

**COMMONWEALTH OF KENTUCKY  
PUBLIC PROTECTION CABINET  
KENTUCKY HORSE RACING COMMISSION  
ADMINISTRATIVE ACTION NOS. 22-TB-003, 004**

**ROBERT A. BAFFERT and  
ZEDAN RACING STABLES, INC.**

**APPELLANTS**

v.

**KENTUCKY HORSE RACING COMMISSION**

**APPELLEE**

**RECOMMENDED ORDER**

The above-styled matter was heard by the previously assigned hearing officer, Hon. Clayton Patrick, on August 22-25, 29-30, 2022. Following the evidentiary hearing, this case was reassigned to the undersigned, Eden Davis Stephens, as Mr. Patrick recused due to an actual or perceived conflict of interest.

Trainer Robert A. “Bob” Baffert and owner Zedan Racing Stables, Inc. (“Zedan”) appealed Stewards’ Rulings 22-0009 and 22-0010, respectively, which were issued on February 21, 2022. These rulings disqualified Medina Spirit from the first-place win in the twelfth race at Churchill Downs on May 1, 2021 (the 147th running of the Kentucky Derby), required Zedan to forfeit the purse, and imposed a 90-day suspension and a \$7,500.00 fine on Mr. Baffert. The stewards’ rulings were issued based on laboratory determinations that sample E427258, taken from Medina Spirit, contained betamethasone at a level of approximately 21 pg/mL to 25 pg/mL. Betamethasone is a prohibited substance (Class C drug, pursuant to KHRC Exhibit 19, KHRC 8-020-1 at 5). It is a violation if a post-race sample taken from a horse contains betamethasone in any amount. *Id. See also* KHRC Exhibit 20, 810 KAR 8:010 Section 24.

Appellants were represented by Hon. Craig Robertson and Hon. Clark Brewster. They called the following witnesses on their behalf: Dr. George Maylin, Laboratory Director of the New

York Drug Testing Research Program (the “New York laboratory”); Thomas Lomangino, retired laboratory director for the United States Equestrian Federation;<sup>1</sup> Dr. Steven Barker, emeritus professor at Louisiana State University and retired director of the drug testing laboratory for the Louisiana State Racing Commission;<sup>2</sup> Appellant Amr Zedan on behalf of Zedan Racing Stables, Inc., and Appellant Bob Baffert. Appellee Kentucky Horse Racing Commission were represented by the Hon. Jennifer Wolsing, Hon. Luke Morgan, and Hon. Shan Dutta. The Commission called the following witnesses on its behalf: Appellant Bob Baffert; Barbara Borden, Chief State Steward; Dr. Bruce Howard, Equine Medical Director; Dr. Heather Knych, professor of clinical veterinary pharmacology at University of California, Davis (“U.C. Davis”); Petra Hartmann, Director of Drug Testing Services at Industrial Laboratories Co. (“Industrial”); Dr. Scott Stanley, University of Kentucky toxicology professor and Laboratory Director of the University of Kentucky Equine Analytical Chemistry Laboratory; Dr. Benjamin Moeller, associate professor at the U.C. Davis Equine Analytical Chemistry Laboratory; and Dr. Mary Scollay, Executive Director and Chief Operating Officer of the Racing Medication and Testing Consortium.<sup>3</sup>

### **Background and Summary of Evidence**

Zedan is the owner of Medina Spirit, a racehorse trained by Mr. Baffert. Medina Spirit competed in the twelfth race on May 1, 2021 at Churchill Downs, and finished in first place.

As the presumed winner of his race, Medina Spirit was required to submit to blood and urine testing. The blood and urine samples were collected using standardized procedures to maintain anonymity and chain of custody. These protocols are outlined in “Procedures and Practices for KHRC Veterinarians.” (KHRC Exhibit 32.)

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<sup>1</sup> Mr. Lomangino retired six years ago, in 2016. TR at 1539-40.

<sup>2</sup> Dr. Barker also retired 6 years ago, in 2016. TR 1568.

<sup>3</sup> Dr. Scollay is now employed with the Horseracing Integrity and Safety Authority.

On May 7, 2021, Industrial Laboratories reported that Medina Spirit's blood sample was positive for betamethasone at approximately 21 pg/mL. Mr. Baffert requested the split sample taken in the test barn be sent to U.C. Davis for additional testing. Following established guidelines, the sample was sent by the Kentucky Horse Racing Commission to the U.C. Davis laboratory, which reported on June 24, 2021 that the split blood sample sent to them was positive for betamethasone at approximately 25 pg/mL. Mr. Baffert also sought DNA testing, which confirmed that the blood samples tested belonged to Medina Spirit.

Betamethasone is a Class C drug. Its presence in a horse's post-race sample is prohibited by the Kentucky Horse Racing Commission, regardless of method of administration. Betamethasone has the potential to influence performance, as well as health and safety, in equine athletes.

Mr. Baffert wished to have the horse's primary samples subjected to further testing in an effort to confirm this theory. Dr. George Maylin's New York Laboratory conducted the required testing and issued findings to the parties on December 3, 2021. Dr. Maylin claimed that his laboratory detected certain Otomax components, including, but not limited to, betamethasone valerate. Betamethasone valerate is the form of betamethasone associated with its ointment formulation. Those findings were later called into question by Dr. Scott Stanley at the University of Kentucky.

A Stewards' Hearing was conducted with Mr. Baffert and Mr. Amr Zedan (client representative for Zedan) in attendance on February 14, 2022, to address violations of the following Kentucky Horse Racing Commission regulations: 810 KAR 2:040 Section 4; 810 KAR 4:010 Section 10(4); 810 KAR 4:100 Section 3(1) and (2)(d); 810 KAR 4:060 Sections 6 and 7;

810 KAR 8:010 Section 2 and 15(2) and (3); 810 KAR 8:030 Section 2(3), Section 3, Section 4(3)(a), (b), and (c), and Section 9. The penalties assessed were outlined in 810 KAR 8:030.

Mr. Baffert, as the trainer, was found to have violated these regulations at this hearing. He was ordered to serve a suspension of 90 days and pay a \$7,500.00 fine. Zedan Racing Stables, Inc. was ordered to forfeit the purse. Medina Spirit was disqualified from his race. The stewards considered Mr. Baffert's three prior medication violations that occurred within 365 days of the 2021 Kentucky Derby in assessing their penalties. Appellants submitted a timely notice of appeal, exercising their right to a KRS 13B administrative hearing to examine the Stewards' Rulings issued on February 21, 2022.

The KHRC called Mr. Baffert on the first day of hearing. He testified about his history of medication positives in the year prior to Medina Spirit's betamethasone positive, Medina Spirit's veterinary treatment history, and his statements to the KHRC stewards and the public about Medina Spirit.

On the second day of hearing, the KHRC introduced testimony from Chief Steward Barbara Borden and Equine Medical Director Dr. Bruce Howard. Ms. Borden testified about the procedural history leading up to the penalization, particularly about the measures taken to initially test the samples from Medina Spirit and the communications after the initial positive betamethasone result. Ms. Borden also testified about the stewards' deliberation process. Dr. Howard gave detailed testimony about the measures taken to collect and store the sample, making sure the samples are properly identified with the assigned number and the testing facility is secure. Dr. Howard also provided expert testimony about veterinary science.

The KHRC called Dr. Heather Knych and Petra Hartmann on the third day of hearing. Dr. Knych testified about the pharmacology of betamethasone, its classification as a "Class C"

medication, and the end of betamethasone's pharmacological effect on a horse. Ms. Hartmann testified about Medina Spirit's primary blood sample, which was tested at Industrial Laboratories, as well as Industrial's practices and procedures.

On the fourth day of hearing, the KHRC called Dr. Scott Stanley, Dr. Benjamin Moeller, and Dr. Mary Scollay. Dr. Stanley testified about his several concerns regarding the validity of Dr. Maylin's laboratory analysis of Medina Spirit's split urine sample. Dr. Moeller testified about Medina Spirit's split blood sample, which was tested by U.C. Davis. Dr. Scollay testified about her review of Medina Spirit's veterinary records, the use of Otomax in horse racing, and the use of Otomax on Medina Spirit.

Appellants introduced testimony from Dr. George Maylin, Mr. Lomangino, and Dr. Barker on the fifth day of hearing. Dr. Maylin testified about his laboratory's analysis of Medina Spirit's split urine sample. Mr. Lomangino testified about his concerns regarding the testing conducted at Industrial Laboratories and U.C. Davis. Dr. Barker testified about the pharmacology of betamethasone and the end of betamethasone's pharmacological effect on the horse.

On the sixth and final day of hearing, Appellants called Mr. Lomangino, Mr. Zedan, and Mr. Baffert. Mr. Lomangino continued his testimony from the fifth day of hearing. Mr. Zedan testified about his experience as Medina Spirit's owner. Mr. Baffert testified about Medina Spirit's treatment with Otomax.

The KHRC and Appellants jointly introduced the following deposition into the record:

- Rolando Cruz, a horse groom who testified about his experience administering Otomax to Medina Spirit. TR 1484.

