's not what her affidavit
18 says. So again, I'm just objecting to his
19 characterization of what she said, when her affidavit
20 says something different.

21 **BY MR. VAN CLIEF:**

22 Q What was in the box that was received in
23 Aurora?

24 A I presume it was --

25 MS. NELSON: I'm gonna object to his

1 presumption. I'm not in a position to give testimony
2 or evidence in this case because I'm the attorney,
3 but we did submit -- we conducted our own
4 investigation, and his presumption was not verified.

5 MR. LAWS: Go ahead with your answer, Dr.
6 Harden.

7 A On Mrs. Morrey's affidavit and what she said to
8 me when we talked to her, she says, Paragraph Four of her
9 affidavit: There's no doubt in my mind that I attached
10 the fax label to the package the three men brought into
11 the store.

12 Then Paragraph Five. Shortly after Mr. Fogelson
13 came back to the store -- so that means shortly after she
14 attached the label to the package that we had brought in,
15 that he came in to purchase a box of similar size.

16 MR. LAWS: At this point, Dr. Harden is just a
17 fact witness. He's supposed to testify about what he
18 observed and what he knows. Now is not an
19 appropriate time for the commissioners to try to ask
20 Dr. Harden what the evidence means if it's not his
21 testimony or something he observed. This is
22 something you all have to figure out on your own.

23 MS. NELSON: Can I ask him some specific
24 question on cross?

25 MR. LAWS: Hold on one second.

1 MS. NELSON: Okay. Sorry.

2 MR. LAWS: Stran?

3 MR. TROUT: I heard somebody say at one point
4 say a third package. There were only two that we're
5 dealing with; is that correct, in this entire set-up?
6 There's not a third package? I thought I heard that
7 somewhere, and wanted to make sure that we're --

8 MR. LAWS: That's a fact that you all will have
9 to determine.

10 MR. TROUT: Because I know there were two.
11 Okay. This is really, I guess it's me trying to
12 figure this out, but we have two sets of tracking
13 data here.

14 One of them ends in 6510, and the other one ends
15 in 1900, and we have the label from 1900, presumably
16 is admitted into evidence, so that's a legitimate
17 label going to Ithaca, New York. We do not have the
18 label on the 6510, which under observation, I'll
19 point out the tracking information says it showed up
20 in Ohio, so that's what we have.

21 I believe, well, in looking at the affidavits and
22 things and what was stated, some of the things stated
23 here were not quite -- I want to go to the original
24 data, if possible, which would be Morrey's, Sandra
25 Morrey's affidavit as to what exactly happened.

1 As I read that, she received a fax label, and he
2 put it on a box and it went somewhere. Then she also
3 received from Mr. Fogelson a label and a box.

4 MS. NELSON: Just to direct your attention to
5 Paragraph Five. The box, the second box received
6 from Fogelson had a label on it.

7 MR. TROUT: So the label and the box were
8 provided at the same time, correct?

9 MS. NELSON: That's what her affidavit says.

10 MR. TROUT: So the fax label went on the other
11 box?

12 MR. LAWS: Correct.

13 MR. TROUT: That's what I think we're all in
14 agreement on that at this point, correct?

15 MR. LAWS: I think so.

16 MR. TROUT: All right. I was trying to get
17 these things straight looking at tracking
18 information. I've done this on the computer, and I
19 can never figure it out most of the time anyway.

20 All right. I don't have any other questions.

21 MR. LAWS: Ms. Dawson, any questions?

22 MS. DAWSON: No. Not right now.

23 MR. LAWS: Ms. Nelson, before you get started,
24 I just wanted to -- there was discussion before about
25 a transmission verification report that Dr. Harden

1 had, and he passed it to you, and you passed it to
2 me. The transmission verification report says: Time
3 11/14/2013, 10:52; name of UPS Store 4572; fax (804)
4 746-1889; telephone (804) 746-1889; service number
5 000H8J189755; date, time 11:14, 10:52; fax number
6 slash name 13305621445; duration 00:00:18; pages,
7 one; result, okay; note standards; then ECM, whatever
8 that means.

9 Ms. Nelson, go ahead when you're ready.

10 MS. NELSON: Sure.

11 **CROSS-EXAMINATION**

12 **BY MS. NELSON:**

13 Q Sure. Doc Harden, let me just go back to sort
14 of the beginning of your retelling of what happened, and
15 specifically to the point where you said you had prepared
16 a FedEx label because you thought you'd be taking the box
17 to FedEx. Had you shipped other samples via FedEx?

18 A Yes.

19 Q Okay, and does the Racing Commission have a
20 FedEx account?

21 A Yes.

22 Q So why in this case could you not have used the
23 Racing Commission's FedEx account to send the sample by
24 FedEx, using the label that you had prepared?

25 A Mr. Eckley was required by regulations to pay

1 for the shipping sample.

2 Q Okay, but there wouldn't have been a regulatory
3 prohibition against the Racing Commission simply saying
4 the charge was "X", cut us a check?

5 A There's no prohibition that I'm aware of.

6 Q Okay, and if FedEx was used in the past, do you
7 know whether that's the procedure that was implemented in
8 prior cases where the Racing Commission simply used it's
9 own FedEx account to send a split sample?

10 A We have done it both ways, but now my
11 comment --

12 Q Thank you. That answered my question. Do you
13 still have that FedEx label that you had prepared?

14 A No.

15 Q Was that FedEx label that you prepared on a
16 pre-printed slip that had the Commission's account number
17 on it?

18 A No. I think it was a generic FedEx account
19 label.

20 Q Okay.

21 A That would have enabled the person to pay for
22 it at the time.

23 Q Okay, but only if they had a FedEx account?

24 A I'm not intimately familiar with how the
25 different parties --

1 Q Okay. So I'm not asking you to speculate, but
2 I'm suggesting that you try to recall whether the
3 decision to ship UPS because Mr. Eckley had a UPS account
4 may have been related to your alls' decision that he use
5 his shipping account. Does that seem like -- is that
6 ringing any bells? I mean maybe it's not, but I'm just
7 asking.

8 A Well, he indicated in the process that he
9 preferred that it would go UPS.

10 Q Okay, but there was, since it has been done
11 either way, you all could have used your FedEx account
12 and sent it the way you wanted to send it?

13 A That is possible. Yes.

14 Q Okay. Now, this box that has "Merial" written
15 on the side of it, the box that you packaged the sample
16 in, was it a box exactly like that or a box sort of like
17 that?

18 A It was a box exactly like that.

19 Q Okay. Exactly like that. So --

20 MR. TROUT: If I could interrupt. You said
21 "Merial" on the side. That's this box in this
22 direction?

23 MS. NELSON: There we go.

24 MR. TROUT: Okay. Just to make sure.

25 MS. NELSON: I would ask to approach the

1 witness.

2 MR. LAWS: Yes.

3 Q Let's take a look at this box here. So this is
4 a box, and it has writing on each side of it, and I'm
5 assuming that the proper package, this is something that
6 you put on there?

7 A I put on this just to help us keep the packages
8 separate.

9 Q So this was not on the package when you took it
10 to UPS?

11 A No.

12 Q Okay. So you took a box exactly like this that
13 -- and did you seal it?

14 A Yes.

15 Q Okay. Did you seal it when you were still
16 here, or did you seal it at the UPS store?

17 A It was sealed here.

18 Q Okay. So you went with a sealed box to the UPS
19 store, correct, and it had no label or outside markings
20 on it; is that correct?

21 A That's correct.

22 Q Okay, and at the point that Susan Morrey, or at
23 the point that you believed that a label was being faxed
24 into the UPS store, you said you left before that label
25 had come in and was affixed to the package; is that

1 correct?

2 A That's correct. We left the FedEx label
3 sitting on the box and I told her this was the correct
4 address.

5 Q Okay. Now, you would agree, would you not,
6 that at that point, you were counting on Ms. Morrey to
7 make sure that the label that she put on the box matched
8 the information that you had given her?

9 A Not only was I counting on that, but Mr.
10 Fogelson was counting on that, and indirectly, Mr. Eckley
11 was counting on that.

12 Q Okay. Now, let me direct your attention. You
13 are familiar with the rules of racing, correct?

14 A Yes.

15 Q Have you read the section, specifically 11 BAC
16 10-180-10 that deals with the laboratory findings and
17 reports and handling of a split sample?

