STANDARDBRED OWNERS ASSOCIATION OF NEW YORK

TO: Hon. John Bonacic
Chair, NYS Senate Racing & Wagering Committee

SEP 16 2011

Hon. Joseph Griffo
Member, NYS Senate Racing & Wagering Committee

Hon. Roy McDonald
Member, NYS Senate Racing & Wagering Committee

CC: Hon. Gary Pretlow
Chair, NYS Assembly Racing & Wagering Committee

FROM: Joe Faraldo
President, SOA of NY

DATE: September 13, 2011

RE: Follow-up to questions regarding lawsuit on out-of-competition testing

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I want to thank you again for the opportunity to testify at last week's Senate hearing on the proposed constitutional amendment. While I am confident that my submitted testimony on that important issue accurately identified the horsemen's position for the record, there was another issue discussed during questioning after my testimony – the recent legal case involving the NYS Racing & Wagering and out-of-competition testing – that I believe requires further clarification.

Quite frankly, we are grateful that you asked about the case, because clearly the upstate track owner who apparently raised the issue of drug testing in horse racing at your September 6th hearing unfairly characterized both the overall issue and, more specifically, the lawsuit brought against the Racing & Wagering Board.

First and foremost, you should know that there is no group of individuals with a more compelling and direct interest in protecting the integrity of horse racing than the horsemen. The security of our financial investments in this sport – from horses to farms to equipment – is directly related to ensuring that racing is conducted fairly and legally, and therefore we have every interest in making sure that racing is as well-regulated as possible. Any inference that the horsemen believe differently – whether it is specifically related to drug testing or any other regulatory requirement – is both unfair and simply not grounded in this factual reality.

Within this important context, we have sought to work closely and constructively with the Racing & Wagering Board on a wide range of regulatory issues. Unfortunately, on this particular issue (which we acknowledge was well intentioned, but badly handled), the Board chose not to work with us. As you can see from the below copied footnote #3 (page 3) from the judge's decision (which we have attached), we horsemen simply sought input into the regulatory/rule-writing process, but our efforts were completely ignored by the Board and the new, unrealistic, unworkable regulations were subsequently put in place arbitrarily:

"On or about June 24, 2008, the Board solicited SOA's review and comments to an earlier draft version of the OCTR's [out-of-competition testing rules]. On or about July 3, 2008, SOA conveyed to the Board, in writing, various criticisms of the proposed regulations, which largely mirror petitioner's arguments herein. The Board did not thereafter reply to petitioner's concern. The next information the petitioners received was the pronouncement that the OCTR's had been adopted by the Board."

It is also extremely important to point out that the court's decision (page 3) strongly reinforced our earlier point about the horsemen's commitment to integrity in our sport and our understanding of the importance of drug testing:

"It is vital to comprehend, at the outset, that none of these parties are opposed to equine drug testing. All parties concur that drug testing is essential to the integrity of the harness horse racing industry, the betting public's confidence, and the health of race horses."

In light of these facts, you can see why we believe it is outrageous that the owner of Tioga Downs would seek to create the impression that the SOA of New York and other harness horsemen are not concerned about helping to resolve any issues with drugs in our sport. Furthermore, his suggestion that illegal drugs are an "epidemic" in harness racing is hyperbole of the worst sort, as it has absolutely no basis in objective fact.

I have attached for your review an article summarizing a new report that was just released by the National Association of Racing Commissioners International, which is the organization representing regulators across both thoroughbred and harness racing nationally. I would call your attention to the very first paragraph, which makes it clear that there is absolutely no evidence to support such sensational claims about an "epidemic" of drugging incidents affecting the integrity of racing:

"With very few exceptions, ***almost all race horses tested for drugs are found to be clean, a fact that undermines the credibility of those who peddle the perception that racing has an out of control drug problem,"*** *RCI President Ed Martin said today in releasing an RCI report entitled Drugs in Racing 2010-The Facts.*

NOTE: Also, in terms of setting the formal record straight, I believe I mentioned a statistic at the hearing of "less than 2% of horses racing in the US who tested positive." I am pleased to report that it turns out that the actual number, as per this regulators' report, is, in fact, only "0.015 percent of all samples tested."

Once again, Senators, I can only speculate why the owner of Tioga Downs would besmirch the racing industry – and in light of the facts and the judge's decision, it is obvious that these accusations are irresponsible and should call his own credibility into question – but I am grateful for the opportunity to address this issue again in greater detail.

As always, should you ever have any questions about this or any other matter related to harness racing in New York State, please don't hesitate to call me at 718-544-6800 or our lobbyist, Joni Yoswein, at 212-233-5700. Thank you for letting me set the record straight on this important issue and for your continued interest in our industry.

Bloodhorse.com

RCI Drug Report: Doping Not Out of Control

By Blood-Horse Staff

"With very few exceptions, almost all race horses tested for drugs are found to be clean, a fact that undermines the credibility of those who peddle the perception that racing has an out of control drug problem," RCI president Ed Martin said Sept. 8 in releasing an RCI report entitled "Drugs in Racing 2010—The Facts."

According to the report, in 2010 U.S. racing regulators sent 324,215 biological samples to a network of professional testing labs that utilized standards more stringent than those used for the Olympics. More than 99.5% of those samples were found to be clean.

"Despite the fact that racing regulators test for more substances with greater sensitivity than any other sport, less than one-half of one percent of all tests detected a substance not allowed to be in the horse on race day," Martin said.

The RCI report also shows that instances of "horse doping" are rare, representing 0.015% of all samples tested. The 10-year trend for findings that might be characterized as doping has remained flat, while there has been a decline during the past decade in the number of therapeutic overages that have resulted in regulatory action. Total medication actions in 2010 were 20% less than 2001, although RCI noted it was not prepared to describe it as a trend.

"Racing, like other sports, has a drug challenge," Martin said. "We cannot lessen our efforts because there are a relative few who will attempt to circumvent the rules for their own purposes. Our commissions, labs, and research centers need adequate resources if we are to remain current and prepared as new substances emerge and find their way to the backstretch." Martin contends that the reality of the drug testing program is often misunderstood and mischaracterized.

The RCI report notes that equine care has evolved to be more medication-reliant in the same way human care has. Racing commission data shows that in those rare instances when a violation of a medication rule does occur, most were associated with a legal substance administered in the normal course of equine care by a licensed veterinarian and cannot be characterized as "horse doping" or as indicative of a "drugging".