In addition, Appellants separately introduced the following depositions into the record:

- Dr. Vincent Baker, who testified about treating Medina Spirit's rash with Otomax. TR 1484 (no objection from KHRC).
  - Pasqual Rivera, a foreman who testified about supervising Mr. Cruz. TR 1484 (no objection from KHRC).
  - Dr. Kevin Dunleavy, who also testified about treating Medina Spirit's rash. TR 1485 (no objection from KHRC).
  - Former KHRC Executive Director Marc A. Guilfoil, who testified largely about his decision to deny Mr. Baffert's request for a stay. TR 1485-1489 (KHRC's objections overruled).
  - Association Steward Tyler Picklesimer, who testified about the Stewards' Ruling and responded to Appellants' concerns that he had a conflict of interest. TR 1489 (no objection from KHRC).
  - Individual and Rule 30.02 depositions of Dr. Bruce Howard, who testified about KHRC regulatory history. TR 1489-1493 (KHRC's objections overruled).
  - Individual and Rule 30.02 depositions of Barbara Borden. TR 1493 (KHRC's objections overruled).
  - Rule 30.02 deposition of Dr. Mary Scollay. TR 1493 (KHRC's objections overruled).
- Appellee KHRC introduced part of Dr. Barker's deposition into the record by avowal. TR 1626-1627. Appellee also introduced part of Dr. Knych's testimony by avowal, as well as a published article relevant to her testimony. TR 694-703. KHRC Exhibit 42A.

## Findings of Fact

### **I. Mr. Baffert's recent history of medication positives**

1. Mr. Baffert testified that he takes “great pride in running a tight ship.” He further testified that he goes to every state, knows exactly the rules in every state, and that is how he runs his operation. TR at 89-90 (Mr. Baffert).
2. Mr. Baffert incurred “a couple of medication positives” at the May 2, 2020 Arkansas Derby, which took place within a year of the May 1, 2021 Kentucky Derby.<sup>4</sup> TR at 156. Two horses that Mr. Baffert trained had post-race lidocaine positives: Charlatan, who won the 2020 Arkansas Derby, and Gamine, who won a separate race on the same day. TR at 93-94 (Mr. Baffert). Lidocaine is a Class B medication in Kentucky and Arkansas. *See* KHRC Exhibit 19, KHRC 8-020-1 at 3 (classifying lidocaine).
3. In July 2020, Mr. Baffert claimed that the medication positives were due to his assistant trainer. Mr. Baffert’s assistant had allegedly transferred lidocaine to the horses after adjusting his Salonpas back patch, which contained lidocaine. At the hearing in this case, however, Mr. Baffert renounced this position. TR at 98-99 (Mr. Baffert).
4. After an administrative hearing, the Arkansas Racing Commission found Mr. Baffert responsible for the condition of his horses, pursuant to the trainer responsibility rule. Mr. Baffert was fined \$5,000.00 for Charlatan and \$5,000.00 for Gamine. Mr. Baffert did not appeal Arkansas’ decision and paid both penalties. TR 94, 96-97, 1791 (Mr. Baffert). *See also* KHRC Exhibit 2, April 22, 2021 Arkansas Order.

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<sup>4</sup> 810 KAR 8:030 Section 4(3)(b) requires the KHRC, when assessing a Class C medication penalty, to consider a trainer’s history of medication positives that occurred within 365 days of the Class C violation. KHRC Exhibit 30, 810 KAR 8:030.

5. Gamine, still trained by Mr. Baffert, incurred another medication positive five months later at the September 4, 2020 Kentucky Oaks. After placing third in the Oaks, Gamine's post-race sample tested positive for 27 pg/mL of betamethasone. TR 105, 134 (Mr. Baffert). This amount was 17 picograms over the prior threshold for betamethasone (10 pg/mL). TR 280 (Ms. Borden).
6. Gamine's Oaks positive arose after Dr. Ryan Carpenter, a California veterinarian, injected two small joints in Gamine's hocks 18 days prior to the Oaks. TR 134, 145, 1750, 1768-1769 (Mr. Baffert).
7. Kentucky's withdrawal guidance recommends that a veterinarian only inject one joint, not two. TR at 141-142 (Mr. Baffert).
8. Mr. Baffert did not seek any clearance testing for betamethasone prior to the Oaks. TR 137. He solely relied on his veterinarian's guidance. Mr. Baffert understood that if he or his veterinarian administered medications outside of the withdrawal guidelines, the horse may test positive, and the trainer may incur a penalization. TR 141, 1773-1774 (Mr. Baffert).
9. Shortly after Gamine tested positive for betamethasone, Chief Steward Barbara Borden engaged in a text message exchange with Mr. Baffert. In this conversation, Ms. Borden explained that the threshold for betamethasone was "limit of detection" as of August 25, 2020. TR 107, 112, 120-121 (Mr. Baffert). *See also* KHRC Exhibit 5; TR 275-276 (Ms. Borden).
10. Mr. Baffert seemed to understand the term "limit of detection" in his texts with Ms. Borden. TR 120-121 (Mr. Baffert). Thus, as of September 12, 2020, Mr. Baffert conveyed he knew and understood Kentucky's post-race betamethasone testing. TR 240 (Mr. Baffert).

11. The KHRC stewards fined Mr. Baffert \$1,500.00 for Gamine's medication positive. Mr. Baffert did not appeal the Stewards' Ruling and paid the penalty. TR 132-133 (Mr. Baffert).
12. Mr. Baffert testified that the stewards treated him professionally regarding Gamine, and that he has always gotten along with Ms. Borden. TR at 111 (Mr. Baffert).
13. On November 4, 2020, Mr. Baffert issued a media statement. He admitted that his recent medication positives had negatively affected horse racing. TR 157-158 (Mr. Baffert).
14. In this statement, Mr. Baffert promised to hire Dr. Hore from Hagyard's Equine Medical Institute. Instead, he hired Dr. Slovis, who did not come out to Mr. Baffert's barn during 2020 or early 2021 due to COVID-19. Mr. Baffert was nonetheless able to transport horses during those years. TR 160-161 (Mr. Baffert).
15. Mr. Baffert also promised to increase employee training, as well as his own oversight and supervision. Mr. Baffert claims that he instructed his veterinarians to no longer use betamethasone in his barn. TR 161, 1779 (Mr. Baffert).

## **II. Medina Spirit and the 2021 Kentucky Derby**

16. Despite Mr. Baffert's alleged instruction, California veterinarian Dr. Vincent Baker prescribed Otomax to treat a "cosmetic issue"; specifically, a rash on Medina Spirit's hindquarters. Baker Deposition at 23. Otomax contains betamethasone valerate. TR 1779 (Mr. Baffert).
17. Although the Otomax bottle states that it contains "betamethasone valerate," Mr. Baffert testified that he did not know that Otomax contained betamethasone. Prior to authorizing the application of this ointment, Mr. Baffert alleged that he never asked his veterinarian or groom what was in Otomax. TR at 130-131, 1759-1760 (Mr. Baffert).

18. Mr. Baffert's Kentucky veterinarian, Dr. Kevin Dunlavy, testified that "**everybody knew** that [betamethasone] is a part of the benefit of the medication. . . . The reason why it was effective is it's kind of antibacterial as well as the steroid tends to settle down the dermatitis." Dunlavy Deposition at 16-17 (emphasis added). Dr. Baker also knew that Otomax contained a corticosteroid. Baker Deposition at 37.
19. Dr. Mary Scollay, then the Executive Director and Chief Operating Officer of the Racing Medication and Testing Consortium, and former KHRC Equine Medical Director for eleven years (until 2019) reviewed Dr. Baker's testimony and the medical records Dr. Baker produced for Medina Spirit. She noted that Dr. Baker failed to disclose any rash on Medina Spirit.
20. Dr. Scollay testified that Dr. Baker failed to say why Otomax was prescribed and how it was to be applied—two rudimentary elements in any animal's veterinary records. She further commented that prescribing a steroid to address a fungal infection can be counterproductive. Dr. Scollay testified that the amount of Otomax purportedly applied topically is about five times greater than that which would have been injected into a horse. TR 1282-1285, 1289, 1307 (Dr. Scollay).
21. Rolando Cruz, the groom assigned to Medina Spirit, testified that he applied Otomax two times per day, in the morning and in the afternoon. (Mr. Cruz's deposition was later introduced as KHRC Exhibit 53 in the hearing.) Mr. Cruz did not know how much Otomax he applied at any given time. Cruz Deposition at 10-11. However, Mr. Cruz used approximately one and a half bottles of Otomax between April 9, 2021 and the day before the Kentucky Derby, April 30. *Id.* at 11. *See also* Baker Deposition at 11. This administration is considerably more than the amount authorized by Dr. Baker.

22. Mr. Baffert knew that Dr. Baker had prescribed daily doses of Otomax for Medina Spirit starting on April 9, 2021. He knew that Medina Spirit's groom was applying the medication. This medication was used to treat a rash on his flank, neck, and behind. TR at 128 (Mr. Baffert).
23. Mr. Baffert never contacted the KHRC to learn whether Otomax is an approved medication. TR 167-168 (Mr. Baffert).
24. Mr. Baffert explained that the last application of betamethasone ointment was applied on the day before the Derby. He stated that he directed his staff to stop treating Medina Spirit with betamethasone ointment to avoid "contaminat[ing]" the horse. TR 165, 167, 220-221 (Mr. Baffert).
25. On May 1, 2021. Medina Spirit finished first in the 2021 Kentucky Derby, a race described by Mr. Baffert as "the greatest race in the world." TR 174-175.

### **III. Sample Collection and Testing**

26. As the putative winner of the race, Medina Spirit was required to submit to blood and urine testing using standardized procedures to maintain anonymity and chain of custody. These protocols are outlined in "Procedures and Practices for KHRC Veterinarians." (KHRC Exhibit 32.)
27. KHRC staff collected a blood and urine sample from Medina Spirit and assigned the paired sample a bar code number. TR 515-518 (Dr. Howard).
28. KHRC's Equine Medical Director, Bruce Howard, D.V.M., produced unchallenged testimony about the measures taken to preserve the integrity of blood and urine samples. He introduced KHRC Exhibits 32-38 to establish objective proof of these methods. Dr. Howard also testified about the steps taken to divide the original sample and securely send

the split sample to U.C. Davis, and about the notification he received of a preliminary medication positive. TR 526-535, 537-542 (Dr. Howard).

