

KENTUCKY HORSE RACING COMMISSION
March 4, 2022
SPECIAL MEETING AGENDA

Location: Kentucky Horse Racing Commission
4063 Iron Works Parkway, Building B
Lexington, KY 40511

Time: 10:30 am

I. Call to Order and Roll Call

II. New Business

1. Requests for Stay in KHRC-22-TB-003 and KHRC 22-TB-004

III. Executive Session

During the meeting on March 4, 2022 the Commission will go into closed session pursuant to KRS 61.810(1)(C) to discuss pending litigation.

V. Adjournment

IMPORTANT POINTS

1. Betamethasone acetate / sodium phosphate – the injectable WAS NOT found in Medina Spirit.
2. The reported medication positive of Betamethasone was in the form of Betamethasone Valerate.
3. The positive test resulted from the use of an ointment/salve known as Otomax which contains Betamethasone Valerate, Gentamicin and Clotrimazole.
4. The Otomax was prescribed and dispensed by Dr. Vincent Baker, DVM to be used to treat a skin infection on Medina Spirit's hip area. The skin infection became visible in early April 2021. Dr. Baker contemporaneously reported this treatment to the California Horse Racing Board and the Jockey Club.
5. Otomax is used for equine skin infections and its use in horses is an accepted practice and use.
6. The Kentucky Rules of Racing do not prohibit the use of topical ointment, salves or liniments provided the substance does not contain any prohibited compound.
7. Kentucky rules of racing expressly prohibit the use of an injectable corticosteroid in the articular joint space of any horse within 14 days of a race.
8. There is no evidence that trainer Baffert violated the 14 day stand down restriction for corticosteroid injections in connection with Medina Spirit.
9. Kentucky rules of racing do not express a post-race testing threshold or limit of detection in any specimen regarding the use of a topical ointment which contains Betamethasone.
10. The stewards find no rule violation relating to Medina Spirit.

MITIGATION

1. The trainer and treating veterinarian reasonably believed that use of Betamethasone was regulated by KHRC's express terms:
 - A. Betamethasone acetate or sodium phosphate
 - B. Restricted administration time – 14 day stand down
2. The use of Otomax has wide use among equine practitioners and does not contain Betamethasone acetate or sodium phosphate.
3. The treating veterinarian and many nationally renown race track veterinarians were unaware that the use of a topical formulation with very low levels of Betamethasone valerate could result in a post-race positive.
4. The Otomax prescribed by the treating veterinarian for Medina Spirit was dispensed for a documented skin infection.
5. The Otomax prescribed by the treating veterinarian for Medina Spirit was contemporaneously reported to the CHRB data bank and the Jockey Club data bank.
6. Medina Spirit did not receive an intra-articular injection of Betamethasone during the restricted administration time set by the KHRC.
7. The trainer reasonably relied on veterinary advice in the treatment of the skin infection
8. The level of reported Betamethasone was 21 picograms, which would have absolutely no possible impact on the race performance.
9. Kentucky has never provided notice or a warning to trainers that use of a common salve with a low level of Betamethasone as a component could result in a post-race positive.
10. Upon hearing of the post-race positive, the trainer reviewed all treatment and self-reported the salve use.
11. The New York testing lab has scientifically confirmed that the post-race Betamethasone positive came from Otomax and not from an intra-articular injection.
12. Otomax has never been classified in Kentucky's classification system but clearly knowledgeable scientific experts would not classify it as Class C.
13. Leading world-wide agencies and regulatory bodies have pronounced and published rules distinguishing Betamethasone topical use from Betamethasone injection use.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 21-CI-00456
ELECTRONICALLY FILED

BOB BAFFERT
AND ZEDAN RACING STABLES, INC

PLAINTIFFS

v.

KENTUCKY HORSE RACING
COMMISSION

DEFENDANT

MOTION TO STAY AND/OR FOR TEMPORARY INJUNCTION

Come the Plaintiffs, Bob Baffert and Zedan Racing Stables, Inc., by counsel, and pursuant to KRS 230.320(2)(f) and Civil Rule 65.04, hereby move the Court for entry of an Order and/or a Temporary Injunction against the Defendant, the Kentucky Horse Racing Commission, staying the enforcement of the penalties contained within Stewards Rulings 21-009 and 21-0010 pending the appeal of those rulings. A Memorandum of Law in support of Plaintiffs' Motion is attached hereto.

NOTICE

This Motion shall come on for hearing before the Franklin Circuit Court as soon as counsel may be heard.

Respectfully submitted,

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Counsel for Plaintiff Zedan Racing Stables, Inc.

CERTIFICATE OF SERVICE

This is to certify that I electronically filed the foregoing via the Court's electronic filing system on this the 28th day of February, 2022. I further certify that this Motion will be served upon the following by email per agreement:

Jennifer Wolsing, General Counsel
Kentucky Horse Racing Commission
4063 Iron Works Parkway
Building B
Lexington, KY 40511

/s/ W. Craig Robertson, III

Counsel for Plaintiffs

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
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BOB BAFFERT
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v.

KENTUCKY HORSE RACING
COMMISSION

DEFENDANT

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO STAY AND/OR FOR TEMPORARY INJUNCTION**

Come the Plaintiffs, Bob Baffert (“Baffert”) and Zedan Racing Stables, Inc. (“Zedan”), by counsel, and hereby move the Court, pursuant to KRS 230.320(2)(f) and CR 65.04, for entry of an Order and/or Temporary Injunction against the Defendant, the Kentucky Horse Racing Commission (the “KHRC”), staying the enforcement of the penalties contained within Stewards Rulings 21-0009 and 21-0010 pending the appeal of those rulings. In support of said Motion, Plaintiffs state as follows:

INTRODUCTION

On May 1, 2021, MEDINA SPIRIT—trained by Baffert and owned by Zedan—won the 147th Kentucky Derby at Churchill Downs Race Track in Louisville, Kentucky. Following the Kentucky Derby, blood and urine samples were collected from MEDINA SPIRIT. Several days later, Plaintiffs were informed by the KHRC that MEDINA SPIRIT’s primary sample allegedly tested positive for 21 picograms of betamethasone. This trace amount is pharmacologically insignificant and would have zero impact on the horse or race.

Most importantly, the KHRC rules related to betamethasone are clear. It is an allowable medication and the rules only limit its use in its injectable form (betamethasone acetate). There are no rules prohibiting betamethasone in its topical form (betamethasone valerate). Baffert's contention has always been that MEDINA SPIRIT was never injected with betamethasone and that the positive test was the result of the topical administration of an ointment called OTOMAX, which was prescribed by a veterinarian to treat a skin rash on the horse, all as allowed under the KHRC rules. As a result, on June 16, 2021, this Court ordered additional testing on MEDINA SPIRIT's urine sample to determine whether the horse was injected with betamethasone or merely received a topical ointment.

Pursuant to the Court's direction, the parties agreed on the New York Equine Drug Testing & Research Laboratory and MEDINA SPIRIT's urine sample was transported by representatives of both parties and hand-delivered to world-renowned Dr. George Maylin, the Director of the laboratory. On December 3, 2021, Dr. Maylin issued his report by way of letter addressed to counsel for both Baffert and the KHRC. Said report was unequivocal in finding that the betamethasone in MEDINA SPIRIT came from a topical ointment (betamethasone valerate) and not from the injectable form of betamethasone (betamethasone acetate). (See New York Equine Drug Testing and Research Laboratory report attached hereto as Exhibit A). Additionally, Dr. Maylin provided an Affidavit summarizing the results which concluded, "it is my opinion that the finding of betamethasone in the official (a) and (b) samples collected from MEDINA SPIRIT by the Kentucky Horse Racing Commission following the 2021 Kentucky Derby resulted from the topical administration of Otomax and not an injection of betamethasone." (See Affidavit of Dr. Maylin attached hereto as Exhibit B).

