THE NEW YORK RACING ASSOCIATION, INC.

IN THE MATTER OF	)
	)
ROBERT A. BAFFERT	)
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	)

HEARING REPORT

Prepared by:

O. Peter Sherwood
Hearing Officer

SERVICE

PRELIMINARY STATEMENT

FINDINGS OF FACT

CONCLUSIONS OF LAW

SERVICE

PRELIMINARY STATEMENT

I. The Parties

A. *New York Racing Association*

1. The New York Racing Association ("NYRA") is a not-for-profit corporation incorporated in 2008 for the purpose of conducting race meetings and pari-mutuel wagering and furthering the raising and breeding of horses, including exercising the powers conferred by N.Y. Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") § 203, which includes the power and right to hold running race meetings and "to hold, maintain and conduct running races at such meetings." (NYRA Ex. 135)

2. NYRA operates three racetracks and pari-mutuel wagering facilities in New York State ("the State"): (1) Aqueduct Racetrack in Queens County; (2) Belmont Park Racetrack in Nassau County; and (3) Saratoga Race Course in Saratoga County (collectively, "the Racetracks"). (*Id.*) It also operates a national advance deposit online wagering platform under the brand name "NYRA Bets" (*see* Hearing Transcript ["Tr."] 719:11-21). NYRA Bets operates in 31 states and offers wagering at over 250 racetracks internationally (Tr. 725:7-726:9).

3. On or about September 12, 2008, the State granted NYRA an exclusive 25-year franchise to conduct Thoroughbred racing and related operations at the Racetracks (the "Franchise Agreement"), pursuant to which NYRA performs its functions. (*Id.*; Tr. 568:17–569:2.)

B. *Robert A. Baffert*

4. Respondent Robert A. Baffert ("Baffert") is an owner and trainer of Thoroughbred horses. (Tr. 1137:2-5). Baffert is a licensed as a Thoroughbred trainer with the

racing commissions of various jurisdictions throughout the country, including the New York State Gaming Commission ("SGC" or "Gaming Commission").

5. Baffert is a well-known figure in the sport of horse racing. Horses trained by Baffert have won significant races, including multiple wins at the Kentucky Derby, the Preakness Stakes, and the Belmont Stakes. He has trained two of the thirteen American Triple Crown winning horses, American Pharoah and Justify. (Baffert Ex. 42; Tr. 1138:14-1140:2; 1149:21-25.)

6. However, Baffert's long career has not been without its share of controversy. Over the course of Baffert's career, racing regulators have sanctioned him many times for violation of equine drug laws. (Tr. 1215:9-13, 18-23).

7. This pre-deprivation due process hearing concerns NYRA's attempts to exclude Baffert from the Racetracks following a number of recent violations of equine drug laws that Baffert is alleged to have committed.

II. Prior Proceedings

8. On May 1, 2021, a Baffert trained horse named MEDINA SPIRIT finished first in the Kentucky Derby. In accordance with Gaming Commission regulations, post-race blood and urine samples were taken from the horse to test for the presence of drugs. A week later the Kentucky Horse Racing Commission ("KHRC") informed Baffert that the blood sample tested positive for betamethasone, a corticosteroid that acts as an anti-inflamatory.

9. On May 17, 2021, NYRA issued a decision suspending Baffert from entering races or occupying stall space at all NYRA operated racetracks. On June 14, 2021, Baffert filed suit in the United States District Court for the Eastern District of New York (the "Court") and sought a preliminary injunction based on the theory that under the New York Racing Law,

NYRA lacked authority to suspend him indefinitely. The Court (Amon, J.) ruled that Baffert's state law claim "appeared to be foreclosed" by the New York Court of Appeals decision in *Samumell v New York Racing Assn, Inc.*, 58 NY2d 231 (1983), but that as a state actor, NYRA was obligated to provide Baffert with a hearing prior to taking action barring him from access to NYRA facilities. The hearing is required under the Due Process Clause of the United States Constitution. The court then granted the injunction.

10. Subsequently, NYRA promulgated certain Hearing Rules and Procedures to apply in cases where it is alleged that a person licensed by the Gaming Commission has engaged in conduct at a NYRA Racetrack or elsewhere that is believed to be injurious to the health or safety of horses and where such conduct may warrant revocation of the person's NYRA-issued credentials.

11. On September 9, 2021, NYRA issued a Statement of Charges and scheduled this administrative proceeding addressed to the charges.

12. On November 19, 2021, Baffert returned to the Court seeking an order to bar this proceeding from going forward. The Court denied the requested relief.

III. Statement of Charges

13. On December 23, 2021, NYRA served Baffert with an Amended Statement of Charges ("ASOC").

14. By the ASOC, NYRA seeks to exercise its discretionary business judgment to exclude Baffert from entering or stabling horses anywhere on grounds that NYRA operates.

15. In the ASOC, based on the facts alleged therein, NYRA sets forth three charges against Baffert for engaging in conduct alleged to be detrimental to: (i) the best interests of racing; (ii) the health and safety of horses and jockeys; and (iii) NYRA business operations.

16. Specifically, Charge I in the ASOC asserts as follows:

> Respondent is charged with engaging in conduct detrimental to the best interests of Thoroughbred Racing. Respondent's conduct has harmed the reputation and integrity of the sport, as well as the public's perception of the sport's legitimacy. As a result of Respondent's conduct, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

17. Charge II of the ASOC asserts as follows:

> Respondent is charged with engaging in conduct detrimental to the health and safety of horses and jockeys. Certain prohibited or otherwise regulated substances, such as betamethasone, have the potential to mask injuries when used in Thoroughbred racing when they exceed the threshold levels legally permitted for a horse at race time. A substance's ability to mask injuries allows a horse to compete in a race when it otherwise should not, which increases the risk of catastrophic injury to horses and jockeys. Accordingly, Respondent's use of betamethasone and other drugs above state mandated threshold limits put the health and safety of horses and jockeys at risk. As a result, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

18. Charge III of the ASOC asserts as follows:

> Respondent's conduct has impeded NYRA's ability to effectively supervise the activities at the racetracks it operates so that its patrons have confidence that the sport is honestly conducted, protecting competitors from the participation in tainted horse races, and safeguarding the wagering public. As a result of Respondent's conduct, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

IV. Administrative Hearing

19. An evidentiary hearing was held in this administrative proceeding on January 24-28, 2022. Thereafter the parties submitted proposed findings of fact and conclusions of law. The parties also submitted responses and objections to each other's proposed findings and conclusions.

20. The matter is now ready for decision.

FINDINGS OF FACT

I. NYRA's Governance

21. As described by NYRA, it is governed by a privately controlled board of directors. (*see* N.Y. Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") § 207(1)).

22. A Franchise Agreement between NYRA and New York State and the State Franchise Oversight Board ("FOB") sets forth performance standards with which NYRA must comply, including standards regarding the number and types of races it must hold each year and, particularly relevant to this matter, standards addressing equine safety and health (the "Performance Standards") (*see* NYRA Ex. 135; Tr. 569:25-570:20).

23. Specifically, the Franchise Agreement provides that NYRA must use its best efforts to meet various Performance Standards. (*see* NYRA Ex. 135, § 2.2).

24. One of the Performance Standards provides that NYRA "shall embrace objectives to encourage growth in on- and off-track handle" and "use its reasonable best efforts to maximize attendance at each of the Racetracks." (*Id.* § 2.2(h))

25. A separate Performance Standard requires NYRA to "consider . . . steps in consultation with industry experts to ensure jockey and equine safety." (*Id.* § 2.2(d).)

26. NYRA states that a failure to abide by these Performance Standards could result in the revocation of its franchise (*see* Racing Law § 244 ["The commission may revoke a license issued by it under this chapter or a franchise granted pursuant to section two hundred six of this article if the corporation to which such license or franchise shall have been issued, or its officers or directors, shall not conduct racing at its track, including pari-mutuel betting on races thereat, in accordance with the terms and conditions of such license or franchise, with the rules of the

commission and with the provisions of this chapter; or if such corporation or its officers or directors shall knowingly permit on its grounds or within the enclosure of its racetrack, lotteries, pool selling or bookmaking, or any other kind of gambling, in violation of this chapter or of the penal law].

27. NYRA is also subject to regulation and oversight by multiple New York State governmental agencies, including the Franchise Oversight Board and the Gaming Commission (*see* NYRA Ex. 135; Tr. 563:19-564:25.) The oversight agencies ensure that NYRA is incompliance with the Performance Standards.

28. For example, the FOB has comprehensive oversight authority over virtually all operations of NYRA, including the authority to revoke NYRA's franchise if the Performance Standards are not met. (*see* Racing Law § 212; Tr. 564:15-20; 567:23-568:9; 571:21-572:3.)