18 A Yes.

19 Q And under "L", you mentioned to Mr. Laws that
20 you were familiar with the chain of custody forms and the
21 regulations?

22 A Yes.

23 Q Okay. So number seven here says, verification
24 of the address of referenced laboratory on the split
25 sample package.

1 A Um-hmm.

2 Q Okay. So you would agree that when the split
3 sample package was left at the UPS store without the
4 label on it that you kind of skipped that point?

5 A No, ma'am. This is -- we verified on the chain
6 of custody form that the shipping address was correct.

7 Q Okay, but you left the package without the
8 shipping information on it?

9 A Well, that's correct. It doesn't stipulate in
10 our regulations.

11 Q Okay. Now, you might hand me the other box
12 that has what we know -- you'll agree that this box has
13 the absolute correct label on it?

14 A Not now, because that was shipped by New York
15 to us.

16 Q Okay.

17 A But this label was on the box.

18 Q Okay. So --

19 MR. LAWS: I'm sorry. When you say this label,
20 is that Exhibit 5?

21 MS. NELSON: This is the only shipping label
22 that is in evidence.

23 MR. LAWS: Okay.

24 Q So the correct label was in fact generated?

25 A Yes.

1 Q Okay, and so the only question is, is that the
2 correct label got put on the incorrect box?

3 A That, I would acknowledge.

4 Q Okay. So in this box, which is the actual box
5 that ended up at the lab with your correct label on it,
6 doesn't have any exterior markings on it; is that
7 correct?

8 A That's correct.

9 Q It's not really exactly the same size as the
10 other box, is it?

11 A That's correct.

12 Q Okay. So if you had stayed at the UPS store to
13 observe the placing of the label onto the box, you would
14 agree, would you not, that it would have been abundantly
15 clear to you that this was not your box?

16 A Are you asking me to speculate?

17 Q I'm not asking you to speculate. I'm asking
18 you whether if you had -- standing here today, does
19 anything about this box look like your box?

20 A No.

21 Q Thank you. I will return this to you. Doc
22 Harden, in looking at -- were you the one who drew the
23 sample from this horse?

24 A No, ma'am. I was not.

25 Q Okay, and the sample collection card, which I

1 believe is the second page of Exhibit 3, does that card
2 indicate who drew the sample?

3 A The blood sample was drawn by Myra Cook.

4 Q How do you know that?

5 A It has her signature on the card.

6 Q would you agree the signature on the card says
7 M. Cook?

8 A Yes.

9 Q Okay, and so how do you know -- do you know
10 this person, and how do you know this person?

11 A She's the test barn supervisor and the
12 technician that's worked for the Racing Commission for
13 several years.

14 Q Okay, and so other than the fact that she
15 signed this card, we don't know anything about the
16 circumstances of the test or indeed whether she
17 maintained the chain of custody placing the sample into
18 the freezer, do we?

19 A I can produce the freezer log.

20 Q But do we have anything that tracks the sample
21 from the time it was drawn by her until it got to the
22 freezer? There's no affidavit from her?

23 A No.

24 Q Is she here today?

25 A No.

1 MS. NELSON: Okay. I don't need to see the
2 freezer log. It's not in evidence. I have no
3 further questions.

4 MR. LAWS: Commissioners, any other questions
5 for Dr. Harden?

6 MR. REYNOLDS: I have a question for
7 Ms. Nelson.

8 MR. LAWS: Ms. Nelson, do you want to wait
9 until the end?

10 MS. NELSON: I think that in these types of
11 hearings, sometimes it helps to entertain the
12 questions at the time it comes to pass.

13 MR. REYNOLDS: I don't know if it's a question.
14 Let me just ask it.

15 MS. NELSON: All right.

16 MR. REYNOLDS: I think during your questioning,
17 you were talking about, you know, the label got put
18 on the dummy package that got to Ithaca, New York.

19 According to Ms. Morrey's affidavit in Section
20 Five, and I'm just gonna read it: Shortly after
21 Mr. Fogelson came back into the store and asked to
22 purchase a box of similar size to the first box he
23 and the two other men brought into the store, he said
24 he had been sent back to ship another package. He
25 took the box that he purchased outside, packed it,

1 brought it back into the store and attached a label
2 that he had with him to the box and had us ship it.

3 So my question is: It's possible that Mr.
4 Fogelson had another label that could have been
5 exactly the same as the one, and it's possible that
6 Mr. Fogelson put that label on the dummy package,
7 according to this affidavit? I'm not saying it
8 absolutely happened, but is it possible that that's
9 where that label could have come from?

10 MS. NELSON: It would seem to me that under
11 that theory, Dr. Maylin would have received two
12 packages, because it would still presume that there
13 was -- that Ms. Morrey did not place the label -- the
14 fact that Ithaca got one package suggests to me that
15 she didn't -- she didn't -- she put a wrong label on
16 a wrong box.

17 MR. REYNOLDS: Thank you.

18 MS. NELSON: Otherwise, they would have gotten
19 two boxes. They still would have gotten the sample.

20 **BY MR. VAN CLIEF:**

21 Q Do we have any way of knowing what Mr. Fogelson
22 brought in, in the way of an address label when he came
23 back the second time?

24 A If I may make my feeble attempt to clarify
25 this. There were two labels generated by UPS. We have

1 the two --

2 MS. NELSON: I'm going to object, because I
3 believe that Dr. Harden is once again going to
4 attempt to testify as to what was on the second
5 shipping label. We don't have it in front of us, and
6 he's going on what he believes to be Ms. Morrey's
7 statement, which is not incorporated in her
8 affidavit.

9 So I think that what we know is that there was a
10 box. Mr. Fogelson went in with a box that was
11 labeled to go to Ohio, and that box got to Ohio.

12 MR. LAWS: Well, I don't think that's the
13 evidence, either. Your objection is noted for the
14 record.

15 MS. NELSON: No. We have the tracking --

16 MR. LAWS: Stop, stop. You objected to his --
17 Now you made your objection. It's not your time to
18 speculate on what happened on something else.

19 Go ahead and answer the question, Dr. Harden.

20 A What I wanted to specify, is there were two
21 labels created. One was created at 11:07 to go to
22 Ithaca. I mean, yeah, to go to Ithaca, New York.
23 Another was created at 11:16 to go to Aurora.

24 The label that was created at 11:16 to go to
25 Aurora was scanned into the UPS store at 11:24. The

1 label created at 11:07 to go to Ithaca was scanned into
2 the UPS store at 11:56.

3 Both labels were scanned into the UPS store
4 after both labels had been created. There was an eight
5 minute gap between creating the second label and when the
6 first of the two labels was scanned into the UPS store.

7 MS. NELSON: I'm objecting again to his
8 interpretation of the tracking records. He's saying
9 that they created the label. He doesn't know when
10 Mr. Fogelson's label was created. We know when it
11 got scanned, but Ms. Morrey did not say in her
12 affidavit that she created a second label that was
13 then put on the second package that Mr. Fogelson came
14 in with.

15 MR. LAWS: I agree. I think he's saying that
16 the label was created. She didn't create it.

17 MS. NELSON: Correct, and Doc Harden here is
18 attempting to argue that there were two labels that
19 were created at the UPS store, and the evidence at
20 the UPS store does not support that testimony.

21 MR. LAWS: I think he's saying that the labels
22 -- I think he's testifying when the labels were
23 created.

24 MS. NELSON: But we don't know that the other
25 label was created. She only created one label.

1 MR. LAWS: Well, there's a second label.

2 MS. NELSON: Yes, there's a second label, but
3 her testimony is the second label came into the store
4 with the package.

5 MR. LAWS: Yeah, and this is when that label
6 was created. These documents say when the labels
7 were created.

8 MR. REYNOLDS: Created or scanned?

9 MR. LAWS: Both.

10 MS. NELSON: But not created by her.

11 MR. LAWS: Correct. She didn't create the
12 second label.

13 MR. VAN CLIEF: So what we know then from the
14 evidence is there were two labels. They were created
15 in some sequential order, and the label that was
16 first created on a timeline went onto the package
17 that contained the chicken warmer, right?

18 MR. LAWS: Correct, at 11:56.

19 MR. VAN CLIEF: And arrived at the lab in New
20 York, and then there was a second label generated
21 sequentially after the first that went somewhere; we
22 don't know where it went though, do we?