Shockingly, despite the fact that the entire purpose of the Court Ordered examination of MEDINA SPIRIT's urine was to determine whether or not there was rules violation, the KHRC Stewards ignored the scientific findings. On February 21, 2022, the KHRC Stewards issued Ruling numbers 21-009 and 21-0010 which disqualified MEDINA SPIRIT as the winner of the 2021 Kentucky Derby and imposed a 90-day suspension and \$7,500.00 fine on Baffert. (See Stewards Rulings attached hereto as collective Exhibit C). The Stewards offered no explanation as to the rationale for their decision.

Worse, the KHRC has refused to follow standard procedure and stay the Stewards Rulings pending appeal. By their terms, the Stewards Rulings are set to go into effect on March 8, 2022. Absent a stay of the Stewards Ruling before March 8, 2022, the Plaintiffs will suffer immediate and irreparable harm. For the reasons that follow, this Court should stay Stewards Rulings 21-0009 and 21-0010 pending the appeal of those rulings either pursuant to KRS 230.320(2)(f) or Civil Rule 65.04.

FACTUAL BACKGROUND

Baffert is unquestionably the most accomplished trainer in the history of thoroughbred racing. Objectively, he has consistently been recognized for excellence and as one of the most positive influences on horse racing throughout the course of his 46-year career. Some of his most notable accomplishments include:

- In 1997, Baffert was awarded the Mr. Fitz Award by the National Turf Writers and Broadcasters' Association. This honor is awarded to an individual or group who typifies the spirit of racing.
- In 1998, Baffert was awarded the Big Sport of Turfdom Award by the Turf Publicists of America. This award is given to a person or group who enhances coverage of thoroughbred racing through cooperation with the media and racing publicists.

- In 1997, 1998, 1999, and 2015, Baffert earned the Eclipse Award, presented by the National Turf Writers and Broadcasters' Association for being the nation's most outstanding trainer.
- In 2007, Baffert was inducted into the Lone Star Park Hall of Fame.
- In 2009, Baffert was inducted into the Thoroughbred Racing Hall of Fame.
- In 2010, Baffert was inducted into the Arizona Sports Hall of Fame.
- In 2010, Baffert was named a University of Arizona Hispanic Alumni Portraits of Excellence Honoree.
- In 2015, Baffert was named March of Dimes Sportsman of the Year.
- In 2018, Baffert was inducted into the Kentucky Sports Hall of Fame.

(See Affidavit of Bob Baffert at ¶ 2, attached hereto as Exhibit D).

On May 1, 2021, MEDINA SPIRIT won the 147th Kentucky Derby, and blood and urine samples were collected shortly after the race. (Amended Complaint at ¶ 13). On May 8, 2021, the Plaintiffs were informed by the KHRC that MEDINA SPIRIT's primary sample allegedly tested positive for 21 picograms of betamethasone. (*Id.* at ¶ 15). This trace amount is pharmacologically insignificant and would have zero impact on the horse or race. (*Id.*; See Affidavit of Dr. Steven Barker, ¶ 8, attached hereto as Exhibit E).

Betamethasone is not a banned substance; in fact, it is approved by the U.S. Food and Drug Administration and recognized by the Racing Medication Testing Consortium and Association of Racing Commissioners International as a valuable therapeutic substance and is included on their Controlled Therapeutic Medication Schedule. (*Id.*). It is commonly administered to horses to reduce inflammation. (*Id.*).

The Kentucky Horse Racing Commission labels betamethasone as a Class C substance. (Amended Complaint at ¶ 18). Class A and B substances are the most highly regulated and are deemed to have the most potential to affect the outcome of a race. (*Id.*). Class C substances are

considered much more benign. (*Id.*). In short, betamethasone—and certainly in such extremely small amounts—is not a substance that would have altered MEDINA SPIRIT’s performance in the Kentucky Derby in any way, shape or form. (Barker affidavit, ¶ 8).

While betamethasone is an allowable medication, the KHRC rules regulate it as an injection. Under the KHRC’s rules, a horse may be *injected* with betamethasone so long as such injection is not administered within 14 days of a race. The two KHRC rules governing betamethasone are 810 KAR 8:010, Section 24 and KHRC 8-020-2, Section 12. Those rules state as follows:

810 KAR 8:010, Section 24:

(1) A corticosteroid shall not be administered **intra-articularly** within fourteen (14) days before post time for the race in which the horse is entered.

KHRC 8-020-2, Section 12:

The following have a 14 day stand down period for **intra-articular** injection (IA). Any IA corticosteroid **injection** within fourteen days is a violation:

- Betamethasone-**Intra-articular** (IA) at 9 mg total dose in a single articular space;
NOTE: Withdrawal time should be increased for use of betamethasone products with a ratio of a > 1:1 **betamethasone acetate** to betamethasone sodium phosphate. Intramuscular administration is associated with substantially longer withdraw times. (emphasis added).

On the other hand, the KHRC rules specifically permit topical ointments. 810 KAR 8:010, Section 4 states as follows:

Certain Permitted Substances. Liniments, antiseptics, antibiotics, ointments, leg paints, washes, and other products commonly used in

the daily care of horses may be administered by a person, other than a licensed veterinarian if:

- (1) the treatment does not include any drug, medication, or substance otherwise prohibited by this administrative regulation;
- (2) the treatment is not injected; and
- (3) the person is acting under the direction of a licensed trainer or veterinarian licensed to practice veterinary medicine in Kentucky and licensed by the Commission.

MEDINA SPIRIT has never been injected with betamethasone. (Amended Complaint at ¶ 19). However, the horse's veterinary records show that in the weeks leading up to the Kentucky Derby he was being treated by a veterinarian for a dermatological condition using a topical anti-bacterial, anti-fungal and anti-inflammatory cream contained in the product OTOMAX. (Barker affidavit, ¶ 13). Such treatment was proper veterinary care to cure the observed skin condition and would not in any way affect the performance of the horse. (Barker affidavit, ¶13). The alleged finding of 21 picograms of betamethasone in MEDINA SPIRIT is consistent with the fact that OTOMAX was applied to the skin of the horse at least once a day, for several days, and was applied to the skin the day before the Derby. (Barker affidavit, ¶ 14).

As a result of the KHRC rules which only regulate betamethasone injections, and specifically authorize the use of topical ointments, this Court ordered testing on MEDINA SPIRIT's urine sample to determine whether the horse was injected with betamethasone or merely received a topical ointment. The parties agreed on the New York Equine Drug Testing & Research Laboratory and MEDINA SPIRIT's urine sample was transported by representatives of both parties and hand-delivered to world-renowned Dr. George Maylin, the Director of the laboratory.

On December 3, 2021, Dr. Maylin issued his report by way of letter addressed to counsel for both Baffert and the KHRC. Said report was unequivocal in finding that the betamethasone in MEDINA SPIRIT came from a topical ointment and not an injection. (Exhibit A). Dr. Maylin also provided an Affidavit summarizing the results which concluded, "it is my opinion that the

finding of betamethasone in the official (a) and (b) samples collected from MEDINA SPIRIT by the Kentucky Horse Racing Commission following the 2021 Kentucky Derby resulted from the topical administration of Otomax and not an injection of betamethasone.” (Exhibit B).