United States Trotting Association News

RCI: Racing's drug 'problem' overstated

Thursday, September 08, 2011

by Steve May
Vice President and Business Manager, Association of Racing Commissioners International

Lexington, KY --- "With very few exceptions, almost all race horses tested for drugs are found to be clean, a fact that undermines the credibility of those who peddle the perception that racing has an out of control drug problem," RCI President Ed Martin said today in releasing an RCI report entitled Drugs in Racing 2010-The Facts.

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SCHENECTADY

PRESENT: **HON. MARK L. POWERS**
ACTING SUPREME COURT JUSTICE

In the Matter of the Application of

MARK FORD, RICHARD BANCA, JOHN BRENNAN, GEORGE CASALE, and STANDARDBRED OWNERS ASSOCIATION, INC.,

Petitioners,

-against-

THE NEW YORK STATE RACING AND WAGERING BOARD,

Respondent,

Pursuant to Article 78 of the Civil Practice Law and Rules.

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JUDGMENT
Index #2010-0303
RJI #46-1-2010-0285

2010-322

NOTICE: **PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN THIRTY DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103(b), SUBDIVISIONS (2)or(6), THE ADDITIONAL DAYS PROVIDED BY SUCH PARAGRAPHS SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.**

APPEARANCES:

Meyer, Suozzi, English & Klein, P.C., 990 Stewart Avenue, Suite 300, P.O. Box 9194, Garden City, New York 1153-9194; (Andrew J. Turro, Esq., of counsel) Attorney for Petitioners, Mark Ford, Richard Banca, John Brennan, George Casale, and Standardbred Owners Association, Inc.

Office of New York State Attorney General Andrew M. Cuomo, The Capitol, Albany, New York 12224-0341; (Christopher W. Hall, Esq., Assistant Attorney General, of counsel), Attorney for Respondent, New York State.

The New York State Racing and Wagering Board, 86 Chambers Street, Suite 201, New

York, New York 10007 (Robert A. Feuerstein, Esq., of counsel), Attorney for Respondent, New York State Racing and Wagering Board; and The New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305; (Rick Goodell, Esq., Assistant Counsel, to the New York State Racing and Wagering Board), Attorney for Respondent, the New York State Racing and Wagering Board.

PAPERS CONSIDERED:

Petitioner's Submissions :

Order to Show Cause filed January 14, 2010, together with annexed Verified Petition dated January 4, 2010, together with exhibits A-I and Turro Affirmations in Support dated January 4, 2010 and January 6, 2010, Casale Affidavit in Support dated January 4, 2010, Brennan Affidavit in Support dated January 4, 2010, Ford Affidavit in Support dated January 5, 2010, Banca Affidavit in Support dated January 4, 2010, and all attachments thereto; Faraldo Affidavit filed January 14, 2010, together with exhibits A-C; Order to Show Cause filed January 26, 2010, together with Turro Emergency Affirmation dated January 19, 2010, exhibits A-E, and all attachments thereto; Notice of Motion filed February 16, 2010; Turro Affirmation in Opposition filed February 16, 2010, together with exhibits A-E; Turro Affirmation in Support filed February 16, 2010, together with exhibits A-E; Turro Reply Affirmation dated October 10, 2010 together with exhibits A-E; Turro Reply Affirmation dated October 12, 2010 together with exhibits A-F; Foreman Affidavit dated October 7, 2010, DiCocco Affidavit dated October 11, 2010, Hunt Affidavit dated October 12, 2010, Stewart Affidavit dated October 11, 2010, together with exhibits A-B and all attachments thereto; Foreman Affidavit in Further Support dated October 25, 2010, together with exhibits A-B; and Turro correspondence dated October 27, 2010.

Respondent's Submissions:

Harkins Affirmation in Support filed February 16, 2010; Feuerstein Affirmation in Support filed February 16, 2010 together with exhibits A-G; Answer dated September 17, 2010 together with exhibits A-F; Goodell Affirmation in Support and Opposition dated September 17, 2010; and Marlin Affidavit dated October 14, 2010.

Court File:

Transcript of Proceedings held January 7, 2010, Supreme Court, New York County, Hon. Eileen A. Rakower presiding; Justice Rakower Decision and Order entered February 16, 2010; So-Ordered Stipulation dated June 9, 2010; and So-Ordered Stipulation dated September 21, 2010.

COUS Book 354 Page 760
Doc No 2011-2086

POWERS, J.

In this Article 78 proceeding in the nature of prohibition, the petitioners, who are stakeholders in the harness horse racing industry, being owners, trainers and/or private farm owners stabling race horses, as well as members of the Standardbred Owners Association, Inc., a not-for-profit horsemen's organization (hereinafter, "SOA"),[1] challenge regulations promulgated by the respondent, the New York State Racing and Wagering Board (hereinafter, "the Board").[2]

The regulations, known as the "Out-of-Competition Testing Rules" (hereinafter, "the OCTR's"), codified at Title 9 of the New York Code of Rules and Regulations (NYCRR), were adopted by the Board on December 15, 2009[3] with an intended effective date of January 1, 2010, as a regulatory testing scheme for the presence of performance-enhancing substances in horses competing in harness races.

It is vital to comprehend, at the outset, that none of these parties are opposed to equine drug testing. All parties concur that drug testing is essential to the integrity of the harness horse racing industry, the betting public's confidence, and the health of race horses. However, petitioners contest the *breadth of* and *lack of lucidity*, of the measures

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[1]The SOA was formed pursuant to §318 of the New York Pari-Mutuel , Racing and Breeding Law. The SOA is recognized by the Board as a duly incorporated association representing the interests of more than a thousand harness race horse owners, trainers and/or jockeys. The SOA's principal offices are located in Yonkers, New York, within Westchester County.

[2]The Board is a regulatory agency, created by the New York State Executive Department under §101 of the New York Pari-Mutuel, Racing and Breeding Law. The Board regulates all horse racing within New York State.