29. The Gaming Commission, Division of Horse Racing and Pari-Mutuel Wagering is responsible for the supervision, regulation, and administration of all horse racing and pari-mutuel wagering activities. It has oversight and enforcement powers and can impose stiff sanctions against NYRA for violations of the Racing Law and administrative rules and regulations (*see* Racing Law § 103[2][d]; *see also id.* § 104[4] [Gaming Commission has the power to monitor any corporation engaged in gaming activity]. [Tr. 573:212-574:8; 574:14-575:3.]

30. In addition, the Gaming Commission is statutorily empowered to revoke and cancel NYRA's franchise or otherwise penalize NYRA for violating Gaming Commission Rules (*see, e.g.*, Racing Law §§ 208[5], 244, 245 [Tr. 564:12-15).

II. Post-Race Drug Tests, July 27, 2019 – May 1, 2021

31. As detailed below, during a 14-month period, horses trained by Baffert have tested positive for regulated substances in excessive or prohibited amounts on seven occasions

in the states of Arkansas, California and Kentucky. In each case, Baffert was found to have violated equine drug laws and was sanctioned (*see* NYRA Exs. 6, 21, 27, 41, 44, 52, 65, 72, 74, 85, 89, 96-97; Tr. 105:21-106:2; Tr. 112:19-113:13; 118:1-11; 118:21-25; 125:14-126:21; 132:14-132:1; 135:7-19; 141:23-142:5; 146:14-16; 148:20-149:1; 151:9-11; 151:18-25; 152:1-5; 155:15-156:4; 159:13-18; 1160:24-1161:5; 166:1-167:7; 167:20-168:1; 1160:24-1161:5; 1161:23-1162:8; 1169:22-1170:2; 1171:19-22; 1177:23-1178:2; 1178:14-17; 1182:7-13; 1182:18-23; 1226:17-23; 1265:18-21; 1268:24-1270:2; *Baffert v Kentucky Horse Racing Comm.*, No. 21-CL-00456, slip op [Franklin Cir Ct March 21, 2022]; Answer ¶ 3).

A. *July 27, 2019: Cruel Intention in California*

32. On July 27, 2019, Cruel Intention, a horse trained by Baffert, finished third in the third race at Del Mar Race Course in Del Mar, California. (NYRA Exs. 1-2)

33. A post-race blood sample drawn from Cruel Intention tested positive for the presence of 510 nanograms per milliliter ("ng/mL") of phenylbutazone. (*see* NYRA Ex. 6; Tr. 105:21 – 106:2; 1159:13-18). This finding was later confirmed by testing conducted at the Texas Medical Diagnostic Laboratory. (*see* NYRA Ex. 8; Tr. 115:7-116:8)

34. Phenylbutazone is a nonsteroidal anti-inflammatory drug and pain reliever that is commonly used for lameness in horses. (*see* NYRA Ex. 11; Tr. 105: 17-20; 415:7-23; 1158:16-18).

35. NYRA proffered expert testimony from Pierre Toutain ("Dr. Toutain"), a veterinarian specializing in veterinary pharmacology (Tr. 405:20 – 406:10), that Phenylbutazone, including in the concentration found in Cruel Intention's blood on July 27, 2019, can affect race performance by masking an injury that would otherwise prevent a horse

from racing, which could put such horse at risk for further injury. (*see* Tr. 416:15-22; 418: 21-23; 419:7 – 420:5; 420:13-22; Tr. 423:12-424:4)

36. The California Horse Racing Board ("CHRB"), the governmental agency responsible for regulating Thoroughbred racing and enforcing equine drug laws (*see* Tr. 102:15-25), classifies phenylbutazone as a Class 4 drug with a penalty category of Class C. (*see* NYRA Ex. 4; Tr. 110:8 – 111:17). Class 4 drugs are primarily therapeutic drugs that "may influence performance but generally have a more limited ability to do so" as compared to those in other classes. (*see* NYRA Ex. 113)

37. On July 27, 2019, there was no allowable level of phenylbutazone that could be found in a horse's bloodstream on the day of a race, making it, effectively, a zero tolerance substance. (*see* Tr. 107:4-13) However, in practice, a laboratory was not likely to report a positive finding of phenylbutazone at levels below 300 ng/mL (.3 micrograms per milliliter ["µg/mL"]). (*see* Tr. 107:14-18) Thus, the 510 ng/mL concentration of phenylbutazone was well above even the minimum concentration at which a laboratory would report the presence of phenylbutazone.

38. An investigation by the CHRB reported that Dr. Vince Baker, a veterinarian at Baffert's stables, asserted that Cruel Intention and other horses in Baffert's stables had been injected with phenylbutazone no later than 10:30 A.M. two days before the July 27, 2019 race. (NYRA Ex. 16)

39. On September 29, 2019, CHRB issued a complaint against Baffert, charging him with violating CHRB Rules 1843(a)(b)(d), 1843.1(a), and 1887(a), in connection with Cruel Intention testing positive for phenylbutazone. (*see* NYRA Ex. 4; Tr. 102:15- 103:4)

40. CHRB Rule 1887 is California's trainer responsibility rule, which states: "The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties[.]" (NYRA Ex. 13; Tr. 1209:25 – 1210:8)

41. CHRB issued Baffert a Notice to Appear before the Board of Stewards for a hearing on October 19, 2019. (*see* NYRA Ex. 4; Tr. 102:15-103:4) On November 23, 2019, the Del Mar Thoroughbred Club Board of Stewards found that Baffert violated CHRB Rules 1843(a)(b)(d) (medication, drugs and other substances), 1843.1 (prohibited drug substances-phenylbutazone), and 1887 (trainer or owner to ensure condition of horse), and imposed a $500 fine on Baffert, which Baffert paid. (*see* NYRA Ex. 21; Tr. 112:19- 113:13; 118:1-11; 118:21-25; 1160:24- 1161:5; 1208:7-16)

B. ***August 3, 2019: Éclair in California***

42. On August 3, 2019 (seven days after the Cruel Intention incident), Éclair, a horse trained by Baffert, finished fourth in the first race. (*see* NYRA Exs. 22-23; Tr. 125:8-13)

43. A post-race blood sample drawn from Éclair tested positive for the presence of 2.88 μg/mL (or 2,880 ng/mL) of phenylbutazone. (*see* NYRA Ex. 27; Tr. 125:14-126:2; 1159:13-18.) This amount is well in excess of the 300 ng/mL (.3 μg/mL) threshold below which laboratories are not likely to report the presence of phenylbutazone.

44. NYRA's expert, Dr. Toutain, testified that the concentration of Phenylbutazone found in Éclair's blood on August 3, 2019 could have affected the horse's performance in the race. (*see* Tr. 424:17-425:3; 425:19 - 426:10; 427:1-7)

45. On August 17, 2019, Baffert signed a Positive Test Notification document ("PTN") regarding Éclair, requested a split sample, and asserting as follows:

> [T]hat he did not know why the horse Éclair tested positive for Bute. Baffert stated he thinks someone is intentionally giving Bute to his horses and mentioned that he would be offering a reward to help solve this case.

(*see* NYRA Ex. 35; Tr. 130:1-14; 1159:19-1160:13; 1221:8-1222:18; 1223:16-1225:20)

46. On or about September 5, 2019, an analysis conducted by the Texas Veterinary Medical Diagnostic Laboratory of Éclair's split sample confirmed the presence of phenylbutazone in her system on August 3, 2019. (*see* NYRA Ex. 29)

47. On September 29, 2019, CHRB issued a Complaint against Baffert, charging him with violating CHRB Rules 1843(a) (b) (d), 1843.1(a) and 1887(a), in connection with Éclair testing positive for phenylbutazone. (*see* NYRA Ex. 25; Tr. 125:14-126:2)

48. CHRB issued Baffert a Notice to Appear before the Board of Stewards for a hearing on October 19, 2019. (*Id.*) On November 23, 2019, the Board of Stewards for Del Mar Thoroughbred Club found that Baffert violated CHRB Rules 1843(a)(b)(d), 1843.1, and 1887 in connection with Éclair testing positive for phenylbutazone. CHRB imposed a $1,500 fine on Baffert, which he paid. (*see* NYRA Ex. 41; Tr. 132:14-132:1; 1160:24-1161:5; 1208:23-1209:5)

C. *May 2, 2020: Charlatan and Gamine at Oaktown Park, Arkansas*

49. On May 2, 2020, Charlatan, a horse trained by Baffert, placed first in the Arkansas Derby held at the Oaklawn Jockey Club in Hot Springs, Arkansas. The Arkansas Derby is a Grade 1 stakes race with a $500,000 purse. (*see* NYRA Exs. 42-43; Tr. 133:6- 134:20; 135:4-5; 1162:7-9)

