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VIRGINIA RACING COMMISSION

AUGUST 23, 2011

10700 Horsemen's Road
New Kent, VA 23124
Commencing at 9:43 a.m.

**IN THE MATTER OF BAY COCKBURN, OWNER/TRAINER
APPEAL OF STEWARD'S RULING NUMBER 11-041.**

COMMISSION MEMBERS:

I. Clinton Miller, Chairman
Mark T. Brown
Stuart Siegel
David J. Reynolds
J. Sergeant Reynolds, Jr.

COMMISSION STAFF:

Bernard Hettel, Executive Secretary
Kimberly M. Carter, Office Administrator

ATTORNEY GENERAL'S OFFICE

Amy K. Dilworth

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1 NOTE: The proceedings commence at 9:35 a.m.

2 CHAIRMAN MILLER: Good morning everyone. Welcome
3 to the Virginia Racing Commission meeting today.

4 The first item on the agenda before we begin the
5 regular meeting of the Commission is to consider the appeal
6 of a steward's ruling related to Bay Cockburn. So if there
7 is no objection, we'll go straight to that.

8 Mr. Petramalo?

9 MR. PETRAMALO: Yes, Mr. Chairman. Let me first
10 introduce my client, Bay Cockburn. It's an English spel-
11 ling, it's pronounced Cockburn.

12 CHAIRMAN MILLER: Well, I should have waited for
13 someone to say it before I said it.

14 Before we begin, I should point out before we
15 begin that we have four Commissioners present, so we do have
16 a quorum for this hearing: Mr. Siegel, Mr. Reynolds, and
17 Mr. Reynolds, and myself.

18 MR. PETRAMALO: Okay.

19 CHAIRMAN MILLER: Proceed.

20 MR. PETRAMALO: What I'd like to do is just
21 make a brief opening statement, and then we can get into the
22 testimony.

23 Bay Cockburn is a licensed owner and trainer here
24 in Virginia. He has a long history in horse racing starting
25 out as a steeplechase jockey and then branching out into

1 training. His farm and training facility is up in Northern
2 Virginia not too far from me in Loudon County.

3 On June 12th, there was a steeplechase race
4 here at Colonial Downs, and Bay Cockburn shipped his horse
5 -- Maximize is the name of the horse -- down to run in that
6 race. Maximize ran and won the race.

7 About a week later, he was advised by the Stewards
8 that the post-race test results from the Iowa State Univer-
9 sity test lab came up positive in the horse's urine for a
10 drug called norpseudoephedrine. Bay exercised his right to
11 have it sent off to another laboratory for a second test.

12 The first laboratory, Iowa State, just tested
13 the urine and came back and said it was positive, without
14 quantifying. We sent -- with the help of Dr. Harden, we
15 sent the split sample off to the University of Florida and
16 asked them to examine both the blood and the urine and to
17 quantify it. The results came back showing trace amounts of
18 the same drug, norpseudoephedrine, in the following concen-
19 trations: In the blood, it was point two-tenths of a nano-
20 gram, and 11 nanograms in the urine.

21 Now, a nanogram is one-billionth of a gram. So in
22 the blood, it was two-tenths of one-billionth. To give you
23 some feel for what a billionth is, do we have anybody here
24 who's 32 years-old? Perhaps Ms. Dilworth? It would be --

25 MS. DILWORTH: Thank you, Mr. Petramalo.

1 MR. PETRAMALO: It would be one second in the life
2 of someone who was 32 years-old. That's a billionth.

3 But in any event, the question then arose:
4 How this drug got into the horse, because it was not admin-
5 istered by Mr. Cockburn or his vet? His vet is Dr. Tim
6 Casey, also from the Northern Virginia area. After a good
7 bit of investigation, Dr. Casey came up with the answer.

8 Bay Cockburn's got two race horses in his barn.
9 One of them is getting an allergy medication -- this stuff,
10 Tri-Hist granules. It's -- in my terms, this is for horses
11 with hey fever like a human. It's an antihistamine, and it
12 has two components: pseudoephedrine and Pyrilamine in equal
13 amounts in a cornmeal base, and this is sprinkled on the
14 horse's feed. So Dr. Casey, who prescribed it -- it's a
15 prescription that's right on the back here -- concluded that
16 somehow or other, Maximize the race horse got some of this.

17 well, the lightbulb went on in Bay Cockburn's
18 mind, and he described for me, and ultimately for the stew-
19 ards, what likely happened, and I'll just demonstrate for
20 you, if you don't mind.

21 Horses are fed in the morning -- and his horses
22 are fed in the morning and at night. The night before the
23 race, his helper -- Bay goes out to the barn -- his helper's
24 got the two feed buckets, and what you do is fill the feed
25 buckets up with the basic stuff. This is wheat, barley,

1 corn, and molasses. It's a little sticky. Then the next
2 thing both horses get is electrolytes just to replace what
3 they lose in sweat. So you put a scoop of this and sprinkle
4 it on. And then for the other horse who's got the hey fev-
5 er, he gets a sprinkling of some of this stuff, and then
6 finally, both horses get a nice dollop of Red Cell, which is
7 a sticky syrup. It's vitamins. They pour them into both
8 buckets. Then Bay's helper, using this very stick, mixes it
9 up.

10 what likely happened is some of the Tri-Hist
11 granules probably stuck to the stick and found their way
12 into Maximize's bucket, and that's borne out because basic-
13 ally the readings -- the two-tenths of a billionth are con-
14 sistent with that. If the horse had received a full dose of
15 this, the reading would have been much higher and it would
16 have also shown up with -- I can't ever pronounce that --
17 Pyrilamine.

18 Anyway, we made this presentation to the stewards,
19 and they agreed that this was not any deliberate administra-
20 tion of any drug to Maximize, but more likely than not hap-
21 pened because of feed contamination, and we argued to the
22 stewards that this was just a minute level.

23 Nonetheless, the stewards, did the following:
24 They took the purse away from Bay Cockburn, which was
25 \$12,000; they fined him \$1500, and they suspended him for

1 15 days, but stayed the suspension as long as he didn't have
2 another drug violation within the next year.

3 Let me quickly add that Bay Cockburn has never had
4 any drug violation in all of his career.

5 well, we did not get the Florida results which
6 quantified it until the day of the hearing, which was July
7 30th, so we went to the hearing and made the argument that
8 this was a trace amount and that any penalty should be rela-
9 tively small.

10 when the results came back from the stewards
11 with the order -- I believe it was -- it's dated July 2nd,
12 I think it's probably a typo. It probably should be dated
13 August 2nd. It's Tab 2 in the exhibits. It's dated July
14 2nd, but I'm sure it should have been August 2nd.

15 CHAIRMAN MILLER: Anyone here on behalf of the
16 stewards today?

17 MR. HETTEL: I can represent them.

18 CHAIRMAN MILLER: would that be correct?

19 MR. HETTEL: That would be correct.

20 MR. SIEGEL: Are you finished, Frank?

21 MR. PETRAMALO: No, I just wanted to clarify the
22 mistake.

23 MR. HETTEL: Yes, and I think we noted that in our
24 prior correspondence that it was a mistake.

25 MR. PETRAMALO: Yes.

1 CHAIRMAN MILLER: So I can take my Tab 2 and mark
2 through July and put August?

3 MR. PETRAMALO: Correct, the hearing was on
4 July 30th, Saturday, and August 2nd I think was the follow-
5 ing Monday, if I'm not mistaken.

6 MR. HETTEL: Tuesday.

7 MR. PETRAMALO: Tuesday.

8 But in any event, because of the severity of the
9 penalty, and given the circumstances and accidental contam-
10 ination that resulted in a minute trace of the drug, we
11 filed an appeal.

12 Now, that then gave us the opportunity to have
13 an expert look at those results, and I did that. I sent off
14 the University of Florida report to Dr. Thomas Tobin of the
15 University of Kentucky, and we will be offering his affi-
16 davit, which is in your packet. Dr. Tobin is probably one
17 of the leading experts on equine medication in the country.
18 He's been teaching at the University of Kentucky for over 30
19 years. His resume is attached to the affidavit, and I think
20 his list of publications is 62 pages long -- something like
21 that.

22 Dr. Tobin concluded, you'll see from his affi-
23 davit, that the trace amount could not have affected the
24 horse's performance on race day, and Dr. Tobin, in the final
25 paragraph, leaves his phone number at the University of Ken-

1 tucky, and he's standing by in case there are any questions
2 about his affidavit.

3 So what we will do at the end of the hearing,
4 based on all of the evidence, including his affidavit which
5 was not before the stewards, is ask you to reverse the
6 stewards' decision.

7 Now, let me throw in a footnote here: Under our
8 regulations, this hearing today is de novo. It's as though
9 we were starting for the first time, so that's why we're
10 able to present to you evidence that was not before the
11 stewards. But in any event, our position is that the stew-
12 ards' ruling should be be overturned and the purse should be
13 reinstated, and Bay Cockburn should not be fined because
14 what we have here is an accidental administration to a horse
15 which resulted in a minute trace of a therapeutic drug which
16 had no effect on the horse on race day.