[3]On or about June 24, 2008, the Board solicited SOA's review and comments to an earlier draft version of the OCTR's. On or about July 3, 2008, SOA conveyed to the Board, in writing, various criticisms of the proposed regulations, which largely mirror petitioners arguments herein. The Board did not thereafter reply to petitioner's concerns. The next information the petitioners received was the pronouncement that the OCTR's had been adopted by the Board.

taken by the Board in fashioning this regulatory scheme. Petitioners contend that the OCTR's are illegal, having been conceived in excess of the Board's jurisdiction, as well as arbitrary, capricious, overbroad, unconstitutionally vague and overly intrusive, requiring a judicial declaration that the regulations are null and void.[4]

On January 7, 2010, oral argument was entertained in Supreme Court, New York County, the Hon. Eileen A. Racer, Supreme Court Justice, presiding, on an emergency Order to Show Cause brought by petitioners to enjoin the Board from enforcement of the OCR's.[5] In a carefully reasoned bench ruling immediately following oral argument, Justice Rakower issued a temporary restraining order, precluding the Board's implementation of its regulations. In so ruling, Justice Racer found that petitioners demonstrated a likelihood of success on the merits of their claims, and a risk of irreparable harm in the absence of a stay. Although the Board subsequently moved for partial relief from the restraining order insofar as it included "protein and peptide-based drugs", no such partial relief has been granted to date.

The Board thereafter moved for a change of venue from New York County to Schenectady County. By Decision and Order, filed with the County Clerk, New York County, on February 16, 2010, finding that the situs of the Board's principal offices, regular meetings and the promulgation of the OCTR's all lie in Schenectady County, the matter

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[4]The petitioner's initially viewed their case as a declaratory judgment action seeking adjudication that the Board's regulations are unconstitutional. However, this Court concurs with Justice Rakower, citing *New York City Health & Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 204 (Ct. of Appeals, 1994)*, that petitioner's claims are cognizable under Article 78.

[5]Although there was an intervening six day period between the effective date of the OCTR's and the issuance of the temporary restraining order, no actions were taken by the Board as far as implementation of the OCTR's during this brief interval.

was re-assigned to this Court.[6]

It is also important to recognize that, prior to the adoption of the OCTR's (and continuing through the present due to the temporary restraining order), all equine drug testing has been conducted at the race tracks, where, at a minimum, the top three finishers of each harness race are immediately tested.

In addition, although the OCTR's are equally applicable to thoroughbreds competing at the state's four flat tracks, the petitioners are solely concerned with the harness race horses who compete at the seven harness tracks across New York State. Upon information and belief,[7] harness horses run an average of 25-30 times in their racing years, organized in weekly rotations, which are interwoven with periods of rest during which they do not compete. Upon further information and belief, any horse which has not competed for 30 days or more must be pre-approved to resume racing, via satisfactory performance in a "qualifying race."

[6]By Order to Show Cause, the petitioners sought reargument and vacatur of the Decision and Order transferring venue to Schenectady County, arguing, essentially, that ample precedent exists (citations omitted) for the action to be maintained in New York County. The Board, however, emphasized that the "material elements" of the case occurred in Schenectady County. Ultimately, Justice Rakower denied the petitioner's application for vacatur of the venue determination.

[7]This information emanates from the oral argument on the record in Supreme Court, New York County, before Justice Rakower, on January 7, 2010. See transcript, page 5, lines 15-19.

THE STATUTES:

New York's Racing, Pari-Mutuel Wagering and Breeding Law are set forth, in relevant part, as follows:

ARTICLE I - SUPERVISION AND REGULATION
§101. NEW YORK STATE RACING AND WAGERING BOARD

1. THERE IS HEREBY CREATED WITHIN THE EXECUTIVE DEPARTMENT THE NEW YORK STATE RACING AND WAGERING BOARD, WHICH BOARD SHALL HAVE GENERAL JURISDICTION OVER ALL HORSE RACING ACTIVITIES AND ALL PARI-MUTUEL BETTING ACTIVITIES, BOTH ON-TRACK AND OFF-TRACK, IN THE STATE AND OVER THE CORPORATIONS, ASSOCIATIONS, AND PERSONS ENGAGED THEREIN. ...

2. THE BOARD SHALL CONSIST OF THREE MEMBERS TO BE APPOINTED BY THE GOVERNOR BY AND WITH THE ADVICE AND CONSENT OF THE SENATE. NOT MORE THAN TWO OF THE MEMBERS SHALL BELONG TO THE SAME POLITICAL PARTY. THE GOVERNOR SHALL DESIGNATE OF THE MEMBERS A CHAIRMAN OF THE BOARD WHO SHALL BE THE CHIEF EXECUTIVE OFFICER OF THE AGENCY AND SHALL SERVE IN THE CAPACITY OF CHAIRMAN AT THE PLEASURE OF THE GOVERNOR. THE CHAIRMAN AND MEMBERS SHALL NOT HOLD ANY OTHER PUBLIC OFFICE OR PUBLIC EMPLOYMENT FOR WHICH THEY SHALL RECEIVE COMPENSATION ... OR ENGAGE IN ANY PRIVATE EMPLOYMENT ...

3. THE MEMBERS OF THE BOARD SHALL HOLD OFFICE FOR TERMS OF SIX YEARS ...

4. OMITTED

5. EACH MEMBER SHALL RECEIVE A SALARY, WITHIN THE AMOUNTS APPROPRIATED THEREFOR, AND SHALL BE PAID ACTUAL AND NECESSARY EXPENSES INCURRED IN THE PERFORMANCE OF HIS DUTIES.

6. TWO MEMBERS OF THE BOARD SHALL CONSTITUTE A QUORUM FOR THE PURPOSE OF CONDUCTING THE BUSINESS THEREOF.

7. NO MEMBER, OFFICER, OFFICIAL OR EMPLOYEE OF THE BOARD SHALL PARTICIPATE AS OWNER OF A HORSE OR OTHERWISE AS A CONTESTANT IN ANY HORSE RACE AT A RACE MEETING WHICH IS UNDER THE JURISDICTION OR SUPERVISION OF THE BOARD, OR HAVE ANY PECUNIARY INTEREST, DIRECT OR INDIRECT, IN THE PURSE, PRIZE, PREMIUM OR STAKE CONTESTED FOR AT ANY SUCH HORSE RACE OR IN THE OPERATIONS OF ANY LICENSEE OR FRANCHISEE OF THE BOARD. ...

8. THE CHAIRMAN OF THE BOARD SHALL APPOINT SUCH DEPUTIES, SECRETARY, OFFICERS, REPRESENTATIVES AND COUNSEL AS THE BOARD MAY DEEM NECESSARY WHO SHALL SERVE DURING HIS PLEASURE, AND SHALL ALSO APPOINT SUCH EMPLOYEES AS THE BOARD MAY DEEM NECESSARY, AND WHOSE DUTIES SHALL BE PRESCRIBED BY THE BOARD

AND WHOSE COMPENSATION SHALL BE FIXED BY THE BOARD WITHIN THE APPROPRIATIONS AVAILABLE THEREFOR. ...