50. A post-race blood sample drawn from Charlatan tested positive for 46 picograms/mL (pg/mL) of 3-Hydroxylidocaine, a metabolite of lidocaine. (*see* NYRA Ex. 44; Tr. 135:7-19; 1161:23- 1161:8; Answer ¶ 3)

51. Also, on May 2, 2020, Gamine, another horse trained by Baffert, placed first in the 7th race, an allowance race on the Arkansas Derby undercard. (*see* NYRA Exs. 50-51; Tr. 140:1-15; 1163:7-9)

52. A post-race blood sample drawn from Gamine tested positive for 185 pg/mL of 3-Hydroxylidocaine, a metabolite of lidocaine. (*see* NYRA Ex. 52; Tr. 141:23- 142:5; 1161:23- 1162:8; Answer ¶ 3)

53. Dr. Toutain testified that lidocaine, of which 3-Hyrdoxylidocaine is a metabolite, is a local anesthetic or nerve block that is used in horses to relieve pain. (*see* Tr. 440:6-11; 441:5-18; *see also*, Tr. 135:23- 136:10)

54. Dr. Toutain also testified that lidocaine can affect race performance, by masking an injury that would otherwise prevent a horse from racing. A horse that races in such circumstances is in danger of further injury. (*see* Tr. 442:18- 443:3; 443:6-12)

55. The Arkansas Racing Commission ("ARC") is the state governmental agency responsible for regulating Thoroughbred racing and enforcing equine drug laws in Arkansas.

56. ARC classifies lidocaine as a Class 2 drug. (*see* NYRA Ex. 60)

57. As Baffert's expert, Dr. Clara Fenger ("Dr. Fenger"), testified, in determining whether lidocaine has been administered to a horse, the amount of 3-Hydroxylidocaine present in a horse's bloodstream is measured. (*see* Tr. 991: 12-16)

58. On May 2, 2020, the allowable threshold for 3-Hydroxylidocaine in Arkansas was 20 pg/mL. (*see* NYRA Ex. 60)

59. An analysis of Charlatan's split sample found the presence of 86.8 pg/mL of 3-Hydroxylidocaine, in excess of the allowable threshold in Arkansas on May 2, 2020. (*see* NYRA Ex. 46; Tr. 139:15-25)

60. Dr. Toutain testified that the concentration of 3-Hydroxylidocaine found could have affected the horse's performance in the race. (Tr. 447:23- 448:5; 451:3- 452:17)

61. An analysis of Gamine's split sample found the presence of 294 pg/mL of 3-Hydroxylidocaine. (*see* NYRA Ex. 54; Tr. 142:6-16.)

62. Similarly, Dr. Toutain testified that the concentration of 3-Hydroxylidocaine found in Gamine's blood on May 2, 2020 could have affected the horse's performance in the race. (*see* Tr. 448:6- 449:11; 452:18-23)

63. Shortly after Baffert was notified of the two lidocaine positives by ARC, Baffert claims to have launched an investigation of his barn. (*see* Tr. 1166:19- 1167:9)

64. Baffert speculated that the 3-Hydroxylidocaine found in Charlatan and Gamine's blood may have been the result of Baffert's assistant trainer, Jimmy Barnes, touching his "Salonpas Lidocaine" patch while bridling Charlatan and Gamine and tying their tongues in advance of the May 2, 2020 races. Barnes purportedly was wearing the patch as he had suffered an injury to his back years before. (*see* Tr. 1167:10-19; 1168:7-11; 1227:8- 1230:2) A statement to this effect was made to the media on Baffert's behalf. (*see* Tr. 1232:6 -1237:17)

65. The Oaklawn Park Board of Stewards found that Charlatan and Gamine tested positive for lidocaine, in violation of ARC Rules 1217(b) and 1233. (*see* NYRA Exs. 60-61; Tr. 143:15-23; 1168:23-1169:7)

66. ARC Rule 1233, an absolute-insurer rule, provides that a trainer is ultimately responsible for the condition of any horse that is entered regardless of the acts of any third parties. (*see* NYRA Ex. 60)

67. Thus, on July 14-15, 2020, the Oaklawn Park Board of Stewards disqualified Charlatan and Gamine and suspended Baffert for 15 days. (*see* NYRA Exs. 48, 56, 61; Tr. 142:21- 143:3, 11-23)

68. Baffert appealed the ARC rulings. (*see* NYRA Exs. 64-67; Tr. 143:24- 144:4; 1169:8-16.)

69. Following a hearing on Baffert's appeal, ARC found that violations as to the amount of lidocaine in Charlatan and Gamine's bloodstreams had occurred, but modified the penalties. (*see* NYRA Exs. 65-67; Tr. 144:17– 146:8) Specifically, ARC rescinded the disqualifications of Charlatan and Gamine and Baffert's suspension, but imposed a $5,000 fine for each positive test, for a total fine of $10,000. (*see* NYRA Ex. 65; Tr. 146:14-16; 1169:22- 1170:2; 1226:17-23)

70. Baffert paid the $10,000 fine. (*see* Tr. 1170:17-25; 1226:17- 1227:2.)

D. *July 25, 2020: Merneith at Del Mar Race Track, California*

71. On May 2, 2020, Merneith, a horse trained by Baffert, placed second in the fourth race at Del Mar Race Course. (*see* NYRA Exs. 68-69; Tr. 146:17-147:7)

72. A post-race urine sample tested positive for 5 ng/mL of dextrorphan, a metabolite of dextromethorphan. This finding was later confirmed by the testing of a split sample. (*see* NYRA Exs. 72, 74; Tr. 148:20-149:1; 1171:19-22; Answer ¶ 3)

73. Dextromethorphan is commonly found in many over-the-counter human cough and cold medicines. (*see* NYRA Ex. 75; Tr. 148:10-19)

74. NYRA presented testimony that it would be unusual to find Dextromethorphan in a horse, as it is not a typical therapeutic for a horse. (*see* Tr. 148:4-9) However,

Dextromethorphan can be abused, as it has the ability to act as an anesthetic when administered in high doses. (*see* NYRA Ex. 75; Tr. 148:10-19)

75. Dextromethorphan is prohibited in any amount in a horse's blood or urine following a race. (*see* NYRA Ex. 75; Tr. 148:10-19)

76. CHRB classifies Dextrorphan as a Class 4 Drug with a Penalty Category B. (*see* NYRA Ex. 71; Tr. 147:24-25)

77. On August 9, 2020, a CHRB investigator conducted an inspection of Baffert's barn at Del Mar Race Course. (*see* NYRA Ex. 80.) The investigator's report stated, in part:

> BAFFERT said he did not know what that medication was and did not know how MERNEITH would have gotten that medication. BAFFERT then called on of his veterinarians, DR. RYAN CARPENTER, who came down to the barn. When told of the violation, Dr. CARPENTER said Dextromethorphan would not be given to any horses. I told them it was a cough suppressant and asked BAFFERT if anyone in his barn might have been using cough medicine. BAFFERT told me the groom who was with MERNEITH at the time had tested positive for Covid 19 and was possibly taking cold medicine.
>
> That groom, WILLIAM ALONZO, was called to the office by BAFFERT. BAFFERT asked ALONZO in Spanish if he had been taking any cold medicine when he was attending to MERNEITH. ALONZO said he had been taking Dayquil and Nyquil at the time. BAFFERT also asked ALONZO if he had urinated on MERNEITH's hay, to which ALONZO said he did not.

(*Id.*; Tr. 149:2-150:7, 150:19-151:5; *see also* Tr. 1242:5-1245:25; 1248:2-18)

78. On September 15, 2020, CHRB received notification that a split sample of Merneith's urine tested positive for Dextrorphan. (*see* NYRA Ex. 74)

79. On September 17, 2020, CHRB filed a complaint against Baffert, charging violations of CHRB Rules 1843(a)(b)(d), 1843.1(a), and 1887(a), in connection with Merneith's positive test for dextrorphan. (*see* NYRA Ex. 71; Tr. 147:8-21)

80. On October 27, 2020, in response to the CHRB's Complaint, Baffert issued the following statement to the media:

> A member of my staff where (*sic*) sick with COVID this summer, including Merneith's groom. I learned he had been taking over-the-counter cough syrups that contained Dextrorphan. This has been an issue in other states where contamination has led to positive tests. That's what happened here. This is clearly another case of contamination. Ultimately, this is my responsibility. It's really embarrassing for the barn, but that's what happened. #2020 sucks.