17 Now, the whole purpose of our rules is, to put
18 it baldly, to punish cheaters -- owners and trainers who are
19 using drugs, many times illegal drugs, to gain an advantage.
20 That's not the case here. What we have is an accidental
21 administration of a therapeutic medication that had no ef-
22 fect on the outcome of the race, and we should not be pun-
23 ishing that type of conduct.

24 That's it.

25 CHAIRMAN MILLER: Any questions from the

1 Commissioners of Mr. Petramalo?

2 MR. SIEGEL: None at this point.

3 CHAIRMAN MILLER: I have a question. Maybe
4 this is better addressed to the stewards, but I'll get your
5 opinion on it first.

6 when there is a trace of a drug, whether it's this
7 finite amount or maybe a little more or maybe even a little
8 more, how does this -- is it -- in the horse industry, in
9 the racing industry, is it per se taken that the drug must
10 have affected the race, or is that a subjective determin-
11 ation the stewards make that if there's a drug present in
12 the system, we determine that it did affect the race, or we
13 say well, there was 10 percent of this or 15 percent of
14 that, and the horse -- we look at the history of the horse
15 to determine whether or not it may have affected the horse's
16 performance? Because if the horse has never won and is con-
17 sidered a mediocre horse, and all of a sudden that horse
18 just ran a terrific race, they make a determination that
19 that drug must have affected the race? On the other hand,
20 if it's a horse that's pretty consistent and ran in that
21 race pretty consistently with its history, and therefore we
22 determine that the drug probably had no effect -- how is it
23 done?

24 MR. PETRAMALO: I would be happy to address that.
25 First of all, we've got to -- it's helpful to

1 divide drugs, medication into an illegal medication that has
2 no business being in the horse -- cobra venom, for example,
3 versus therapeutic medication, these Tri-Hist granules, and
4 what is commonly used -- I call it aspirin, Doc Harden calls
5 it phenylbutazone -- it's Bute. Now, often times when you
6 are dealing with therapeutic medication, there are threshold
7 limits set so that that decision can be made as to whether
8 or not there's an overage in the horse's system, and there-
9 fore, it's in effect on the horse on race day or it isn't.

10 Now, if there is an overage, there are fines, et
11 cetera. But, for example, with bute or phenylbutazone, in
12 your rules you set the threshold as two micrograms per mil-
13 liliters of blood. So post-race, if my horse comes in with
14 one microgram, no harm, no foul, because the two is the cut-
15 off level. The assumption is if it's less than two, it has
16 no effect on the horse. However, if it's eight micrograms,
17 then I'm in trouble.

18 Now, the problem is there are many therapeutic
19 drugs out there, probably at least 50 or so that are offic-
20 ially listed. But there are not -- there are not thresholds
21 set for all of them. For many of them, there are. There
22 are not for the drugs that we're talking about today. So
23 what we're really looking at is kind of a zero tolerance.
24 In other words, what's being called a positive is minute,
25 but it's being taken as though in the stewards' ruling as

1 though it had some effect on the horse, and that's kind of a
2 shorthanded explanation.

3 Now, here -- here is the real industry-wide
4 problem: The testing instruments and the testing capabil-
5 ities are getting more and more sensitive. Iowa State, the
6 contractor with the Racing Commission, has a very fine lab
7 and they've got the best equipment. It's something I can
8 never pronounce correctly. It's liquid chromatography/mass
9 spectrometry. That's state of the art, and they can detect
10 something down to a picogram, which is one trillionth of a
11 gram.

12 The point is: If you want to find something,
13 you can find it. Now, this wasn't always the case. It's
14 that the testing technology has evolved. So what we're
15 doing is getting labs like Iowa State finding something like
16 this and calling it positive because there are basically no
17 standards now set in Virginia for the particular medication
18 we're talking about, and that's where we are. And it's for
19 that reason that I went to Dr. Tobin for his opinion as to
20 whether two-tenths of a billionth had any likely impact on
21 the horse's performance, and he said no, and he explains it
22 in his affidavit.

23 CHAIRMAN MILLER: All right. Thank you.

24 After that, any questions?

25 MR. SIEGEL: One question. Has this purse been

1 redistributed to these other horses --

2 MR. PETRAMALO: No.

3 MR. SIEGEL: -- at this point?

4 MR. PETRAMALO: It's been stayed.

5 MR. SIEGEL: So it's held in escrow or whatever?

6 MR. PETRAMALO: Yes. The purse money actually
7 goes from Colonial Downs to the National Steeplechase Assoc-
8 iation. They distribute it to the jumpers.

9 MR. SIEGEL: So they're holding it?

10 MR. PETRAMALO: They're holding it, that is
11 correct. The money has not been distributed; nor has Mr.
12 Cockburn paid the fine. The fine is normally payable within
13 72 hours. We applied for and were granted a stay of the
14 stewards' ruling.

15 CHAIRMAN MILLER: All right.

16 Do you have anything further?

17 MR. PETRAMALO: Well, yes, I wanted to swear the
18 witness and --

19 CHAIRMAN MILLER: You have no further -- I liken
20 it to a trial -- you have no further opening statement?

21 MR. PETRAMALO: That is correct, unless you have
22 more questions.

23 CHAIRMAN MILLER: Okay. No questions?

24 All right. Are you ready to proceed?

25 MR. PETRAMALO: Do you want to swear in --

1 NOTE: The witness is sworn.

2 BAY COCKBURN, called as a witness by the
3 Petitioner, first being duly sworn, states as follows:

4 DIRECT EXAMINATION

5 BY MR. PETRAMALO:

6 Q would you please state your full name and address
7 for the record?

8 A My name is Bay Cockburn. My address is 35075
9 Bloomfield Road, Round Hill, Virginia.

10 Q And are you currently licensed as an owner and
11 trainer by the Virginia Racing Commission?

12 A I am, yes.

13 Q And how long have you been training horses?

14 A I've been training horses in this since -- I've
15 held my trainers license with the NSA since 1992.

16 Q And most of the horses you train are
17 steeplechasers?

18 A Most of the horses I train are steeplechasers,
19 yes.

20 Q Maximize -- is that one of your horses?

21 A That is, yes.

22 Q You own that horse?

23 A I own that horse with my son.

24 Q And you trained that horse?

25 A I trained it myself, yes.

1 Q Did you ship Maximize down here to race at
2 Colonial Downs on June 12th?

3 A I did, yes.

4 Q Before shipping Maximize down here, did you have
5 him treated with any special medication of any sort?

6 A No.

7 Q Now, Maximize won that race?

8 A Maximize won that race, yes.

9 Q Afterwards, you were informed by the stewards that
10 the drug test came back positive for norpseudoephedrine?

11 A That's correct, yes.

12 Q You discussed that with your vet, veterinarian?

13 A I did, yes.

14 Q That's Dr. Tim Casey?

15 A Yes, Dr. Casey.

16 Q Did Dr. Casey have any explanation as to how that
17 drug may have found it's way into Maximize?

18 A Yes, after a while, he said it was the Tri-Hist
19 that I gave one of my other horses because he was allergic
20 to the pollen in the trees.

21 Q Let me see show you what we will mark as
22 Petitioner's Exhibit 1. This is the Tri-Hist?

23 A Yes.

24 Q This is the actual jar?

25 A Yes, uh-huh.

1 Q And the prescription on the back -- Maurice F.
2 Casey, is that your vet?

3 A That's correct, yeah.

4 Q And it says "Who Do You Call It" -- that's the
5 name of the horse?

6 A That's the name of the horse.

7 Q Did you name that horse?

8 A I did, yes.

9 Q All right.

10 So this was prescribed by Dr. Casey for Who Do You
11 Call It?

12 A That's correct, yes.

13 Q And you had your helper give this in the feed to
14 Who Do You Call It?

15 A Who Do You Call It, yes, every evening.

16 Q But you did not intentionally give it to --

17 A None of the other horses don't need it.

18 Q So you didn't give it to Maximize?

19 A No.

20 Q Now, did you -- after Dr. Casey told you that
21 this was the likely source of the norpseudoephedrine, did
22 you give some thought as to how that may have gotten into
23 Maximize's system?

24 A Yeah, well, as soon as he told me that it was --
25 that that drug was in the Tri-Hist, it didn't take me long

1 to put two and two together, because the Red Cell, which is
2 the tonic I give the horses with all the vitamins is a very
3 thick syrup, and I give them like two fluid ounces of it,
4 and it's very sticky, and when I mix it with the stick into
5 the feed, I mean, I give them like over half a bucket in the
6 evening, and you really have to mix it really -- like for at
7 least a minute to get everything mixed up, because if you
8 leave any globs, the horses won't eat it, so you have to
9 really mix it up. It's like mixing a cake really, and to
10 get all the ingredients together, and with the electrolytes
11 which is sort of like Gatorade to get -- make them drink the
12 water, and that's all he gets is the Red Cell and the elec-
13 trolytes; and this other horse, who Do You Call It, he gets
14 the Tri-Hist. I have another horse as well, I'm Telling, so
15 I have three horses now. I have three buckets, and they all
16 go along, and once the bucket is full, they just all get
17 mixed with that stick.