9. OMITTED

10. THE BOARD MAY RETAIN AND EMPLOY PRIVATE CONSULTANTS AND AGENCIES ON A CONTRACT BASIS FOR RENDERING TECHNICAL OR OTHER ASSISTANCE AND ADVICE FOR THE PERFORMANCE OF ITS DUTIES.

11. THE BOARD SHALL, ANNUALLY, MAKE A FULL REPORT TO THE GOVERNOR OF ITS PROCEEDINGS FOR THE PRECEDING CALENDAR YEAR AND SUCH SUGGESTIONS AND RECOMMENDATIONS AS IT SHALL DEEM DESIRABLE.

ARTICLE IX- MISCELLANEOUS
§902. EQUINE DRUG TESTING AND EXPENSES

1. IN ORDER TO ASSURE THE PUBLIC'S CONFIDENCE AND CONTINUE THE HIGH DEGREE OF INTEGRITY IN RACING AT THE PARI-MUTUEL BETTING TRACKS, EQUINE DRUG TESTING AT RACE MEETINGS SHALL BE CONDUCTED BY A STATE COLLEGE WITHIN THIS STATE WITH AN APPROVED EQUINE SCIENCE PROGRAM. THE STATE RACING AND WAGERING BOARD SHALL PROMULGATE ANY RULES AND REGULATIONS NECESSARY TO IMPLEMENT THE PROVISIONS OF THIS SECTION, INCLUDING ADMINISTRATIVE PENALTIES OR LOSS OF PURSE MONEY, FINES OR DENIAL, SUSPENSION OR REVOCATION OF A LICENSE FOR RACING DRUGGED HORSES." *(EMPHASIS ADDED.)*

THE BOARD'S REGULATIONS:

The regulations, codified at Title 9, Chapter I, Subchapter B, State Harness Racing Commission, §4120, Drugs Prohibited and Other Prohibitions, of the New York Code of Rules and Regulations (NYCRR), read, verbatim, as follows:

§4120.17. OUT-OF-COMPETITION TESTING

(A) ANY HORSE ON THE GROUNDS OF A RACETRACK UNDER THE JURISDICTION OF THE BOARD OR STABLED OFF TRACK GROUNDS IS SUBJECT TO ADVANCE TESTING WITHOUT ADVANCE NOTICE FOR BLOOD DOPING, GENE DOPING, PROTEIN AND PEPTIDE-BASED DRUGS, INCLUDING TOXINS AND VENOMS, AND OTHER DRUGS AND SUBSTANCES WHILE UNDER THE CARE OR CONTROL OF A TRAINER LICENSED BY THE BOARD.

(B) HORSES TO BE TESTED SHALL BE SELECTED AT THE DISCRETION OF THE STATE JUDGES OR ANY BOARD REPRESENTATIVE. HORSES TO BE TESTED SHALL BE SELECTED FROM AMONG THOSE ANTICIPATED TO COMPETE AT NEW YORK TRACKS WITHIN 180 DAYS OF THE DATE OF TESTING OR DEMAND FOR TESTING.

(C) THE STATE JUDGES OR ANY BOARD REPRESENTATIVE MAY REQUIRE ANY HORSE OF A LICENSED TRAINER OR OWNER TO BE BROUGHT TO A TRACK UNDER THE JURISDICTION OF THE BOARD FOR OUT-OF-COMPETITION TESTING WHEN THAT HORSE IS STABLED OUT-OF-STATE AT A SITE LOCATED WITHIN A RADIUS NOT GREATER THAN 100 MILES FROM A NEW YORK STATE RACETRACK. THE TRAINER IS RESPONSIBLE TO HAVE THE HORSE OR HORSES AVAILABLE AT THE DESIGNATED TIME AND LOCATION.

(D) A BOARD VETERINARIAN OR ANY LICENSED VETERINARIAN AUTHORIZED BY THE STATE JUDGES OR ANY BOARD REPRESENTATIVE MAY AT ANY TIME TAKE A URINE OR BLOOD SAMPLE FROM A HORSE FOR OUT-OF-COMPETITION TESTING.

(E) PROHIBITED SUBSTANCES ARE:

(1) BLOOD DOPING AGENTS INCLUDING, BUT NOT LIMITED TO, ERYTHROPOIETIN (EPO), DARBEPOETIN, OXYGLOBIN, HEMOPURE, ARANESP, OR ANY SUBSTANCE THAT ABNORMALLY ENHANCES THE OXYGENATION OF BODY TISSUES;

(2) GENE DOPING AGENTS OR THE NONTHERAPEUTIC USE OF GENES, GENETIC ELEMENTS, AND/OR CELLS THAT HAVE THE CAPACITY TO ENHANCE ATHLETIC PERFORMANCE OR PRODUCE ANALGESIA;

(3) PROTEIN AND PEPTIDE-BASED DRUGS, INCLUDING TOXINS AND VENOMS.

(F) THE PRESENCE OF ANY SUBSTANCE AT ANYTIME DESCRIBED IN SUBSECTIONS (1), (2) OR (3) OF SUBDIVISION (E) IS A VIOLATION OF THIS RULE FOR WHICH THE HORSE MAY BE DECLARED INELIGIBLE TO PARTICIPATE UNTIL THE HORSE HAS TESTED NEGATIVE FOR THE IDENTIFIED SUBSTANCE, ...

(G) THE TRAINER, OWNER, AND/OR THEIR DESIGNEES AND ANY LICENSED RACING CORPORATION SHALL COOPERATE WITH THE BOARD AND ITS REPRESENTATIVES/DESIGNEES BY:

(1) ASSISTING IN THE IMMEDIATE LOCATION AND IDENTIFICATION OF THE HORSE SELECTED FOR OUT-OF-COMPETITION TESTING;

(2) PROVIDING A STALL OR SAFE LOCATION TO COLLECT THE SAMPLES;

(3) ASSISTING IN PROPERLY PROCURING THE SAMPLES; AND

(4) OBEYING ANY INSTRUCTION NECESSARY TO ACCOMPLISH THE PROVISIONS OF THIS RULE.