29. After Medina Spirit left the winner's circle, a veterinarian followed him back to the test barn. Churchill Downs' guard checked in the horses on the guard log sheet, and also checked the license of the person with the horse. The test barn administrator scanned Medina Spirit's microchip and ensured that he used the right water bucket while cooling out. Each water bucket is dumped, disinfected, and dried out after every use to prevent cross-contamination. TR 526-527 (Dr. Howard).
30. Every horse coming into the test barn is assigned a sample number beginning with "E," as well as a barcode. The barn log depicts the horse's name, sample number, gender, and trainer. The log will show whether the horse produced a urine sample. TR 531 (Dr. Howard). *See also* KHRC Exhibit 32, KHRC Practices and Procedures.
31. Victor Mendoza sampled Medina Spirit's urine using a urine catch stick. The urine is divided into two smaller cups: a primary sample and a split sample. The urine cups are capped and evidence tape is placed over the top. Those samples are placed in the freezer. Three tubes of Medina spirit's blood were also taken. The tubes were capped and covered in evidence tape. They are placed on a rack, where they sit for 30 minutes. Then, the tubes are centrifuged to separate the red blood cells from the serum. The tubes are placed in the refrigerator. Two tubes go to the primary laboratory and the third tube is retained for the split laboratory. TR 532-534 (Dr. Howard). *See* KHRC Exhibit 33, Detention Barn Log; KHRC Exhibit 34, Test Barn Log; KHRC Exhibit 35, Horse ID Card.
32. At the end of the day, the primary blood and urine samples were placed in a large cooler with ice packs and proper padding. Each horse's blood samples are placed in a padded

sleeve and then a small Ziploc bag. Those samples are consolidated into a larger Ziploc bag. The primary urine samples are also placed in the cooler. The veterinarians conduct a count to ensure that all samples are included. The cooler is locked with a security number and padlock. A courier ships the cooler to Industrial in Wheat Ridge, Colorado. TR 535-536, 538 (Dr. Howard).

33. The barn log and the horse ID cards are placed in a large manila envelope and sealed with evidence tape. Anything identifying the horse is placed in sealed envelopes. Those envelopes remain sealed until a positive is confirmed or the race day is cleared. TR 541-542.
34. Mr. Baffert testified that no one tampered with Medina Spirit or Medina Spirit's post-race samples. TR 207 (Mr. Baffert).
35. On May 5, 2021, Industrial Laboratories notified Chief Racing Steward Barbara Borden, Dr. Howard, KHRC State Steward Brooks Becraft, and KHRC Chief Veterinarian Nick Smith of a preliminary medication positive at the May 1, 2021 Derby. The KHRC did nothing with that information at that time. Ms. Borden testified taking action would have been improper at that time, and preliminary positives often end up passing. TR 282-285 (Ms. Borden). *See also* KHRC Exhibit 37, May 5, 2021 preliminary report.
36. On May 7, 2021, Ms. Borden learned for the first time that Medina Spirit's medication positive had been confirmed. TR 286-288; 492 (Ms. Borden). *See* KHRC Exhibit 10, Industrial Certificate of Analysis.
37. Ms. Borden then contacted KHRC investigators to organize a barn search. The stewards did not notify anyone else of the medication positive, including KHRC Commissioners,

members of the media, or their friends and family. No items found in the barn search tested positive for betamethasone. TR 287-291 (Ms. Borden).

38. Mr. Baffert requested a split sample analysis be performed by U.C. Davis. He also requested a DNA test. The split sample confirmed the betamethasone positive and the DNA test confirmed that the horse who tested positive was Medina Spirit. TR 302-306 (Ms. Borden). KHRC Exhibit 11, May 28, 2021 U.C. Davis Certificate of Analysis; KHRC Exhibits 24 and 25, DNA confirmation documentation.
39. Mr. Baffert then requested additional testing to determine whether the betamethasone positive resulted from an ointment or an injection. Ultimately, Medina Spirit's split urine sample was tested by Dr. Maylin's New York laboratory. The stewards received a letter from Dr. Maylin, outlining the alleged test results. TR 306-307. *See also* KHRC Exhibit 12a, Maylin letter.

#### **IV. Industrial Laboratory's Primary Sample Testing**

40. Petra Hartmann, Laboratory Director for Industrial Laboratories, testified about the analysis performed by Industrial on Medina Spirit's blood. Industrial found Medina Spirit's blood sample to contain betamethasone at 21 pg/mL and reported this to the KHRC. KHRC Exhibit 47 at KHRC 2539.
41. Ms. Hartmann testified that the sample arrived in a locked, sealed cooler, which was sent directly from Churchill Downs to their laboratory. The integrity of the cooler was checked to ensure that it was not compromised. The samples themselves did not show any evidence of tampering. Industrial employees did not know which sample number corresponded to which horse. TR 863, 867, 875 (Ms. Hartmann).

42. In preparing for the hearing in this matter, Ms. Hartmann discovered that Industrial's betamethasone SOP had not been updated in writing. Industrial's current betamethasone detection SOP had been validated in 2019, which is documented in writing. Industrial's SOP's changes are documented in positive control logs, sample worksheets, instrument acquisition methods, and the data packet at issue in this case. TR 881-882, 909, 910-911, 913-914 (Ms. Hartmann).
43. Appellant's expert, Mr. Tom Lomangino, expressed concerns about Industrial's laboratory packet, all of which he later retracted. Mr. Lomangino has a Bachelor of Science from Bowie State University and no further formal education. Right after college, he got a job working at a Maryland laboratory, where his father served as the laboratory director. Prior to his retirement in 2016, Mr. Lomangino had served as the laboratory director at the United States Equestrian Federation for approximately ten years. TR 1500-1501, 1506, 1539 (Mr. Lomangino).
44. During his six years of retirement, Mr. Lomangino has not tested any samples for medication. During his ten years with the U.S. Equestrian Federation, he tested samples approximately once a month. TR 1540-1541 (Mr. Lomangino).
45. Mr. Lomangino admitted that currently-employed laboratory directors with graduate degrees, such as Dr. Ben Moeller at U.C. Davis and Dr. Scott Stanley at the University of Kentucky, are more qualified than he is to opine on laboratory testing issues. TR 1544 (Mr. Lomangino).
46. Since his retirement, Mr. Lomangino has testified as an expert in five racing medication cases. In all five instances, he testified for the trainer, rather than a racing commission. In

four of those five cases, he testified for clients of Appellants' lead attorney, Clark Brewster. TR 1545-1546 (Mr. Lomangino).

47. Mr. Lomangino does not disagree with Industrial that the SOP that Industrial used in 2021 was properly validated in 2019. Nor does he disagree with Industrial that the method used in 2021 worked. TR 1698 (Mr. Lomangino).
48. Mr. Lomangino initially testified that it was unacceptable for a testing laboratory to have an unwritten SOP. He later clarified on direct examination that "it'd be better" to have a written SOP regarding the determination of a specific medication. TR 1515-1516 (initial testimony), 1535 (clarification).
49. Of note, member laboratories in the Association of Official Racing Chemists ("AORC") can provide a data packet to an AORC Review Board, in order to get independent verification of their laboratory findings. The members are not required to submit their SOPs when they get that verification. Their data must stand on its own. TR 1703 (Mr. Lomangino).
50. Mr. Lomangino later explained that he was not concerned about Industrial's alleged failure to have a written SOP. Instead, he was concerned about the reference standard that Industrial had used. TR 1705-1706<sup>5</sup>
51. Mr. Lomangino initially opined that Industrial had incorrectly used a dexamethasone reference standard to determine the presence of betamethasone. Mr. Lomangino later realized that this testimony was incorrect; in fact, Industrial correctly used a

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<sup>5</sup> "Q: So you're not concerned about the written standard operating procedure at all? Your concern is about the standard they [Industrial] used? Lomangino: Sure."

“betamethasone” reference standard for detecting betamethasone in the Medina Spirit sample. TR 1534 (initial testimony) 1704, 1706 (retraction).

52. It was also originally Mr. Lomangino’s opinion that Industrial failed to comply with Standard 7.2.1.2 of the ISO 17025 standards. In summary, this standard states that all methods relevant to laboratory activities must be kept up-to-date and made available to laboratory personnel. However, he later acknowledged that nothing in Standard 7.2.1.2 states that all laboratory methods must be set forth in a formal SOP. Instead, standards could be included in an informal document, provided everyone at the laboratory knows how to access the standard. TR 1696 (initial testimony), 1698-1699 (retraction). As set forth in Section IV, *supra*, Petra Hartmann testified that the betamethasone SOP was set forth in such informal documents during 2021, including positive control logs, instrument acquisition methods, and sample data packets. TR 881-882, 909, 910-911, 913-914 (Ms. Hartmann).
53. Mr. Lomangino also initially opined that Industrial violated Standard 7.2.1.3 of the ISO 17025 standards. This standard states that the laboratory shall ensure that it uses the latest valid version of the method. Later, Mr. Lomangino retracted that testimony, testifying that he has no reason to believe that Industrial was not using the latest valid SOP for testing betamethasone in 2021; therefore, Industrial did not violate 7.2.1.3. TR 1699-1700 (initial testimony); 1700-1701 (retraction).
54. Appellee KHRC’s expert, Dr. Scott Stanley, opined on Industrial Laboratory’s standard operating procedure (“SOP”) for detecting betamethasone in 2021. Dr. Stanley testified that Industrial had a betamethasone detection method in 2014, which was revised in writing during 2022. However, the 2022 written method had been validated in 2019, and was used

between 2019 and 2022, even though the method had not yet been reduced to writing. Dr. Stanley sees Industrial's action as a failure to keep paperwork timely. It would constitute a deficiency, but would not result in a laboratory shutdown or a severe penalty. TR 1183-1184, 1186 (Dr. Stanley).