18 Q Let me show you -- let me interrupt you and show
19 you this stick which we'll mark as Petitioner's Exhibit 2.
20 Is that the actual stick?

21 A That's the actual stick, and you can see on the
22 bottom of it it's still got all the feed you can see stuck
23 on it, and it obviously got some of the granules stuck on
24 the stick -- on the end of the stick, but you can see that
25 it was only -- as it came back from the Florida lab that it

1 was only .2 -- point -- naught-point-two nanograms over a
2 millimeter of the -- to get into the feed of Maximize, so I
3 mean, it was just one of those damn unlucky things.

4 Q So you're certain that Maximize was not given a
5 full therapeutic dose?

6 A Exactly. If he got a full dose of it, he'd of
7 had a whole lot more into his system. And as you said, Dr.
8 Tobin said in his letter, you know, in his last paragraph,
9 he'd have had a lot more of the -- I can't remember what the
10 other stuff was called --

11 Q Oh, Pyrilamine?

12 A Pyrilamine, yes. So I mean he only got a tiny
13 little bit on the end of a stick, and that's exactly how the
14 -- what I've said to Dr. Casey that I was using Red Cell,
15 and he said, well, that's exactly how he got the stuff that
16 was prohibited in his feed.

17 Q And the Red Cell is this vitamin supplement?

18 A Yes, it's got a whole lot of vitamins in that.
19 It's a tonic really.

20 Q Now, you haven't run Maximize -- you haven't raced
21 Maximize since then, have you?

22 A No, I haven't, and like Commissioner Miller was
23 asking about how much did it enhance the horse's perfor-
24 mance, and the last time he ran under NSA rules was back in
25 2009, and the horse won that race, and then I didn't run --

1 I ran him in 2010, but I didn't run him in NSA races because
2 my son had come of age of 16, and he was allowed to ride in
3 -- over jumps, so I was running the horse in point-to-point,
4 and he won two or three point-to-points, and then I wanted
5 to run him in the fall of 2010, and then the horse started
6 to bleed on me, so I was running him -- I scheduled to run
7 him on Lasix obviously down here on -- which I usually do
8 run the horse on Lasix, but he was bleeding at home, and
9 obviously, at home you don't work your horse on Lasix be-
10 cause it takes too much out of the horse. You can't work
11 horses on Lasix all the time. Otherwise, you have a hat-
12 rack. The horse just draws out all the urine out of the
13 horse and makes them urinate before you run the horse.

14 Q That's because Lasix is a diuretic?

15 A Diuretic, exactly, so you don't -- when you --
16 when you're training a horse and galloping it, you don't use
17 Lasix, but when it comes to race day and you know you have a
18 horse that might bleed, then you use the Lasix. So -- but
19 he started to bleed for me at home, so I had to go a dif-
20 ferent way of training him at home, and so if you remember
21 the spring of this year was really wet, he didn't like the
22 wet ground, so I had to wait, and the first good ground we
23 were getting, the hard ground we were getting was for the
24 steeplechase race. He was down here in -- here at Colonial
25 Downs, and so that's when I ran him again under National

1 Steeplechase Races. And that was the second race since I'd
2 run him, and he'd run down here before on the grass, once on
3 the flat when my son's grandfather, my father-in-law had
4 him, and he'd always been in a place that actually he had
5 won a race, and he had to be put down, placed down to third
6 one day when he ran down here because I think the jockey had
7 come over on the horse, but he had always been in the money
8 when he'd run down here on the flat on the grass. So I mean
9 he was a consistent horse on the grass down here.

10 Q Is Maximize in training to race now?

11 A He's training to race now, and if I can get him
12 out of the -- get him to run, I wanted to bring him down
13 again.

14 Q When you say bring him down again, that's for the
15 steeplechase races that are here in September during the
16 harness meet?

17 A Exactly.

18 MR. PETRAMALO: I have nothing further.

19 CHAIRMAN MILLER: Mr. Petramalo, how do you
20 describe your Exhibit 1?

21 MR. PETRAMALO: It's a container of Tri-Hist
22 Granules, and the second one would be described as the
23 mixing stick.

24 CHAIRMAN MILLER: That will be Exhibit 2?

25 MR. PETRAMALO: Correct.

1 CHAIRMAN MILLER: Is the mixing stick.

2 I just want the record to show that the Commission
3 agrees that those two exhibits will be admitted to record
4 without objection, unless someone objects.

5 Does anyone object?

6 NOTE: There was no response.

7 CHAIRMAN MILLER: Okay.

8 NOTE: The items described above were marked
9 as Petitioner's Exhibits 1 and 2.

10 MR. PETRAMALO: Thank you.

11 CHAIRMAN MILLER: Any questions? Any of the
12 Commission have any questions of the Appellant?

13 MR. J. SERGEANT REYNOLDS: I've got a question.

14 How often does something like this come before the
15 stewards or the Commission when medicine's accidentally mixed
16 into another horse's feed?

17 MR. PETRAMALO: Oh, I think that -- let me say,
18 in my opinion it's not uncommon. We had other cases this
19 past meet, but the person to ask that question to is my col-
20 league in the back there, Dr. Harden. He can give you a
21 much better answer than I can.

22 MR. J. SERGEANT REYNOLDS: Then I would follow-up
23 and say if it does happen from time to time that maybe the
24 helper didn't have enough experience or anything, but why
25 would you mix medicine -- in the use of some sort of pre-

1 scribed medicine, would you do it right next to another
2 horse's feed or use a mixing stick in each bucket?

3 THE WITNESS: That's a good question, because I
4 didn't think that Tri-Hist granules -- I didn't think it was
5 -- I thought it was just a herbal because that's what I
6 thought, I was told that it was a herbal, it was more herbs
7 and I didn't think it had any -- I didn't think about it
8 having anything bad in it to, you know, that would affect a
9 race horse in his outcome, and it wasn't until -- actually,
10 there was a very good question, because when I was talking
11 to another trainer, they had looked up -- they've got about
12 15 horses, and when they told me it was Tri-Hist, they said,
13 oh, they said they didn't make a mistake, but their vet had
14 told them to use a different bucket and just have the one
15 bucket and to leave the stick on the bucket and have that
16 bucket away, you know, just use that bucket when they use
17 Tri-Hist, and like I never -- it never clicked with me and
18 my vet never sort of thought to warn me about it or never
19 even clicked with him either.

20 MR. J. SERGEANT REYNOLDS: Okay. Thank you.

21 MR. REYNOLDS: I have a question.

22 Are you asking for a reversal of all of the
23 findings?

24 MR. PETRAMALO: Yes.

25 MR. REYNOLDS: I think you named them in your

1 opening statement, but you are asking for --

2 MR. PETRAMALO: Yes, the three elements of the
3 penalty was the forfeiture of the purse, \$1500 fine, and the
4 15 day suspension conditional on not having another drug
5 violation.

6 The latter one obviously wasn't a big concern of
7 ours. The first two are.

8 CHAIRMAN MILLER: Anyone here on behalf of the
9 stewards that wishes to cross-examine the appellant?

10 NOTE: There was no response.

11 CHAIRMAN MILLER: Dr. Harden, do you want to come
12 aboard?

13 DR. HARDEN: I wouldn't necessarily want to
14 cross-examine, but I would like an opportunity to comment.

15 CHAIRMAN MILLER: Come forward and identify
16 yourself for the court reporter.

17 DR. HARDEN: Yes, I'm Dr. Rich Harden, I'm the
18 Equine Medical Director for the Racing Commission.

19 MR. PETRAMALO: Just as a technicality, if Dr.
20 Harden's going to testify, I think the rules require that he
21 be sworn. Not that I think it's necessary, but --

22 CHAIRMAN MILLER: Well, I asked if he had any --
23 if anyone has any questions. Someone is -- I've got to get
24 used to this: Is there really an official representative of
25 the stewards here today?

1 MR. HETTEL: It would have to be me in my capacity
2 as Executive Secretary, and when Dr. Harden gets finished
3 with his question, I do have one.

4 CHAIRMAN MILLER: Okay. Ordinarily, you would
5 then direct the question to --

6 MR. HETTEL: Yes.

7 CHAIRMAN MILLER: -- to the appellant. But if
8 it's all right, we'll have Dr. Harden ask his question.

9 MR. PETRAMALO: I have not objection to that.

10 CHAIRMAN MILLER: Dr. Harden, will you frame the
11 question that you have, or questions?

12 DR. HARDEN: well, I actually don't have
13 questions, I just at some point would like to comment.

14 CHAIRMAN MILLER: Okay. well, you want to testify
15 then --

16 DR. HARDEN: Yes.

17 CHAIRMAN MILLER: Okay, so there's --

18 Now, do you have a question, Mr. Hettel?

19 **CROSS-EXAMINATION**

20 **BY MR. HETTEL:**

21 Q well, in terms of the jar of Tri-Hist granules,
22 that is a prescribed medication, correct?

23 A Yes. But it's not prescribed -- well, no, I
24 didn't get it from -- no, I didn't have to get -- it's not
25 prescribed.