(NYRA Ex. 78; *see also* Tr. 1174:21-25-1175:2-25-1176:2-23)

81. Indeed, Baffert has suggested that the presence of Dextrorphan in Merneith's urine is the result of the groom who had taken over-the-counter cough medication urinating on hay in Merneith's stall that the horse later ingested. This theory lacks credibility, especially given that the groom initially stated that he had not urinated on hay in Merneith's stall, but later changed his story, telling the CHRB that he had been scared of being fired by Baffert. (*See* Tr. 50: 4-24)

82. On November 29, 2020, the Board of Stewards for Del Mar Thoroughbred Club found that Baffert violated CHRB Rules 1843(a)(b)(d) (medication, drugs and other substances), 1843.1 (prohibited drug substances-dextromethorphan), and 1887 (trainer or owner to insure condition of horse), and imposed on Baffert a $2,500 fine. (*See* NYRA Ex. 85; Tr. 151:9-11, 151:18 - 152:5; 1177:23-1178:2.) Baffert paid the fine. (*See* Tr. 1177:23-1178:2; 1241:11-16)

E. *September 4, 2020: Gamine at the Kentucky Oaks*

83. On September 4, 2020, Gamine, a horse trained by Baffert, placed third in the Longines Kentucky Oaks, a Grade 1 stakes race with a $1.25 million purse, that was run at

Churchill Downs Racetrack in Louisville, Kentucky. (*See* NYRA Ex. 87-88; Tr. 154:12 - 155:14.)

84. The Kentucky Oaks is America's premier and most lucrative race for 3-year-old fillies customarily held each year on the day before the Kentucky Derby. (*See id.*; Tr. 1252:15-21.)

85. The Kentucky Horse Racing Commission ("KHRC") is the governmental agency responsible for regulating Thoroughbred racing and enforcing equine drug laws in the Commonwealth of Kentucky.

86. On September 11, 2020, KHRC learned that a post-race blood sample drawn from Gamine immediately after the Kentucky Oaks tested positive for of 27 pg/mL of betamethasone. (*See* NYRA Ex. 89; Tr. 155:15-156:4; 1178:14-17; Answer ¶ 3)

87. Betamethasone is a corticosteroid anti-inflammatory that can provide relief from discomfort in horses. (*See* Tr. 156:5-11; 427:22-428:1; 1254:9-11) Betamethasone is typically used by veterinarians to suppress joint inflammation. (*See* Tr. 428:10-17)

88. Dr. Toutain testified that Betamethasone can affect race performance by masking an injury that would otherwise prevent a horse from racing, and that horses racing while using a corticosteroid are more likely to have a catastrophic injury during a race. (*see* Tr. 429:21– 430:22)

89. KHRC classifies betamethasone as a Class C drug. (*See* NYRA Ex. 91)

90. While betamethasone is a permitted medication in Kentucky, a 14-day withdrawal time is mandated and any level of detection on race day is a violation of Kentucky law. (*see* NYRA Ex. 93)

91. On September 12, 2020, Barbara L. Borden, the Chief Steward of the KHRC, advised Baffert that Gamine tested positive for 27 pg/mL of betamethasone. In a series of text messages with Ms. Borden, Baffert stated that "[t]his whole thing is ridiculous," and that he "followed every rule and guideline." Baffert also seemed to indicate that he was not aware that the threshold for betamethasone in Kentucky had changed to a zero tolerance limit as of August 25, 2020. (*See* NYRA Ex. 98; Tr. 158:4-18; 159:1-12; 159:19-160:17; see also 1178:18-1179:14; 1254:5-8; 1258:8-21)

92. On September 14, 2020, Baffert requested that a split sample be tested of Gamine's urine.

93. On January 30, 2021, KHRC found that Baffert violated multiple KHRC regulations, including Kentucky's trainer responsibility rule (810 KAR 4:100); imposed a $1,500 fine on Baffert; and disqualified Gamine. KHRC also directed the return of the purse money. (*See* NYRA Exs. 96-97; Tr. 166:1-167:7, 167:20-168:1; 1182:7-13; 1182:18-23; 1265:18-21)

94. Baffert paid the fine. (*see* Tr. 1182:21-23; 1265:22-1266:2)

95. After Gamine tested positive for betamethasone and KHRC's findings regarding the same, Baffert claims he instructed his veterinarians to stop administering betamethasone to his horses, purportedly saying, "I want betamethasone out of my barn." (*See* Tr. 1184:16-1185:8)

96. Indeed, on November 4, 2020, Baffert issued the following press release to the media:

> 2020 has been a difficult year for everyone. It has been no exception for my family, my barn, and me. I am very aware of the several incidents this year

concerning my horses and the impact it has had on my family, horse racing, and me.

I want to have a positive influence on the sport of horse racing. Horses have been my life and I owe everything to them and the tremendous sport in which I have been so fortunate to be involved.

We can always do better and that is my goal. Given what has transpired this year, I intend to do everything possible to ensure I receive no further medication complaints. As such, I want to announce that, beginning immediately, I plan to implement the following procedures in an effort to make my barn one of the leaders in best practices and rule compliance:

1.- I am retaining Dr. Michael Hore of the Haygard Equine Medical Institute to add an additional layer of protection to ensure the well-being of horses in my care and rule compliance.-

2.- I am increasing the training and awareness of all my employees when it comes to proper protocols.-

3.- I am personally increasing my oversight and commitment to running a tight ship and being careful that protective measures are in place.

I want to raise the bar and set the standard for equine safety and rule compliance going forward. For those of you that have been upset over the incidents of this past year, I share in your disappointment. I humbly vow to do everything within my power to do better. I want my legacy to be one of making every effort to do right by the horse and the sport.

(*See* NYRA Ex. 110; Tr. 163:13-17; 164:11-166:16; 1272:2-1279:2; Answer ¶ 12)

97. It appears that Baffert did not follow through on the statements he made in the press release. For example, on May 12, 2021, a representative of Baffert explained that, contrary to the November 4, 2020 press release, Baffert had not hired Dr. Michael Hore, stating:

"There were initial discussions and plans to begin the process of it materializing … They did not materialize as expected due to COVID, but I've had

conversations with Dr. Hore the last couple days about that very subject and discussing about getting that back on track."

(NYRA Ex. 111; Tr. 178:20-180:6)

F. *Baffert's Response*

98. Baffert disputes NYRA's characterization of these six incidents as "prohibited". He argues that such findings are "categorically incorrect" (Baffert Reply to ¶ 25); and "misleading" (*id.* ¶ 27). He seeks to minimize the infractions, stating that NYRA "grossly overstates" the effect of the substances detected.[1] Citing expert testimony he presented at the hearing, Baffert argues that at the reported concentrations, the substances detected would not be performance enhancing, would not mask injury and would otherwise have no effect on the horses' performance in a race. (*See id*, ¶¶ 33, 55, 83, 120)[2] These opinions likely reflect ongoing debates within the community of equine veterinarians and thoroughbred horse racing regulators as to where to set the standards for the maximum levels of medications that will be tolerated in thoroughbred horses on race day (*See* Tr. 1105:24-1107:18; Ex. 113 ["Uniform Classification Guidelines for Foreign Substances and Recommended Penalties Mode Rule" of the Association of Racing Commissioners International] ["ACRI"] [2020]) However, the fact remains, and I so find, that in each of the six instances discussed above, foreign substances were found at levels above the maximum concentrations permitted under the then applicable

[1] NYRA is not alone in its characterization of at least one of the medications at issue: betamethasone has been referenced as a "banned substance" in Kentucky (*see* the Kentucky Decision at 16).

[2] NYRA's expert opined that even at the levels reported, the presence of the medications at issue could be injurious to the horses (*see* Findings 32, 43, 53, 60, 88). R. Fenger opined there is no effect. (*See* Tr. 982:18-22; 1015:16-18). She did not dispute that the levels of drugs reported exceeded the published ACRI limits.

ARCI Standards and that after investigation, the relevant regulatory agencies found Baffert in violation of the applicable rules. In each case a fine was imposed and Baffert paid it.

G. *May 1, 2021: Medina Spirit at the 2021 Kentucky Derby*

99. On May 1, 2021, Medina Spirit, a horse trained by Baffert, placed first in the Kentucky Derby. The Kentucky Derby is a Grade 1 stakes race with a $3 Million purse and is the first leg of America's Triple Crown. (*See* NYRA Exs. 100-101; Tr. 168:25-170:15; 1281:16-21)

100. On May 7, 2021, KHRC learned that a post-race blood sample drawn from Medina Spirit immediately after the race tested positive for of 21 pg/mL of betamethasone - - the same drug that Baffert claims he instructed his veterinarians to stop administering following Gamine's positive test in September 2020. (*see* NYRA Ex. 103; Tr. 172:8-17; 1281:7-11; Answer ¶ 4) The finding was confirmed in a split sample reported on May 27, 2021 (*see* NYRA Ex. 104; Tr. 180:8-16)

101. According to Dr Toutain, the betamethasone in the concentration found in Medina Spirit's blood on May 1, 2021 could have affected the horse's performance. (*See* Tr. 438:16-439:25)

102. On May 9, 2021, Baffert held a press conference, in which he disclosed that Medina Spirit tested positive for betamethasone and the KHRC was investigating the matter. (*See* NYRA Ex. 119; Tr. 172:18 - 174:19; 1188:7-10; 1293:9-1294:10)

103. During the press conference, Baffert repeatedly denied that Medina Spirit was ever treated with betamethasone. He made the following statements:

- "I'm not a conspiracy theorist, I know everybody is not out to get me, but there is definitely something wrong. Why is it happening, you

know, to me, you know? There's problems in racing but it is not Bob Baffert."