THE FAILURE OR REFUSAL TO COOPERATE IN THE ABOVE BY ANY LICENSEE OR OTHER PERSON SHALL SUBJECT THE LICENSEE OR PERSON TO

PENALTIES, INCLUDING LICENSE SUSPENSION OR REVOCATION, THE IMPOSITION OF A FINE AND EXCLUSION FROM TRACKS OR FACILITIES SUBJECT TO THE JURISDICTION OF THE BOARD.

(H) ANY HORSE WHICH IS NOT MADE AVAILABLE FOR TESTING AS DIRECTED, INCLUDING THE FAILURE TO GRANT ACCESS ON A TIMELY BASIS, SHALL IN THE ABSENCE OF ACCEPTABLE MITIGATING CIRCUMSTANCES, BE INELIGIBLE TO PARTICIPATE IN RACING FOR ONE HUNDRED TWENTY DAYS.

(I) IN THE ABSENCE OF EXTRAORDINARY MITIGATING CIRCUMSTANCES, A MINIMUM PENALTY OF A TEN (10) YEAR SUSPENSION WILL BE ASSESSED FOR ANY VIOLATION SET FORTH IN SUBDIVISION (F).

(J) AN APPLICATION TO THE BOARD FOR AN OCCUPATIONAL LICENSE SHALL BE DEEMED TO CONSTITUTE CONSENT FOR ACCESS TO ANY OFF-TRACK PREMISES ON WHICH HORSES OWNED AND/OR TRAINED BY THE INDIVIDUAL APPLICANT ARE STABLED. THE APPLICANT SHALL TAKE ANY STEPS NECESSARY TO AUTHORIZE ACCESS BY BOARD REPRESENTATIVES TO SUCH OFF-TRACK PREMISES.

POINTS OF COUNSEL:

In a nutshell, the Board offers that its OCTR's are the result of growing concern over the surreptitious use of blood-doping agents and gene-doping agents, neither of which have a legitimate use in horse racing. The Board explains that blood-doping agents cause increased oxygenation to muscle tissue and/or stimulate the central nervous system, and/or act in other ways to enhance a horse's strength and stamina. Some such substances, depending upon their time of administration, have a long-lasting, major effect but may no longer be at detectable levels by the date of competition. Gene doping agents are those which operate to enhance lung and breath capacity. The Board rationalizes that all endorphins create an unfair advantage during competition by altering a horse's physiology, as do other agents that produce an analgesic effect, such as cobra and other poisonous snake venoms, which block a horse's pain receptors. The Board contends that its OCTR's are essential to protect horses from the dangers of racing under such substances citing *Matter of Casse v. New York State Racing & Wagering Bd., 70 N.Y.2d 589 (Ct. of Appeals, 1987.)*

The Board also defends its OCTR's as representing a major new push to "go after the cheaters," promulgated in accordance with the protocol and timetable of the *New York State Administrative Procedure Act (SAPA)*. Key to the scheme is the "element of surprise," intended to send a loud message of zero tolerance, which is supported by the Racing Medication and Testing Consortium (RMTC.)

The Board further asserts that its OCTR's are the simplest and least expensive means to control the administration of performance-enhancing drugs, including "drug cocktails"[8]

[8]A "drug cocktail" refers to a combination of substances, given in low dose concentrations beyond detection, but, nonetheless, effective at altering performance.

"collateral substances"[9] and/or "masking agents"[10] within the equine racing industry and, particularly, when the Board receives a "tip." In support of its position, the Board has offered the expert opinion of Dr. George A. Marlin, an expert on equine pharmacology and long-time director of the Board's Drug Testing and Research Program. Per Dr. Marlin, "the only practical means of detecting protein-based drugs is to test horses at some time prior to competition when the drug is still present in the body at a detectable level.

The Board relies upon the precedent of Matter of Sullivan County Harness Racing Assn. v. Glasser, 30 N.Y.2d 269 (Ct. of Appeals, 1972); U.S. ex rel. Terraciano v.Montanye, 493 F.2d 682 (2d Cir. 1974); Matter of Glenwood TV v. Ratner, 103 A.D.2d 322 (2nd Dep't 1984); Equine Practitioners Assn. v. New York State Racing & Wagering Bd., 105 A.D.2d 215 ((1st Dep't 1984); and Barry v. Barchi, 443 U.S. 55, 67 (United States Supreme Court, 1979) in support of its broad power, the full arsenal of which has been voluntarily submitted to by stakeholders.

Finally, the Board argues that its OCTR's satisfy the traditional three-part test for approval insofar as (I) there is a substantial government interest; (ii) the search (to wit: the taking of a sample) advances that interest; and (iii) the property owner is apprised of the search. The Board points to sister-states, and, in particular, New Jersey, Indiana and Kentucky, all of which authorize off-track testing, as does the model rule promulgated by the Association of Racing Commissioners International, Inc.

The petitioners counter that the Board has engaged in unlawful administrative action, in excess of its jurisdiction. Specifically, petitioners argue that by empowering itself to test horses stabled off track, the Board has unilaterally expanded its own authority, which is statutorily limited to "at race meetings."

The petitioners further argue that the OCTR's are vague, subject to arbitrary and capricious enforcement, and bear no rational relationship to the Board's objective to achieve "uniformity with other racing jurisdictions and consistency with the Model Rule." In particular, the petitioners maintain that testing as much as 180 days prior to a race is wholly unnecessary in light of the current state of the science which, despite the Board's protestations to the contrary, *can and does* detect performance enhancing substances simultaneous with the race.
In support of its position, petitioners offer the expert opinions of Dr. Jonathan H. Foreman, Professor of Equine Internal Medicine, Dr. Vincent R. DiCicco, DVM (Doctor of Veterinary Medicine), Dr. James Hunt, DVM, and Dr. Michael William Stewart, DVM.

Petitioners further assert that, by compelling owners/trainers to transport horses stabled outside the state, but within 100 miles of a state racetrack, into the state for testing, upon demand, the Board is illegally exercising jurisdiction beyond state lines. The selection of a radius of 100 miles is, in petitioners view, itself, arbitrary, capricious and without any meaningful basis.

[9]"Collateral" substances refers to such substances which alter the duration of a drug's action.

[10]"Masking agents" are those substances which act to conceal the presence of another drug. This includes diuretics, such as Furosemide (Lasix), which interferes with the accuracy of the Board's testing at race meetings. Past attempts by the Board to detect EPO and DPO in race horses were derailed when owners/trainers realized that, through "masking," the tell-tale antibodies otherwise produced when a horse was doped would not be produced if the horse's immune system were suppressed via administration of immuno-suppressants.