1 Q How did you come by it?

2 A I got it from the vet.

3 Q And he diagnosed your horse's problem?

4 A Yes.

5 Q And suggested, if not prescribed, this medication?

6 A well, he had the medication there and he gave it
7 to me.

8 MR. HETTEL: And Frank, you did read some label on
9 it?

10 MR. PETRAMALO: Yes.

11 Q So, within that there was some specific guide-mark
12 on how it was to be used, and Dr. Casey, when he gave it to
13 you, Mr. Cockburn --

14 A Yes, because that's what he suggested I use.

15 Q well, but my question is there was no caveat? I
16 mean this is beyond the usual circumstance for your feed
17 protocol, so when you added it, particularly with this label
18 from a veterinarian, it would seem to me to be a necessity
19 for some caution.

20 Am I'm mistaken?

21 CHAIRMAN MILLER: Is that a question?

22 MR. HETTEL: That is a question.

23 Q wouldn't you have been cautious given the
24 extraordinary use of this substance into your feed protocol?

25 A Yes, but I think the other stuff for the feed

1 protocol, and he put stuff on it, and there's nothing --
2 there's -- like he gives me herbs and stuff for -- like I
3 used on -- to give on race day before race day because he
4 bleeds and there were Chinese herbs that he gave me and he
5 told me how to approach on it, exactly how to do it, and we
6 got those tested as well to make sure there was nothing in
7 them, and we didn't bring them down today, but we brought
8 them before the stewards, and Chinese herbs -- and there was
9 nothing -- it was just completely herbal -- there were just
10 completely herbs all together, Chinese herbs, and he'd writ-
11 ten down like things -- like what -- exactly how to admini-
12 ster the Chinese herbs like I say. You give one packet --
13 two packets, one on the Thursday, two days -- three days
14 out, and then one packet in the morning one day out, and one
15 in the morning of the day of the race, and they weren't --
16 there was nothing in -- they had -- you know, in the Chinese
17 herbs; they were just completely herbs.

18 Q well, maybe my follow-up, given the Chinese herbs
19 and the holistic nature of all of that substance, this thing
20 in this container Frank's holding right now had a sufficient
21 amount of the pseudoephedrine to be detected by Iowa State.
22 To me, there was a necessity for your veterinarian -- I mean
23 if he didn't know it was in there, that's both of you-all's
24 fault, but --

25 CHAIRMAN MILLER: I would just caution you, you're

1 getting into argument now.

2 Q But by the same token, my follow-up question is,
3 I can't imagine the veterinarian not doing that, and to that
4 point, shouldn't he have known that? Shouldn't that veter-
5 inarian have known the effects of this drug?

6 A Yes, well, he did. As soon as I told him that I
7 had pseudoephedrine in my blood test when I got it back from
8 -- that it came back and he found out what it was, and he
9 went and looked up my chart as to what I was giving my
10 horses. He didn't need to look at another thing. He just
11 said, oh, well, that's the Tri-Hist that you're giving the
12 three year-old, and I said, you know, you know -- but he
13 knew I wasn't giving it the other, you know, the other -- I
14 wasn't giving it my race horses, and he didn't think about
15 the way I was stirring my feed, I suppose, or thinking it
16 was going to get stuck on the -- I was feeding Red Cell and
17 it was going to get stuck on my mixing stick.

18 CHAIRMAN MILLER: Could I just -- Mr. Hettel, and
19 Dr. Harden will testify. I mean you-all will have an oppor-
20 tunity to testify. I think if I could try to frame the
21 question I think Mr. Hettel was getting at -- perhaps when
22 this prescription, this jar of prescriptive medication was
23 given to you, did your local vet there in Loudon County give
24 you any caution about its use?

25 THE WITNESS: No, he didn't. I told him that --

1 he knew I wasn't going to -- it wasn't for a horse that I
2 was going to race.

3 CHAIRMAN MILLER: Well, if I may interrupt, we
4 don't know what he knew because he's not here.

5 THE WITNESS: No. He didn't say anything about
6 it, no.

7 CHAIRMAN MILLER: But he didn't tell you to be
8 very cautious with this because this is a substance that
9 could have ramifications if it gets into the system of one
10 your race horses?

11 THE WITNESS: Right. No, he didn't.

12 CHAIRMAN MILLER: Now, second, to save me time
13 and everyone else time, if your eyes are good, Mr. Petra-
14 malo, what is the caution on the container itself, if you
15 would read it, please?

16 MR. PETRAMALO: Yes. It says: Caution. Feder-
17 al law restricts this drug to use by or on the order of a
18 licensed veterinarian; and on the back, is a label from
19 Maurice F. Casey, DVM, with his address with a date of
20 5/12/11, and it's "Who Do You Call It", Tri-Hist. Give one
21 tablespoon in feed once or twice a day as needed.

22 Is that Dr. Casey's writing?

23 THE WITNESS: Yes.

24 MR. PETRAMALO: Okay. There's another warning:
25 For animal use only, for horses only, not for use in horses

1 intended for food. Possible side effects of using this pro-
2 duct include CNS stimulation, nervousness, excitation, or
3 sedation, temporary anhidrosis -- in- -- good grief, I don't
4 know what this word is -- and incoordination and weakness.
5 That's --

6 CHAIRMAN MILLER: So that's the caution that's on
7 the container itself, and the bottom line is that there was
8 no additional cautionary advice from the vet regarding this
9 medication?

10 THE WITNESS: No, there was no caution, no.

11 CHAIRMAN MILLER: Thank you.

12 was that what you were trying to get at?

13 MR. HETTEL: It was the fact that the pseudo-
14 ephedrine is -- to me, the caution about that.

15 CHAIRMAN MILLER: Are you -- is your case
16 presented, or do you rest, as we would say in court?

17 MR. PETRAMALO: Oh, no, no, no, perish the
18 thought. I got all dressed up today.

19 I'm being facetious.

20 CHAIRMAN MILLER: Because we'll get to your
21 testimony. I'm trying to follow the protocol you would in a
22 courtroom, so you will be able to testify after Mr. Petra-
23 malo has rested his case.

24 MR. PETRAMALO: I'm being facetious.

25 I have one additional exhibit which I will mark as

1 Petitioners Exhibit 3, and that's the affidavit of Dr.
2 Thomas Tobin.

3 You have the affidavit in front of you. The
4 spiral binder, the first tab is Dr. Tobin's curriculum
5 vitae, the second tab is the University of Florida test
6 results, and the third tab is the Iowa State test results.

7 As I said in my opening statement, Dr. Tobin
8 is one of the leading experts on equine medication in the
9 country. He's got a Veterinary Degree from I think Trinity
10 College of Dublin, perhaps, University College-Dublin; he
11 has a Master of Science Degree from the University of
12 Guelph, he's got a Ph.D. in pharmacology from the University
13 of Toronto, and he's been, as I said before, teaching at the
14 University of Kentucky for at least 30 years. And if you
15 take a look at the 62 pages of publications and presentat-
16 ions, you will see that it's all to do for the most part
17 with pharmacology and drugs, drug use, drug testing in
18 horses, and I would offer that as Petitioner's Exhibit 3.

19 CHAIRMAN MILLER: Any Commissioner have any
20 question relating to the Appellant's motion to admit Exhibit
21 Number 3, the affidavit of Dr. Tobin to the record?

22 MR. SIEGEL: No.

23 CHAIRMAN MILLER: Do the stewards have an
24 objection to admitting the affidavit of Dr. Tobin to the
25 record?

1 MR. HETTEL: No, sir.

2 MR. PETRAMALO: May I simply read one portion,
3 which I think highlights the essence of our case?

4 CHAIRMAN MILLER: All right. Let me first make
5 the statement that Exhibit 3 is now admitted to the record
6 without objection.

7 MR. PETRAMALO: I apologize. I'm sorry.

8 CHAIRMAN MILLER: All right.

9 NOTE: The document described above was marked
10 as Petitioner's Exhibit Number 3.

11 MR. PETRAMALO: Mr. Chairman, I'm looking now at
12 paragraph five where Dr. Tobin says pseudoephedrine can also
13 act as a stimulant to a horse's central nervous system caus-
14 ing nervousness and excitement; however, I do not believe the
15 minute traces reported by the University of Florida affected
16 the race performance of Maximize. In my opinion, the levels
17 reported by the Florida laboratory would have had to be sub-
18 stantially higher before I would draw a conclusion that the
19 horse's performance could have been affected by the nor-
20 pseudoephedrine found in his system.

21 That's the essence of our case.

22 CHAIRMAN MILLER: All right.

23 MR. PETRAMALO: With that, I don't know whether
24 it's actually necessary to -- well, let me do this: Let's
25 mark as Petitioner's Exhibit 4 the binder you have before

1 yours labeled Appellant Bay Cockburn's Exhibits. All they
2 are are the Notice of Hearing from the stewards; the stew-
3 ards' ruling; a request for the stay, and then excerpts from
4 the Commission's regulations and also from the RCI Model
5 Rule.