- "It's just, it's shocking. I still, you know. And so, this shouldn't have happened. So, I don't know what, there's a problem somewhere. It didn't come from us. Something happened there. We don't know what it is."

- "I just say, it just seems odd. That why am I the only one that has, uh, you know, the contaminations? Why am I the only one?"

(*Id.*)

104. On May 9, 2021, Churchill Downs Racetrack suspended Baffert from entering horses at its facilities. The racetrack explained its decision in a press release as follows:

> It is our understanding that Kentucky Derby winner Medina Spirit's post-race blood sample indicated a violation of the Commonwealth of Kentucky's equine medication protocols. The connections (*sic*) of Medina Spirit have the right to request a test of a split sample and we understand they intend to do so. To be clear, if the findings are upheld, Medina Spirit's results in the Kentucky Derby will be invalidated and Mandaloun will be declared the winner.
>
> Failure to comply with the rules and medication protocols jeopardizes the safety of the horses and jockeys, the integrity of our sport and the reputation of the Kentucky Derby and all who participate. Churchill Downs will not tolerate it. Given the seriousness of the alleged offense, Churchill Downs will immediately suspend Bob Baffert, the trainer of Medina Spirit, from entering any horses at Churchill Downs Racetrack. We will await the conclusion of the Kentucky Horse Racing Commissions' investigation before taking further steps.

(NYRA Ex. 121)

105. On May 10, 2021, Baffert gave multiple media interviews in which he continued to deny Medina Spirit was given betamethasone and impugned Churchill Downs' motivations, attributing the suspension to "cancel culture." (*See* NYRA Ex. 119; Tr. 176:18-177:21; *see* also 1299:5-1302:25; 1303:13-1313:6)

106. In public interviews with the media, Baffert continued to deny administering betamethasone to Medina Spirit and suggested that he may be the target of a conspiracy. Baffert also continued to make statements accusing the KHRC of "cancel culture". (Id.)

107. On May 11, 2021, Baffert issued the following written statement to the media:

> On May 8, 2021, I was informed by the Kentucky Horse Racing Commission that MEDINA SPIRIT allegedly tested positive for 21 picograms of betamethasone. On May 9, 2021, I held a press conference in which I stated that I intended to thoroughly investigate how this could have happened and that I would be completely transparent throughout the process. I immediately began that investigation, which has resulted in me learning of a possible source for the betamethasone, and now, as promised, I want to be forthright about what I have learned.
>
> Following the Santa Anita Derby, MEDINA SPIRIT developed dermatitis on his hind end. I had him checked out by my veterinarian who recommended the use of an anti-fungal ointment called Otomax. The veterinary recommendation was to apply this ointment daily to give the horse relief, help heal the dermatitis, and prevent it from spreading. My barn followed this recommendation and MEDINA SPIRIT was treated with Otomax once a day up until the day before the Kentucky Derby. Yesterday, I was informed that one of the substances in Otomax is betamethasone. While we do not know definitively that this was the source of the alleged 21 picograms found in Medina Spirit's post-race blood sample, and our investigation is continuing, I have been told by equine pharmacology experts that this could explain the test results. As such, I wanted to be forthright about this fact as soon as I learned of this information.
>
> As I have stated, my investigation is continuing and we do not know for sure if this ointment was the cause of the test results, or if the test results are even accurate, as they have yet to be confirmed by the split sample. However, again, I have been told that a finding of a small amount, such as 21 picograms, could be consistent with application of this type of ointment. I intend to continue to investigate and I will continue to be transparent. In the meantime, I want to reiterate two points I made when this matter initially came to light. First, I had no knowledge of how betamethasone could have possibly found its way into MEDINA SPIRIT (until now) and this has never been a case of attempting to game the system or get an unfair advantage. Second, horse racing must address its regulatory problem when it comes to substances which can innocuously find their way into a horse's system at the picogram (which is a trillionth of a gram) level. MEDINA SPIRIT earned his Kentucky Derby win and my pharmacologists have told me that 21 picograms of betamethasone would have

> had no effect on the outcome of the race. MEDINA SPIRIT is a deserved champion and I will continue to fight for him.

(NYRA Ex. 106; Tr. 177:23-178:17; *see also* 1192:9-17; Answer ¶ 9)

108. On May 15, 2021, in advance of Medina Spirit running in the Preakness Stakes, Baffert issued a statement to the media again asserting, in relevant part: "The only possible explanation that we have uncovered to date--and I emphasize the word possible--is that betamethasone is an ingredient in a topical ointment that was being applied to Medina Spirit to treat a dermatitis skin condition he developed after the Santa Anita Derby." (NYRA Ex. 120; Baffert Ex. 15; Tr. 1196:10-1197:23)

109. On June 2, 2021, Churchill Downs Incorporated ("CDI") announced the suspension of Baffert for two (2) years effective immediately through the conclusion of the 2023 Spring Meet at Churchill Downs Racetrack. (NYRA Ex. 123; Tr. 180:17-181:2) The suspension prohibits Baffert, or any trainer directly or indirectly employed by Bob Baffert Racing Stables, from entering horses in races or applying for stall occupancy at all CDI-owned racetracks. (Id.)

110. CDI's Chief Executive Officer, William C. Carstanjen, explained the suspension, in a public statement, as follows:

> Reckless practices and substance violations that jeopardize the safety of our equine and human athletes or compromise the integrity of our sport are not acceptable and as a company we must take measures to demonstrate that they will not be tolerated. Mr. Baffert's record of testing failures threatens public confidence in Thoroughbred racing and the reputation of the Kentucky Derby. Given these repeated failures over the last year, including the increasingly extraordinary explanations, we firmly believe that asserting our rights to impose these measures is our duty and responsibility.

(*id.*)

111. On September 10, 2021, CDI announced a new rule that prohibited any horse trained by Baffert from running in qualifying races for the 2022 Kentucky Derby and Longines Kentucky Oaks. (*See* NYRA Ex. 130; Tr. 181:3-182:4) The new rule also prohibits horses trained by Baffert from entering the Kentucky Derby or Longines Kentucky Oaks under the name of another trainer. (*See id*)

112. On December 6, 2021, Medina Spirit collapsed and died after a workout at Santa Anita Park in Arcadia, California. (*See* Answer ¶ 14)

113. On February 14, 2022, the KHRC Board of Stewards held a hearing regarding Medina Spirit's May 2021 betamethasone positive.

114. On February 21, 2022, the Board issued Rulings 22-0009 and 22-0010. In Ruling 22-0009, the Board found a violation occurred, suspended Baffert for 90 days and imposed a fine of $7,500. (https://khrc.ky.gov/Documents/22-0009%20%20Robert%20A.%20Baffert%20-%20Class%20C.pdf.) In Ruling 22-0010, the Board determined a violation occurred, disqualified Medina Spirit as the winner of the 2021 Kentucky Derby and declared second place finisher Mandaloun the winner of that race. (https://khrc.ky.gov/Documents/22-0010%20%20Amr%20F.%20Zedan%20%20Medina%20Spirit%20DQd.pdf)

115. Baffert sued, seeking a stay of his suspension. In an order dated March 21, 2022, the Franklin Circuit Court, Commonwealth of Kentucky denied Baffert's request (*see Baffert, et al. v. Kentucky Horse Racing Commission*, (Case No. 21 CI 00456 ("Kentucky Decision")). Accordingly, the suspension in Kentucky commenced on April 4, 2022.

116. On April 4, 2022, the New York Gaming Commission announced that it would reciprocally honor Baffert's suspension in Kentucky and that Baffert would not be allowed to

race at any track in New York through July 2, 2022. (see https://www.gaming.ny.gov/pdf/Baffert%20PR.4.4.22%20.pdf)

III. Other Conduct and Their Impact

117. NYRA asserts that Baffert's issues with improperly medicated horses have impacted NYRA's business.

A. *NYRA's National Wagering Presence*

118. As noted above, NYRA operates NYRA Bets, which allows customers in thirty-one jurisdictions nationwide to place bets virtually and online. (*See* Tr. 715:12-13; 719:9-21; 725:5-8)

119. NYRA Bets' far-ranging operations allow customers to wager on races at over 250 racetracks, including races at Del Mar, Oaklawn Park, and Churchill Downs. (*See* Tr. 725:5-21; 726:2-10)

120. NYRA Bets has approximately 200,000 customers throughout the United States. (*See* Tr. 724:19-24; 725:5-8) and expends substantial resources in efforts to maintain and increase its customer base. (*see* Tr. 774:19-776:12).