23 MR. LAWS: Aurora, Ohio.

24 MS. NELSON: Aurora, Ohio.

25 **BY MR. VAN CLIEF:**

1 Q Okay, but we don't know that it went on the
2 sample box though, or do we?

3 A Other than Mrs. Morrey's affidavit.

4 Q And the sample box has never been recovered
5 since; is that correct?

6 MR. LAWS: Correct.

7 MS. NELSON: Correct.

8 A No one called the UPS store and said, hey, I
9 got a bunch of horse blood. What do I do with this?

10 Q Has anybody tried to track through Aurora,
11 Ohio? And presumably there is an address that it went
12 to. Has that been run down? Have we looked to see what
13 they received up there?

14 A That was Freedom Health, LLC --

15 Q Right.

16 A -- and I contacted Mr. --

17 Q Pellegrini?

18 A Yes.

19 Q Did Dr. Pellegrini tell you what he received?

20 A I have not spoken to Dr. Pellegrini.

21 Q Has anybody tried to ascertain what Dr.
22 Pellegrini received in Ohio?

23 A According to Mr. Eckley's testimony, they were
24 rude to him and didn't give him any information about any
25 knowledge of the package.

1 Q Has anybody from the Commission tried to
2 ascertain what was received at Dr. Pellegrini's
3 establishment?

4 A No, sir. If I might comment, part of the
5 reason at this point is that the Commission would have
6 lost all chain of custody on that package, and so even
7 had it been recovered, it would not have been valid as a
8 test sample.

9 Q It would be interesting to know where it went.

10 A Yeah.

11 Q Is the only individual in all of this who had
12 their hands -- other than the UPS store -- on the labels
13 Mr. Fogelson?

14 A Yes.

15 Q He generated two labels, correct?

16 MR. LAWS: One label was faxed to the UPS
17 store, and Mr. Fogelson brought in the second one.

18 MR. VAN CLIEF: So he caused two labels to be
19 generated; is that correct?

20 MR. LAWS: I think so. You disagree.

21 MS. NELSON: Doesn't matter.

22 MR. LAWS: Fair enough. If you wanna tell him
23 why, it's your opportunity to persuade him.

24 DR. HARDEN: Mr. Fogelson is in Aurora, Ohio.
25 We received a letter from him a couple of days ago

1 unrelated to this case. I'm not allowed to
2 speculate, however, I can testify that I took two
3 shipping labels with a pair of scissors, and in about
4 two minutes created a totally bogus label that would
5 be going to Dr. George Maylin that has the barcode
6 and the tracking information going to Dr. Sams in
7 Kentucky.

8 Just from observation, I know that UPS packages,
9 they don't read the label. They scan each with a
10 little handheld scanner, and that's how these things
11 are shipped and tracked and carried throughout this
12 way.

13 MR. LAWS: We don't know how each individual
14 UPS employee does that, so --

15 MR. TROUT: I was gonna say that's unrelated to
16 this case, that comment concerning that.

17 I did want to ask something I think this comes
18 back to. Has the affidavit of Ms. Morrey been
19 objected to, or has there been anything, or maybe
20 there is not -- she had a statement that Mr. Fogelson
21 showed up with a box and a label, and that label was
22 put on that box and shipped.

23 MS. NELSON: Her affidavit suggests it came in
24 with the box.

25 MR. TROUT: Brought it back to the store and

1 attached a label that he had with him.

2 MS. NELSON: Right.

3 MR. TROUT: So it sounds like he attached the
4 label.

5 MS. NELSON: Yes.

6 MR. TROUT: I'm assuming this has not been
7 contested.

8 MS. NELSON: Given the nature of these
9 proceedings, there's not really a legal basis to
10 object to the evidence presented by affidavit, and
11 for that reason, there's no substantive legal
12 objection I can make.

13 We're at a little bit of a disadvantage when Ms.
14 Morrey is not here to be examined, but this is the
15 Commission's evidence, not my evidence, and so the
16 decision to not bring her in so that you all can ask
17 her questions means that we are simply limited by
18 what her statement is.

19 MR. TROUT: Okay. I like that other option,
20 but that's all right.

21 MR. LAWS: There's other people that we need to
22 take testimony from today, so do we have any other
23 questions for Dr. Harden at this point?

24 NOTE: There is no response.

25 MR. LAWS: At this point, Commission members,

1 do you have any questions that you'd like to ask
2 Mr. Eckley?

3 MS. NELSON: well, Josh, who are the other
4 witnesses we need to take testimony from?

5 MR. LAWS: Perhaps Bernie, if we need him as a
6 rebuttal witness.

7 MS. NELSON: So the Commission is done unless
8 we need rebuttal?

9 MR. LAWS: Yes.

10 MS. NELSON: Okay.

11 MR. REYNOLDS: I'm curious, Mr. Eckley --

12 MR. LAWS: Hold on.

13 MR. REYNOLDS: I'm sorry.

14 MR. LAWS: She gets the opportunity to ask
15 questions. Mr. Eckley, can you hear me?

16 MR. ECKLEY: Yes, sir.

17 MR. LAWS: Can you raise your right hand for
18 me?

19 MR. ECKLEY: Yep.

20 MR. LAWS: Is it raised?

21 MR. ECKLEY: Yes, sir.

22 NOTE: The witness is sworn.

23 **DEAN ECKLEY**, called on his own behalf,
24 first being duly sworn, testifies as follows:

25 MR. LAWS: Can you hear me?

1 MR. ECKLEY: I can hear you.

2 MR. LAWS: Good. If at any time you cannot
3 hear me or Ms. Nelson or one of the commissioners
4 when they ask you a question, just go ahead and speak
5 up and let us know. Okay?

6 MR. ECKLEY: Okay.

7 MR. LAWS: Can you tell me your name for the
8 record, please?

9 MR. ECKLEY: Dean Eckley.

10 MR. LAWS: Can you spell that for the court
11 reporter?

12 MR. ECKLEY: D-E-A-N -- last name E-C-K-L-E-Y.

13 MR. LAWS: Sorry for making you do that a
14 second time. Ms. Nelson, did you have any questions
15 for your client?

16 MS. NELSON: Just briefly.

17 **DIRECT EXAMINATION**

18 **BY MS. NELSON:**

19 Q Dean, did you sign a three-page affidavit in
20 connection with this hearing?

21 A Yes.

22 Q Did you review that document before you signed
23 it?

24 A Yes.

25 Q Can you just confirm for the commissioners that

1 basically, that affidavit contains your side of the
2 story?

3 A Yes.

4 MS. NELSON: Okay. I think rather than having
5 him go through everything that we have already set
6 forth in the affidavit, that if you all have
7 questions for him, that you proceed with your
8 questions, and we'll just rely on the affidavit so
9 that we don't have to go over it again.

10 MR. LAWS: Commissioners, if you have any
11 questions, go ahead.

12 MR. REYNOLDS: I've got one.

13 **CROSS-EXAMINATION**

14 **BY MR. REYNOLDS:**

15 Q Mr. Eckley, does Mr. Fogelson still work for
16 you?

17 A No.

18 Q why does he not work for you anymore?

19 A He moved to California.

20 Q Okay. So he was not terminated; he just moved
21 to California?

22 A It was kind of mutual.

23 Q Okay.

24 A He said he was going, and I didn't really need
25 him. I had plenty of help, so we just kind of went our

1 separate ways.

2 **BY MR. LAWS:**

3 Q Do you know when he moved to California?

4 A End of November, early December.

5 Q of last year?

6 A Yes.

7 Q Okay. Thank you.

8 MS. NELSON: I'm sorry. Dean, is that what he
9 told you?

10 MR. LAWS: That's -- yeah. Basically, yeah.

11 MS. NELSON: You didn't help him move or
12 anything? You don't know that he actually --

13 MR. ECKLEY: No. I actually -- I had a load of
14 horses going out that way, so he hitched a ride on
15 one of my rigs, so I do have a pretty good idea.

16 MS. NELSON: Okay. Thanks.

17 **BY MR. REYNOLDS:**

18 Q I don't know if you can answer this or not. I
19 think Mr. Fogelson can best answer it, but he's not here
20 to answer it.

21 Do you know why Mr. Fogelson would go to the UPS
22 store, have the folks from the Virginia Racing Commission
23 leave, and then he all of a sudden comes back a few
24 minutes later to buy a new box and ship it somewhere?