6 CHAIRMAN MILLER: That's this document here?

7 MR. PETRAMALO: That's correct.

8 CHAIRMAN MILLER: Any objection from the stewards?

9 MR. HETTEL: No, sir.

10 CHAIRMAN MILLER: Exhibit Number 4 has been
11 identified to be admitted to the record.

12 NOTE: The document described above was marked
13 as Petitioner's Exhibit Number 4.

14 MR. PETRAMALO: Thank you. And with that, we
15 would rest our case.

16 CHAIRMAN MILLER: Now, do the stewards desire or
17 through their witness, Dr. Harden, desire that we ring up
18 Dr. Tobin and present any questions to him related to his
19 affidavit.

20 DR. HARDEN: No, sir.

21 MR. HETTEL: No, sir.

22 CHAIRMAN MILLER: Okay. All right.

23 It's in your hands now to present the stewards'
24 case.

25 MR. HETTEL: well, thank you, sir.

1 The Stewards, upon notice of a positive test from
2 Iowa State, the official laboratory of this Racing Commis-
3 sion, notified Mr. Cockburn of the positive results for
4 Maximize. Within that they held a hearing. Mr. Petramalo
5 was there to represent Mr. Cockburn, and within that, they
6 referred heavily and they relied totally on the Uniform
7 Classification Guidelines for Foreign Substances published
8 by Racing Commissions International, which is in Tab 6 of
9 the booklet that Mr. Petramalo has distributed to the mem-
10 bership. Within that, this medication is listed as a Class
11 3, which is the lower end of the hierarchy of medications;
12 it's on the second to last page of that booklet.

13 MR. PETRAMALO: The pages are numbered in the
14 lower right-hand corner.

15 MR. HETTEL: I'm sorry, page 12, and this is the
16 revised edition dated September 10th. As a matter of fact,
17 I got the most revised one this morning from RCI in prepar-
18 ation for this meeting. That has not changed; and within
19 that, it was in a sufficient amount that Iowa State could
20 detect it; it was in a sufficient amount that Florida State,
21 the referee laboratory, could detect it.

22 Again, there seems to be some consideration for
23 the sloppy technique, for lack of a better description, of
24 mixing of the feed with the medication, the food, and the --
25 is it Red Cell in the jug? Red Cell. So within that, it is

1 a recipe for disaster, no doubt, but also within that, the
2 stewards are duty-bound to uphold the rules of the Virginia
3 Racing Commission. To that point, they had findings of fact
4 and conclusions of law and issued the ruling.

5 And that's my statement.

6 CHAIRMAN MILLER: Could I ask a question, Mr.
7 Hettel?

8 MR. HETTEL: Yes, sir.

9 CHAIRMAN MILLER: With that decision by the
10 stewards, any trace, no matter how small of this particular
11 agent, which is a Class 3-D --

12 MR. HETTEL: Yes, sir.

13 CHAIRMAN MILLER: -- no matter how small, it is
14 presumed, maybe it's almost even an un rebuttal presumption
15 that that trace amount did affect the outcome of the race?

16 MR. HETTEL: Yes, sir, by virtue of it being
17 included on this list. If it were not, then certainly it
18 would be not have an inconclusion on the list, so the powers
19 that be that formed this calculation of this list after some
20 consideration thought it necessary to include it as a Class
21 3 penalty and a Class 3 classification.

22 CHAIRMAN MILLER: So any Class 3 substance --

23 MR. HETTEL: Yes, sir. Well within the parameters
24 of the contract that was agreed to by Iowa State to do our
25 official testing for this Commission.

1 MR. PETRAMALO: Mr. Chairman, I might direct you
2 to page seven, lower right-hand, handwritten, where I think
3 this goes --

4 CHAIRMAN MILLER: Wait, page seven of what?

5 MR. PETRAMALO: Tab 6, sir.

6 CHAIRMAN MILLER: Page 7 of Tab 6?

7 MR. PETRAMALO: Yes, look in the lower right-hand
8 corner where the pages are numbered, and the page of the
9 Drug Classification Scheme, and what we're looking at is
10 Class 3. Do you see that?

11 CHAIRMAN MILLER: Yes, sir.

12 MR. PETRAMALO: And the very last sentence, and
13 this is slightly different from Mr. Hettel's representation.
14 what it says is Class 3 drugs have the potential of affect-
15 ing the performance of a race horse. They may or may not be
16 accepted for therapeutic use, and they have the potential --

17 CHAIRMAN MILLER: So it's not -- so that language
18 would indicate it doesn't per se -- I mean it's not -- it
19 could be -- it's rebuttable that it affected the performance
20 of the race?

21 MR. PETRAMALO: Yes, in my opinion, yes.

22 CHAIRMAN MILLER: Well, what do we say about that?

23 MR. HETTEL: Well, my comment to that would be
24 that the necessity of the contractual language of this Com-
25 mission with Iowa State made it inclusive to call it a posi-

1 tive. They didn't just arbitrarily do it; they specifically
2 did it when they found this substance in the sample that was
3 submitted from Maximize.

4 CHAIRMAN MILLER: Okay. well, let me understand:
5 Iowa State identified it as a positive --

6 MR. HETTEL: Yes, sir, they did.

7 CHAIRMAN MILLER: -- no matter what the amount,
8 but Iowa State doesn't go further than just identifying --
9 they just identify what kind of medication is present in the
10 system, they don't make any kind of determination about
11 whether it affected performance, is that --

12 MR. HETTEL: Go head Dr. Harden, you can answer
13 that.

14 DR. HARDEN: If I may comment to that. They
15 have -- all of the laboratories that are participating with
16 these have procedures that they are -- that they follow to
17 determine whether a drug is a positive or not. Not a number
18 per se, but a procedure, and one of their categories is that
19 it must be of a certain amount that it is likely to be con-
20 firmed in a referee laboratory, so they may find it at a
21 small amount, and in fact, we have a number of cases where
22 the lab will call me and say look, I found this at a low
23 level, it's too low to report, and we file it away just as
24 intelligence information to watch a trainer or watch a horse
25 or whatever. But it's not just that they found one molecule

1 and called it a positive, and this is Dr. Tobin's own com-
2 ments -- I'm going to plagiarize him a little bit, but if
3 you can see this, this is a four followed by 21 zeroes.
4 That's the standard dose of Butazolidin, the number of mole-
5 cules in that dose. So you give a horse a shot of Bute,
6 he's got 4 and 21 zeroes molecules of Butazolidin in his
7 system. We can detect the last three zeroes. Once those
8 are gone, that horse is negative for Butazolidin. But there
9 is still four with 18 zeroes of molecules in that horse's
10 system.

11 CHAIRMAN MILLER: My question, Dr. Harden, is
12 this: I think we're talking about -- maybe I'm wrong, but I
13 think we're talking about two different things. The Iowa
14 laboratory makes a determination of positive or negative,
15 the content of a drug in the system, but they don't -- am I
16 correct in saying that the Iowa laboratory does not make a
17 determination about whether or not that very small trace
18 amount would affect the performance of a horse in the race?

19 DR. HARDEN: No, sir, they do not.

20 CHAIRMAN MILLER: They do not?

21 DR. HARDEN: That is correct.

22 CHAIRMAN MILLER: Mr. Petramalo, do you have any
23 questions --

24 well, do you want Dr. Harden to continue further?

25 MR. PETRAMALO: No, continue on, Doctor, go ahead.

1 CHAIRMAN MILLER: Why don't you give your full
2 testimony now so that Mr. Petramalo can then cross-examine
3 you or have the opportunity to cross-examine you?

4 MS. DILWORTH: would you like to swear the
5 witness?

6 CHAIRMAN MILLER: Let me ask him first. Well, you
7 go ahead and swear him in, then I'll ask him a question to
8 clear it up.

9 NOTE: The witness is sworn.

10 **DR. RICH HARDEN**, called as a witness before the
11 Commission, first being duly sworn, testifies and says, viz:

12 **EXAMINATION**

13 **BY CHAIRMAN MILLER:**

14 Q Now, Dr. Harden, you had previously made comments
15 on the record prior to being sworn due to my negligence. I
16 thank counsel for pointing that out.

17 As to the statements you previously made before
18 being sworn, do you swear to tell the truth, the whole
19 truth, and nothing but the truth, so help you God?

20 A Yes.

21 Q Okay.

22 A First, I would like to comment that the method
23 they described with the buckets, the Red Cell and the powder
24 is a perfectly reasonable explanation, which I would not
25 contest. I think that's a perfectly logical explanation of

1 how the medication got into the horse's system.

2 Second, I'm good friends with Dr. Tobin. In fact,
3 he and I have co-authored papers, and so I don't question or
4 refute his expert opinions in this field.

5 Probably where we have the issue is when we get
6 down into talking about thresholds of substances as to whe-
7 ther the Commission wants to establish a threshold level of
8 some two or three thousand substances that we could potent-
9 ially come across, and then the penalties related to it.

10 The threshold is a real sticky area to get into
11 determining whether or not a particular number had an effect
12 on a race. I think when you look at the national picture,
13 we're getting into a very gray area, because I think nation-
14 ally the drugs in race horses is a headline all across the
15 country, and I don't think we want to get in a situation of
16 saying, well, we'll allow a little bit of this and a little
17 bit of that and a little bit of this regardless of how it
18 appeared.