121. Approximately 70 percent of NYRA's wagering revenue is generated from NYRA Bets operations, as opposed to wagering at the Racetracks. (*see* Tr. 721:18-722:7.)

122. Matthew Feig, the general manager of NYRA Bets, testified about NYRA Bets' business and the impact Baffert's regulatory issues have had on that business. Donald Scott, NYRA's vice president of marketing, testified as well. (*See* Tr. 774:20-775:17) Both are seasoned marketing professionals whose testimony I find credible.

123. Feig and Scott testified that NYRA Bets faces strong competition from other market participants, including competitors who had been in business for fifteen years before NYRA Bets was launched in 2016. (*See* Tr. 722:12-24; 780:19-25)

124. NYRA and NYRA Bets employ a marketing team to assist in bringing in new customers nationwide, both to the Racetracks and to bet online with NYRA Bets. (*See* Tr. 774:19; 775:1-12; 779:20 – 780:9) The marketing team promotes brand awareness and brand equity (*See* Tr. 780:10-18)

125. Part of the NYRA's marketing strategy is to promote, communicate and publicize NYRA's commitment to the safety and security of horses and race integrity. (*See* Tr. 774:13-775:5; 781:17-782:17)

126. Thus, conduct occurring at racetracks anywhere in the United States impacts the business of NYRA Bets and NYRA. (*See* Tr. 809:8-810:7)

127. Negative media reports regarding the safety and security of horses and race integrity can adversely impact NYRA Bets' relationship and rapport with its customers and recruiting potential new customers. (*See* Tr. 781:17-782:1-7; 783:17-784:6)

128. NYRA believes that Baffert's conduct as reported in the media regarding his multiple medication violations, threatened NYRA Bets' "brand equity" and trustworthiness with its customers. (*See* Tr. 790:13-791:10)

129. NYRA called Dr. Camie Helenski, a senior lecturer at the University of Kentucky, who testified regarding the emerging academic study of the "social license to operate" in animal husbandry.

130. The theory focuses on public perception and public acceptance of the care or lack thereof of thoroughbred horses and other animals used in sporting events. (*See* Tr. 542:22-543:11; 503:12-504:5)

131. Under this construct, as public trust in a certain activity increases, the social acceptance or "license" accorded the activity increases. (Tr. 504)

132. NYRA argues that Baffert's reported violations is a danger to NYRA Bets' "brand equity" and trustworthiness. It also risks damaging NYRA's so-called "social license," which, as noted, is the public's acceptance of NYRA's business and the sport of thoroughbred racing based on its perception of those activities. (*See* Tr. 502:25-503:1-17; 511:2-19; 515:8-18; 517:4-22)

B. *Health and Safety of Thoroughbred Horseracing Athletes And NYRA's Franchise*

133. NYRA employs a team of equine safety investigators and veterinarians to monitor and examine horses on race day. (*see* Tr. 623:18-25; 624:11-7; 653:3-17) In evaluating horses on race day, the equine safety investigators: (a) look for any indication of pain in the horse (*see* Tr. 624:8-15) and (b) evaluate a horse's walk and/or jog to assess whether there is any injury. (*see* Tr. 624:8-20)

134. In addition, on race day, the veterinarians complete (a) an examination of the horse to make sure the horse is not in distress and that there are no obvious wounds or injuries (*see* Tr. 655:7-20) and (b) a hands-on inspection of the horse that involves palpating the horse's limbs and a passive reflection of the limbs to determine if there is any sign of pain or inflammation (*see* Tr. 656:13-18).

135. If the equine safety investigators and/or veterinarians detect any sign of injury in a horse, the horse will be scratched from racing on that day. (*see* Tr. 656:24-657:7; 658:4-13, 23-25-659:1-2.)

136. NYRA presented persuasive testimony that therapeutic medications, such a betamethasone, lidocaine, and phenylbutazone, can mask symptoms of a horse's injury, making it difficult for equine safety investigators and veterinarians to accurately assess if a horse is injured or otherwise impaired. (*see* Tr. 625:5-13; 677:3-17; 679:7-25-680:1-7.)

137. Thus, the use of medication to mask an injury increases the probability that a horse will experience a breakdown on the racetrack, including a potentially catastrophic injury that may result in euthanasia of the horse. (*see* Tr. 625:14-19; 625:20-25; 634:8-11, 17-21.)

138. Further, the breakdown of a horse during the race is also dangerous to the jockey of that horse and other horses and jockeys on the racetrack. (*see* Tr. 627:25-628:1-20.)

139. Baffert protests that these scenarios are "entirely hypothetical and fails to take into account the specific concentration levels reported. None of this pertains to what actually happened (Baffert emphasis) (*see,* e.g. Baffert Responses to ¶¶ 120, 200-201).

140. These protestations notwithstanding, I note that NYRA need not prove that a drug found in a blood sample had an effect on the horse (*see Kentucky Horse Racing Comm. v. Mission*, 592 S.W. 739, 749-50 [Ky Ct App 2019]; *see* also *Kentucky Decision* ["the actual effect of a banned drug is irrelevant"]).

141. I find that NYRA presented persuasive testimony that a failure to protect the health and safety of horses and jockeys impacts NYRA's ability to satisfy the Performance Standards set forth in the Franchise Agreement. Failure to meet such Performance Standards can result in revocation of NYRA's franchise. (*See* Tr. 571:21-572:3)

142. NYRA has presented credible testimony in support of its goodfaith conclusion that Baffert's violations of established standards for medication in horses can and likely have had a negative impact on NYRA's operations. Other jurisdictions have reached similar conclusions based on their reasonable business judgment. (*See* Ex. 123, [CDI press release]).

143. The evidentiary record shows that Baffert was found in violation of standards regulating the administration of identified medications to thoroughbred horses on seven separate occasions in a fourteen-month period. His responses to the findings evidences a disregard for the seriousness of the violations and of the regulations. Such conduct is detrimental to the best interests of racing. If unremedied this conduct will continue to pose risks to the health and safety of horses and jockeys.

CONCLUSIONS OF LAW

I. Preliminary Matters

144. Before proceeding to the merits of the ASOC, I must consider whether the ASOC is justiciable.

145. Baffert's Proposed Findings of Fact and Conclusions of Law sets forth eight grounds for dismissal of the ASOC on this basis. Most of the justiciability claims were addressed in my decision dated January 20, 2022. (*See Matter of Robert A. Baffert,* Decision on Motion to Dismiss, dated Jan. 20, 2022, at 6 (Sherwood, J.) ("January Order").

146. Baffert also repeats and supplements these arguments, two motions, a motion for a directed verdict (made both orally and in an associated written motion submitted at the time his post-hearing memorandum) and a "post-hearing motion to dismiss cause". NYRA requested that both motions be stricken as they were inconsistent with counsels' agreement

regarding post-hearing submissions. Although NYRA was correct, I reaffirmed the leave given as to the former motion. The latter motion is unauthorized.

A. Re-asserted Justiciability Defenses

147. First, Baffert's claim that NYRA lacks jurisdiction over this matter because all of the alleged violations occurred outside New York, was rejected in the January Order. There I explained that NYRA does not seek to regulate out-of-state conduct but instead seeks to exercise its authority to prevent similar conduct at its Racetracks. Baffert has failed to offer any new law or regulation that would require revisiting that decision. To the contrary, NYRA has shown that under New York Gaming Commission regulations, NYRA is required to exclude from the Racetracks any "person...whose conduct at a race track in New York *or elsewhere*, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing[.]" 9 NYCRR §400346 (emphasis added).

148. Baffert has been suspended by the New York Racing Commission (not by NYRA) as a result of his suspension by the KHRC. The proprietary of imposing reciprocal discipline pursuant to regulation for extra-state violations is well established in New York law. (*See* e.g. *Matter of Valvano*, 186 AD 3d 1 [1st Dept 2020] [granting reciprocal discipline in New York of a lawyer for engaging in unethical conduct in New Jersey]). Upon these additional reasons, the January Order is re-affirmed.

149. Second, Baffert argues that NYRA's efforts to exclude him from the Racetracks violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because such efforts amount to a prohibited exercise of jurisdiction over out-of-state events (*see Matter of Spencer D.M.*, 414 N.Y.S.2d 490, 492 (N.Y. Sup. Ct. 1979); *see also Pearson v. Northwest Airlines*, 309 F.2d 553, 563 (2d Cir. 1962). Here I have already

concluded, the ASOC "do not implicate the Due Process Clause because NYRA does not seek to regulate the operations of any out-of-state racetrack" January Order at 6.