25 A I have no idea. I didn't know anything about

1 it until Mr. Hettel called me and told me anything about
2 it.

3 **BY MR. LAWS:**

4 Q Okay. Did you ask Seth about that?

5 A I did. He said he had a friend he had to send
6 some stuff to. He didn't really elaborate on the
7 situation.

8 Q You didn't ask him any other questions about
9 it?

10 A Not really, no. I'd asked him why he went back
11 in there -- I did ask him later on who he sent his
12 package to and received it, and he told me that they
13 received his package. That's all he said. I didn't
14 really ask any further questions. It all sounded, you
15 know, like whatever he sent got to the proper place.

16 **BY MR. REYNOLDS:**

17 Q He didn't tell you whether it went to Aurora,
18 Ohio or some other place? I guess he didn't say?

19 A No.

20 **BY MR. LAWS:**

21 Q That was the day he was supposed to send or
22 participate in sending the split sample to New York,
23 correct?

24 A Yes.

25 Q Did it bother you that he had went back to send

1 a second package just a few minutes later when he was
2 supposed to be sending your split sample to New York?

3 A Bernie called me -- Bernie and then called me
4 and said my package was already sent before that.
5 whatever he does on his own time is not really my
6 business.

7 Q But you found out about this after -- strike
8 that. The conversation you had with Seth was after you
9 found out your split sample didn't get to the correct
10 place, right?

11 A Well, yeah. At first, Mr. Hettel called me and
12 said that the package didn't arrive and that Seth had
13 went back and sent another package. That's the first I
14 had heard about it.

15 Q So you found out your sample didn't get where
16 it was supposed to go. The person you paid to make sure
17 your sample went where it was supposed to go went back a
18 few minutes later, and those were the only questions you
19 asked him about it?

20 A I asked him later on and he didn't elaborate.

21 Q Didn't have any follow-ups for him?

22 A I dealt more with Bernie on the situation
23 because he seemed to have more information about the
24 package, so I called him. I didn't ask Seth a whole lot
25 of questions. I more dealt with Mr. Hettel on, you know,

1 more on where the package was, where I should call, if he
2 had called anybody, you know, trying to locate the
3 package that was missing.

4 Q Even though Seth was the person you paid to do
5 that that morning, you talked more to Bernie about it as
6 opposed to your employee?

7 A Bernie is the one that called me and told me my
8 package had been sent. They were all there together, so
9 I --

10 Q I'm talking about after you found out the split
11 sample didn't get where it was supposed to go. You
12 didn't have any follow-up for Seth, even though you paid
13 him?

14 A Like I mentioned, I asked him why he went back
15 and sent another package. He said he had some stuff to
16 send to somebody. It didn't strike me as weird that he
17 had something to send. I mean people send boxes all the
18 time, so I didn't get into it a lot.

19 I really had no idea it was -- that people
20 thought that his package would have got mixed up with the
21 blood sample that had been sent earlier. According to
22 Mr. Hettel and Seth, that had already been a done deal,
23 so I really didn't question it.

24 MR. LAWS: Okay. Questions from the
25 Commissioners?

1 MR. VAN CLIEF: I've got one.

2 **BY MR. VAN CLIEF:**

3 Q Mr. Eckley, speaking of Mr. Fogelson, was he in
4 your employ? Was he working for you when he was found
5 in possession of needles and syringes?

6 A Yes.

7 Q Did you take any action at that point?

8 A That was kind of when we were on our falling
9 out, and you know, we were, we had, you know, I had so
10 much stuff going on right then, that I wanted to get
11 everything back to Northfield and try and reevaluate my
12 stable, and then when I got back, I took that in
13 consideration and that was part of the reason we went our
14 separate ways when we got back.

15 I was shorthanded. I had 50 horses racing. I
16 was shorthanded in Colonial. I was shorthanded in
17 Northfield. I had to do what I had to do at the time as
18 far as employees.

19 MR. VAN CLIEF: Can I ask Dr. Harden a
20 question?

21 MR. LAWS: Let's stick with Mr. Eckley.

22 MR. VAN CLIEF: Okay.

23 MR. LAWS: Any other questions?

24 MR. TROUT: I do have just a couple of them
25 here.

1 BY MR. TROUT:

2 Q It's not clearly on the documentation here. On
3 that date, the 14th of November, were you contacted --
4 were you involved at all in the production of labels,
5 shipping labels?

6 A I'm sorry. I can't hear you.

7 Q were you involved in the production of any
8 shipping labels?

9 A No.

10 Q There are two phone numbers given which may be
11 transcribed, and I can read those to you, but are either
12 one of those associated with you? I will read the
13 numbers. The difference seems to be the area code of 330
14 is one, and 303 is the other. (330) 407-6341 or (303)
15 562-1445.

16 A I don't recall those phone numbers.

17 Q They are not associated with you? They are not
18 your phone numbers?

19 A They are not mine. No.

20 Q okay.

21 MS. NELSON: I believe that Paragraph Nine of
22 Mr. Eckley's affidavit described in detail his
23 involvement with the issue of the account and how the
24 label --

25 MR. TROUT: That is what I was concerned about;

1 any direct involvement with the production of labels
2 with this whole thing that took place with the UPS
3 store and various parties at that time, if he was
4 involved. I have to read through his affidavit to
5 see what's in there.

6 MS. NELSON: Okay. Yes.

7 Q Did you have any involvement at that time? Who
8 did you talk with on the phone and what basically was
9 your involvement on the 14th with either phone calls from
10 the Racing Commission, from Dr. Harden, from Mr.
11 Fogelson, from the UPS store or anybody else?

12 A I talked to Mr. Hettel that morning. I told
13 him that I had some stuff going on. I had an employee
14 that was out closer that way, a guy closer in
15 Pennsylvania that I was gonna send him down to witness
16 it, and the next --

17 I didn't really talk to anybody until the UPS
18 store, and basically, the next thing I knew was they had
19 everything under control, and Bernie said that the
20 package had been shipped and we'll get back to you when
21 the results come back.

22 Q Were these phone calls, particularly the first
23 phone call, was that initiated by you or by Mr. Hettel?

24 A I believe I called him first to let him know
25 that I wasn't going to be the one there, you know.

1 Q what about then you had the subsequent contact
2 apparently after things were shipped? who initiated that
3 call?

4 A Mr. Hettel called me.

5 Q During this period did you have direct
6 conversations with Mr. Fogelson?

7 A Can you repeat that please?

8 Q On that same morning that same day, did you
9 have a direct phone or other types of communications with
10 Mr. Fogelson?

11 A Yeah. I wanted to make sure everything was on
12 time.

13 Q when did those take place?

14 A I talked to him probably 7:30, eight o'clock
15 that morning to make sure he was in transit, he knew
16 where he was going. I know another reason I sent him was
17 because he was familiar, obviously, with the area, so I
18 talked to him then, and then I talked to him when they
19 were leaving the UPS store.

20 Q It has been brought out here, apparently, as
21 you said, you couldn't be there and asked Mr. Fogelson to
22 basically I guess represent you or to take care of making
23 sure the package went out. Did that conversation take
24 place by telephone that morning?

25 A Yes.

1 Q And then a subsequent conversation at the UPS
2 store when he was at the UPS store? Because you don't
3 know where he is when he's calling.

4 A I believe he called me and said they did not
5 create the labels and they were getting the labels
6 created. Like I said, that morning, I had 30 horses
7 jogging. I expected that, you know, three of them, he
8 could take care of it. I couldn't be there. My hands
9 were tied as far as anything I could do for him, so I
10 just kind of went about my business.

11 Q This is a direct conversation that you were a
12 party to with Mr. Fogelson; is that correct, by
13 telephone?

14 A Yes.

15 Q You just indicated that a label could not be
16 read; is that correct?

17 A I don't exactly remember what the problem was,
18 but something that could not be printed at the store is
19 what I was told.

20 Q Okay.

21 A By Mr. Hettel and Seth.

22 Q But you were not involved -- were you involved
23 subsequently in the production or faxing of a label?

24 A No.

25 Q Okay.

1 MR. LAWS: Any other questions?

2 MS. DAWSON: I have a couple of questions I'd
3 like to ask Mr. Eckley.

4 **BY MS. DAWSON:**

5 Q There seems to be a disconnect here with Mr.
6 Fogelson's action in obtaining the correct label. He
7 told, according to testimony we heard this morning, that
8 he didn't want to ship the sample by FedEx, preferred UPS
9 because the account number was with UPS. Would that have
10 been your account number?