Unbelievably, despite the fact that the entire purpose of the Court ordered examination of MEDINA SPIRIT’s urine was to determine whether or not there was a rules violation, the KHRC Stewards ignored the scientific findings. On February 21, 2022, the KHRC Stewards issued Ruling numbers 21-009 and 21-0010 disqualifying MEDINA SPIRIT as the winner of the 2021 Kentucky Derby and imposing a 90-day suspension and \$7,500.00 fine on Baffert.¹ (Exhibit C). The Stewards offered no explanation as to the rationale for their decision. Despite being asked, the Stewards failed to address Dr. Maylin’s scientific findings or otherwise explain how, in the face of incontrovertible evidence that no betamethasone injection was ever given to MEDINA SPIRIT, there was a rule violation.

The Stewards Rulings are preliminary and have been appealed to the KHRC as is expressly authorized by regulation. The matter will now go before the KHRC for a full blown administrative hearing. As such, the Stewards Rulings aren’t even a final administrative decision of the KHRC. Of course, whenever the KHRC does issue a final decision, it is subject to being appealed to this Court.

Typically, given the preliminary nature of a Stewards Ruling, the KHRC stays any implementation of penalties imposed therein until all appeal are exhausted and there is a final and binding decision. This is in large part because the KHRC recognizes that irreparable harm will be suffered by licensees if they are forced to presently suffer the consequences of a ruling that is subject to being reversed later. For example, a trainer who is forced to serve days of a suspension

¹ Even more troubling, the 90 day suspension is well beyond the 30-60 day maximum allowed under the KHRC’s penalty rule. See 810 KAR 8:030, Section 4 (3)(a).

now cannot ever get those lost days back if the ruling imposing the suspension is subsequently vacated or modified.

KRS 230.320 sets forth a process by which parties can request that a Stewards Ruling be stayed pending appeal. First, application can be made to the Executive Director of the KHRC. KRS 230.320 (2)(a). If the Executive Director declines to issue the stay, application can then be made to the Chairperson of the KHRC. If the stay is still not granted, appeal can be made to this Court. KRS 230.320 (2)(f).

Plaintiffs have followed the statutory procedure set forth in KRS 230.320. However, the Executive Director has refused to grant a stay and, although appeal has been made to the Chairperson of the KHRC, no decision has been made by that body and the starting date of the suspension is imminent. The Plaintiffs cannot afford to wait. Absent a stay of the Stewards Ruling before March 8, 2022, the Plaintiffs will suffer immediate and irreparable harm.

ARGUMENT

I. The Court should stay the Stewards Rulings pursuant to KRS 230.320.

KRS 230.320(2)(f) authorizes this Court to review any decision of the KHRC refusing to stay a Stewards Ruling. Under this statute, the Plaintiffs' burden is low. Plaintiffs must only establish good cause for a stay. Here, that burden is easily met as, absent a stay, the Plaintiffs' appeal of the Stewards Rulings would be rendered meaningless. This is because Plaintiffs will currently be forced to suffer the consequences of penalties they are appealing. If they are successful in their appeals, the harm they will have already suffered cannot be undone.

In this case, the Stewards have imposed a 90 day suspension on Baffert that is set to take effect on March 8, 2022. He has appealed that ruling and the matter is set for administrative adjudication before the KHRC. In other words, the Stewards Ruling imposing the suspension isn't even a final decision of the administrative body at this point. However, if Baffert is forced to serve

his suspension now, the consequences to him are significant and his appeal of that Ruling will necessarily be rendered moot.

First, any suspension imposed by the KHRC will be honored through reciprocity by every other racing jurisdiction in the United States. Thus, if the suspension is put into place now, Baffert will be precluded from racing anywhere in the United States for 90 days. Further, in California where Baffert his based, he will be forced to vacate his barns and remove all signage. (Baffert Affidavit, ¶ 9). This will effectively put him out of business. (*Id.*). Thus, the consequences of serving a suspension are severe.

Second, if forced to serve a suspension now, Baffert’s appeal would be rendered moot. This is because any subsequent ruling that vacates or modifies the suspension would be meaningless if those days have already been served. The genie cannot be put back into the bottle. This is why the KHRC always grants stays in cases like this and its actions here are unprecedented. Treating Baffert differently than every other trainer is arbitrary and capricious. *See Wagoner v. Blair Fork Coal Co.*, 534 S.W.2d 250, 252 (Ky. 1976) (administrative boards must act fairly and honestly and treat everyone alike according to the standards and rules prescribed; failure to do so is arbitrary which Courts will not permit).

Plaintiffs are clearly entitled to a stay of the Stewards Rulings pursuant to KRS 230.320. Accordingly, this Court should enter an Order saying those Rulings while they are being appealed.

II. The Court should stay the Stewards Rulings pursuant to CR 65.04.

CR 65.04(1) authorizes circuit courts to grant a temporary injunction when “it is clearly shown ... that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the

action, or the acts of the adverse party will tend to render such final judgment ineffectual.” Temporary injunctions are meant to maintain the status quo until the substantive issues in a case can be fully heard. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

Injunctive relief is proper when the court determines that: (1) the movant's position presents ‘a substantial question’ on the underlying merits of the case, i.e. that there is a substantial possibility that the movant will ultimately prevail; (2) the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) an injunction will not be inequitable, i.e., will not unduly harm other parties or disserve the public. *SM Newco Paducah, LLC v. Kentucky Oaks Mall Co.*, 499 S.W.3d 275, 278 (Ky. 2016) (quoting *Price v. Paintsville Tourism Commission*, 261 S.W.3d 482, 484 (Ky. 2008)). Because all three requirements are satisfied here, the Plaintiffs are entitled to a temporary injunction staying the KHRC from enforcing the Stewards Rulings while they are being appealed.

I. There is a Substantial Likelihood That Plaintiffs Will Prevail on the Merits.

Kentucky courts require a party seeking a temporary injunction to show a substantial question exists—which is another way of saying that there is “a *substantial possibility* that the plaintiff] will ultimately prevail on the merits.” *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020) (quoting *Norsworthy v. Kentucky Bd. of Med Licensure*, 330 S.W.3d 58, 63 (Ky. 2009)); *see also Maupin*, 575 S.W.2d at 699. Moreover, “even if the Plaintiff is unable to show a strong or substantial probability of ultimate success on the merits, an injunction can be issued when the plaintiff at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” *Morgan v. Bevin*, 298 F.Supp.3d 1003, 1009 (E.D. Ky. 2018) (internal citations omitted). In this case, Plaintiffs easily

establish a substantial possibility that some or all of the Stewards' Ruling will be reversed for three reasons.

First, the Stewards' Rulings are unsound and contrary to the plain text of KHRC regulations. When interpreting regulations, Kentucky law is clear that the text is "supreme." *Owen v. University of Kentucky*, 486 S.W.3d 266, 270 (Ky. 2016). "[T]he words of the text are of paramount concern, and what they convey, in their context, is what the text means." *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). In determining the meaning of the text, "words will be presumed to be understood in their ordinary meanings, unless context mandates otherwise." *Id.* Equally important, Kentucky courts "will not construe a meaning that the text cannot bear." *Id.*

There are two KHRC rules governing betamethasone. Those rules are as follows:

810 KAR 8:010, Section 24:

(1) A corticosteroid shall not be administered **intra-articularly** within fourteen (14) days before post time for the race in which the horse is entered.