19 My second concern is in establishing the penal-
20 ties. RCI has a penalty category system that they have
21 determined, and several years ago when the Racing Commis-
22 sion, Virginia Racing Commission was establishing its pen-
23 alty levels, we had a commission and staff that were of a
24 zero tolerance opinion, and as a result, some of the penal-
25 ties in our Virginia regulations far exceed the penalty

1 recommendations that RCI has come out with, and I think this
2 is a huge part of the basis of this case is the penalty.
3 We're not disputing whether or not the medication was in the
4 horse, we're just disputing the penalty. And so I think
5 this is something that the Commission needs to address in
6 the future with our medication rules.

7 I think to specifically answer Commissioner
8 Reynolds' question of how often a feed mix-up occurs, we had
9 11 positive cases for the summer meet from nine different
10 horses. Two of those were a mix-up in the feed, at least as
11 alleged by the trainers. And in response to Mr. Cockburn's
12 comment about Chinese herbs, one of these positives was an
13 herbal product. Herbal products are drugs. All of our
14 drugs comes from plant products or chemically manufactured
15 plant products, so you can't just willy-nilly use herbs in
16 horses and think that, oh, there's nothing in there, because
17 there is.

18 Further, there has been research that's deter-
19 mined that in about 25 percent of the herbs imported from
20 China, they contain manufactured medications that are put in
21 the herbs so that they will work, and you think you're get-
22 ting something for the money you spend on the herbs. So I
23 strongly contend that we need to not turn our back and just
24 allow herbs to be given to race horses thinking that there's
25 nothing there.

1 I think that's probably the gist of my comments.
2 One last comment. The Tri-Hist -- essentially a
3 dose of Tri-Hist has eliminated from the horse within about
4 24 hours, so I would speculate that the mix-up of this prob-
5 ably occurred the night before the race. This was an after-
6 noon race, so my speculation is that the feed mishap occur-
7 red that evening, although that wasn't in their testimony.
8 So that it was within the 24 hour zone there that it was
9 used. I don't think it would have been detected further out
10 than that.

11 Q Is that your testimony? Do you have anything
12 further?

13 A Yes, sir.

14 CHAIRMAN MILLER: Mr. Petramalo?

15 **CROSS-EXAMINATION**

16 **BY MR. PETRAMALO:**

17 Q Dr. Harden, one example of what you were talking
18 about I think in the difference between the RCI-recommended
19 penalties and the Virginia penalties appeared in this case,
20 did it not?

21 A Yes.

22 Q The RCI-recommended penalty for the trainer was a
23 \$500 fine, and under our regulations, it's \$2500?

24 A That is correct.

25 MR. PETRAMALO: I have no further questions.

1 CHAIRMAN MILLER: Do you have any further
2 witnesses for the stewards?

3 MR. HETTEL: No, sir.

4 CHAIRMAN MILLER: Do you have any further
5 questions for Dr. Harden?

6 MR. HETTEL: No, sir, I do not.

7 CHAIRMAN MILLER: So both parties have presented
8 their cases and have rested?

9 MR. PETRAMALO: Yes.

10 CHAIRMAN MILLER: Now I have a question, Mr.
11 Petramalo. On page 212 of your Tab 5 in your --

12 MR. PETRAMALO: Yes, I'm with you, sir.

13 CHAIRMAN MILLER: Fortuitously, I see something
14 underlined there under disciplinary action.

15 MR. PETRAMALO: Not fortuitous. I did that.

16 CHAIRMAN MILLER: I figured such.

17 It says -- and it's interesting -- it says in
18 issuing penalties against individuals found guilty of medi-
19 cation and drug violations, a regulatory distinction shall
20 be made between the detection of therapeutic medications
21 used routinely to treat race horses and those drugs that
22 have no reason to be found in any concentration in the test
23 sample on race day, and I assume that by your underlining
24 this, you wanted to try to focus attention on that particu-
25 lar --

1 MR. PETRAMALO: Yes, Mr. Chairman. As I said in
2 the opening, the purpose of our rules is to punish cheaters,
3 and cheaters are people who put drugs in a horse that have
4 no business being in a horse; they're not therapeutic. And
5 that's what our rule says. I mean that's basically it. So
6 you have to distinguish between something clearly illegal,
7 clearly cheating -- cobra venom -- and a therapeutic medi-
8 cation. And as I said before, what we have in this case is
9 an amalgam of things: we have accidental and unintentional
10 administration of a portion of a therapeutic medication
11 which resulted in a trace level of the medication being
12 found in the serum and the urine when we sent it off to
13 Florida, and Dr. Tobin's conclusion, uncontested, is that
14 the level was too small to have had any effect on the out-
15 come. So that's putting together our whole case.

16 CHAIRMAN MILLER: Any Commissioners have any
17 questions of Mr. Petramalo or the Petitioner or of Dr.
18 Harden or Mr. Hettel?

19 NOTE: There was no response.

20 CHAIRMAN MILLER: Let me run something by you,
21 Dr. Harden on the -- you indicated that we're treading on
22 dangerous ground when we look at a medication in a race
23 horse and determine that a small, trace amount might be
24 overlooked by the Commission and say, well, that's okay.
25 Is that what you said?

1 DR. HARDEN: In essence, yes, sir.

2 CHAIRMAN MILLER: On page -- on page -- if you
3 look at the Petitioner's list of exhibits and you go to Tab
4 5, page 210, which is the first page in Tab 5 and start
5 there, that is a duplication, apparently, which is apparent-
6 ly accurate of the rule. Under medications and prohibited
7 substances, I gather Class 1 -- that certainly states that
8 these substances should never be found in a horse's system,
9 period, end of story, right?

10 DR. HARDEN: (Nodding head indicating in the
11 affirmative).

12 CHAIRMAN MILLER: Class 2, these substances have a
13 high potential to affect the outcome of a race, but most are
14 not generally accepted as therapeutic agents in the race
15 horse and have no approved or indicated use in the horse.
16 So that's pretty clear, end of story.

17 So if you've got a Class 1 or a Class 2
18 medication, I would certainly agree with your previous com-
19 ment.

20 A Class 3 substance, however, they don't -- the
21 rule isn't as explicit about the finality of finding a trace
22 amount. It says substances found in this class may or may
23 not have an accepted therapeutic use in a horse, but have a
24 potential for enhanced performance, as Mr. Petramalo pointed
25 out. It doesn't have any other language to indicate that it

1 should never be found in a horse. It says their presence in
2 a horse's system is prohibited on race day because they have
3 a potential to enhance performance.

4 And then Class 4 substances are routinely used
5 in race horses and they may influence performance, but they
6 generally have a more limited ability to do so.

7 what I'm getting at is the rules -- the rules
8 themselves have a clear differentiation between the serious-
9 ness of a Class 1 or a Class 2 as compared to a Class 3 or a
10 Class 4 medication, and I'm trying to determine in my own
11 mind whether we are -- whether we, as a Commission -- I
12 would ask Mr. Hettel and Mr. Petramalo, I'd like to hear
13 your comment -- are we as a Commission bound to determine
14 that even an absolute, almost infinitesimal -- I can't pro-
15 nounce that -- anyway, I came close -- amount of a drug in a
16 system indicates to the Commission that we must determine as
17 a Commission, and the stewards must determine as stewards,
18 that no matter how small the trace, no matter how it got
19 there, that that is a violation which merits penalties,
20 whatever the penalties are? Is that what our rules say, Mr.
21 Hettel?

22 MR. HETTEL: Yes, sir. I think that the
23 complication gets to be this Commission aligned itself with
24 the model rules of the RCI. Within that, this document that
25 Frank has submitted is publicized in our rule book. Within

1 that, the previous Commissioners and the previous Executive
2 Secretary took a pretty stern view of a violation. I'll
3 refer back to -- this was found in a sufficient amount, even
4 though I think we can say it was a mistaken administration,
5 there's no doubt given the testimony this morning that it
6 was a mistake. But nonetheless, Mr. Cockburn's responsible
7 for his horse; he's responsible for the fellow who mixes the
8 feed, he's responsible for the guy who put it in for the
9 horse to eat.

10 It gets to be the point again at what point does
11 the Commission say we can set that all aside because it was
12 a mistake? well, if you had an accident driving in here
13 this morning, you didn't wake up this morning and saying I'm
14 going to have an accident. And therein lies the complicat-
15 ion of the regulatory body that you sit on. At what point
16 do you set anything aside and say, well, we're sympathetic
17 to the situation simply because it was a mistake and we want
18 to set this aside? what do you do on the next one that may
19 be just one more level up or one more level down, but none-
20 theless it wasn't a deliberate administration? The com-
21 plication is that in jurisprudence, how do you decide what's
22 important?