11 A No, it wouldn't have been. I have a UPS
12 account number, but I was never asked for mine.

13 Q You were not asked for it?

14 A They had asked -- I guess they communicated
15 with Seth about the shipping and where they wanted to go.
16 I don't think I had much to do with that.

17 Q So the telephone number that was used,
18 according to evidence that we have here from which the
19 address allegedly -- that was to be used to ship the
20 split sample was the home, I gather, of Dr. Pellegrini,
21 Freedom Health, LLC, I guess, Freedom Health, LLC. Are
22 you familiar with them?

23 A No.

24 Q You're not familiar with them?

25 A No.

1 Q You don't know them?

2 A Not just, you know. I called them about the
3 package, and you know, now I know of them, but not at
4 that time. I had no idea what their business was.

5 Q So for some reason, Mr. Fogelson contacted that
6 person or that number in order to get an account number
7 and a label to ship a sample that belonged to your horse
8 that was supposed to go to New York State?

9 A Right.

10 Q I find that very strange.

11 **BY MR. LAWS:**

12 Q Did you ever ask Seth why he did that?

13 A He said that I did not send him any money. I
14 was not aware that I was responsible for paying for it in
15 the first place, and that he said he had to use a UPS
16 account number. I didn't realize it was Freedom Health
17 or who it was. I just assumed it was his.

18 Q Did you ever ask Seth why he contacted Freedom
19 Health to get the label created?

20 A He said they couldn't create labels there.

21 Q Did you ever ask him why he contacted Freedom
22 Health to get the label created and faxed?

23 A No.

24 **BY MR. VAN CLIEF:**

25 Q Just to be perfectly clear, you say you did not

1 have a relationship and are not aware of Freedom Health,
2 LLC. Were you aware of or did you know or have a
3 relationship with Dr. Frank Pellegrini?

4 A I know of him now after trying to figure out
5 about this package, but I don't have a relationship with
6 him, no.

7 **BY MR. LAWS:**

8 Q Did you ever contact them and ask them if they
9 received a blood sample?

10 A I did.

11 Q what did they say?

12 A I called them. I kind of got the run around at
13 first. I don't think I actually got a hold of Frank
14 personally, but I talked to three our four people over
15 there, and basically, the answer I get is it's none of my
16 business what they receive. They're pretty -- they're
17 not the friendliest people I've ever dealt with.

18 MR. LAWS: Any other questions from the
19 commissioners?

20 NOTE: There is no response.

21 MR. LAWS: Ms. Nelson, did you have any
22 questions for your client?

23 **REDIRECT EXAMINATION**

24 **BY MS. NELSON:**

25 Q Dean, when Mr. Laws was asking you questions,

1 he asked a question, and the way he phrased it was saying
2 that you had paid Seth to make sure that the sample was
3 sent.

4 Did you understand that it was Seth's
5 responsibility to send the split sample?

6 A I understood it to be all three of their
7 responsibilities. That's how I take it.

8 Q So did you even pay Seth to do anything that
9 day?

10 A He was under salary. I paid him weekly to do
11 whatever I need him to do. I didn't pay him for any
12 particular job.

13 Q Okay. So his job that day was to show up as
14 your representative; is that correct?

15 A His job was to go down there and witness the
16 sending of the sample. I didn't figure he was gonna have
17 his hands on it at all. He was just supposed to watch
18 and sign off on it.

19 MS. NELSON: Okay. Thank you. That's the only
20 questions I had.

21 **REXCROSS EXAMINATION**

22 **BY MR. LAWS:**

23 Q Mr. Eckley, when did you find out that Mr.
24 Fogelson had been caught with syringes?

25 A The morning that they came to the barn to

1 search, obviously, my employees called me and I said, you
2 know, just watch and make sure everything, you know, that
3 they are doing what they're supposed to do. Take your
4 time and help them. whatever they need, to help them.

5 Q October 29th sounds about right?

6 A Yes, and the girl who worked for me, she called
7 me and said they were searching the barn rooms and that
8 they might need to be able to get to mine, and you know,
9 anybody that was on my, I guess down as an employee for
10 me. I said, you know, whatever you do, just you know,
11 follow their orders, you know. Do whatever they need.

12 They had called me back that afternoon and said
13 that Seth had been mouthy or got in an argument with
14 somebody, and I got on the phone with Seth and I told
15 him --

16 Q I apologize for cutting you off. I just wanted
17 to know the date that you found out.

18 A Yeah.

19 Q Did you have any other employees in Virginia on
20 the morning of November 14th?

21 A I didn't have any employees in Virginia on
22 November 14th, other than Seth.

23 Q Seth was here on November 14th, right?

24 A Other than, I mean I didn't have any horses I
25 was racing.

1 Q Have you ever had a groom that you employed
2 besides Seth found with syringes found in a similar
3 situation as Seth was?

4 A No. I don't think so. Not that I'm aware of.

5 MR. LAWS: Anybody else?

6 NOTE: There is no response.

7 MR. LAWS: Ms. Nelson?

8 MS. NELSON: No.

9 MR. LAWS: I think we're done asking you
10 questions at this point, Mr. Eckley. I don't plan on
11 calling Bernie to testify. Commissioners, are you
12 ready to go into closed session?

13 MS. NELSON: Don't I get closing argument?

14 MR. LAWS: I'm sorry. Yes. I apologize.
15 Ms. Nelson has the opportunity to make a closing
16 statement. Go ahead when you're ready.

17 MS. NELSON: Okay. Thank you, Commissioners,
18 for this opportunity. I also want to thank you for
19 your service, both to the Commission and to the horse
20 industry.

21 One of the things about the horse industry is
22 that really, we're a self-governing sport, and so it
23 really takes committed horsemen like yourselves who
24 are willing to volunteer their time and their
25 expertise to protecting not just the integrity of the

1 sport, but the welfare of the animal.

2 The thing about the industry is that because the
3 animal is the same regardless of the discipline,
4 whether it's this racing commission or a governing
5 body of the sport, like the United States Equestrian
6 Federation or international governing body of the
7 sports or breed organizations, really, they are all
8 sort of set up the same way, and the reasons behind
9 drug and medication rules are all the same; because
10 at the end of the day, it's all about the welfare of
11 the horse.

12 At the end of the day, the fact is that this is
13 my first time appearing before you all, but I
14 frequently appear before other organizations to deal
15 with similar issues.

16 Given the similarities, obviously, and the fact
17 that we're are all talking about the same animal, you
18 may not realize -- well, you might realize the
19 science behind drugs and medications rules is sort of
20 the same, because it has to do with the horse.

21 But regardless of the discipline and regardless
22 of what body is prosecuting an alleged violation, the
23 scientists and the vets in the background are pretty
24 much all the same players, certainly on the east
25 coast.

1 So no matter the discipline or body I'm dealing
2 with, I'm dealing with the same group of guys, so Dr.
3 Sams in the HFL lab are well known to me. It's not
4 the first case -- in fact, every time I have one of
5 these cases, I deal with Dr. Sams, and this is the
6 first time where he's on the other side.

7 You know, when I first got this case and I looked
8 at the file and saw that HFL was the lab, I was kind
9 of excited. I would have loved to cross-examine him
10 if he was here, not because cross-examination is some
11 kind of a game or an interrogation; because what it
12 really is in one of these types of cases, it becomes
13 a conversation.

14 It's a conversation between scientists who are
15 doing the same kind of testing, but maybe using
16 slightly different protocols. They have their
17 opinions about how the science works and the medicine
18 and all of that, and so I always learn something new.

19 But one thing I'd like you to focus on is that
20 actually, his absence from the room today is kind of
21 problematic. Ultimately, the problem is that we're
22 arguing over boxes, and we're not arguing over the
23 science.

24 You know, a body when it has a positive on A
25 sample will almost always look at that A sample and

1 say we have a slam dunk; our A sample says this.
2 The point is that the B sample is what gives a
3 trainer or an owner the opportunity to defend. You
4 can't assume that the B sample always comes back to
5 confirm the A sample. If it did, we wouldn't need a
6 B sample ever. It wouldn't be written into the
7 rules.

8 In my experience, even though by far the B
9 samples do come back to confirm the A sample, they
10 don't always, and we don't know until we get the
11 results of the B sample whether they confirm or they
12 don't.