**V. U.C. Davis' Split Sample Testing**

55. The referee laboratory at U.C. Davis confirmed the positive results for Medina Spirit's split blood sample at 25 pg/mL on May 27, 2021. TR 1210 (Dr. Moeller); KHRC Exhibit 51 at 41.
56. Dr. Moeller testified that the sample arrived in good condition at U.C. Davis' laboratory. The laboratory performed a confirmation analysis on two aliquots of the split sample. Both aliquots contained betamethasone, in an amount consistent with that found by Industrial. TR 1206-1207, 1209, 1211 (Dr. Moeller).
57. Appellants' expert, Mr. Lomangino, initially testified that there was betamethasone contamination in the negative control urine during U.C. Davis' split sample testing. On cross-examination, Mr. Lomangino admitted that betamethasone could not be found in the negative control urine. *Compare* TR 1523 (initial testimony) *with* TR 1556 (Q: "Therefore, according to the AORC criteria, [U.C. Davis] cannot identify betamethasone in the [negative control] sample they are testing; also correct? Lomangino: Correct.). *See also* KHRC 51 (U.C. Davis packet) at 29; TR 1551-1555 (Lomangino's testimony establishing that there are insufficient betamethasone ions in the negative control to establish that betamethasone contamination was present in that sample). *See also* TR 1556-1558, 1561, 1563-1565 (Mr. Lomangino) (chromatogram depicting negative control urine does not show betamethasone contamination); KHRC 51 (U.C. Davis packet) at 29. *See also* TR

1239, 1241, 1254-1255 (Dr. Moeller) (explaining that there was no betamethasone in the negative control).

**VI. Mr. Baffert's Explanation of the Medication Positive**

58. Mr. Baffert testified at the hearing he believes that the medication positive arose due to the Otomax administration. Consequently, he sought additional testing from Dr. Maylin's New York laboratory, in an attempt to ascertain if the Otomax components could be detected in Medina Spirit's post-race samples. TR 188-189, 229 (Mr. Baffert). *See also* KHRC Post-Hearing Exhibit 54, March 21, 2022 Franklin Circuit Court Order.<sup>6</sup>
59. Mr. Baffert agrees with the guidance from Dr. Kevin Dunlavy, who stated that trainers should stop using Otomax ointment 48 hours before a race. TR 1789-1790. *See also* Dunlavy Deposition at 16-17.

**VII. New York Laboratory Testing**

60. With the KHRC's agreement, Medina Spirit's primary blood and urine samples were then "appropriately packaged and shipped by the Colorado laboratory [Industrial] to [Appellants'] chosen laboratory in New York for further testing," in order to try and obtain more information about whether Medina Spirit's positive arose from an ointment or an injection. KHRC Post-Hearing Exhibit 54, March 21, 2022 Franklin Circuit Court Order at 2. During transport or upon arrival, however, the tube containing the primary blood sample shattered. The KHRC agreed to allow Appellants to test a portion of the urine split sample, but the parties disagreed as to the division of the urine. Judge Wingate, writing for

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<sup>6</sup> KHRC Post-Hearing Exhibit numbers start after the last hearing exhibit number.

the Franklin Circuit Court, divided the urine and issued an order related to the “transportation and division of the urine split sample.” *Id.*

61. Dr. Maylin has a Doctor of Veterinary Medicine degree, as well as a Master’s degree and Ph.D. in pharmacology/toxicology. Dr. Maylin has conducted drug testing since 1971, primarily for the state of New York. Dr. Maylin has published 90 articles about equine pharmacology and testing. Dr. Maylin is currently employed as the head of the accredited New York Drug Testing Research Program. TR 1376-1379 (Dr. Maylin). *See* ZX145, Dr. Maylin’s curriculum vitae. His laboratory conducted the additional testing requested by Mr. Baffert.
62. Dr. Clara Fenger, a non-testifying expert for Appellants, asked Dr. Maylin’s laboratory to test a post-race urine sample from Medina Spirit, in an effort to determine if Otomax components were present. This testing was completed pursuant to a court order and with the approval of the Commission and Mr. Baffert’s attorneys. TR 1380-1381, 1444 (Dr. Maylin).
63. Dr. Scott Stanley is a University of Kentucky professor. He is also the director of the University of Kentucky’s Equine Analytical Chemistry Laboratory (“UK Lab”) and the Director of the Research of Mass Spectrometry facility at the University of Kentucky. He has his Ph.D. in toxicology, which is the forensic study of compounds that may affect biological systems. Dr. Stanley has also served as a laboratory inspector for the International Federation of Racing Authority. TR 1034-1036, 1038-1039 (Dr. Stanley). *See* KHRC Exhibit 48, Stanley curriculum vitae. Dr. Stanley testified on behalf of the KHRC, stating his concerns about Dr. Maylin’s laboratory packet.

64. Otomax contains betamethasone 17-valerate, clotrimazole, and gentamicin. Dr. Maylin claims to have found betamethasone 17-valerate, clotrimazole, and a metabolite of clotrimazole in Medina Spirit's urine sample. TR 1384-1385 (Dr. Maylin). *See also* TR 1397-1398 (clotrimazole); TR 1399-1400 (clotrimazole metabolite); TR 1400-1401 (betamethasone 17-valerate).
65. However, Dr. Maylin's test method is unpublished and has not been peer-reviewed. Dr. Maylin admits that he would need a significant number of additional administration trials before a journal would accept his method for publication. Dr. Maylin admitted that he had attempted to validate his method using an Otomax administration trial involving only two research horses. TR 1436 (Dr. Maylin).
66. Dr. Maylin's method is completely unique. He is unaware of any laboratory in the United States, other than his own, which can detect betamethasone 17-valerate in horse urine. No other laboratory has ever looked at betamethasone 17-valerate in horse urine before. TR 1431-1436 (Dr. Maylin).
67. Dr. Maylin testified that a party must either "take [his] word for it" or come to his laboratory and test the samples itself, if the party has concerns that his method reliably detects betamethasone 17-valerate in horses. TR 1437-1438 (Dr. Maylin).
68. Dr. Maylin used SOFT standards for the urine testing.<sup>7</sup> During his deposition, Dr. Maylin stated that he had no good reason for using SOFT standards over the AORC standards approved for accredited laboratories. At hearing, he testified differently; he claimed for the first time that he chose to use SOFT standards because he was not provided enough urine for testing. TR 1441-1444 (Dr. Maylin).

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<sup>7</sup> SOFT standards are the standards established by the Society of Forensic Toxicologists.

69. Dr. Maylin admitted that he does not know his laboratory's limit of detection for betamethasone 17-valerate and clotrimazole. Yet, SOFT standards require that limit of detection studies must be carried out for all methods. TR 1447, 1473 (Dr. Maylin).
70. Dr. Stanley disagreed with Dr. Maylin's conclusions that the New York Laboratory's analysis proves that the Otomax components clotrimazole and betamethasone 17-valerate were present in Medina Spirit's post-race urine sample. TR 1051, 1132-1133 (Dr. Stanley).<sup>8</sup>
71. One of Dr. Stanley's largest concerns regarding Dr. Maylin's analysis is that Dr. Maylin was unable to find free betamethasone (i.e., betamethasone without a valerate, acetate, or phosphate ester) in the urine sample. This failure is concerning for two reasons. First, free betamethasone was found by the two other laboratories that tested Medina Spirit's post-race samples: Industrial and U.C. Davis. Second, one would expect to find more betamethasone in the urine sample than in a blood sample. Dr. Maylin's failure to find betamethasone may mean that his method does not work properly. TR 1060, 1109-1111, 1181-1182 (Dr. Stanley); KHRC 49 (Maylin packet) at 130 (testing for free betamethasone and not finding it).
72. In response to this point, Dr. Maylin first stated during his direct examination by Appellants' counsel that he did not test for free betamethasone, because the court order told him to only test for betamethasone 17-valerate, clotrimazole, and gentamicin. Yet, this explanation does not match the evidence. First, Dr. Maylin tested for three compounds not

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<sup>8</sup> The KHRC originally asked to bring Dr. Stanley as a rebuttal witness to Dr. Maylin. However, Hearing Officer Clayton Patrick instead directed the KHRC to bring this witness during its case-in-chief. Over the KHRC's objection, Mr. Patrick ruled that it was improper to have a rebuttal witness if he would testify to topics that the KHRC would reasonably know or be able to anticipate. Consequently, Dr. Stanley rebutted Dr. Maylin prior to the introduction of Dr. Maylin's testimony by Appellants. TR 1046-1047.

included in the court order: a metabolite of clotrimazole, betamethasone acetate (associated with betamethasone injections), and betamethasone phosphate (also associated with betamethasone injections). TR 1177, 1392, 1445-1446. It does not follow that Dr. Maylin did not test for free betamethasone because he felt constrained to test only for the substances listed in the court order.