150. Third, Baffert maintains that the claims against him must be dismissed to the extent they pertain to matters fully adjudicated or currently being investigated in other racing jurisdictions. He admits that the "historical matters in California, Arkansas, and Kentucky were fully investigated and adjudicated on the merits". As discussed in the Findings of Fact, a violation was found in each case, a fine was imposed and Baffert paid it. As I have already found, *res judicata* as Baffert seeks to involve it, "simply is not applicable".

151. It is well settled that in reciprocal discipline cases in New York, the ultimate responsibility for determining what sanction should be imposed rests with the entity in which the individual is facing reciprocal discipline. (*see, e.g., Matter of Munroe,* 89 AD 3d 1, 7-8 [1st Dep't 2011] [finding that an attorney who had been suspended for 2½ years in Massachusetts for engaging in a pattern of fraud, forgery, filing frivolous lawsuits and conversion, should be disbarred in New York for such conduct]; *In re Kersey,* 444 Mass 65, 70, 825 NE 2d 994, 998 [2005] ["On a matter of reciprocal discipline, we may impose whatever level of discipline is warranted by the facts even if that discipline exceeds, equals, or falls short of the discipline imposed in another jurisdiction."] [internal citation & quotation omitted]; *Idaho State Bar v. Everard,* 142 Idaho 109, 116, 124 P 3d 985, 992 [2005] ["ultimate responsibility for determining what sanction should be imposed" rests on the state in which the attorney is facing reciprocal discipline]).

152. Fourth, Baffert asserts the Full Faith and Credit Clause of the United States Constitution requires this body to give equal force to the prior adjudications. Full Faith and Credit requires "that a court provide a foreign judgment with the same credit, validity, and

effect that it would have in the state that pronounced it". *Boudreaux v. State, Dep't of Transp.*, 11 NY 3d 321, 324-25 (2008). The principle he cites is not applicable. NYRA is not purporting to enforce a foreign judgment and there was no evidence presented at the hearing to suggest that NYRA has attempted to displace the rulings of any other jurisdiction.

153. Fifth, Baffert argues that NYRA lacks legal authority to commence these proceedings and to impose any punishment that affects Baffert's use of his New York racing license. This too was raised and rejected at an earlier stage of these proceedings (*see* January Order at 3 [concluding that Baffert's *ultra vires* theory "fails on the merits"]).

154. Citing New York Court of Appeals precedent, Baffert asserts that state agencies "may not promulgate a regulation that added a requirement that does not exist under the statute," but can "only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute" *Town of Fallsburg*, 78 NY 2d 194, 204 (1991). He adds this includes both substantive rules governing conduct and those establishing procedures to be followed in adjudicatory proceedings.

155. Here again, I have held that NYRA is not a state agency and, thus, is not subject to rules and regulations that govern the conduct of State agencies (*see* January Order at 3 ["NYRA is a private not-for-profit agency[.] . . . It is not a government agency and, thus, the FOIL is inapplicable"]). Further, the Court of Appeals has held that NYRA is not subject to the State Administrative Procedure Act ("SAPA") (*see Saumell,* 58 NY 2d at 237 [holding that "NYRA retains its common-law right of exclusion and is not governed by the State Administrative Procedure Act"]).

156. Baffert would have me disregard this settled law based on a theory that there has been a "sharply different factual landscape and important legal changes in NYRA's

relationship to the state since 1983" when *Saumell* was decided (Baffert Conclusions ¶ 94). Here again I have previously dismissed this claim (*see* January Order at 4-5, rejecting argument that NYRA lacks authority to exclude a licensed trainer from its facilities unless and until his license is revoked by the Gaming Commission; *see also,* 58 NY 2d at 234 ["The common-law right of . . . NYRA . . . to exclude persons from its premises includes the right when there is reasonable cause to believe a jockey licensed by the New York State Racing and Wagering Board guilty permitted to exclude licensees "in the best interests of racing generally" and in the exercise of "a reasonable discretionary business judgment"]).[3]

157. Sixth, in another attempt to avoid settled New York law, Baffert argues that "[w]hatever common-law property rights NYRA may have historically possessed at the time of *Saumell*'s decision, NYRA is now a tenant, rather than the owner, of the property in question and thus, its discretion is limited by the standards the State of New York imposes on the racetracks and the regulations in place concerning licensees" Baffert Conclusions ¶ 98. This argument was rejected by Judge Amon in *Baffert v. NYRA,* No. 21-cv-3329, *slip op.* [EDNY July 14, 2021]). It is likewise rejected here.

158. Baffert maintains that in *Halpern v. Lomenzo*, 367 NYS 2d 653 (NY Sup. Ct. 1975), New York courts rejected a Gaming Commission attempt to *expressly* delegate licensing decisions and punishments to NYRA and the Jockey Club. In doing so, the court

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[3] Federal courts, construing New York law, have similarly so held; most recently Judge Carol Amon in *Baffert v. New York Racing Assn.,* No. 21-CV-3329, slip op., at 13-14 (EDNY. July 14, 2021) (finding that Respondent's claim that NYRA lacked authority to suspend him was foreclosed by the Court of Appeal's decision in *Saumell*); *see also Galvin v. New York Racing Assn.,* 70 F Supp 2d 163, 181 (EDNY 1998) ("In cases involving violations it considers more serious, NYRA management has jurisdiction to convene its own panel to determine whether NYRA should sanction the credential holder."), *aff'd without opn.,* 166 F 3d 1200 (2d Cir 2000).

determined that though some authority may be delegated to private entities or associations, "[t]he licensing power is 'essentially a sovereign power,' and any regulation yielding it to another" is "an unconstitutional relinquishment of legislative power." *id.* at 662-63 (quoting *Fink v Cole*, 302 NY 216, 244 [1951]); *see also Nassau Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd.*, 402 NYS 2d 134 [NY Sup Ct 1978]; and *Anderson v. New York Racing Ass'n*, 2004 WL 60287 [SD NY Jan 12, 2004]

159. This defense was rejected by the Judge Amon in *Baffert v NYRA*. Further and as the Executive Director of the Gaming Commission explained to that court, two years after *Halpern* was decided, the former Racing and Wagering Board amended 9 NYCRR § 4022.12 to explicitly recognize the "exclusionary rights of thoroughbred racetracks" (Affirmation of Robert Williams, dated June 29, 2021, submitted in support of NYRA in *Baffert v. NYRA* and in post-hearing papers here).

160. Seventh, Baffert asserts that a decision is "arbitrary" if it is without sound basis in reason and is made without regard to the facts (*see Murphy*, 977 NYS 2d at 163). Thus, an action is arbitrary and capricious when it exceeds the agency's statutory authority or is made in violation of the Constitution or the laws of New York, or without regard to the agency's prior dealings with other similarly situated individuals (*see Lipani v. New York State Div. of Human Rights*, 56 AD 3d 560, 561 (1st Dept 2008); *Matter of Charles A. Field Delivery Serv., Inc.* 66 NY 2d 516, 520 (1985).

161. The actions that are challenged here do not violate any of these well-understood general principles of law. On this record, there has been no showing that trainers who committed six adjudicated medication related violations in a fourteen-month period were treated differently. Further, the level of barred medication reported in connection with Medina

Spirit, has resulted in two-year suspension from entering horses of Churchill Downs, a $10,000 fine and loss of the $3,000,000 purse originally awarded.

162. Eighth, Baffert argues that the ASOC deprives him of due process because NYRA's Hearing Rules and Procedures were enacted after the alleged conduct occurred. Under New York law, absent legislative intent to the contrary, statutes and regulations are prescribed prospectively *see Rudin Mgmt. Co., Inc. v. Department of Consumer Affairs*, 213 AD 2d 185 [1995]; *see also Zajdowicz v. New York State & Local Police & Fire Ret. Sys.*, 267 AD 2d 863, 865 [3d Dept 1999] ["It is well settled that retroactivity is not favored in regulatory changes and, absent language requiring such a result, regulations will not be given retroactive effect."].

163. Both the court in *Baffert v. NYRA* and this Hearing Officer have already rejected this defense as unsupported by citation to any pertinent legal authority (*see* January Order at 1 ["[T]he claim that NYRA is attempting to apply the Rules *ex post facto* has been considered and rejected by the Federal Court. This hearing officer agrees with the reasoning of Judge Amon. Baffert has not been suspended pending the evidentiary hearing.").