KHRC 8-020-2, Section 12:

The following have a 14 day stand down period for **intra-articular** injection (IA). Any IA corticosteroid **injection** within fourteen days is a violation:

- Betamethasone-**Intra-articular** (IA) at 9 mg total dose in a single articular space;
NOTE: Withdrawal time should be increased for use of betamethasone products with a ratio of a > 1:1 **betamethasone acetate** to betamethasone sodium phosphate. Intramuscular administration is associated with substantially longer withdraw times. (emphasis added).

Both of these rules plainly address and limit injections of betamethasone (betamethasone acetate). They do not in any way address or limit topical applications of betamethasone (betamethasone valerate). In fact, the KHRC rules specifically permit topical ointments. 810 KAR 8:010, Section 4 states as follows:

Certain Permitted Substances. Liniments, antiseptics, antibiotics, ointments, leg paints, washes, and other products commonly used in the daily care of horses may be administered by a person, other than a licensed veterinarian if:

- (1) the treatment does not include any drug, medication, or substance otherwise prohibited by this administrative regulation;
- (2) the treatment is not injected; and
- (3) the person is acting under the direction of a licensed trainer or veterinarian licensed to practice veterinary medicine in Kentucky and licensed by the Commission.

In this case, Plaintiffs have presented *undisputed* scientific proof that the positive test result following the Kentucky Derby was the result of a topical ointment containing betamethasone valerate, while also conclusively determining that MEDINA SPIRIT *was not* injected with betamethasone acetate. (Exhibits A and B; Am. Compl. at ¶¶ 30-31.) Betamethasone acetate—the metabolite present in the injectable form of betamethasone—is the only one referenced in the KHRC regulations and those regulations only address *intra-articular injections*. 810 KAR 8:010, § 24; 810 KAR 8:020-2, § 12. There is no mention of *other* betamethasone metabolites or the presence of betamethasone in other forms. To the contrary, the KHRC regulations *expressly permit* the use of “ointments” that are “commonly used in the daily care of horses.” 810 KAR 8:010, § 4.

It is a primary rule of construction that the enumeration of particular things excludes the idea of other terms omitted from the text. *Fox v. Grayson*, 317 S.W.3d 1, 8-9 (Ky. 2010) (concerning the *expressio unius est exclusio alterius* canon of construction). This rule is “most helpful when there is a strong, unmistakable contrast between what is expressed and what is

omitted.” *Id.* In this case, the KHRC regulations specifically enumerate the exact metabolite (betamethasone acetate) and treatment form of betamethasone (intra-articular corticosteroid injection) that is prohibited if administered within the stand-down period provided within the regulations. By contrast, there is no mention of betamethasone valerate or its use in topical ointments—which are themselves presumptively permitted under 810 KAR 8:010, § 4.

The Stewards Rulings disqualifying MEDINA SPIRIT and imposing penalties on Plaintiffs did not include any rationale or explanation for their conclusion. Specifically, and despite Plaintiffs’ request for clarification, the Stewards declined to state whether they believed (contrary to irrefutable scientific evidence) that MEDINA SPIRIT was in fact injected with betamethasone acetate or, alternatively, whether they believe Otomax and topical uses of unregulated betamethasone metabolites nonetheless amount to a violation of the KHRC regulations. But either way, the Stewards have erred: either they ignored unquestionable scientific evidence that MEDINA SPIRIT was not injected with betamethasone acetate or they willfully disregarded the plain texts of their own regulations as to which substances are and are not prohibited.

This distinction is important and is the whole reason this Court ordered supplemental testing of MEDINA SPIRIT’s urine sample. Now that the truth has come out, the Stewards and the KHRC have apparently determined that they do not care and intend to punish Plaintiffs anyway, without explanation, and without delaying implementation of their punishment pending appeal. The plain text of the regulations at issue demonstrates that Plaintiffs raise a substantial possibility of success in reversing the Stewards’ Rulings. The Stewards’ penalties should therefore be stayed while that process plays out.

Second, Plaintiffs raise a serious question concerning the merits by demonstrating bias in the Stewards panel adjudicating their case. All Kentucky adjudications, whether judicial or

administrative, are protected by due process guarantees “whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures.” *Commonwealth Nat. Res. & Envtl. Prot. Cab. v. Kentec Coal Co., Inc.*, 177 S.W.3d 817, 724 (Ky. 2005). Agencies “must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.” *Morgan v. United States*, 304 U.S. 1, 22 (1938). As such, “a biased decision-maker is constitutionally unacceptable,” and Kentucky’s justice system “has always endeavored to prevent even the probability of unfairness.” *Baker v. Commonwealth*, 2007 WL 3037718 at *14 (Ky. App. Oct. 19, 2007) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In this case, Plaintiffs hearing was conducted by a three-Steward panel. One of those Stewards, however, is an employee of Churchill Downs. Months ago, and before hearing any evidence, Churchill Downs imposed its own suspension of Baffert which is currently being litigated. That Steward is unavoidably predisposed, if not pressured, to act in a way that upholds or confirms actions that his employer has already taken. His presence and bias in the proceedings taints the entire panel and undermines the panel’s decision, which again was issued without any explanation or rationale for its ruling.

Third, Plaintiffs raise a substantial possibility of success on the merits because the Stewards exceeded their authority in imposing a penalty beyond the range permitted in the KHRC regulations. 810 KAR 8:030, Section 4(3)(a)—which relates to penalties applicable to a “Class C drug violation and an overage of permitted NSAIDs”—provides for a *maximum* penalty of a 30-60 day suspension and a \$2,500-5,000 fine absent mitigating circumstances. Therefore, even if the Stewards correctly determined that Plaintiffs violated Kentucky’s rules of racing (which they did not), they erred in imposing a penalty beyond the maximum penalty allowed for a Class C drug violation under the KHRC regulations.

Thus, because Plaintiffs have adequately demonstrated a substantial possibility they will ultimately prevail on the merits, the Court should reverse the KHRC's decision to deny Plaintiffs' request to stay their suspension and further enjoin the KHRC from attempting to enforce those penalties until this matter is finally decided.

II. Plaintiffs Will Suffer Immediate and Irreparable Injury Without the Entry of a Temporary Injunction.

Under Kentucky law, a party is entitled to injunctive relief when he or she establishes that "his or her right will be violated by the adverse party and that without the requested relief he or she will suffer irreparable injury." *Commonwealth, Revenue Cab. v. Ledger*, 955 S.W.2d 539 (Ky. App. 1997). Irreparable injury may be established by proving that the available legal remedies will not adequately address the harm, such that "even a favorable judgment will not give [the party] adequate relief." *Collins v Commonwealth*, 324 S.W.2d 406 (Ky. 1959); *see also North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010) (irreparable harm is one in which "final judgment will be rendered ineffectual"). It has also been found to exist when money damages will not fully compensate a plaintiff's injury. *United Carbon Co v. Ramsey*, 350 S.W.2d 454, 461 (Ky. 1961). An injury is irreparable when "the nature of the plaintiff's loss would make damages difficult to calculate." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

Courts have repeatedly held that, in the realm of sports, where the sporting events cannot be replayed after the fact, "[i]mproper suspensions . . . can undoubtedly result in irreparable harm." *Nat'l Football League Players Ass'n v. Nat'l Football League*, 598 F. Supp. 2d 971, 982 (D. Minn. 2008). There is a long line of case law recognizing the logic of this view. For example:

- A college football player accusing the NFL of improperly deeming him ineligible for the draft showed irreparable harm because "los[ing] a year of playing time in the NFL" was "irremediable." *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 411, 412 (S.D.N.Y. 2004).