73. Dr. Maylin later admitted at hearing that he did test for free betamethasone but could not find that substance in the Medina Spirit urine sample. TR 1470-1471 (“Q: That means you’re testing for betamethasone, correct? A: Yes.”). *See also* KHRC 49 (Maylin packet) at 101-101, 130 (showing that Dr. Maylin conducted a test for betamethasone, which has a precursor ion of 393.5 and a product ion of 147). Therefore, Dr. Maylin tested for free betamethasone, but—unlike the two other laboratories in this case—could not find that substance in Medina Spirit’s sample. TR 1180-1182; 1471 (Dr. Maylin).
74. Appellants’ expert witness, Dr. Steve Barker, testified that Dr. Maylin correctly decided not to test for free betamethasone in the urine sample. Dr. Barker opined that the test for betamethasone would have destroyed Dr. Maylin’s ability to find the valerate ester in the urine. He testified that “Dr. Stanley knew that, and he misled this court” by raising concerns about Dr. Maylin’s failure to find betamethasone in Medina Spirit’s urine sample. TR 1609-1612 (Dr. Barker). Yet, Dr. Barker’s testimony is directly opposed to Dr. Maylin’s testimony on this issue. Dr. Maylin testified that he *did* try to find free betamethasone, and was unable to do so. *See supra* paragraph 80.
75. Dr. Stanley testified that Dr. Maylin’s tests for clotrimazole, betamethasone 17-valerate, and clotrimazole metabolites showed evidence of sample contamination in the negative control urine. *See* TR 1081-1084, 1085 (clotrimazole); 1087-1088, 1092, 1105-1107

(clotrimazole metabolite); 1116-1117, 1120-1121 (betamethasone 17-valerate). *See also* KHRC 49 (Maylin packet) at 58, 64 (clotrimazole); 86, 87 (clotrimazole metabolite); 136, 165 (betamethasone 17-valerate).

76. The negative control urine is an equine urine sample that does not have any of the targeted compound. It represents the baseline negative sample. Pursuant to RMTC and SOFT standards, a negative control sample should be “clear and clean of the analyte” being tested. If there is sample contamination, then that precludes the laboratory from definitively concluding that it found the analyte in the tested sample. TR 1072, 1074-1075 (Dr. Stanley). *See also* TR 1450-1451 (Dr. Maylin’s admission that SOFT standards require him to have “zero” contamination).
77. Appellants’ expert witness, Mr. Lomangino, agreed that contamination is completely unacceptable. To avoid the presence of a contamination and achieve a reliable result, the laboratory analyst should keep running negative samples until all contamination disappears from the negative control. TR 1521-1522 (Mr. Lomangino).
78. As just one example of contamination, one of Dr. Maylin’s test runs found approximately 4.86 picograms of betamethasone 17-valerate in the negative control urine, and 6.36 picograms of betamethasone 17-valerate in Medina Spirit’s sample. In other words, Dr. Maylin’s method showed that the uncontaminated negative sample contained 76% of the amount of betamethasone valerate that he claimed to find in Medina Spirit’s urine. *See* KHRC 49 (Maylin packet) at 136. “Clearly, the method is not adequate to make those identifications.” TR 1116-1117 (Dr. Stanley).
79. Dr. Maylin admitted that the clotrimazole negative control was “slightly contaminated,” but claimed that this contamination did not bear on his finding that Medina Spirit’s urine

sample contained clotrimazole, because of the signal-to-noise ratio. TR 1393-1394 (Dr. Maylin).

80. Dr. Maylin did not respond to the concerns raised by Dr. Stanley regarding contamination in the clotrimazole metabolite tests or the betamethasone 17-valerate tests.
81. Dr. Stanley testified that Dr. Maylin's testing did not yield consistent results for clotrimazole or betamethasone 17-valerate. For example, a sample spiked with 40 picograms of clotrimazole resulted in a considerably smaller peak than a sample spiked with only 10 picograms of clotrimazole. Similarly, a sample spiked with 20 picograms of clotrimazole yielded vastly different results when tested at different times. TR 1077-1082 (clotrimazole); TR 1116-1117 (betamethasone valerate). *See* KHRC 49 (Maylin packet) at 64, 85 (clotrimazole), 136 (betamethasone valerate).
82. Dr. Maylin did not respond to Dr. Stanley's concerns about inconsistent testing results.
83. Dr. Stanley testified that the chromatograms of Medina Spirit's urine sample strongly suggest that betamethasone 17-valerate is not detected in the sample. TR 1112-1114, 1119 (Dr. Stanley). *See* KHRC 49 (Maylin packet) at 116-118.
84. Dr. Maylin did not respond to Dr. Stanley's concern that the chromatograms do not depict betamethasone 17-valerate in Medina Spirit's sample.
85. Dr. Maylin had no explanation for why his laboratory packet states that he repeatedly tested Medina Spirit's urine sample for clotrimazole's methane metabolite, even though he did not have a necessary reference standard for that metabolite. TR 1465-1467 (Dr. Maylin).
86. Dr. Maylin admitted that it is possible, given his results, that Medina Spirit could have been treated both topically and by injection. It is also possible that Medina Spirit's urine contained betamethasone acetate and/or betamethasone phosphate, but that those esters

were not preserved by the Commission due to the urine collection tubes that were used. TR 1429-1430 (Dr. Maylin).

87. Finally, Dr. Maylin admitted that he did not “rigorously” look for the esters associated with injection (betamethasone acetate and phosphate). This is not the only instance of Dr. Maylin’s disparate treatment between the esters associated with ointments versus injections. Dr. Maylin conducted a drug administration trial of Otomax, in order to have blood and urine samples available as a source of the analytical standard. In contrast, Dr. Maylin conceded that he did not conduct an “in-depth study” on betamethasone acetate, the ester associated with a betamethasone injection. TR 1383-1384, 1426, 1430-1431, 1446 (Dr. Maylin).

#### **VIII. Betamethasone**

88. Dr. Knych has a Doctor of Veterinary Medicine and a Ph.D. in pharmacology and toxicology. Dr. Knych is a full professor at U.C. Davis School of Veterinary Medicine. She is also section head for the pharmacology section in the K.L. Maddy Equine Analytical Chemistry Laboratory. Her area of specialty is drug metabolism of anti-inflammatory drugs, including corticosteroids, in performance horses. She has published several recent articles regarding this topic. Dr. Knych also sits on the Racing Medication Testing Consortium (“RMTC”) Scientific Advisory Committee, which makes recommendations for the classification of drugs. TR 650-653 (Dr. Knych). *See* KHRC 39, Knych curriculum vitae.
89. Dr. Knych testified for Appellee KHRC. Dr. Knych has served as an expert witness in only one prior proceeding. In that case, she was an expert witness for a trainer and against the KHRC. TR 654-655 (Dr. Knych).

90. Dr. Steven Barker has a bachelor's degree in chemistry, a master's in chemistry and physical chemistry, and a Ph.D. in chemistry and neuroscience. Dr. Barker is currently a retired, emeritus professor at Louisiana State University ("LSU"). Dr. Barker was director of the LSU equine medication surveillance laboratory, from 1987 until his retirement in 2016. The LSU laboratory was the official drug testing laboratory for the Louisiana State Racing Commission. Dr. Barker has published 9 journal articles about horses in the last 22 years, the most recent being published a decade ago in 2012. Dr. Barker has never published anything about corticosteroids in horses or any other animal. The focus of his recent publications has been the impact of hallucinogenic drugs on the human brain. TR 1567-1568, 1629-1632 (Dr. Barker).
91. Dr. Barker testified for Appellants Baffert and Zedan Racing Stables. After Dr. Barker retired in 2016, he has rendered expert services in 31 cases. 25 of those cases (81%) involve testimony for a trainer against a racing commission or board. Dr. Barker has testified as a paid expert witness for Appellant Bob Baffert in four cases, including the present appeal. TR 1618, 1621-1622 (Dr. Barker).
92. Betamethasone is a synthetic corticosteroid, used as a therapeutic medication, which increases the production of anti-inflammatory proteins and decreases the production of pro-inflammatory proteins. This results in the alleviation of some of the clinical signs of inflammation, such as heat, redness, swelling, and pain. The only FDA-approved way to administer betamethasone to horses is intra-articularly. Betamethasone may also be administered to a horse intramuscularly or topically. TR at 660-662, 664-665 (Dr. Knych); TR 1572 (Dr. Barker).

93. Betamethasone is classified as a Class C medication. TR 260 (Ms. Borden); TR 670-671 (Dr. Knych). The route of administration does not matter to a medication's classification. "The drug is the drug once it gets into the system." TR 674 (Dr. Knych).<sup>9</sup>
94. Betamethasone and dexamethasone are both "potent corticosteroids." TR 675. They are approximately 25 to 35 times more potent than naturally occurring cortisol. TR 761-762. These medications are also far more potent than cortisol that someone could buy at the drugstore. TR 664 (Dr. Knych).
95. Betamethasone is similar to dexamethasone. Those medications are stereoisomers of one another. TR 661. Stereoisomers are compounds with the same molecular structure or composition. Special steps have to be taken to differentiate between the two chemicals when we use mass spectrometry analysis. TR 675 (Dr. Knych).
96. A medication's route of administration also does not make a difference to the effects that the medication has in the horse. Once the drug enters the body, the route of administration no longer matters. It is the concentration of the active ingredient that determines the effect. TR 680-681 (Dr. Knych).

**IX. Stewards' Hearing**

97. Barbara Borden is the Chief Steward for the Kentucky Horse Racing Commission. She is a high school graduate and long-time racetrack employee, who moved up from working with horses to becoming a race official. She is accredited through the University of Louisville Stewards' Accreditation Program. TR 257-259 (Ms. Borden).
98. In 2021, betamethasone was a "limit of detection" medication in Kentucky, regardless of route of administration. TR 261-262 (Ms. Borden); Picklesimer Deposition at 31.

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<sup>9</sup> Dr. Barker admitted that he does not "really know what a Class C is." TR 1668 (Dr. Barker).