Petitioners further assert that the Fourth Amendment prohibition against unreasonable searches extends to administrative inspections, citing Donovan v. Dewey, *452 U.S. 594 (United States Supreme Ct.,1981);* and Annobile v. Pelligrino, *303 F.3d 107 (2d Cir,. 2002),* such that by authorizing sanctions, fines, suspension and/or revocation of licensure and/or exclusion from race tracks, against both licensees and "other persons," the Board has infringed upon private property interests and the expectation of privacy, effectively vesting itself with the power to conduct warrant-less searches.

Finally, despite the Board's indication to the contrary, petitioners point to substantial differences between these regulations and those existing in sister-states and the model rule. Specifically, petitioners argue that the omission of any provision for "split-sampling" is a radical departure from other jurisdictions and that the "off-track" provisions are also readily distinguishable in that, unlike New York State, private farms are licensed in the comparison jurisdictions.

DISCUSSION:

The Court recognizes that, as the only sport in this state affording legalized betting, horse racing is a heavily regulated industry. Indeed, the legislature has seen fit to empower the Board to make "any rules and regulations necessary" to implement equine drug testing at race meetings. However, while the Board's charge is sweepingly broad, it is not unfettered. As held in *Matter of Empire State Assn. of Assisted Living, Inc. v. Daines, 26 Misc.3d 340 (Supreme Court, Albany County, 2009) "even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives" quoting* Matter of Medical Socy. of State of N.Y. v. Serio, *100 N.Y.2d 854, 865 (Ct. of Appeals, 2003), quoting* Boreali v. Axelrod, *71 N.Y.2d 1, 9 (Ct. of Appeals, 1987.)* Rather, after the legislature fixes a primary standard, it endows a regulatory agency to "fill in the interstices" by promulgating rules conforming to its enabling legislation. *Empire State Assn.of Assisted Living, 26 Misc.3d at 345.*

Petitioner's foremost argument concerns whether the Board's authority to test

harness race horses is statutorily limited such that it may only occur "at race meetings" and, thus, does not extend to horses stabled off-track. Since it can only be speculated which horses will actually compete as much as six months prior to a race, petitioners maintain that the collective pool of horses subject to the Board's reach under its OCTR's impermissibly includes not only those horses which will subsequently be available at the track but also horses that do not ultimately race.

The Board, however, maintains that the statutory language "at race meetings" is merely "a reference," not intended by the legislature to limit testing to the grounds of race facilities. The Board insists that its OCTR's are consistent with its charge of ensuring that horses competing in races are not administered stimulants or other substances intended to increase their natural speed.

The Court must construe the statutory language , as the legislature intended, giving effect to its plain meaning. *See Matter of New York State Clinical Lab. Assn v. Kaladjian, 194 A.D.2d 189, 193 (3rd Dep't, 1993.)* The bill jacket reveals that the real purpose and justification for the legislation was to address dissatisfaction in regard to the operation of the testing laboratory at Cornell University's College of Veterinary Medicine, the then exclusive administrator of the state's equine drug testing program. The bill was intended to expand the range of providers beyond Cornell, which had become ill-positioned to handle modern testing needs.[11] Absent from the memoranda in support of the bill (Assembly Bill A9954, Sponsor Pretlow and Senate Bill S6352-A, Sponsor Adams) is any discussion of horses stabled "off-track."

[11]Upon information and belief, Morrisville State College, a part of the State University system, represented itself as housing the largest equine science program in the world and being situated to assume testing responsibilities within its newly established facility - the Morrisville Equine Drug Testing and Research Program. Morrisville State College is believed to have been negotiating with the Board, at the time the legislation was enacted.

It is recognized that agencies make policy choices in formulating rules. To be sure, agencies interpret the law, as part of the range of their administrative functions. Indeed, this Court would generally be inclined to extend the Board wide latitude, given the special expertise of this regulatory agency. *Cf.* Matter of United Univ. Professions v. State of New York, 36 A.D.3d 297, 299 (3rd Dep't, 2006.) However, the bill itself contains the phrase "*at race meetings overseen by the State Racing & Wagering Board.*" It is well-settled that "the starting point in interpreting a statute to determine the legislature's intent is the text of the statute itself." Id., at 298.

Obviously, horses stabled "off-track" on privately-owned farms as much as six months preceding a race are neither "at race meetings" nor at facilities "overseen" by the Board. Under these circumstances, this Court is constrained to find that subdivisions (A), (B),(C),(D), (F) and (G) of the OCTR's stretch beyond the Board's enabling legislation. By logical extension, subdivisions(H), (I) and (J) are likewise an encroachment upon inherently legislative action. Any contrary ruling is in contravention of the plain language of the statute.

The declaration that all of the foregoing OCTR's (exclusive of subdivision E), are illegal, null and void, is, essentially, dispositive of this case as a whole, obviating the need to address the remaining arguments. However, while this Court declines to remand the matter to the Board for the drafting of permissible regulations, it stands to reason that the Board, in its own time, will engage in that process. In that light, this Court will consider the residual arguments in an effort to guide the parties.

PRE-RACE TESTING:

In this Court's view, petitioners have persuasively demonstrated that a 180 day period for testing, in advance of a race, is an arbitrary duration of time. Indeed, the Board concedes that the 180 day figure is "not based on science per se." Indeed, the Board is hard-pressed to convincingly argue that this lengthy period should be allowed to stand simply based upon "expectations" and a general familiarity with which horses are likely competitors.

This Court concurs with Justice Rakower's apt words regarding the overly broad and vague fixing of a 180 day period that *"it's not a red herring because it is a very large net...it may be that you only want to ensnare the ones who are going to be competing in that way but where it becomes overly broad is when it casts beyond those that you hope to catch and really applies almost to any horse."*

Having carefully reviewed the Board's submissions, no justification can be found for it having settled upon a 180 day period, leaving the Court, and petitioners, to ponder why it did not select 210 days or 150 days, or, for that matter, any alternative number. There is simply nothing sui generis about a 180 day window.

Moreover, the Board's own Regulatory Impact Statement refers to its duty to prescribe rules for horses *"about to participate."* The phrase *"about to participate"* cannot reasonably be construed as including a time frame as great as 180 days, which, presumably, precedes the race registration period. There is simply no objective criteria upon which to anticipate which horses will compete in the future. Thus, a window of 180 days allows the Board to test any horse. The Board's enabling legislation does not give the Board the unbridled authority to select horses for testing without any factual predicate.