13 I have certainly had cases where the B sample
14 comes back, doesn't confirm the substance at all, or
15 the information we get from the B sample gives us
16 information that we didn't have when we were just
17 looking at the A sample.

18 I'm going to give you an example of this, because
19 you're all horsemen and you can all appreciate in
20 theory that a B sample can come back differently, but
21 you might not be able to, in the absence of a
22 specific example, understand how it can really be
23 relevant. It can really make a difference.

24 I had a case where the A sample came back
25 positive for Bute at such an overage that it was off

1 the charts. So we sent the B sample off, and the B
2 sample came back within normal limits, within the
3 limit. The question was how do you get the A sample
4 that's way up here and the B sample is perfectly
5 fine?

6 In that case, Dr. Sams was busy with other things
7 and I had to call up another veterinary
8 pharmacologist who is a colleague of Dr. Sams in a
9 different jurisdiction, and I had never heard the
10 explanation that he gave me, but he had one.

11 Based on what the vets, what the testing vet had
12 relayed and what the trainer had relayed about the
13 mode of administration and the timing and the
14 behavior of the horse, what it turned out was that
15 there is a phenomenon where, and you can sort of
16 imagine this.

17 When a horse, when you give an IV shot, if your
18 aim isn't necessarily true for the entire time that
19 the needle is in the neck, some of the substance that
20 you are injecting can sometimes sort of leak out and
21 drip down the outside of the vein.

22 The term for that is a para-vascular
23 administration. I had never heard of this, but you
24 basically get the substance out on the outside, and
25 then if you pull a sample from at a point below where

1 the administration point is, if the substance is
2 still sort of resting outside the vein, as you go
3 into the vein to try to get it, you contaminate the
4 sample with the substance that wasn't absorbed that
5 didn't get into the vein that leaked out.

6 In that case, the testing vet established that he
7 had taken the A sample from the spot below the neck.
8 The horse -- a spot lower on the neck that the
9 trainer said was below the point of administration,
10 and then that the horse had moved, and he went back
11 in and drew the B sample from a spot up above.

12 Now in my wildest imagination, I could not have
13 come up with such an explanation for how you could --
14 that that could be a defense. Never in a million
15 years.

16 But the point is that if we hadn't had the B
17 sample to test, and if the B sample result hadn't
18 come back different, we had nothing. We had nothing.

19 In that case, that hearing ended up being many
20 hours of testimony of the chemists, the veterinary
21 pharmacologist to flush that out. We were arguing
22 about the science, and we needed the vets to be
23 telling us about the science. We're not having that
24 conversation here today. That's the conversation
25 that we should be having.

1 Now, maybe if we had the B sample, we would have
2 looked at it and said, well, we had an opportunity to
3 defend and there is not a defense here, because maybe
4 that's what the experts would have told us, but I
5 don't know because we weren't given that chance.

6 why is all this important? Because the
7 Constitution affords people certain guarantees. The
8 law gives us certain rights, and the rules of racing
9 do, too. Here is where you are different than a lot
10 of the other panels that I've talked to, because
11 you're not a private club. You are appointed by the
12 Governor. You are basically officers of the state.
13 You are the government. You're not a private club.

14 So the law applies to you. It's not just the
15 rules of some club that you get to decide how it
16 works. You're applying the law, and before you can
17 enforce the law, you've got to follow the law.

18 If this was a criminal case and you were a Court,
19 you would understand how this works because you have
20 to apply it every day.

21 The police investigating a crime have to follow
22 the rules. A Court trying a case has to follow the
23 rules, and you can't send someone to prison if the
24 rules aren't followed. There are rules about chain
25 of custody evidence. There are rules about

1 maintaining the integrity of the evidence.

2 There are rules about guaranteeing a defendant
3 rights; rights to a speedy trial, rights to counsel,
4 the Bill of Rights. People have rights.

5 Really, the same is true here. Okay? So what
6 rules were not followed? The box was left without a
7 label. We have no B sample results. We're way past
8 the 45 days, way past the 45 days to conduct a review
9 based on the timing that the appeal request was made
10 from the stewards' decision.

11 These are all problems, but the absence of the B
12 sample is the biggie, because without the B sample,
13 we have no opportunity to defend.

14 We're arguing about the wrong thing, and I
15 suggest that the reason that we're here at all is
16 because when we went to the stewards' meeting, and
17 you heard the testimony of the steward, he didn't
18 really understand the argument that I was making,
19 because my argument was if you look at the rule, if
20 you look at the rule, the stewards aren't allowed to
21 take action until the B sample results have been
22 received.

23 So my argument to him at the time was you don't
24 have the authority to make a ruling other than a
25 dismissal, and if you make a ruling, we are going to

1 appeal it to the Commission, because that's the
2 point; you lack the authority without the B sample.

3 Obviously, he didn't understand the argument
4 then, because he didn't understand it today. He said
5 you didn't say anything. We did say something. The
6 point was you can't suspend Mr. Eckley. You can't
7 impose any kind of sanction because we're still
8 sitting here waiting for the results of the B sample.
9 He didn't understand the point, and that's why we're
10 here today.

11 I'm not here as I am in many, many cases when
12 there's a drug and medication violation where I'm
13 basically begging for the mercy of the panel on
14 behalf of my client. That's not what I'm doing here
15 today, because we don't get that far. I'm here to
16 tell you that you have to follow the law, and the law
17 is clear, and if you don't follow the law, a Court is
18 gonna tell you that you have to follow the law.

19 If we have to take that route, we will, and it's
20 going to be at very great expense, and it's going to
21 be embarrassing for the Commission if it doesn't
22 recognize that absolute basic premiss that you have
23 got to follow the law before you can enforce it.

24 These rules are great, but you can't ignore them
25 ever. You can't hold a trainer to be the absolute

1 ensurer of the course unless you're going to follow
2 all the rules that justify imposition of that
3 standard of liability. You just can't do it. The
4 law is clear, and I simply ask you to do the right
5 thing. Thank you.

6 MR. LAWS: Any commissioners have any questions
7 for you?

8 MS. NELSON: Ask away.

9 MR. LAWS: Any questions?

10 NOTE: There is no response.

11 MR. LAWS: I have a couple questions about the
12 legal argument that you made.

13 MS. NELSON: Sure.

14 MR. LAWS: In the Virginia Administrative Code
15 that you cited, Part L, and the part above it is K:
16 shipment of split samples and trainer and owner of a
17 horse within 48 hours of receipt of notice of
18 positive test to request a sample be shipped, et
19 cetera, et cetera, and other areas of the code, it
20 talks about the shipment.

21 The part where it talks about the stewards, where
22 the stewards cannot impose discipline, I'll just flip
23 to it. I want to get your opinion on this. Do you
24 have the cite off the top of your head?

25 MS. NELSON: You know, I was just thinking that

1 I don't have that cite off the top of my head.

2 MR. LERMOND: It's in 180-110.

3 MR. LAWS: Okay. Thank you.

4 MS. NELSON: Yeah. I have that one.

5 MR. LAWS: It's the very last one of the rules,
6 if that helps.

7 MS. NELSON: Here it is. It's on Page 203 of
8 the rules. It's F7.

9 MR. LAWS: Yeah. It says if the trainer or the
10 owner elects to send a split sample to a reference
11 laboratory. So I think it's pretty clear that the
12 trainer or the owner has to elect to send the split
13 sample to a reference laboratory in order to take
14 away the stewards' authority to issue a discipline;
15 is that correct?

16 MS. NELSON: Yes. Correct.

17 MR. LAWS: So if the trainer or the owner or
18 the trainer or owner's agent sends the incorrect
19 label and that's why it doesn't get to the shipper,
20 what effect does it have on that?

21 MS. NELSON: well, first of all, I think that
22 the basic issue is that the rules put on the
23 Commission the burden of ensuring the integrity of
24 the shipment.

25 MR. LAWS: I'll get to the remedy about that,

1 because I'm gonna ask you about that, too.

2 MS. NELSON: Okay. So I think the fact that
3 the Commission allows in any way somebody else to get
4 involved in any way in that responsibility has to
5 take responsibility -- it doesn't change the
6 Commission's responsibility.

7 The Commission can certainly delegate that
8 responsibility, but it is then responsible for its
9 representative, the Commission's representative, to
10 make sure that the job gets done right.