99. This is because betamethasone is listed in the Class C medication schedule and does not have an established concentration level. TR 403, 405-406, 414, 436-437 (Ms. Borden). *See also* KHRC Exhibit 20, 810 KAR 8:010 Section 2(6) (medication classification schedule lists medications violating this regulation). 810 KAR 8:010 Section 1(5) (defining positive finding as finding that prohibited medication is present in a sample, except for medications that are found under an established concentration level); KHRC Exhibit 19, KHRC 8-020-1 (medication classification schedule defining betamethasone as a Class C medication).
100. In Kentucky, it is common for a medication to not have a listed threshold level. For example, there are 85 Class C medications, and only 13-15 of those medications have a listed threshold. TR 265-266 (Ms. Borden).
101. In Ms. Borden's experience, this interpretation has not confused trainers or veterinarians. After betamethasone's threshold level changed to limit-of-detection on August 25, 2020, the Commission saw only two betamethasone positives. Both positives were incurred by trainer Bob Baffert.<sup>10</sup> First, Gamine had a betamethasone positive in the 2020 Kentucky Oaks. Then, Medina Spirit incurred a betamethasone positive at the 2021 Kentucky Derby. TR 270-271 (Ms. Borden).
102. The Stewards' Hearing was held in February 2022 to allow for additional testing to be completed. Stewards Barbara Borden, Brooks Becraft, and Tyler Picklesimer constituted the panel of stewards. Mr. Picklesimer was the association steward, as required by regulation. TR 310-313 (Ms. Borden).
103. Mr. Picklesimer is employed by Churchill Downs as a steward. He is also the racing secretary at Turfway Park, Kentucky Downs, and Ellis Park. Turfway Park is owned by

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<sup>10</sup> This is still true, as of the date of this filing.

Churchill Downs. Churchill Downs imposed a ban on Mr. Baffert in May 2021. TR 313-314 (Ms. Borden); Picklesimer Deposition at 7-8.

104. The stewards believed that Mr. Picklesimer could reach an independent decision. Historically, the stewards have not experienced pressure or negative consequences if they chose not to penalize other racing participants who are ejected from Churchill. TR 315-316; 367 (Ms. Borden).
105. Ms. Borden was also confident of her own ability to reach an independent decision. Although she is dating a seasonal employee at Turfway Park, she did not feel any pressure from Churchill Downs or her partner to reach a particular decision, nor did she discuss the pending matter with her partner. TR 319-320 (Ms. Borden).
106. The stewards did not experience any pressure from Churchill Downs, the KHRC, or anyone else in state government. The stewards also were not influenced by media reports, opinion articles, KHRC Commissioners, or anyone at the New York Racing Association (“NYRA”). TR 317, 322 (Ms. Borden). *See also* Picklesimer Deposition at 20 (characterizing Churchill Downs’ decision to exclude Mr. Baffert as a “Churchill Downs issue” that the “stewards didn’t have anything to do with.”), and 20-21 (no conversations between Churchill Downs and Picklesimer about this case).
107. The stewards listened to witness testimony and considered quite a few exhibits, including a “photograph of a horse’s hindquarters that appeared to have a rash on it.” They deliberated for a week and reached a unanimous decision. TR 320, 322, 480 (Ms. Borden). Mr. Baffert was suspended for 90 days and fined \$7,500.00. Medina Spirit was disqualified and the purse was ordered to be returned. KHRC Exhibit 26, Stewards’ Ruling 22-0009.

108. Churchill Downs' ban was considerably more severe than the KHRC Stewards' Ruling. Churchill banned Mr. Baffert for two years; while the stewards only suspended Mr. Baffert for 90 days. TR 317-318 (Ms. Borden).
109. This interpretation is in keeping with the KHRC's historical practice regarding medication positives, and particularly positives arising from betamethasone and its stereoisomer, dexamethasone. TR 338-341 (Ms. Borden). KHRC Exhibit 27 (suspension and fine for betamethasone positive from an ointment). *See also* KHRC Exhibits 28A and 28B (similar suspensions for dexamethasone positives from a spray and an injection, respectively).
110. Per 810 KAR 8:030 Section 4(3), the stewards considered Mr. Baffert's medication positives within the last 365 days. They considered Charlatan and Gamine's lidocaine positives at the 2020 Arkansas Derby to be two separate Class B violations, because Arkansas imposed two separate fines, and cited to the trainer responsibility rule. The stewards also considered Gamine's medication positive at the 2020 Kentucky Oaks, for a total of three medication positives prior to Medina Spirit's betamethasone positive. TR 346, 351 (Ms. Borden); Picklesimer Deposition at 25-26.
111. The stewards did not reinvestigate the Arkansas matter, because the Arkansas Racing Commission's decision was final. TR 498-499 (Ms. Borden). Picklesimer Deposition at 27-28.
112. 810 KAR 8:030 does not state what the stewards should do for a trainer, like Mr. Baffert, who incurred a fourth medication positive in 365 days. *See* KHRC Exhibit 30, 810 KAR 8:030. The penalties for a Class C medication positive are set forth as follows:

(b) Trainer

First offense	Second offense within a 365-day period in any racing jurisdiction	Third offense within a 365-day period in any racing jurisdiction
Zero to ten (10) day suspension absent mitigating circumstances;	Ten (10) to thirty (30) day suspension absent mitigating circumstances;	Thirty (30) to sixty (60) day suspension absent mitigating circumstances;
AND	AND	AND
\$500 to \$1,000 fine absent mitigating circumstances.	\$1,500 to \$2,500 fine absent mitigating circumstances.	\$2,500 to \$5,000 fine absent mitigating circumstances.

113. Therefore, to establish a penalty, the stewards continued the pattern established in 810 KAR 8:030 Section 4(3)(b). The penalties increased by 30 days and \$2,500 with each additional prior medication positive. So, the stewards exercised their discretion and added 30 days and \$2,500 to the maximum penalty for a third medication positive in 365 days. This led to the decision to impose a 90-day suspension and \$7,500 fine. TR 351-352, 502 (Ms. Borden).

114. The stewards’ decision was authorized by 810 KAR 8:030 Section 10, which allows stewards to suspend up to 5 years and fine up to \$50,000 for offenses “not otherwise provided for in this administrative regulation.” TR 351-352, 501-502 (Ms. Borden).

115. The stewards’ decision is distinguishable from the considerably harsher penalties imposed by Churchill Downs and NYRA. NYRA banned Mr. Baffert from their tracks for an

indeterminate period of time<sup>11</sup> and Churchill Downs also banned Mr. Baffert for two years. TR 249 (Mr. Baffert).

116. The stewards found no mitigating factors. TR 353 (Ms. Borden).
117. The stewards lessened Mr. Baffert's penalty by not including Mr. Baffert's July 2020 dextrophan positive in California in his list of prior medication positives. That positive was incurred within 365 days of the Derby positive. The stewards found the science regarding dextrophan to be unreliable after a series of dextrophan positives had to be dismissed in Kentucky. TR 383-384 (Ms. Borden). Had the stewards considered the dextrophan positive, they would have imposed a stronger penalization, as Medina Spirit's positive would have been Mr. Baffert's fifth medication positive in one year.
118. The stewards considered that Mr. Baffert's veterinarian filed a timely and accurate veterinary report of Medina Spirit's treatment. However, that timely report is not a mitigating factor, because it is a minimum requirement for regulatory compliance. TR 481, 496 (Ms. Borden). The accuracy of the veterinarian's report has been called into question after the Stewards' Hearing, because it lacks fundamental information about diagnoses, treatments, and consent to use an off-label medication. TR 1287-1288 (Dr. Scollay).
119. The stewards found the following aggravating factors: (1) Mr. Baffert's previous betamethasone violation at the 2020 Oaks, and (2) the fact that Mr. Baffert incurred medication positives at Kentucky's flagship thoroughbred races. TR 354 (Ms. Borden).
120. Ms. Borden testified about a comparable case involving trainer Carlos Lopez, who incurred four medication positives in a year. Like Mr. Baffert, two of the positives were Class C

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<sup>11</sup> This Hearing Officer takes judicial notice that, following an administrative appeal, NYRA set Mr. Baffert's penalty at a one year removal from its tracks. KHRC Post-Hearing Exhibit 55, Byron King, *NYRA Panel Suspends Baffert Through Jan. 25, 2023* BloodHorse, (June 23, 2022) (available at <https://www.bloodhorse.com/horse-racing/articles/259834/nyra-panel-suspends-baffert-through-jan-25-2023>).

violations and two were Class B violations. Mr. Lopez was suspended for 100 days and referred to the License Review Committee for consideration of his license prior to reinstatement. Mr. Lopez incurred a harsher penalty because his positives were closer together in time than Mr. Baffert's. TR 355-356 (Ms. Borden).

121. Ms. Borden distinguished Mr. Baffert's case from certain Class C Amicar positives in Kentucky, in which the laboratory originally reported several Amicar positives, but later reported those samples as "passed." Mr. Baffert's sample was not later reported as a "passed" sample; instead, it is still a positive finding. TR 493-494 (Ms. Borden).