- Five NFL players suspended for four games because of positive drug tests obtained an injunction against their suspensions because there were “substantial questions” about the players’ “inadvertent use of a banned substance” and because their “reputation[s]” would be “irretrievably tarnished” if suspensions were implemented. *Nat’l Football League Players Ass’n*, 598 F. Supp. 2d at 982.
- A 19-year-old professional hockey player obtained an injunction against a rule imposing a minimum age of 20, because continued competition carried “financial and emotional rewards in excess of [the player’s] salary.” *Linseman v. World Hockey Ass’n*, 439 F.Supp. 1315, 1319 (D. Conn. 1977).
- A professional basketball player showed irreparable harm when threatened with a challenge to his eligibility to play under the NBA’s draft rules because, if forced to sit out, the player’s “public acceptance as a super star will diminish to the detriment of his career.” *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1057 (C.D. Cal. 1971).

Baffert is similarly situated. During the next 90 days, numerous races, including the Triple Crown, will be run. (Baffert Aff. ¶ 10). This is not limited to Kentucky—due to reciprocity laws in place in all racing jurisdictions - Baffert will be effectively prevented from entering horses to race anywhere in the United States. (*Id.* at ¶ 7). Any missed races will be an opportunity forever lost, analogous to a football or basketball player being suspended for critical playoff games. The Triple Crown and all the other graded races only come around once a year—and if Baffert is prohibited from participating in 2022—it is an opportunity that can never be regained. There is no compensating for the missed opportunity to participate in the prestigious races that define the success of a trainer’s career and garner goodwill with clients. Given the unique nature of the industry, any prolonged suspension of Baffert will also have the effect of destroying his business for a period of time much longer than the suspension itself. Most directly, in California—where Baffert is based—any suspension over 60 days will require him to vacate his barns and remove his signage, effectively putting him out of business. (Baffert Affidavit at ¶ 9).

Moreover, the Sixth Circuit has explained that in addition to uneasily calculable damages, irreparable harm can include “loss of customer goodwill.” *Southern Glazer’s Distributors of Ohio*,

LLC v. Great Lakes Brewing Co., 860 F.3d 844, 852 (6th Cir. 2017). As Judge Rogers explained, “[i]t is appropriate to use a preliminary injunction to avoid harms to goodwill and competitive position,” particularly when the injury harms “goodwill and competitive position in ways that would be hard to compensate.” *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 279 (6th Cir. 2015).²

This is even more true for Baffert than most trainers because he offers a unique and highly specialized service in training only elite thoroughbred racehorses for prestigious Graded Stakes races, including the Triple Crown. Graded Stakes races are the most elite races and a Grade I Stakes races is the highest level of racing in the industry. (Baffert Affidavit at ¶ 10). Those races generally offer the highest purses and are intended to showcase the best, most elite horses in the industry. (*Id.*) Because Baffert worked his way up the ladder of horse racing to become an elite thoroughbred trainer, training horses for Graded Stakes and prestigious races is the foundation of his livelihood. (*Id.* at ¶ 11). His clients spend significant monies on top-class horses at annual thoroughbred auctions to participate in these races. (*Id.* at ¶ 12). They cannot afford to be excluded from those races. Thus, any suspension will necessarily precipitate a mass exodus from his care of horses worth tens of millions of dollars as owners cannot allow themselves to be excluded from all of the highly prestigious races which occur in the next 90 days. (*Id.* at ¶¶ 8, 11-12.)

As *Great Lakes Brewing* explained, “[w]hen a distributor loses a unique product like Great Lakes’ craft beer, it threatens their relationship with the retailers that have come to rely on the distributor for the in-demand product.” *Id.* at 853 (referring to *Tri-Cty. Wholesale Distribs., Inc. v.*

² The Sixth Circuit’s position is hardly unique. See *Regeneron Pharma., Inc. v. United States Dep’t of Health & Human Servs.*, 510 F.Supp.3d 29, 39-40 (S.D.N.Y. 2020) (“A court can find irreparable harm based on ‘loss of reputation, good will, and business opportunities’”) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)). Thus, “a loss of existing business and a decline in the opportunity for new business may qualify as irreparable harm.” *Id.* at 40.

Wine Grp., 656 F. App'x 477, 483 (6th Cir. 2012) (“The loss of a product which is ‘unique’ ... can cause a drop in customer goodwill”). By analogy, this is equally true of Baffert—by needlessly enforcing a preliminary suspension while Baffert appeals the Stewards Rulings, Baffert’s entire business model and his relationships with his unique clients are gravely threatened. Because Baffert faces irreparable harm to his ability to ply his trade and potentially forever disrupting his goodwill with his clientele, injunctive relief staying the KHRC’s preliminary penalty is necessary while Baffert appeals the Stewards Rulings.

III. The Equities Favor the Entry of a Temporary Injunction.

Finally, the *Maupin* standard requires the Court to assess the equities involved in granting temporary injunctive relief:

The sufficiency of a verified complaint to support a temporary injunction should be evaluated by a balance of hardships test. That rule, well recognized in the federal system, provides that if the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient if the complaint raises a serious question warranting a trial on the merits.

575 S.W.2d at 699. In order to award a temporary injunction, the Court must find “that an injunction will not be inequitable, *i.e.*, will not unduly harm other parties or disserve the public.” *Beshear v. Goodwood Brewing Co, LLC*, --- S.W.3d ---, 2021 WL 3730896, at *4 (Ky. 2021) (quoting *Price v. Paintsville Tourism Comm’n*, 261 S.W.3d 482, 484 (Ky. 2008)). When weighing the equities, “although not an exclusive list, the court should consider such things as possible detriment to public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.” *Id.* (quoting *Maupin*, 575 S.W.2d at 699); *see also Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020).

This factor requires the Court to weigh the harm to Plaintiffs against the potential harm to the KHRC and the public. Examining the effects of injunctive relief make clear that the KHRC

will not be prejudiced by a temporary injunction in any way—to the contrary, an injunction merely preserves the status quo while this matter is permitted to be fully litigated to finality. If the KHRC ultimately prevails and the Stewards’ decision is upheld, then Plaintiffs’ penalties can be immediately enforced. Neither the Stewards nor the KHRC have expressed any public interest in insisting that the preliminary penalties take immediate effect, and they have offered no explanation or justification for their decision to take the highly unusual action of denying a request for stay while a licensee appeals a preliminary ruling. Put bluntly, there is absolutely no harm to the KHRC or the public in waiting to impose penalties until *after* Plaintiffs have exhausted their appeals.

By contrast, the harm to Plaintiffs is immeasurable. Once they serve the time of their suspensions, that lost time cannot be given back. This not only deprives Baffert of the ability to ply his trade throughout the country in unique, once-a-year opportunities, but the unnecessarily punitive length of the Stewards’ proposed suspension threatens his entire business. Because the temporary injunction would merely preserve the status quo and does not alter the parties’ existing relationship while the merits are fully adjudicated, the balance of equities strongly favors granting Plaintiffs injunctive relief. The KHRC is the party attempting to upend the status quo, and thus, it should be enjoined.