23 CHAIRMAN MILLER: And your bottom line is that
24 the negligence of the trainer/owner in this case by allowing
25 this to be susceptible to be in the horse's system because

1 of the feeding process --

2 MR. HETTEL: Yes, sir.

3 CHAIRMAN MILLER: -- went through, that he should
4 be answerable to that?

5 MR. HETTEL: Yes, that's it. Very good.

6 CHAIRMAN MILLER: Dr. Harden?

7 DR. HARDEN: Well, I wanted to specifically answer
8 your question: There is a paragraph towards the latter part
9 of the medication chapter, and I'm sorry I don't have it in
10 front of me, but it states that the stewards have the option
11 to determine a laboratory report as positive or negative.
12 In other words, a chemical identification, if the stewards
13 have reason to -- and again I don't have the exact wording
14 in front of me, but it does give the stewards the leeway to
15 hold a laboratory finding positive or negative.

16 CHAIRMAN MILLER: So even though it is definitely
17 a positive because it's there, they can determine that it's
18 not a positive for the legal purposes that the stewards ac-
19 cepted it?

20 DR. HARDEN: That's correct.

21 CHAIRMAN MILLER: Because it's such a small amount
22 that they will deem it not positive for their purposes?

23 DR. HARDEN: Yes.

24 MR. SIEGEL: And thus, this Commission has that
25 same right?

1 CHAIRMAN MILLER: If that's the case.

2 MR. SIEGEL: If that's the case.

3 DR. HARDEN: I would like to get an exact copy of
4 that.

5 CHAIRMAN MILLER: Well, would you get it, please?

6 DR. HARDEN: Yes, I will.

7 MR. PETRAMALO: I can get you a copy.

8 MR. HETTEL: While you're on that point, may I ask
9 Amy, that under the broad plenary powers of this Racing Com-
10 mission that they can take action that way?

11 MS. DILWORTH: Are you asking me for legal advice
12 on the record?

13 MR. HETTEL: I am indeed.

14 MS. DILWORTH: What's the question again?

15 MR. HETTEL: The necessity for this Commission to
16 enforce the rules is -- do they possess the broad plenary
17 power to set it aside?

18 CHAIRMAN MILLER: To do what now?

19 MR. HETTEL: Well, I think Commissioner Siegel,
20 unless I'm missing it, posed a question of the power base
21 for the Racing Commission to set --

22 MR. SIEGEL: Well, what I was really asking is
23 that Dr. Harden said that the stewards have the right to set
24 aside and determine whether or not the violation warrants --

25 MR. HETTEL: Well, with all due respect to the

1 administrative record of the rule, I don't think any steward
2 in America is equipped to do that.

3 MR. SIEGEL: Okay, I was just saying whatever
4 power the stewards have, do we have the same power on appeal
5 is the question I was really asking. So let's find out what
6 the power of the stewards is.

7 MS. DILWORTH: Mr. Siegel, to answer your
8 question, this is a review that is a de novo review. That
9 means that you can consider everything that the stewards
10 considered at their hearing and any new and additional evi-
11 dence that is presented to you today, and you have the
12 authority to substitute your judgment for that of the
13 stewards in the case.

14 MR. SIEGEL: I think that answered my question,
15 and what counsel has presented -- has stated is there's some
16 evidence here that wasn't presented to the stewards at the
17 time of the hearing.

18 MR. PETRAMALO: Yes, that's Dr. Tobin's opinion
19 that it has no effect.

20 MR. SIEGEL: So there is some additional testimony
21 that wasn't given to them that we have the advantage of
22 hearing?

23 MR. PETRAMALO: Yes.

24 CHAIRMAN MILLER: Dr. Harden, did you find your
25 reference? It would be interesting to get that on the

1 record.

2 DR. HARDEN: This is Chapter 180 of our Code,
3 Section 110, paragraph F-5, and it says after receiving the
4 appropriate information on the identified substance, the
5 stewards shall determine whether the chemical indentifi-
6 cation constitutes a violation of the regulations of the
7 Commission and whether it should be deemed a positive test
8 result. In doing so, the stewards are to consider, among
9 other things, the concentration level reported, it's likely
10 effect on the horse, and whether environmental contamination
11 may they contributed to the test result.

12 CHAIRMAN MILLER: Well, I must say that that
13 addresses the concern that I voiced earlier about whether
14 the Commission, in light of a finding of a very small amount
15 of substance in a horse -- whether the Commission then would
16 have the ability to make a determination itself as to whe-
17 ther or not such a small concentration effectively would --

18 MR. SIEGEL: Constitute?

19 CHAIRMAN MILLER: -- I can't think of the word
20 now. Mess up the race. In other words, whether the race
21 decision should be aborted because of such a small amount,
22 and apparently from that language, the stewards could say
23 that even though there was a trace of something, they can
24 deem it not positive for the purposes of determining it's
25 effect on the race. And of course, if the stewards can do

1 that, ergo, of course the Commission can do that. That's
2 the point I was trying to make earlier.

3 That's not to say that's the decision I would make
4 in this case, but at least we have the ability to do that if
5 we wish to.

6 MR. SIEGEL: Right, and the stewards did not see
7 Dr. Tobin's report, correct?

8 MR. PETRAMALO: That's correct.

9 MR. SIEGEL: So they didn't have the benefit of
10 that. Not that the whole case was based on that, but that's
11 a piece of evidence that could have caused the stewards to
12 act differently.

13 CHAIRMAN MILLER: Okay, now, anyone? Mr. Hettel,
14 do you have anything further?

15 MR. HETTEL: I'm done.

16 CHAIRMAN MILLER: Dr. Harden, do you have anything
17 further?

18 DR. HARDEN: (Shaking head indicating in the
19 negative).

20 CHAIRMAN MILLER: Mr. Petramalo, anything further?

21 MR. PETRAMALO: Just to kind of summarize the
22 problem that Bernie referred to -- that is, we've been talk-
23 ing about finding one molecule. Let me just read to you
24 from one of Dr. Tobin's publications, and I think Dr. Harden
25 was attempting to make the same point, or did make the same

1 point.

2 It says Dr. Tobin, as the co-author, says the in-
3 creasing sensitivity of drug-testing techniques and instru-
4 mentation brings with it the problem of detecting more and
5 more minute traces of drugs, including therapeutic medicat-
6 ions used legitimately and appropriately to protect the
7 health and welfare of the horse, traces that are clearly
8 pharmacologically and forensically irrelevant. As such, the
9 extremely high sensitivity of current analytical techniques
10 has created significant problems and perhaps has made the
11 so-called zero tolerance concept or approach to equine drug
12 testing irrational and irrelevant when applied to therapeu-
13 tic medications.

14 Do you you agree with that, Doctor?

15 DR. HARDEN: Essentially, yes.

16 CHAIRMAN MILLER: Thank you.

17 Do you have anything further?

18 MR. PETRAMALO: No, sir.

19 CHAIRMAN MILLER: Now, I have a question of our
20 counsel.

21 Now, in past quasi-judicial and judicial bodies
22 I've served on, we would have the opportunity to recess and
23 discuss the matter among ourselves as to what determination
24 we should make on the evidence presented.

25 Do we have that opportunity here, or must we do

1 all of our consultation in open meeting?

2 MS. DILWORTH: If you decide that you need to
3 request legal advice, then that would be appropriate grounds
4 for a closed meeting. If you do not, then in any event,
5 your deliberations should be on the record.

6 CHAIRMAN MILLER: All right. Well, we're going to
7 have to -- we'll go into --

8 Now, to go into a closed session, do we have to go
9 through the routine?

10 MS. DILWORTH: Yes.

11 CHAIRMAN MILLER: All right, for legal advice.

12 I'll tell you the legal advice that we're seeking
13 here is are we -- what is the extent of or authority relat-
14 ing to addressing a determination made by the stewards in
15 their penalties that they imposed and in the findings that
16 they made.

17 So in accordance with the provisions of Section
18 2.2-3711 (A)(7) of the Code of Virginia, I move that the
19 Commission go into a closed meeting for the purpose of con-
20 sultation with legal counsel employed or retained by the
21 Commission regarding specific legal matters requiring the
22 provision of legal advice by such counsel.

23 Mr. Reynolds?

24 MR. J. SERGEANT REYNOLDS: Yes, aye.

25 CHAIRMAN MILLER: Mr. Reynolds?

1 MR. REYNOLDS: Yes.

2 CHAIRMAN MILLER: Mr. Siegel?

3 MR. SIEGEL: Aye.

4 CHAIRMAN MILLER: The Chairman votes aye.

5 we'll try to make this as quick as possible. I
6 apologize to everyone else for this taking so long, but it
7 is very important, as are most of these matters, and it's
8 very important to especially Mr. Cockburn who is affected by
9 the decision.

10 Thank you, we'll be back as soon as we can.

11 NOTE: The Commission goes into closed session at
12 10:49 a.m. and is reconvened at 11:29 a.m. as follows:

13 CHAIRMAN MILLER: I move the adoption of the
14 following resolution: I hereby certify that the Virginia
15 Racing Commission was convened in a closed meeting on this
16 date pursuant to the Virginia Freedom of Information Act,
17 and wherein, pursuant to Virginia Code Section 2.2-3712, to
18 the best of each member's knowledge, only public business
19 matters lawfully exempted from open meeting requirements
20 under this chapter, and only such public business matters as
21 were identified in the motion by which the closed meeting
22 was convened were heard, discussed, or considered by the
23 Commission in the closed meeting.