122. Ms. Borden also distinguished Mr. Baffert's case from certain levamisole positives in Kentucky. For example, trainer Joe Sharp incurred several levamisole positives, and ultimately reached a settlement with the KHRC. This is because levamisole had been removed from the Commission's Medication Classification Schedule when the positives were incurred. In contrast, betamethasone was listed as a Class C medication positive on May 1, 2021, and continues to be listed as a Class C medication, which is prohibited in post-race samples. Borden 30.02(6) deposition at 48-49 (testifying in her capacity as Chief State Steward, but not for the KHRC).<sup>12</sup>

### **Conclusions of Law**

This matter is properly before this administrative body pursuant to KRS 230.320 and KRS Chapter 13B. Mr. Baffert is a licensed trainer subject to the authority of the KHRC, as set forth in 810 KAR 4:100 Section 3(1) (trainer responsibility rule). Mr. Baffert was required to follow the regulations found in 810 KAR 2:040, 4:010, 4:100, 4:060, 8:010, and 8:030, and was subject to the penalties in 810 KAR 8:030 Section 4(3)(b). Similarly, Zedan Racing Stables, Inc. is a licensed

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<sup>12</sup> Ms. Borden's deposition was introduced into the administrative record by Appellants. TR 1491.

owner subject to the authority of the KHRC, as set forth in 810 KAR 3:020 Section 2. Zedan Racing Stables, Inc. was required to follow the regulations found in 810 KAR 2:040, 4:010, 4:060, 8:010, and 8:030, and was subject to the penalties in 810 KAR 8:030 Section 4(3)(c).

**I. The KHRC has the burden to establish a *prima facie* case that Medina Spirit was administered and carried betamethasone in the Derby.**

Parties agree the Kentucky Horse Racing Commission has the burden of proof but differ framing the question of what needs to be proven. KHRC argues it must establish a *prima facie* case that Medina Spirit “was administered and carried, while running in the [147th Kentucky Derby] . . . a drug, medication, [or] substance . . . prohibited by” 810 KAR 8:010 Section 2(5). KHRC proposes if it establishes a *prima facie* case, then Appellants have the burden of rebutting that case. Appellants believe this case is solely premised on whether the use of a topical ointment, Otomax, for a clinically diagnosed skin infection on a racehorse, constitutes a violation of any clearly expressed and unambiguous rule lawfully promulgated by the Kentucky Horse Racing Commission (KHRC).

In administrative hearings, the party with the burden of proof on any issue has the “burden of going forward and the ultimate burden of persuasion on that issue.” KRS 13B.090(7). “The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, except when a higher standard of proof is required by law.” *Id.* Appellants are challenging the stewards’ rulings disqualifying Medina Spirit, forfeiting the purse, and applying a suspension based on laboratory determinations that sample E427258, taken from Medina Spirit, contained betamethasone at a level of approximately 21 pg/mL to 25 pg/mL. Betamethasone is a prohibited substance (Class C drug, pursuant to KHRC Exhibit 19, KHRC 8-020-1 at 5). It is a violation if a post-race sample taken from a horse contains betamethasone in any amount. *Id.* See also KHRC Exhibit 20, 810 KAR 8:010 Section 24. It is the undersigned’s determination that

what must be proven from this proceeding is whether there was betamethasone, in any amount, taken from the post-race sample is a violation of 810 KAR 8:010. KHRC bears the burden of proof on the issue of whether there was a violation of 810 KAR 8:010. Once it is established through prima facie evidence, appellants must rebut. This is congruent with the provisions of KRS 230.320 which outlines the administrative process for the denial, revocation, or suspension of a license. As one of the appellants are appealing the Stewards' ruling regarding a suspension, he has the burden of proof to show the ruling was invalid.

**II. The KHRC's regulations prohibit betamethasone in a post-race sample, regardless of the method of administration.**

810 KAR 8:010 Section 2(5) establishes there is a violation if a racehorse was administered and carried a "prohibited substance" during a race. It is proven when the KHRC's laboratory presents a report of a "positive finding." (KHRC Exhibit 20) The KHRC laboratory presents a "positive finding" when the laboratory has conducted testing and determined that a medication that is "restricted or prohibited" by 810 KAR 8:010 or 810 KAR 8:020 was present in a sample. *Id.* at Section 1(5).

Such a positive finding is a "violation of KHRC regulations," unless the substance is present under an "established concentration level" as set forth in 810 KAR 8:010 or 810 KAR 8:020. If the medication has an established concentration level, then a positive finding only occurs when the laboratory reports that the medication was present "in excess of the established concentration level." *Id.* at Section 1(5) (defining positive finding); KHRC Exhibit 8, KHRC 8-020-2 at 5 (¶ 11) (incorporated by reference in 810 KAR 8:020 and treating a "positive finding" as a "violation of KHRC regulations").

At the running of the 147th Kentucky Derby on May 1, 2021, no KHRC regulation set forth an "established concentration level" under which betamethasone is allowed in a post-race

sample. Therefore, a laboratory finding of betamethasone in a post-race sample establishes a *prima facie* case that a trainer violated the KHRC's medication regulations.

The KHRC's regulations do not state that any route of administration excuses a post-race betamethasone positive. *See generally* KHRC Exhibit 20, 810 KAR 8:010; KHRC Exhibit 19, KHRC 8-020-1. As the route of administration is irrelevant to the medication positive it is therefore unnecessary to issue factual findings or conclusions of law on the pharmacological effects of betamethasone<sup>13</sup>. Any further inquiry into the drafting history of the regulation is unnecessary. *Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995) (drafting history is irrelevant when regulation is clear). Similarly, an administrative tribunal cannot decide facial constitutional issues, such as whether science causes the KHRC's betamethasone regulations to be "arbitrary and capricious." *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001); *W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W.3d 108, 112 (Ky. 2012) (same).

Appellants contend that 810 KAR 8:010 Section 4 permits the administration of betamethasone ointment; therefore, a betamethasone positive arising due to an ointment administration is not a violation. This interpretation improperly conflates the KHRC's regulations governing medication *administration* with the regulations governing medication *levels in post-race samples*. KHRC has the statutory authority to regulate horse racing, including the determination of which medications are therapeutic and whether or not to set a threshold.

The Horse Racing Commission was created for the purpose of maintaining integrity and honesty in racing, the promulgation and enforcement of rules and regulations effectively preventing the use of improper devices, the administration of drugs or stimulants, or other

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<sup>13</sup> As the hearing officer does not make any findings or conclusions regarding the pharmacological effects of betamethasone on a horse, the issue of whether to include the testimony of Dr. Knych as it relates to pharmacology is moot.

improper acts for the purpose of affecting the speed or health of horses, and the promotion of interest in the breeding of and improvement of the breed of thoroughbred horses, and the Commission is vested with extensive authority over all persons on racing premises for the purpose of maintaining honesty and integrity and orderly conduct of thoroughbred racing. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972). The Kentucky state racing commission is vested with authority to prohibit the use of certain specified medication in racehorses and to deny share of purses to owner of horse where it is shown that prohibited medications have been used contrary to regulations. *Jacobs v. Kentucky State Racing Commission*, 562 S.W.2d 641 (Ky. App. 1977).

Appellants argue that the stacking ban proves that there is no “limit of detection” standard for corticosteroids. The stacking ban penalizes trainers whose horses test positive for *two or more* corticosteroids, even if one of those steroids fell under its “established concentration level.” It also enhances penalties for the detection of more than one “limit of detection” corticosteroid. Nothing about the stacking ban prohibits the KHRC from prohibiting individual corticosteroids in post-race samples. *See* Dr. Howard deposition at 67: 4-18. *See also* TR 612 (Dr. Bruce Howard).

**III. The KHRC stewards did not have a conflict of interest that precluded them from issuing Stewards’ Rulings 22-0009 and 22-0010.**

Appellants believe the stewards could not issue their rulings due to a conflict of interest. 810 KAR 2:040 Section 2(3) lists the only conflict of interest prohibition applicable to KHRC stewards: a steward shall not serve on a Stewards’ Panel if the steward receives income from a licensee involved in a case before that panel. Neither Ms. Borden nor Mr. Picklesimer receive income from either licensee involved in this case; therefore, they did not have a conflict of interest that mandated their recusal.

The ongoing litigation between Churchill Downs and Mr. Baffert did not necessitate the recusal of either Ms. Borden or Mr. Picklesimer. The alleged connection between Ms. Borden and Churchill is incredibly remote. Nor is there evidence that Mr. Picklesimer (or any other steward) was influenced by Churchill Downs, the media, the KHRC, or any other outside source. TR 317, 320 (Ms. Borden); Picklesimer Deposition at 20-21. Furthermore, Mr. Picklesimer's presence was mandated by KRS 230.240(1), which requires one association steward to sit on every panel.

Finally, the Stewards' Rulings in this case were restrained and reasonable. The stewards could have imposed a 5-year suspension and \$50,000.00 fine. KHRC Exhibit 30, 810 KAR 8:030 Section 10. Instead, they suspended Mr. Baffert for 90 days and fined him \$7,500.00. TR 351-352, 501 (Ms. Borden). The stewards also lessened Mr. Baffert's penalty by not considering the July 2020 dextrorphan positive. TR 383-384 (Ms. Borden).

**Dr. Maylin's findings are excluded pursuant to KRE 702.**

KRE 702 provides that an expert witness may testify only if the expert's specialized knowledge "will help the trier of fact to understand the evidence or determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case." *See McKiver v. Murphy-Brown*, 980 F.3d 937, 1008 (4th Cir. 2020) (courts do not accept new methods with no credence in the broader scientific community); *Moore v. Ashland Chem. Co., Inc.*, 151 F.3d 269 (5th Cir. 1998) (affirming expert exclusion where theory was neither published nor peer reviewed, had no determined error rate, and was not generally accepted); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995) ("Daubert II") (refusing to accept conclusions based solely on expert's say-so).

As an initial matter, Dr. Maylin's purported conclusion that Medina Spirit was administered betamethasone via ointment and not by an injection is not relevant to this Hearing Officer's determination. As set forth in Section II, *supra*, betamethasone is prohibited at the limit of detection in post-race samples, regardless of route of administration.

Additionally, Dr. Maylin's novel testing method is neither published nor peer-reviewed. To be published, Dr. Maylin's laboratory would need to conduct significantly more administration trials. This method is so unique that no other testing laboratory in the United States can detect betamethasone 17-valerate in a horse's samples. Dr. Maylin has admitted that anyone seeking to verify his method would either have to "take his word for it" or come to the New York laboratory and do their own research. TR 1431-1436, 1436 1437-1438 (Dr. Maylin).