CONCLUSION

Accordingly, and for the foregoing reasons, Plaintiffs request that the Court stay the KHRC from imposing all penalties set forth in Stewards Rulings 21-0009 and 21-0010 pending the appeal of those Rulings.

Respectfully submitted,

/s/ W. Craig Robertson, III

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859-233-2012

Counsel for Plaintiff Bob Baffert

and

/s/ Clark Brewster

Clark Brewster

Pro Hac Vice KBA# 16420917

2617 E. 21st Street

Tulsa, OK 74114

Counsel for Plaintiff Zedan Racing Stables, Inc.

CERTIFICATE OF SERVICE

This is to certify that I electronically filed the foregoing via the Court's electronic filing system on this the 28th day of February, 2022. I further certify that this motion will be served upon the following by email:

Jennifer Wolsing, General Counsel
Kentucky Horse Racing Commission
4063 Iron Works Parkway
Building B
Lexington, KY 40511

/s/ W. Craig Robertson, III

Counsel for Plaintiffs

New York Drug Testing and Research Program

777 Warren Road Ithaca, NY 14850
Telephone: 607-882-9065 Fax: 607-882-9067

December 3, 2021

Jennifer Wolsing
General Counsel
PPC/Kentucky Horse Racing Commission
4063 Iron Works Pkwy, Building B
Lexington, KY 40511

W. Craig Robertson III
Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746

Dear Ms. Wolsing and Mr. Robertson,

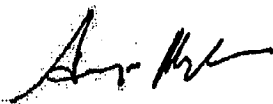
The New York Drug Testing & Research Program (NYDTRP) has tested the Churchill Downs urine sample E427258 that was delivered by your representatives on July 14, 2021.

The urine sample was tested to determine if the alleged topical administration of OTOMAX could have resulted in the finding of betamethasone in the official A and B samples collected by the Kentucky Horse Racing Commission.

The urine sample contained clotrimazole, 2-(chlorophenyl) diphenylmethanol, a metabolite of clotrimazole, and betamethasone 17-valerate. Gentamycin was not confirmed in the sample. These analytes were detected in a topical administration of OTOMAX to two thoroughbred research horses. Betamethasone acetate was not detected in the sample. Other routes of administration have not been studied yet.

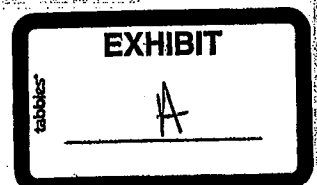
The analytical data to support these findings and the metabolism and excretion studies are available for review by an expert scientist in our Ithaca Laboratory. We consider this to be a research project that will be submitted to a peer reviewed journal and as such is confidential until the data has been submitted for review.

Sincerely,



George A. Maylin, D.V.M., Ph.D.
Director, New York Drug Testing & Research Program

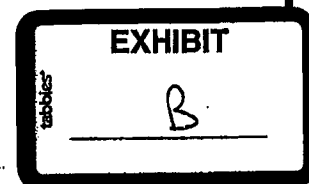
GAM/kep



AFFIDAVIT

Affiant, being duly sworn, hereby states as follows:

1. My name is Dr. George Maylin. I am of sound mind, over eighteen years of age, and make the statements contained herein based on my own personal knowledge.
2. I am the Director of the New York Equine Drug Testing and Research Laboratory which is located in Ithaca, New York. The New York Testing laboratory is fully accredited thorough ISO 17025 and the Racing Medication Testing Consortium. We test all equine samples from New York racing jurisdictions. We also test equine samples from other racing jurisdictions when such testing does not interfere with our primary responsibility to the New York Gaming Commission.
3. Pursuant to a Court Order entered in the matter of *Bob Baffert and Zedan Racing Stables, Inc. v. Kentucky Horse Racing Commission*, Franklin Circuit Court, Civil Action No. 21-CI-00456, a urine sample (E427258) from MEDINA SPIRIT was hand delivered to me on July 14, 2021 by representatives of both parties.
4. I agreed to test the MEDINA SPIRIT urine sample to determine if the alleged topical administration of OTOMAX could have resulted in the finding of betamethasone in the official A and B samples collected from the horse by the Kentucky Horse Racing Commission.
5. Attached hereto as Exhibit A is a letter dated December 3, 2021 which I sent to the representatives of both parties following the testing. This letter sets forth my findings which are based on a reasonable degree of scientific certainty.
6. Specifically, the MEDINA SPIRIT urine sample contained both a metabolite of clotrimazole and betamethasone 17-valerate. This is consistent with the topical administration of



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Andy Beshear
Governor

Public Protection Cabinet
Kentucky Horse Racing Commission
4063 Iron Works Parkway, Building B
Lexington, KY 40511
Telephone: (859) 246-2040
Fax: (859) 246-2039

Ray A. Perry
Secretary

Marc Guilfoil
Executive Director

Jonathan Rabinowitz
Chairman

STEWARDS RULING

Ruling number: 21-0009
Sample #E427258

Track: Turfway Park

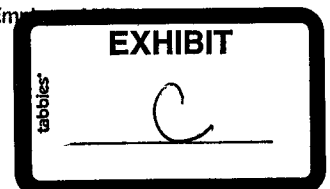
Date: February 21, 2022

Trainer: Robert A. Baffert

Upon receipt of notification from Industrial Laboratories, the official testing laboratory for the Kentucky Horse Racing Commission, and confirmed at University of California, Davis (Laboratory No: 210525-424136), sample number E427258 taken from MEDINA SPIRIT, who finished first in the twelfth race at Churchill Downs on May 1, 2021, contained betamethasone in blood (Class C drug)(fourth medication violation in 365 days in any racing jurisdiction). After a formal hearing before the Board of Stewards Robert A. Baffert is hereby suspended 90 days, March 8, 2022 through June 5, 2022 (inclusive) and fined seven thousand five hundred (\$7,500) dollars. MEDINA SPIRIT is disqualified and all purse money forfeited. Pari-mutuel wagering is not affected by this ruling. During his suspension Mr. Baffert is denied the privileges of all facilities under the jurisdiction of the Kentucky Horse Racing Commission. Entry of all horses owned or trained by Mr. Baffert is denied pending transfer to persons acceptable to the stewards. Upon receipt of this ruling, it is required within thirty (30) days to pay any and all fines imposed to the Kentucky Horse Racing Commission. Failure to do so will subject the licensee to summary suspension of license pursuant to 810 KAR 3:020 Section 15 (cc).