Finally, the Board's argument that certain performance enhancing substances are

only present at detectable levels well before race day is at odds with the modern state of the science of testing. Indeed, the precedent of Matter of Laterza v. New York State Racing & Wagering Bd., *68 A.D.3d 1509 (3rd Dep't, 2009)*[12] is binding upon this Court and sanctioned utilization of the ELISA (enzyme-linked immunosorbent assay) antibody screening test to detect prohibited substances concomitant with racing. In fact, the Board concedes herein, as it did in Laterza, that certain techniques, such as the liquid chromotography mass spectrometer, go even beyond ELISA and are highly sensitive to the presence of performance enhancing agents, close in time to a race.

Nevertheless, the Board excuses itself from utilizing such techniques citing their high cost.[13] The Court's finds the Board's argument that sophisticated techniques are cost-prohibitive to offer little solace to those affected by the Board's reliance on antiquated testing protocols. This is especially true in light of the Board's own divulgence that a myriad of new drugs continue to infiltrate the equine racing industry, such that compiling a list of substances which could be controlled, if administered within 180 days of a race, is not even feasible.[14]

The intrusion involved with a 180 day pre-race testing period cannot be reconciled with the irresponsibility of failing to employ less restrictive alternatives, notwithstanding associated costs. Thus, as to the 180 day component, the OCTR's are arbitrary and capricious and impermissibly vague. If this Court were to accede to such regulations,

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[12]The Third Department in Laterza reversed the Board's suspension of a trainer whose horse tested positive for performance enhancing substances but the Board's expert failed to pinpoint its time of administration.

[13]According to submissions offered by petitioners, the University of Pennsylvania routinely performs ELISA testing and also offers the advanced liquid chromatography mass spectrometer testing.

[14]In the opinion of the Board's expert, Dr. Marlin, "for every known substance, there are a burgeoning number of bio-similar agents, often made in third world countries or clandestine laboratories. ...New drugs are under continuous development."

equine drug testing would be vulnerable to all kinds of abuse and discriminatory enforcement. The Board's interest in costs cannot justify the illegality of its actions.

TRANSPORTATION OF OUT-OF-STATE HORSES:

Next, petitioners argue that the Board's requirement that owners/trainers, who are outside New York State lines, transport race horses into the state for the purpose of testing, provided they are within 100 miles of a state racetrack is arbitrary and capricious.

Petitioners argument finds support in the Board's paltry justification that "a line must be drawn somewhere." It is illogical that in an effort to "catch the cheaters," the Board itself creates a situation so easily subject to exploitation. In essence, all an unprincipled owner/trainer need do to circumvent the Board's regulations is to stable a horse at least 101 miles away. The only difference between a horse stabled outside state lines at a distance of 99 miles from a state track and one stabled outside state lines at 101 miles, could well be an owners/trainers shrewdness and intent to evade the regulations.

The Board has failed to rebut petitioner's induction with any objective evidence or criteria to support having selected a range of 100 miles. Indeed, subdivisions (C) and (G)(1) of the OCTR's lend themselves to strategic circumvention by the very unscrupulous owners/trainers which the Board hopes to unearth.

Additionally, the Court credits petitioners assertions as to the genuine cost of transporting horses from sister states. Indeed, while the Board conceded, in its regulatory impact statement, that it could not calculate actual transportation costs "because they are dictated on a case-by-case basis," the Board nonetheless appears to have grossly underestimated such costs. In fact, petitioners have presented evidence establishing

that the costs of horse transportation are more than triple the Board's estimate.

In this Court's view, the gross underestimation of foreseeable costs, which the Board then thrusts upon owners/trainers, is further indication that the OCTR's were drafted inartfully and with inadequate information. While the Board summarily dismisses the costs as de minimus, the Court indeed finds that they are significant. The Board's enabling legislation does not afford it the power to impose unspecified, substantial costs upon stakeholders.

PRIVACY INTERESTS:

Next, petitioners argue that the OCTR's are overly intrusive and infringe upon the fundamental right to privacy.

This Court is mindful of the law's strong preference to avoid unnecessary constitutional adjudication (citations omitted.) However, given that Board licensure in New York State is not required for operators of private horse farms, the Board's argument that the slight nature of the search (to wit: the taking of a sample) does not encroach upon private property rights can hardly stand. It is not the "degree" of intrusion that makes it improper but, rather, the intrusion, itself.

The Board's regulatory power is applicable to commercial property maintained by licensee's but, as applied to non-licensees, subdivisions (D), (G)(2), (G)(3), and (G)(4) of the OCTR's constitute action outside the scope of the Board's authority.

Similarly, subdivision (J), which purports to vest the Board with express or implied consent to enter upon private property, concomitant with an application for Board licensure, is overbroad and contrary to fundamental rights.

PENALTIES:

Next, the Court views the penalties contained within these OCTR's as disproportionate to the conduct, in all but the most extreme situations of horse doping. The Court recognizes that the Board desires to fix a high deterrent value for conduct in violation of the rules. However, given that the Board concedes that a comprehensive list of prohibited substances is not even available and that the validity of test results is not necessarily confirmable with the Board's present resources, the severity of these consequences "shocks the conscience."

These are penalties which are, indeed, subject to erroneous imposition (as in circumstances of false positive test results) with career-ending consequences, particularly insofar as the ten year suspension. Moreover, the Board's inclusion of non-licensees within its discretion to fine and/or exclude from Board facilities, constitutes administrative excess. Indeed, as drafted, the Board assumes the authority to penalize potentially any person, regardless of whether such person is under their jurisdiction. This is not the Board's charge. Similarly, it is improper for the Board to revoke the license of an owner/trainer simply because he asserts his fourth amendment rights. *See LaChance v. New York State Racing and Wagering Bd., 118 A.D.2d 262 (1st Dep't 1986).*[15]

INTERNAL INCONSISTENCY:

Next, petitioners contend that certain substances specifically prohibited in subdivision (E) of the OCTR's are identical to drugs, medications and substances

[15]The caselaw offered by the Board on this point does not compel a contrary result and, indeed, preceded LaChance.

accepted by the Board as recognized treatment for race horses.

The Board counters that, where circumstances command a "permitted use" substance, it will exempt it and the owner/trainer who administers it, from penalty under the OCTR's. This assurance from the Board is, essentially, in the form of a mere verbal representation.