Dr. Maylin's method produced unreliable results. The method could not detect free betamethasone in Medina Spirit's urine, when two other laboratories readily detected free betamethasone in Medina Spirit's post-race samples. TR 1060, 1109-1111, 1181-1182 (Dr. Stanley); KHRC 49 (Maylin packet) at 130 (testing for betamethasone and not finding it). Dr. Maylin admitted that he tested for free betamethasone, but did not find it in the urine. TR 1470-1471. Dr. Maylin's testing was also riddled with contamination problems. TR 1081-1084, 1085 (clotrimazole contamination); TR 1087-1088, 1092, 1105-1107 (clotrimazole metabolite contamination); TR 1116-1117, 1120-1121 (betamethasone 17-valerate contamination). Dr. Maylin's method yielded very inconsistent results when testing for clotrimazole and betamethasone 17-valerate. TR 1077-1082 (clotrimazole inconsistencies); TR 1116-1117 (betamethasone 17-valerate inconsistencies).

**IV. The KHRC's betamethasone regulations are clear, so their regulatory history is irrelevant.**

“Kentucky law is clear that the text is ‘supreme’ when interpreting statutes and regulations.” *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016). Where a statute or regulation’s plain language is clear, the trier of law may not construe it otherwise, even if the regulation’s history or context may suggest an alternative purpose. *See, e.g., Whittaker v. McClure*, 891 S.W.2d 80, 83 (Ky. 1995).

The plain language of the KHRC’s betamethasone regulations is clear: betamethasone is prohibited in a post-race sample. *See* KHRC Exhibit 20, 810 KAR 8:010 Section 2(6) (classification schedule sets forth medications “violating this regulation”) and Section 1(5) (positive finding occurs when the laboratory detects a prohibited substance); KHRC Exhibit 19, KHRC 8-020-1 at 5 (Classification Schedule lists betamethasone); KHRC Exhibit 8, KHRC 8-020-2 (no threshold level for betamethasone). Therefore, the Commission’s original reasons for removing the betamethasone threshold on August 25, 2020 are irrelevant.

Yet, even if the KHRC’s regulations were unclear, the Commission considered betamethasone’s systemic effects when drafting the regulations that changed betamethasone to a limit-of-detection medication. *See, e.g.,* TR at 568-570 (Dr. Bruce Howard). *See also* KHRC Post-Hearing Exhibit 56, KHRC Statement of Consideration at 9. Consequently, even if the regulation’s drafting history were relevant, the KHRC’s focus was not solely related to joint injections. The KHRC also considered the impact of betamethasone on the horse’s entire system.

Additionally, the KHRC has a longstanding, uninterrupted history of treating all medications without thresholds as limit-of-detection medications and of finding that the administration route leading to a medication positive is irrelevant. For example, the KHRC previously penalized a trainer for a betamethasone positive that occurred due to an ointment

administration. *See, e.g.*, KHRC Exhibit 27, Stewards' Ruling 16-0087; KHRC Exhibit 28A, Stewards' Ruling 19-0034. Therefore, its regulatory interpretation is entitled to controlling weight. *See Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991).

**V. The KHRC's regulations were properly noticed and promulgated.**

The KHRC's August 2020 regulatory amendment moved betamethasone's threshold from 10 pg/mL to the limit of detection. This regulation was properly noticed and promulgated.

The KHRC was fully apprised of the text of the proposed regulatory amendment that it approved on April 21, 2020, which removed the 10 picogram per milliliter betamethasone threshold from KHRC 8-020-2. Appellants' Exhibit D15, April 21, 2020 meeting materials at 10 (removing betamethasone from the threshold levels list); Appellants' Exhibit D16A at 50-52 (April 21, 2020 meeting transcript, approving the proposed changes).

The Legislative Research Commission ("LRC") was also properly noticed of the proposed amendments. On April 15, 2020, the KHRC properly filed numerous documents with the LRC, including two documents that explicitly struck through the betamethasone threshold set forth in KHRC 8-020-2. The KHRC also filed five pages of rule-making documents, which accurately summarized the anticipated changes in KHRC 8-020-2. Although the summary documents did not reference the specific change to betamethasone, the documents stated that trainers would have to alter their medication practices to comply with the regulatory amendments, including mandatory threshold levels. This is sufficient to meet the notice requirements set forth in KRS Chapter 13A. *See KHRC Post-Hearing Exhibit 57*, April 15, 2020 email to LRC.

**VI. The Stewards' Rulings disqualifying Medina Spirit, returning the purse, suspending Mr. Baffert, and fining Mr. Baffert should be upheld, based on the un rebutted finding of betamethasone in Medina Spirit's post-race sample.**

The KHRC met its burden of demonstrating that the blood and urine samples taken from Medina Spirit followed all protocols outlined in 810 KAR 8:010 and 810 KAR 8:060. Dr. Howard reviewed the paperwork filled out on the day of the race and testified that all appropriate measures were taken to properly identify and collect the samples, maintain the test barn to avoid contamination, and send the samples to the respective laboratories safely.

Here, the Commission has established its *prima facie* case, because Industrial Laboratories found that Medina Spirit's post-race blood sample tested positive for betamethasone at approximately 21 picograms per milliliter. KHRC Exhibit 10, Industrial finding. Mr. Baffert's chosen split laboratory (the University of California, Davis) confirmed approximately 25 picograms per milliliter of betamethasone in Medina Spirit's split sample. KHRC Exhibit 11, U.C. Davis confirmation.

Petra Hartmann and Dr. Benjamin Moeller testified that they received the primary and split samples, respectively. The samples were only marked by their number, with no way for the laboratories to learn the name of the horse, the owner, or the race results. Ms. Hartmann and Dr. Moeller testified about following the standards and practices of maintaining chain of custody and keeping samples intact for testing. Both the primary and the split laboratories provided reports. KHRC Exhibits 47 and 51, respectively. Both expert witnesses testified that the protocols used by each laboratory followed current standards and practices for testing.

Appellants did not rebut the *prima facie* evidence, which shows that Medina Spirit was positive for Betamethasone, a prohibited Class C substance. Appellants' expert, Mr. Lomangino, initially raised concerns that Industrial improperly tested for betamethasone using a

dexamethasone reference standard; however, he retracted that concern upon further questioning. TR 1534 (initial testimony); 1704, 1706 (retraction). He also admitted that U.C. Davis' laboratory packet did not show evidence of betamethasone contamination in the negative urine sample. TR 1523 (initial testimony); TR 1556 (admission). Finally, there was no evidence that Industrial Laboratories operated without a written SOP. Instead, the evidence showed that Industrial's SOP was documented informally, through positive control logs, sample worksheets, instrument acquisition methods, and the data packet at issue in this case. TR 881-882, 909, 910-911, 913-914 (Ms. Hartmann).

Moreover, Mr. Baffert admitted that his agents, under his direction, administered Otomax, an ointment containing betamethasone, twice a day to Medina Spirit, up to and including the day before the 2021 Derby. TR 128, 165, 167, 220-221 (Mr. Baffert). *See also* Cruz Deposition at 11; Baker Deposition at 11. This administration would have led to at least five times more betamethasone being applied to Medina Spirit than he would have received in an intra-articular injection. TR 1307 (Dr. Scollay).

The Hearing Officer finds and concludes that the Kentucky Horse Racing Commission has shown that the stewards' decision was made on reliable, substantive evidence that the horse, Medina Spirit, was administered and carried the prohibited substance, betamethasone.

KRS 13B.090(7) also states that the agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. Barbara Borden testified that the stewards considered three of Mr. Baffert's four prior medication violations that occurred in a 365-day period: the two lidocaine positives in Arkansas, and the betamethasone positive at the Kentucky Oaks. The stewards did not consider a dextrophan positive in California.

After consideration of the evidence at the stewards' hearing, the stewards assessed a penalty based on the pattern set forth in 810 KAR 8:030 Section 4(3). The stewards found no mitigating factors, but they did lessen Mr. Baffert's penalty by choosing not to consider the dextrorphan positive that Mr. Baffert incurred in July 2020. TR 353, 383-384 (Ms. Borden).

This penalty was far from the maximum penalty allowable, which would have allowed the stewards to suspend Mr. Baffert for up to five (5) years and impose a fine of up to \$50,000.00. KHRC Exhibit 30, 810 KAR 8:030 Section 12. TR 351-352, 501-502 (Ms. Borden).

The undersigned finds this penalty was appropriate based on the facts found above.

### **Recommended Order**

This Hearing Officer, being otherwise sufficiently advised, recommends Stewards' Rulings Nos. 22-0009 and 22-0010 be affirmed in their entirety.

Recommended on May 26, 2023.

  
**Eden Davis Stephens**  
**Hearing Officer**  
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## **NOTICE OF EXCEPTION AND RIGHTS TO APPEAL**

If a party does not agree with the recommended order and wishes to appeal, case law requires a litigant to file exceptions with the Board or agency to preserve the right to review by the circuit court. You also have a right to appeal the Final Order of the agency pursuant to KRS 13B.140(1), which states:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 13B.110(4), you have the right to file exceptions to this recommended decision:

- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head. Transmittal of a recommended order may be sent by regular mail to the last known address of the party.

Pursuant to KRS 23A.010(4), "[s]uch review by the Circuit Court shall not constitute an appeal, but an original action." The Kentucky Court of Appeals has suggested that an appeal to circuit court begins upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing has been served upon the following via email on Friday, May 26, 2022:

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