24 Do you agree, Mr. Siegel?

25 MR. SIEGEL: Yes, aye.

1 CHAIRMAN MILLER: Mr. Reynolds?

2 MR. REYNOLDS: Yes, aye.

3 CHAIRMAN MILLER: And I vote aye. The other
4 Mr. Reynolds is absent without leave.

5 Anyway, we've got three votes, it doesn't matter.

6 All right. Now, we received legal advice
7 regarding A, the parameters of what we can or can't do; and
8 B, the status of the case and the nature of this hearing,
9 which as pointed out by counsel for the Petitioner that it
10 is de novo, the Commission is going to make a decision here
11 in public.

12 I don't know what the other Commissioner's are
13 going to do, and I don't know what I'm going to do, but I'm
14 going to do it last.

15 But in any event, I do want to point out for the
16 record that the affidavit of Dr. Tobin was received in evi-
17 dence without objection. Dr. Tobin's testimony was unquest-
18 ioned, unrebutted. Did I understand correctly, Mr. Petra-
19 malo, that the Florida lab result -- was that presented to
20 the stewards, or did that come after the stewards?

21 MR. PETRAMALO: No, that was presented to the
22 stewards.

23 CHAIRMAN MILLER: That was presented to the
24 stewards?

25 MR. PETRAMALO: It never showed up until -- the

1 hearing was on the 30th; I got copy on the 30th. The report
2 was dated the 28th. All of these are July dates, so --

3 CHAIRMAN MILLER: But it was put before the
4 stewards before they made their determination?

5 MR. PETRAMALO: Yes.

6 CHAIRMAN MILLER: So the item of evidence that was
7 not received by the stewards was Dr. Tobin's affidavit?

8 MR. PETRAMALO: That's correct.

9 CHAIRMAN MILLER: All right, and I think the
10 Commission is ready to make a determination regarding this,
11 and we'll begin with Commissioner Siegel.

12 MR. SIEGEL: I drew the short straw, I guess.

13 It's my feeling that certainly Mr. Cockburn is
14 ultimately responsible for the condition of his horse. I
15 think it's clear, as with any trainer. But as the Chairman
16 points out, the Commission had the benefit of testimony and
17 evidence that was not -- that the stewards did not have, and
18 I believe that based on that testimony, as well as what I
19 heard here, I believe that the trace amounts found in this
20 particular sample did not constitute a violation, and thus,
21 I would personally vote to overturn the stewards' recommend-
22 ation.

23 CHAIRMAN MILLER: Commissioner David Reynolds?

24 MR. REYNOLDS: I agree with that, and I note that
25 I'm glad you drew the short straw.

1 The evidence received after the hearing, and also
2 pursuant to the regulations we've got, the stewards can take
3 into consideration the concentration of the kind of drugs in
4 this case, and therefore, we have the same rights. So I
5 support Mr. Siegel's position.

6 CHAIRMAN MILLER: Commissioner Sergeant Reynolds?

7 MR. J. SERGEANT REYNOLDS: Thank you, Mr. Chair-
8 man.

9 You know, while I, you know, I hold you
10 responsible for the condition of your horse, and we heard
11 the expert testimony today, and while, you know, I respect
12 the stewards for what they have done and what their recom-
13 mendations were, you know, it's very hard to vote on some-
14 thing like this, but when I look at the class of violation,
15 I guess, a Class 3 that talked about the potential for
16 having an effect on the outcome of the race, you know,
17 that's what I really look at; and when you look at the trace
18 amount of what was in there, and I know it was put in there
19 by accident -- I absolutely believe that -- I would encour-
20 age you -- hopefully you've changed your protocol on how you
21 feed your horses in the future, I'm sure you've already made
22 that decision, but I'm going to agree -- it's hard to do it,
23 but I'm going to agree with the other two commissioners who
24 have voted so far that I think this should be overturned,
25 but not lightly on my part. But I am voting with Commis-

1 sioners Reynolds and Siegel to vote to overturn the stew-
2 ards' recommendation and finding.

3 CHAIRMAN MILLER: Thank you, Commissioner
4 Reynolds.

5 Before I comment, I would like for our counsel to
6 read the responsibility of the stewards relating to those
7 test results.

8 MS. DILWORTH: Mr. Chairman, I need to locate it.
9 I apologize, I don't have it on --

10 CHAIRMAN MILLER: Well, that's all right. I'll
11 try to --

12 MS. DILWORTH: We can certainly restate it into
13 the order that will be entered in this case.

14 CHAIRMAN MILLER: I would like for it to be.

15 MS. DILWORTH: This is regulation 11 VAC
16 10-180-110, laboratory findings and reports, section F-5,
17 which states, quote, after receiving the appropriate in-
18 formation on the identified substance, the stewards shall
19 determine whether the chemical identification constitutes a
20 violation of the regulations of the Commission, and whether
21 it should be deemed a positive test result. In doing so,
22 the stewards shall consider, among other things, the con-
23 centration level reported, it's likely effect on the horse,
24 and whether environmental contamination may have contributed
25 to the test results, end quote.

1 CHAIRMAN MILLER: Thank you.

2 In light of that, it seems to me that this
3 Commission in its finding here today, and even without my
4 vote so far, by three -- the opinion voiced by the three
5 previous Commissioners, that it does nothing to take away
6 the seriousness of the medication problem in race horses.

7 Because the stewards and this Commission are not
8 bound to find that there was a negative effect on the race
9 if a very small trace of that medication is found in a
10 horse, and in fact, from the evidence before us in this
11 case, the contract laboratory itself contracted by this
12 Commission makes a determination about whether or not
13 there's a positive finding -- not based upon whether or not
14 there was a small trace of medication in a horse, but whe-
15 ther or not there was a trace enough of medication that in
16 their opinion that it should be deemed positive, so the fact
17 that there's a small trace there is not in and of itself a
18 positive finding, it's a subjective determination made by
19 the laboratory as to whether or not this should be deemed
20 positive that carries forward to the stewards themselves,
21 according to the language just recited by counsel, that even
22 though there is a trace of medication in the race horse that
23 it can be deemed not positive by the stewards themselves
24 because it is of such small consequence.

25 The language says that the stewards shall consider

1 the concentration level. why would they be mandated to con-
2 sider the concentration level of a medication if any level
3 was determinative of whether or not there was a violation?
4 That wouldn't make sense.

5 And also, they shall consider the likely effect
6 on a horse, and if it was such a small amount of medication,
7 they could go further and say it likely would not have af-
8 fected the horse in this race.

9 There's no doubt that the trainer/owner had some
10 negligence involved in his feeding process. My opinion cor-
11 responds with that of Commissioner Siegel and Commissioners
12 Reynolds that in this case, the stewards' decision should be
13 overturned by this Commission in this de novo hearing. But
14 I must point out for the record that the stewards did not
15 have the benefit of this affidavit of Dr. Tobin, and as I
16 said before, unquestioned, unrebutted testimony that I think
17 that had the stewards had it, that perhaps they would have
18 made a different ruling in this case.

19 So that's the determination of the Commission.
20 We'll put this in a written order which will be sent to
21 counsel, and hopefully posted on our website if it's re-
22 quested, if anyone requests the same, and it will contain
23 all of what each Commissioner has recited, and hopefully it
24 will be satisfactory, and I would ask counsel and our Exe-
25 cutive Secretary to review a draft of the order before it's

1 put in it's final form so that it does adequately express, I
2 hope, what sometimes I'm unable to do off the cuff -- ex-
3 press it thoroughly and completely, and that it will be a
4 ruling that, as I say, should not derogate from our belief
5 that medication in the racing industry is something that has
6 to be very closely scrutinized, and we take very seriously
7 the injection of medication into the horses.

8 But this points out very clearly, as in cases
9 regarding human beings, each case is different. Each case
10 that comes before any court or any Commission is an individ-
11 ual case unique in its circumstances. No matter how the
12 public may view all crime being the same, all immoral act-
13 ions being the same, they're all different. They're all --
14 each case has to stand and rise on its own individual merit,
15 as this case, I think Mr. Cockburn through his testimony and
16 through the testimony of his witnesses and the efforts of
17 his counsel have shown that's why cases have to be viewed
18 that way. They're all individual cases.

19 Thank you, and that's the end of the hearing.

20 MR. PETRAMALO: Thank you. We appreciate your
21 consideration and your ruling.

22

23

24

HEARING CONCLUDED

25

1 STATE OF VIRGINIA,
2 COUNTY OF NEW KENT, to-wit:

3

4 I, Roy Garrison Wood, a Notary Public for the
5 State of Virginia at Large, do hereby certify that the
6 foregoing hearing was duly taken and sworn to before me at
7 the time and place set out in the caption hereto.

8 Further, that the transcript is, to the best of
9 my ability, a true and correct record of the proceedings,
10 and that there were -- exhibits marked during the taking
11 hereof.

12 Given under my hand this 3rd day of October, 2011.

13

14

15

16

ROY GARRISON WOOD, RPR, CP
Notary Public for the State of Virginia at Large

17

18

19 Notary Registration Number: 198565

20 My Commission expires:

21 November 30, 2011

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