11 So I think that that's the first point. The
12 owner or the trainer electing to have the split
13 sample sent has no regulatory responsibility, because
14 ultimately, the responsibility to the integrity of
15 the shipment, because ultimately, the burden and the
16 responsibility of maintaining chain of custody is on
17 the Commission; it's not on the owner.

18 MR. LAWS: Well, is your argument the stewards
19 don't have authority to impose discipline because the
20 reference laboratory split sample results were never
21 received, correct?

22 MS. NELSON: Correct, and I think that if you
23 look at other jurisdictions, and I cite to these
24 cases in my original memorandum that was to the
25 Commission, is that there are other jurisdictions

1 that actually have rules that deal with if the split
2 sample doesn't get tested, if something happens. And
3 then the argument becomes whether the circumstances
4 of the specific case fit within the regulatory
5 exception to that.

6 MR. LAWS: I understand. I'm just trying to
7 get back to my question.

8 MS. NELSON: Okay.

9 MR. LAWS: In that section where it gives the
10 stewards authority and also takes it away. If the
11 authority is taken away if the owner or trainer
12 elects to send the split sample to the reference
13 laboratory.

14 MS. NELSON: Correct.

15 MR. LAWS: If the owner or trainer's agent
16 prevents that from being elected to send to a
17 reference laboratory, do the stewards then have no
18 authority if the owner or the owner's agent is
19 responsible for that sample not getting to the
20 reference laboratory? Does that mean the stewards
21 don't have the authority to impose discipline?

22 MS. NELSON: Your question is kind of round
23 about, so I'm not gonna answer it as a yes or no, but
24 I think the answer is that your regulation,
25 Virginia's regulations do not address that kind of a

1 contingency, and if they did, then you might have a
2 different argument in this case, but they don't, so
3 you have to stick to the regs.

4 MR. LAWS: well, if the regs were silent, as
5 you said.

6 MS. NELSON: But this involves a fundamental
7 right to a B sample, so if you're going to impose --
8 so I say that in this kind of a fact pattern with the
9 regulations being as they are, the fact that the
10 regulations are silent, you would be, in essence, the
11 Commission doesn't have the authority to in dealing
12 with this case come up with a new exception.

13 MR. LAWS: We're not talking about the
14 fundamental right; we're talking about the regulatory
15 right.

16 MS. NELSON: It's a fundamental regulatory
17 right. The fundamental necessity of it is that you
18 have the absolute right to a B sample. Now if you
19 are going to erode away on that right under certain
20 circumstances, that's got to be spelled out in the
21 regs. You can't just enunciate that on a
22 case-by-case basis, like we just think that this time
23 this reg shouldn't apply because of these
24 circumstances. Other jurisdictions have had that
25 built into their regs and we just don't.

1 MR. LAWS: The fundamental right that we're
2 talking about has to be elected by the trainer or
3 owner to secure it.

4 MS. NELSON: Yes.

5 MR. LAWS: And if the owner's agent prevents
6 that right from being exercised, how does that take
7 away the stewards' authority?

8 MS. NELSON: How does that take away the
9 stewards' authority? The stewards have no authority
10 at the point that the sample is elected to be sent.
11 They have no authority until the results come back.

12 MR. LAWS: And if the owner's agent didn't
13 elect to send it to a reference laboratory, he
14 elected to send it to Ohio, how does that stop the
15 stewards from issuing their discipline?

16 MS. NELSON: There is a fundamental flaw in
17 your -- the way you're posing the question, because
18 the trainer -- his -- if you're gonna call -- seth
19 was his representative.

20 MR. LAWS: He's an agent. He's an employee.

21 MS. NELSON: That's fine. His agent, his
22 representative. To witness the sending of the
23 sample, the evidence is that he went and he witnessed
24 it, and the Commission left the box there without the
25 label on it.

1 Everything beyond that fact as to how the correct
2 label got put on the wrong box is pure speculation,
3 and I don't believe that there is any evidence that
4 Mr. Fogelson is guilty of any wrongdoing.

5 I think that the answer, the reasonable answer
6 here, is that Ms. Morrey made a mistake. It's human
7 nature for people to not want to admit that they have
8 made a mistake, but the reality is that we have a
9 mistake in this record.

10 We have, you know, there's a mistake in her
11 affidavit. There's a mistake here. Is it really
12 incredible that she put the correct label on the
13 wrong box?

14 MR. LAWS: She pointed out that mistake in her
15 affidavit though, didn't she?

16 MS. NELSON: What?

17 MR. LAWS: The telephone numbers being --

18 MS. NELSON: No, she didn't.

19 MR. LAWS: Dr. Harden testified that she told
20 him that.

21 MS. NELSON: But that's not in her affidavit.

22 MR. LAWS: Yeah, I know. He testified that
23 it's in the record.

24 MS. NELSON: But you didn't correct the
25 affidavit. My point is that people are capable of

1 making mistakes, and if Dr. Harden had stood there
2 and watched that label get put on the wrong box, he
3 would have said, hey, hey, hey. Not my box. Not my
4 box.

5 MR. LAWS: In going to that, the chain of
6 custody --

7 MS. NELSON: That's not an election by
8 Mr. Fogelson.

9 MR. LAWS: If he had not stayed and watched the
10 label get put on the box, he did the same thing. He
11 left before the label was put on the box. And had
12 the label had been put on the correct box and had got
13 to the right reference laboratory, it still would
14 have been a violation of those regs. What would you
15 argue --

16 MS. NELSON: Wait a minute. What would have
17 been a violation of the regs? Because if he'd stayed
18 there and watched the label be put on the correct box
19 and it got to the thing, we'd have a B sample.

20 MR. LAWS: Yeah. No. That's the point. The
21 technical violation that we're talking about, if he
22 had left before the label was attached to the box,
23 and the correct box had gotten to the correct
24 reference laboratory, what would the result be? What
25 would your client be arguing? What would the remedy

1 be? what would the result be?

2 MS. NELSON: well, first of all, in my
3 experience, even such a technical violation, if it
4 had gotten to the lab, we never would have found out
5 about it. We never would have found out about it.

6 MR. LAWS: well, if you had.

7 MS. NELSON: well, there are attorneys who
8 would say that that's a break in the chain of
9 custody, but you know what, I'm not one of them.
10 Because if he took the box and he put the label on it
11 and we have the tracking number and the right label
12 got put on the right box and ended up in the lab and
13 we ended up with the B sample, to me, no harm, no
14 foul.

15 I think other attorneys would make a huge stink
16 about it if they found out, but to me, no harm, no
17 foul.

18 MR. LAWS: Okay.

19 MS. NELSON: Because once you get the B sample
20 results, then I know if my client has a defense or
21 not. Again, it's not that he's guaranteed a defense;
22 it's that he's guaranteed an opportunity for a
23 defense.

24 MR. LAWS: I understand. I just wanted your
25 opinion on that.

1 MS. NELSON: Okay.

2 MR. LAWS: Any questions for any commissioners?

3 MR. VAN CLIEF: I've got one. I'm just looking
4 through the documentation again.

5 Ms. Nelson, it's in Paragraph Two of your
6 January 24th submission and addendum to the
7 January 14th letter to the Commission.

8 MS. NELSON: Yes.

9 MR. VAN CLIEF: I'm still trying to figure out
10 what went where. You're saying that Seth Fogelson
11 confirmed the package he sent to Ohio was received by
12 the intended recipient, which I assume is Dr.
13 Pellegrini, and that the contents were the same as he
14 had packaged in Virginia. Do we have any way of
15 knowing what that was? Has anybody tried to find
16 that out?

17 MS. NELSON: Yeah. I'm the attorney, so I'm
18 not supposed to give evidence, and the problem is
19 that from an evidentiary standpoint, I would have
20 needed an affidavit from Dr. Pellegrini, which I
21 wasn't able to get.

22 Now, what I can represent to you, which I am
23 stipulating on the record is not proper evidence, but
24 I'm trying to answer your question.

25 I contacted the lab. I got -- I did an

1 investigation. I tracked down the person who signed
2 for the package, and they said if blood had come in,
3 it would have gotten put in the fridge. They checked
4 the fridge; there was no blood. Seth -- I talked to
5 Seth. He said that he had spoken to Dr. Pellegrini.
6 It was a Ph meter that he had sent and that it was
7 received as it had been sent.