- 810 KAR 2:040 Section 4
- 810 KAR 4:010 Section 10, subsection (4)
- 810 KAR 4:100 Section 3, subsections (1) and (2)(d)
- 810 KAR 4:060 Sections (6) and (7)
- 810 KAR 8:010 Section 2
- 810 KAR 8:010 Section 15 subsections (2) and (3)
- 810 KAR 8:030 Section 2, subsection (3)
- 810 KAR 8:030 Section 3
- 810 KAR 8:030, Section 4, subsections (3)(a) and (b)
- 810 KAR 8:030 Section 9

BY ORDER OF THE STEWARDS





Andy Beshear
Governor

Public Protection Cabinet
Kentucky Horse Racing Commission
4063 Iron Works Parkway, Building B
Lexington, KY 40511
Telephone: (859) 246-2040
Fax: (859) 246-2039

Ray A. Perry
Secretary

Marc Guilfoil
Executive Director

Jonathan Rabinowitz
Chairman

STEWARDS RULING

Ruling number: 21-0010
Sample #E427258

Track: Turfway Park

Date: February 21, 2022

Owner: Amr F. Zedan

Upon receipt of notification from Industrial Laboratories, the official testing laboratory for the Kentucky Horse Racing Commission, and confirmed at University of California, Davis (Laboratory No: 210525-424136), sample number E427258 taken from MEDINA SPIRIT, who finished first in the twelfth race at Churchill Downs on May 1, 2021, contained betamethasone in blood (Class C drug). Amr F. Zedan was present at a formal hearing before the Board of Stewards. MEDINA SPIRIT is disqualified and all purse money forfeited. Pari-mutuel wagering is not affected by this ruling. All purse monies must be returned to the association. The purse of this race is ordered redistributed as follows:

THE OFFICIAL ORDER OF FINISH IS:

- | | |
|---------------------------------------|--|
| 1 st #7 MANDALOUN | 11 th #2 LIKE THE KING |
| 2 nd #9 HOT ROD CHARLIE | 12 th #20 BOURBONIC |
| 3 rd #14 ESSENTIAL QUALITY | 13 th #13 HIDDEN STASH |
| 4 th #6 O BESOS | 14 th #3 BROOKLYN STRONG |
| 5 th #10 MIDNIGHT BOURBON | 15 th #18 SUPER STOCK |
| 6 th #4 KEEPMEINMIND | 16 th #15 ROCK YOUR WORLD |
| 7 th #12 HELIUM | 17 th #11 DYNAMIC ONE |
| 8 th #1 KNOWN AGENDA | 18 th #19 SOUP AND SANDWICH |
| 9 th #17 HIGHLY MOTIVED | |
| 10 th #5 SAINTHOOD | |

Disqualified # 8 MEDINA SPIRIT

- 810 KAR 2:040 Section 4
- 810 KAR 4:010 Section 10, subsection (4)
- 810 KAR 4:060 Sections (6) and (7)
- 810 KAR 8:010 Section 2
- 810 KAR 8:030 Section 4, subsections 3(a) and (c)
- 810 KAR 8:030 Section 9

BY ORDER OF THE STEWARDS



COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 21-CI-00456
ELECTRONICALLY FILED

BOB BAFFERT
AND ZEDAN RACING STABLES, INC

PLAINTIFFS

v.

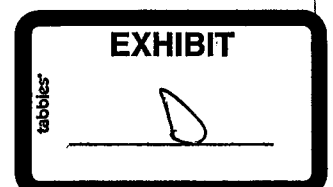
KENTUCKY HORSE RACING
COMMISSION

DEFENDANT

AFFIDAVIT

Affiant, being duly sworn, hereby states as follows:

1. My name is Bob Baffert. I am of sound mind, over eighteen years of age, and make the statements contained herein based on my own personal knowledge.
2. I am a licensed thoroughbred trainer. Over the past few decades, I have been honored and humbled to receive several awards from various thoroughbred/racing/sports organizations. These honors demonstrate not only my level of achievement in this industry, but my dedication to its success. I consider these awards to be some of my greatest accomplishments:
 - a. In 1997, I was awarded the Mr. Fitz Award by the National Turf Writers and Broadcasters' Association. This honor is awarded to an individual or group who best typifies the spirit of racing.
 - b. In 1998, I was awarded the Big Sport of Turfdom award by the Turf Publicists of America. This award is given to a person or group who enhances coverage of thoroughbred racing through cooperation with the media and racing publicists.



- c. In 1997, 1998, 1999, and 2015, I earned the Eclipse Award, presented by the National Turf Writers and Broadcasters' Association, given to the nation's most outstanding trainer.
 - d. In 2007, I was inducted into the Lone Star Park Hall of Fame.
 - e. In 2009, I was inducted into the Thoroughbred Racing Hall of Fame.
 - f. In 2010, I was inducted into the Arizona Sports Hall of Fame.
 - g. In 2010, I was named a University of Arizona Hispanic Alumni Portraits of Excellence Honoree.
 - h. In 2015, I was named March of Dimes Sportsman of the Year.
 - i. In 2018, I was inducted into the Kentucky Sports Hall of Fame.
3. I have been training horses for over 46 years. I possess a trainer's license from several racing jurisdictions, including the Commonwealth of Kentucky. My license remains active, without limitation, and in good standing in all jurisdictions.
4. Horses I have trained have won the Kentucky Derby seven times; the Preakness Stakes seven times; the Belmont Stakes three times; and the Breeders Cup eighteen times. Of the thirteen Triple Crown winners in American history, I have trained two of them: AMERICAN PHAROAH in 2015 and JUSTIFY in 2018.
5. On May 1, 2021, MEDINA SPIRIT, a horse I trained, won the 147th Kentucky Derby at the Churchill Downs Race Track in Louisville, Kentucky.
6. On February 21, 2022, I was informed by the Stewards of the Kentucky Horse Racing Commission that, due to post race blood and urine tests, MEDINA SPIRIT would be disqualified as the winner of the 2021 Kentucky Derby and I would be suspended for 90 days and fined \$7500.

7. If I am suspended, I will be prevented from entering horses to race anywhere in the United States. This is because any suspension imposed by Kentucky will be recognized through the reciprocal arrangements between the racing jurisdictions of each state. Certain races only come around once a year and are limited to horses of a particular age. Every day that I am prevented from entering horses in races is one day of lost opportunity that I can never regain, and for which I will be harmed.

8. Moreover, any suspension will likely have the effect of harming my business for a significant period of time much longer than the suspension itself. The suspension will precipitate horses currently in my care—worth tens of millions of dollars—being moved to other trainers because their owners cannot allow those horses to be excluded from participation in the lucrative races. This will effectively put me out of business in all states.

9. In California, where I am based, any suspension over 60 days will require me to vacate my barns and remove all signage. As a result, I will be effectively put out of business.

10. Graded Stakes are the most elite races and a Grade I Stakes race is the highest level of racing in the industry. Graded stakes generally offer the largest purses, and are intended to showcase the best horses in the industry. All three Triple Crown races are Grade I Stakes races. A 90 day suspension will prevent me from participating in any of those races in 2022. I will also be prevented from participating in numerous other prestigious races. If those races are missed, they are forever lost opportunities.

11. I have spent my entire career working my way up the ladder of horse racing to get to the point where I can consistently compete at the highest level. Training horses for Graded stakes races is now the foundation of my livelihood. I do so throughout the United States and, heretofore, thoroughbred owners know that, when they place a horse in my care, they will have

the opportunity to have their horses race in the best races throughout the country. A 90 day suspension threatens to destroy (a) my ability to ply my trade, (b) my current business model, and (c) my ability earn a living not just in Kentucky, but throughout the country.

12. I have a number of owners who invest in partnerships that spend significant monies on top class horses at annual thoroughbred auctions, including the Keeneland and Saratoga yearling sales. These owners are in pursuit of horses that can race in the country's most prestigious races, including the Triple Crown. If I am suspended and unable to participate in all of the Triple Crown races, I have been informed that those owners may no longer invest in horses to be placed in my care as a trainer.

Further affiant sayeth naught.