The difficulty of particular substances being both "prohibited" and "permissible,"depending upon the surrounding circumstances and purpose for administration, is that the Board could choose to invoke its severe penalties in situations when the particular substance was used properly for its recognized therapeutic value.

Specifically, stem cells[16], recognized as available treatment for ligament, tendon and tissue injuries in horses are "protein and peptide-based" as is plasma and "endoserum," (a commercial anti-salmonella product) used to treat diarrhea in horses. In addition, "oxyglobin," an expressly prohibited substance pursuant to subdivision (E) (1), is generally accepted within the racing industry as an emergency blood substitute in the event a horse suffers deep lacerations. A variety of additional substances[17] falling within the category that are permissible up until 24 or 48 hours of race time, contain protein-based ingredients, prohibited by these regulations.

The Court concurs with petitioners that it is foreseeable that, if conflicting regulations are permitted to stand, the care of horses will likely be compromised due to veterinary concern over the potential for race disqualification and severe sanctions.

It is untenable for the Board to simply expect petitioners to trust in the Board's ability

[16]The Court understands that there are different forms of stem cell treatment, including multi-potential stem cell therapy (MSC) - which involves the injection of healthy bone marrow into a lamed area- as well as platelet rich plasma stem cell therapy.

[17]This includes tetanus antitoxin, chymotrypsin, immuno stimulants, sarapin and biologics.

to distinguish among circumstances where a particular substance is prohibited versus permissible, given their significant stake in the outcome of the Board's interpretation of events. Such internal inconsistency fails to apprise owners, trainers, veterinarians, etc. of the legal boundaries of their care and causes a "chilling effect." In this regard, the Court finds the OCTR's vague and overbroad.

UNIFORMITY:

Finally, the Board defends its OCTR's as being substantially similar to the model rule and/or regulations adopted in sister states.[18] However, petitioners have particularized significant distinctions between the OCTR's and those regulations existing in other jurisdictions.

The most grave of these departures is the OCTR's complete omission of a "split sampling" procedure[19], necessary to safeguard against "false positive" results. The omission of this component, as a whole, is incompatible with the model rule.

In addition, no other jurisdiction categorically bans all protein and peptide-based substances, without regard for therapeutic value. Moreover, no other jurisdiction allows testing to be mandated on private and/or commercial property not within the Board's licensure, nor requires horses stabled beyond geographical boundaries to be transported into their jurisdiction for testing.

[18]This Court declines to address the legitimacy of evaluating the legality of the OCTR's against sister-state regulatory schemes. While petitioner's point to the lack of relevance of foreign jurisdictions, petitioners are not aggrieved by such consideration and actually find additional support for their own position when other jurisdictions are compared and contrasted.

[19]"Split sampling" involves the secondary testing of a sample by an independent laboratory chosen by the owner/trainer.

Having scrutinized these regulations for "genuine reasonableness and rationality in their specific context," See Matter of Pukin v. New York State Dept of Health, 224 A.D.2d 107, 109 (3rd Dep't, 1996), the Court again finds the OCTR's unreasonable, arbitrary and capricious.

CONCLUSION:

This Court recognizes its duty to uphold regulatory action which has a rational basis to a substantial state purpose and is not unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated. However, having carefully considered the parties' arguments, the OCTR's are so lacking in reason as to require nullification in their entirety.

The Board's position that it will be better equipped to "catch the cheaters" with the "element of surprise," is inconsistent with its own representations that newer substances continue to be introduced within the equine racing industry which are not detectable, due to insufficient funds and/or lack of existing tests. This Court sees little progress offered by these OCTR's to address the pervasive problem of performance-enhancement. Indeed, the Board may well be "shoveling sand against the tide." Nevertheless, the evidence relied upon by the Board does not meet a basic threshold of reliability and its present plan is clearly ineffectual for its purposes.

In this Court's view, there is an inherent unfairness to adopting rules that sweep across an entire industry, looking for one bad apple and subject to all kinds of abuses in implementation and enforcement without any built-in protections for those affected and with disregard for their legitimate concerns. It is disingenuous for the Board to empower

itself with, essentially, carte blanche discretion to test whomever, whenever for whatever and then merely pledge to exercise good judgment over such unfettered power. This Court concurs with petitioners that "the Board cannot justify strict, prohibitive and contradictory regulations by now offering that it may prospectively choose not to enforce them with vigor."

The Board's failure to invest in modernized testing practices so as to keep pace with the development of improved extraction protocols and more sophisticated analytic testing, while empowering itself to test off-track, and outside state lines, and imposing severe sanctions for non-compliance, is an exercise of power so excessive as to render the OCTR's illegal, null and void.

In addition to being unlawful, the OCTR's are also arbitrary insofar as a 180 day testing window is without empirical basis in science or fact and encourages discriminatory enforcement. The transportation of race horses from stables outside state lines but, within a 100 mile radius from a state track, involves costs that have been grossly underestimated by the Board. The 100 mile radius, like the 180 day testing window, is not based upon objective criteria and both are arbitrary and capricious.

Despite the Board's well-intentioned endeavor to regulate equine drug testing, it has impermissibly exceeded its authority and encroached upon the fundamental rights of both licensees and non-licensees. Its regulations are also internally inconsistent and lack clarity as to which substances are prohibited and which are permissible for therapeutic or medical treatment. Further, the regulations have inadequate and, actually, non-existing, safeguards to insure the reliability of test results. Moreover, the Board's regulations fail to achieve uniformity with other jurisdictions and/or the model rule, as well as fail to accomplish their objective.

Absent legislative revision of the statute, the Board's regulatory scheme cannot stand, as it for the legislature, and not the Court, to circumscribe the Board's regulatory power. This Court is limited to the plain language of the statute. The Court indeed recommends that the Board seek legislative revision and/or increased fiscal consideration, remaining mindful that imprecise definitions lend themselves to illegal agency intervention into private affairs.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is granted insofar as the Board's OCTR's are annulled in their entirety and the temporary restraining order is hereby made permanent enjoining the Board from enforcing its regulations as promulgated; and it is further

ORDERED that petitioner shall forthwith enter and file this Judgment, together with notice of entry upon respondent.

Dated at Schenectady, New York
this 10th day of August, 2011.

HON. MARK L. POWERS
ACTING SUPREME COURT JUSTICE

MAILED
8/15/11 aom

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