8 MR. LAWS: A Ph meter? What is that?

9 MS. NELSON: I have no idea.

10 MR. LAWS: Is that to determine something's
11 acidic content?

12 MS. NELSON: I think so, and my understanding
13 is that Freedom Health, that it's like -- it's like
14 an ulcer medication, so what they get are not usually
15 blood samples; they are stool samples.

16 MR. LAWS: Any idea why a Ph meter would be
17 sent overnight or why that couldn't be bought in
18 Ohio?

19 MS. NELSON: You all could have subpoenaed Seth
20 Fogelson.

21 MR. LAWS: Fair enough.

22 MS. NELSON: But they were both from the same
23 town, they're friends. Something. You know.

24 MR. LAWS: Got ya. I understand. Gotta deal
25 with the facts you have. All right.

1 MR. VAN CLIEF: Can I ask question of Dr.
2 Harden?

3 MR. LAWS: Sure. Let's try not to open
4 everything back up.

5 MR. VAN CLIEF: I meant to ask this earlier. I
6 don't know. I should know.

7 EPO or synthetic EPO, is that administered
8 intravenously or given by injection or orally? How
9 do you administer it?

10 DR. HARDEN: It's an injection, I would think
11 usually intravenously, but it can be given
12 intramuscularly.

13 MS. NELSON: I think just one, you know, one
14 more point that I'd like to make is that we don't --
15 one of the other things that would be an issue if we
16 were arguing about the samples and the science and
17 the samples, is that there would have to be a whole
18 lot more evidence in the record establishing the
19 integrity of the chain of custody of the A sample
20 itself, and it's highly irregular in a drugs and
21 medications case to not have testimony at least by
22 affidavit of the testing veterinarian to say these
23 are the steps we took, this is how we took the
24 sample, this is blah, blah, blah, how it was done
25 regularly, how it ended up and how I drew the B

1 sample.

2 Again, if we were arguing about the science of
3 that, there would be a heck of a lot more -- there
4 would be focus on that for a significant part of this
5 hearing. It's not there.

6 MR. LAWS: At this point then, is there a
7 motion in accordance with Virginia Code
8 2.2-3711(A)(7), to go into a closed session for the
9 purposes of consultation with legal counsel
10 pertaining to actual or probable litigation, the
11 actual litigation being in this case, in consultation
12 with legal counsel employed or retained by a public
13 body regarding specific legal matters requiring legal
14 advice by such counsel, i.e. my legal advice and how
15 to handle the Eckley case that's currently in front
16 of us?

17 Any motion for that?

18 MR. TROUT: So moved.

19 MS. DAWSON: Second.

20 MR. LAWS: All those approve?

21 NOTE: The Commission votes aye.

22 MR. LAWS: Opposed?

23 NOTE: There is no response.

24 MR. LAWS: We'll go into closed session.

25 NOTE: There is a recess at 12:13 p.m.

1 while the Commission is in closed session;
2 thereafter, the hearing continues as follows:

3 MR. LAWS: All right. At this point, is there
4 a motion to go out of closed session and go back into
5 open session, in accordance with 2.2-3711, and does
6 the motion also certify that the only subject
7 discussed in the closed session was the material
8 mentioned in the motion to go into closed session,
9 which was to consult for legal advice on the current
10 litigation?

11 MR. VAN CLIEF: So moved.

12 MR. LAWS: All those in favor?

13 NOTE: The Commission votes aye.

14 MR. LAWS: Opposed?

15 NOTE: There is no response.

16 MR. LAWS: So what we're gonna do is announce
17 the decision and give a brief decision explanation
18 why. There will be a written decision coming out.
19 I got 90 days, so at some point this summer, perhaps
20 in the fall.

21 The decision is unanimous. We'll poll folks
22 afterwards to get their actual vote, but the facts,
23 the factual findings the Commission makes will be in
24 the written decision itself, so we'll go into those
25 in the written decision.

1 The legal questions that the Commission has to
2 answer are basically surrounding Section 2.2-4027 of
3 the administrative code, and that's how a reviewing
4 Court, a reviewing Circuit Court would look at the
5 Commission's decision.

6 what a reviewing Circuit Court has to do is find
7 the error of law that the Commission makes or made in
8 its decision in order to overturn it. That section of
9 the law gives examples. It says: such issues of law
10 include, and the third thing it lists is observance
11 of required procedures when any failure therein is
12 not due to harmless error.

13 So that begs the question what does that section
14 mean. So in researching that section, I came across
15 two Court of Appeals decisions implicating the
16 Department of Social Services.

17 In that situation, not to get into the facts too
18 much, the investigator, under the Virginia
19 Administrative Code, anytime an investigator is
20 investigating an allegation of child sexual abuse or
21 assault, the Virginia Administrative Code requires an
22 investigator to record the interview of the person
23 who is accused with one or two exceptions that aren't
24 really relevant.

25 In those two cases, the interview -- the

1 investigator did not record the interviews as
2 required by the Virginia Administrative Code, and the
3 Circuit Court was asked to determine the consequences
4 of that failure.

5 what the Circuit Court found was that the
6 Virginia Administrative Code required the
7 investigator to record the interview, and it was not
8 harmless error when he failed to record the
9 interview, because when the interview was recorded,
10 the reviewing Circuit Court can look at tone, body
11 language and inflection of voice to try to gather
12 evidence. In other words, in reviewing the recording
13 itself, there's evidentiary value that the Court
14 would have and they can't get any other way, except
15 for viewing that tape.

16 Additionally, the second Court of Appeals case
17 said that not only does the reviewing of that tape
18 provide additional evidence, it goes to the ultimate
19 question the Court is to decide. In other words, the
20 evidence that was absent goes to the heart of the
21 matter.

22 Unfortunately, for the Commission or for the
23 stewards and the Commission staff in this case, it
24 was failing to abide by the Virginia Administrative
25 Code that resulted in something more than their

1 harmless error. It prevented the evidence of the
2 drug test from being present to the Commission and
3 help rule on the ultimate issue.

4 For those reasons, the Commission will vote
5 unanimously to vacate the stewards' decision, and I
6 will prepare a decision stating that and laying out
7 the factual findings of the Commission and the legal
8 reasons why they are taking that action.

9 At this point, we need to poll the members of the
10 Commission to see what their vote is, and I'll go
11 ahead and do that.

12 Commissioner Trout, is it your vote for me to
13 write the decision I've laid out?

14 MR. TROUT: Yes.

15 MR. LAWS: Ms. Dawson, is it your vote for me
16 to write the decision as I've laid out?

17 MS. DAWSON: Yes.

18 MR. LAWS: Commissioner Reynolds, is it your
19 vote for me to write the decision they way I've laid
20 out?

21 MR. REYNOLDS: Yes.

22 MR. LAWS: And Commissioner Van Clief, is it
23 your vote for me to write out the decision as I've
24 laid out?

25 MR. VAN CLIEF: Yes, it is.

1 MR. LAWS: So is there a motion on the table
2 for me to put that decision in writing and that will
3 be the decision of the Commission?

4 MS. DAWSON: So moved.

5 MR. LAWS: Second?

6 MR. TROUT: Second.

7 MR. LAWS: All those in favor?

8 NOTE: The Commission votes aye.

9 MR. LAWS: All those opposed? None?

10 NOTE: There is no response.

11 MR. LAWS: At this point then, I'll go ahead
12 and get this decision out within 90 days, and that
13 will be the decision of the Commission.

14 Any other business?

15 MR. REYNOLDS: No other business. Any other
16 business?

17 MS. DAWSON: No.

18 MR. REYNOLDS: Do I hear a motion to adjourn?

19 MR. VAN CLIEF: So moved.

20 MR. REYNOLDS: Second?

21 MS. DAWSON: Second.

22 MR. REYNOLDS: All in favor?

23 NOTE: The Commission votes aye.

24 MR. REYNOLDS: All right. We're adjourned.

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NOTE: This meeting is adjourned at
12:44 p.m.

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CERTIFICATE OF COURT REPORTER

I, Sandra G. Spinner, hereby certify that having first been duly sworn, I was the Court Reporter at the meeting of the Virginia Racing Commission at the time of the hearing herein.

Further, that to the best of my ability, the foregoing transcript is a true and accurate record of the proceedings herein.

Given under my hand this 25th day of June, 2014.

SANDRA G. SPINNER

COURT REPORTER