Bob Baffert
BOB BAFFERT

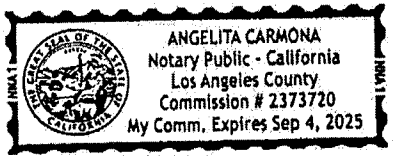
STATE OF CALIFORNIA)
) :SS
COUNTY OF Los Angeles)

The foregoing instrument was subscribed, sworn to, and acknowledged before me by Bob Baffert on this 28th day of February, 2022.

My Commission expires: 9/4/2025

Angelita Carmona
NOTARY PUBLIC

100702873.1



COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. _____
ELECTRONICALLY FILED

BOB BAFFERT
AND ZEDAN RACING STABLES

PLAINTIFFS

v.

KENTUCKY HORSE RACING
COMMISSION

DEFENDANT

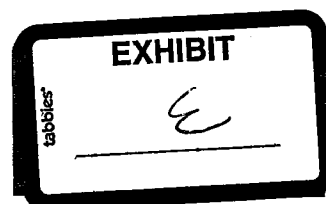
AFFIDAVIT

Affiant, being duly sworn, hereby states as follows:

1. My name is Dr. Steven A. Barker. I am of sound mind, over eighteen years of age, and make the statements contained herein based upon my own personal knowledge, training, experience and professional expertise.

2. I received a B.S. in Chemistry (with a minor in Mathematics and Physics) from the University of Alabama in Birmingham ("UAB") in 1971. I subsequently earned an M.S. in Chemistry (with a minor in Physical Chemistry) in 1973 as well as a Ph.D. in Chemistry and Neurochemistry in 1978—both also from UAB.

3. I have held the positions of Associate Professor (1985-1989), Professor (1990-2016) and the Evert Besch Distinguished Professor of Veterinary Medicine (2004-2010) and I am currently Professor Emeritus (2016-present) in the Department of Comparative Biomedical Sciences at the Louisiana State University ("LSU") School of Veterinary Medicine in Baton Rouge, Louisiana.



4. From 2014 to 2016, I also served as the Section Head in the Louisiana Animal Disease Diagnostic Laboratory within the LSU School of Veterinary Medicine.

5. From 1985 to 2016, I was the Director of the Analytical Systems Laboratory within LSU's School of Veterinary Medicine. I also served as State Chemist for the Louisiana State Racing Commission from 1987 to 2016 and as Director of the Equine Medication Surveillance Laboratory, also from 1987 to 2016.

6. I have been informed that preliminary testing of MEDINA SPIRIT's primary serum sample collected following the 2021 Kentucky Derby allegedly contained 21 picograms of betamethasone/ml of serum.

7. A picogram is one-trillionth of a gram. For reference, a picogram is the rough equivalent of one drop of water in an Olympic sized swimming pool. The 21 picograms allegedly detected in MEDINA SPIRIT's primary sample meets every pharmacologic and practical definition of a "trace" amount of the substance.

8. It is my considered opinion that the presence of such a trace amount of betamethasone has no pharmacological effect on a horse and would have had no impact on MEDINA SPIRIT's victory in the 147th running of the Kentucky Derby.

9. Betamethasone itself is not a performance-enhancing drug. Rather, it is a substance that can suppress inflammation similar to other corticosteroids such as hydrocortisone and prednisone. Contrary to many media reports and statements it is not an anabolic steroid and possesses none of the pharmacological properties of this distinctly different class of drugs.

10. Further, betamethasone is not a banned substance. In fact, it is approved by the United States Food and Drug Administration (FDA) and recognized by the Racing Medication Testing Consortium and Association of Racing Commissioners International as a valuable

therapeutic substances, and is included on their Controlled Therapeutic Medication Schedule.

It is commonly administered to horses to reduce inflammation.

11. Betamethasone is most commonly given to horses through injection. Indeed, the current "threshold" for betamethasone in a racing horse, set by the RMTC (Racing Medication and Testing Consortium) and others, is 10 picograms betamethasone/ml of blood. This threshold, which again establishes the fact that it is not a "banned" substance, was completely and totally established based on scientific data obtained from the injection of betamethasone in the fetlock and/or other equine joints and its measurement post-injection in blood as a function of time. The major and appropriate concern was to prevent horse's from running on injured or damaged joints, leading to breakdowns and eventual death of the horse or injury to the jockeys. No other sources or uses of betamethasone, such as topical application or environmental sources, were considered in establishing this limit. Aside from injection, however, scientific studies have proven that environmental or innocent contamination can lead to substances such as betamethasone being detected in the blood and/or urine of a horse, especially when monitored at picogram quantities. Further, wound sprays and topical ointments for treatment of dermatitis in a horse often contain betamethasone. Many psoriasis creams and other products for humans can contain betamethasone. Any of these external sources can be responsible for inadvertent contamination or transfer. These facts not only bring the established threshold into question but make "limit of detection" and "zero-tolerance" thresholds for such a substance arbitrary, capricious and of no value in a regulatory paradigm. The risk of contamination has become magnified as technology improves and tests employed by various racing jurisdictions become more and more sensitive. This makes the laboratories capable of detecting increasingly more

minute levels of substances at levels that have no possible pharmacological influence or are present due to inadvertent contamination or their use in a non-performance-affecting manner.

12. Veterinary records for MEDINA SPIRIT show that the horse was being treated by a veterinarian for a dermatological condition using a topical anti-bacterial, anti-fungal and anti-inflammatory cream contained in the product OTOMAX. OTOMAX is commonly used to treat dermatologic conditions in other species and is permitted for use in the equine under the conditions of FDA AMDUCA (Animal Medicinal Drug Use Clarification Act of 1994) regulations. Such treatment was proper veterinary care to cure the observed condition and would not in any way effect the performance of the horse or endanger the horse, the rider or the participants in the race.

13. The alleged finding of 21 picograms of betamethasone in MEDINA SPIRIT is consistent with the fact that this substance was being applied to the skin of the horse at least once a day, for several days, and was applied to the skin the day before the race. Further there is no record that betamethasone was ever given to MEDINA SPIRIT as an intentional injection.

14. It is my opinion that, if the finding in MEDINA SPIRIT'S primary sample is confirmed by the split sample analysis, the source of the finding of betamethasone in this case was topical administration of the OTOMAX product. It is my further opinion that blood levels observed had, to a scientific certainty, no effect on the performance of the horse or any bodily function, including the condition of its joints. It is also of great concern that the threshold for this substance is set at such a low level and that, in setting the threshold, the regulatory authorities failed to consider possible human sources or, particularly, its commonly used topical application for treatment of dermatological conditions.

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 21-CI-00456
ELECTRONICALLY FILED

BOB BAFFERT
AND ZEDAN RACING STABLES, INC

PLAINTIFFS

v.

KENTUCKY HORSE RACING
COMMISSION

DEFENDANT

ORDER

This matter having come before the Court on the Motion to Stay and/or for Temporary Injunction filed by the Plaintiffs, Bob Baffert (“Baffert”) and Zedan Racing Stables, Inc. (“Zedan”) (referred to collectively herein as the “Plaintiffs”), the parties having the opportunity to be heard, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED** as follows:

1. That Plaintiffs’ Motion is **GRANTED**;
2. That the Defendant, the Kentucky Horse Racing Commission, is hereby prohibited from enforcing the penalties described in KHRC Stewards Rulings 21-009 and 21-0010 until those matters are final and Plaintiffs have exhausted all appeals.

So **ORDERED** this the ___ day of March, 2022.

JUDGE, FRANKLIN CIRCUIT COURT
Division II