164. It is undisputed that NYRA's Hearing Rules and Procedures were promulgated to conform to Judge Amon's decision holding that Baffert was entitled to a pre-deprivation due process hearing and the ASOC post-dates promulgation of those procedures. However, providing notice of procedures is not an element of due process. *Cf. Galvin v. N.Y. Racing Ass'n,* 70 F Supp 2d 163, 174 [EDNY 1998] [noting that due process is "flexible" and procedural protections may vary "as the particular situation demands"] Rather, due process requires only fair notice of prohibited conduct (*see Fed. Comm'n v. Fox Television Stations, Inc.,* 567 US 239, 253 [2012].)

165. As I have already determined, adequate notice of the charges was given (*see* January Order at 2 ["the eleven-page statement of charges gives adequate notice of the charges NYRA has proffered against the Respondent"].) The ASOC are not vague (*see id*, at 3 ["The assertion that these standards are 'vague, entirely subjective and non-falsifiable' is not grounds for dismissal of the Charges"]).

166. Baffert's arguments that NYRA's rules are too vague to form the basis of charges against him or that he was not provided fair notice of prohibited conduct, are belied by the fact that NYRA merely seeks to enforce standards[4] and interests[5] that have long been recognized at common law,[6] including NYRA's authority to exclude licensees from its

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[4] *Compare* Amended Statement of Charges at 10-12 (noting that NYRA may "exercise its reasonable discretionary business judgment to exclude" Baffert from, and deny him credentials to access, "the grounds it operates, or any portion of such grounds"), *with Saumell,* 58 NY 2d at 238 (noting that a racetrack proprietor holds a common-law right to exclude licensees provided that the exclusion is in "'the best interest of racing generally' and in the exercise of 'a reasonable discretionary business judgment'") (citation omitted), *Jacobson v N.Y. Racing Ass'n,* 33 NY 2d 144, 150 (NY 1973) (same); 9 NYCRR §§ 4003.46 (compelling NYRA to eject any "person . . . whose conduct at a race track in New York or elsewhere, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing"); 4022.12 (noting that a steward may exclude from its grounds a licensee who "has been involved in any action detrimental to the best interests of racing generally").

[5] *Compare* Amended Statement of Charges at 10-11 (charging Baffert with engaging in conduct that "has harmed the reputation and integrity of the sport," that is "detrimental to the health and safety of horses and jockeys," and that impedes NYRA's ability to operate the racetracks "so that its patrons have confidence that the sport is honestly conducted, protecting competitors from the participation in tainted horse races, and safeguarding the wagering public"), *with Casse v N.Y. State Racing & Wagering Bd.,* 70 NY 2d 589, 595-96 (1987) ("Without question, this State has an important interest in assuring the fairness and integrity of horse racing[,] . . . in protecting competitors from participation in tainted horse races and safeguarding the wagering public from fraud[,]" and "protecting horses from the dangers of racing under the effects of analgesics or stimulants.").

[6] *See also St. Lucia v Novello,* 284 AD 2d 591, 592 (3d Dep't 2001) (rejecting contention that the statute and regulation are unconstitutionally vague where they defined professional medical misconduct in general terms — conduct that evidences moral unfitness to practice medicine — because it "provide[s] sufficient warning concerning the manner in which the profession must be practiced").

Racetracks (*see, e.g., Saumell,* 58 NY 2d at 234 ["The common-law right of . . . NYRA . . . to exclude persons from its premises includes the right when there is reasonable cause to believe a jockey licensed by the New York State Racing and Wagering Board guilty of misconduct to deny him access."]; *Jacobson,* 33 NY 2d at 150 [NYRA permitted to exclude licensees "in the best interests of racing generally" and in the exercise of "a reasonable discretionary business judgment"]). Baffert had adequate notice of both NYRA's right to exclude and conduct prohibited drug-testing by regimes of states in which he is licensed.

B. <u>Duplicate and Unpleaded Defenses</u>

167. After NYRA rested, Baffert moved for a directed verdict, citing four grounds (*see* 811:21-820:22), specifically that 1) NYRA's exclusion of Baffert was arbitrary and capricious in violation of CPLR 7803 (*see* Tr. 813:16-814:19); 2) NYRA failed to give fair notice of the alleged violation and that the Rules are retroactive in their application in violation of Baffert's procedural due process and equal protection rights (*see* Tr. 814:20-815:11); 3) that the out-of-state findings on which NYRA relies must be given *res judicata* effect (*see* Tr. 815:12-818:22); and 4) that NYRA's sanctions are based on out-of-state conduct that was constitutionally protected speech (*see* Tr. 818:23-819:19).

168. In his written submission in connection with the motion, Baffert gives scant attention to the defenses that were the focus of his oral presentation (*compare* Tr. 811-820 with Respondent's Post-Hearing Motion for a Directed Verdict). Instead, he asserts he is being subjected to retaliation for his exercise of protected speech. (*See id* pp 6-19 and 29-32)

169. Having already addressed the first three grounds asserted on the motion for a directed verdict, I will not revisit them here (*see* ¶¶ 146, 158-59 [exclusion arbitrary and capricious]; 160-63 [due process and equal protection]; 148-49 [*res judicata*] and more

generally 145-164).

170. To the extent Baffert now claims the Rules and Procedures are void because they prohibit constitutionally protected speech, the defense must be denied because (a) this affirmative defense was not pleaded as one of the fifteen (15) affirmative defenses pleaded and (b) the defense was not developed at the evidentiary hearing and there is little, if any, evidence in the record to support it.

171. In this new line of defense, Baffert challenges the Rules and Procedures for "punishing trainers for pursuing and disclosing legal defenses (Directed Verdict Br. at 14), asserts falsely that "Mr. Baffert's greatest offense *according to NYRA* was making excuses" (emphasis added) (*id*); attacks NYRA for meeting his shifting explanations for the multiple medication violations found with skepticism (*id.* at 18) and as "unlawful retaliation" (*id* at 29-37). However, as set forth at length in the Findings of Fact above, the "offense" for which NYRA excluded him was multiple instances of doping horses he entered in races. Baffert did not prove at the hearing that NYRA's actions were products of any improper motivation.

II. Common Law Right of Exclusion

172. The right of an operator of a racetrack to exclude a person from its premises has been settled law for more than a century. *See Marrone v. Washington Jockey Club,* 227 U.S. 633, 636 (1913) (establishing discretion regarding racetrack exclusion); *Grannan v. Westchester Racing Assn.*, 153 NY 449, 464 (1887) (noting that "ruling the delinquent off the track" is "the principal[] method of enforcing obedience to its rules and the usages of the turf"); *see also* B. Liebman, *The Supreme Court and Exclusions by Racetracks,* 17 Villanova Sports Ent. L.J. 421 (2010).

173. This right has been upheld by New York courts consistently. *see Jacobson v. New York Racing Assn.,* 33 N.Y.2d 144, 149 [1973] [NYRA has the common law authority "to serve whomever it pleases and exclude patrons without reason or sufficient excuse"]; *Madden v. Queens Cnty. Jockey Club,* 296 NY 249, 253-54 [1947] [NYRA has the right arbitrarily to exclude anyone from its premises, "as long as the exclusion is not founded on race, creed, color or national origin"], *cert. denied,* 332 US 761 [1947]; *see also People v. Licata,* 28 NY 2d 113 [1971] [citing *Madden* with approval and reiterating the absolute right to eject a patron]; *Grannan v. Westchester Racing Assn.,* 153 NY 449 [1887] [holding that Westchester Racing Association could lawfully exclude from its track the plaintiff who admitted he had bribed a jockey and had thereby violated one of the association's rules]; *Presti v. New York Racing Assn.,* 46 AD 2d 387, 389-90 [2d Dep't 1975] [excluding racing broker from racetrack]; *Vaintraub v. New York Racing Assn.,* 28 AD 2d 660, 660-61 [1st Dep't 1967] [NYRA may exclude people except on the basis of race, color or national origin]; *Gottlieb v. Sullivan Cnty. Harness Racing Assn.,* 25 AD 2d 798, 799 [3d Dep't 1966] [holding that racetrack officials who prohibited a convicted bookmaker from entering "had the right, power, and authority to determine the plaintiff an undesirable and to terminate his license"]; *Halsey v. New York Racing Assn.,* No. 18789/2004, 800 NYS 2d 347, 2005 NY Misc LEXIS 552, at **2-3 [Sup Ct NY Cnty March 1, 2005] [excluding owner from entering racetracks who "yell[ed] at NYRA starting gate personnel," "agitat[ed] the race horses," and "distract[ed] the starters and jockeys"]).

174. The common law right of exclusion coexists with a regulation of the Gaming Commission that mandates NYRA exclude or eject undesirable persons from its premises, as follows:

> No person . . . whose conduct at a race track in New York or elsewhere, is or has been improper, obnoxious, unbecoming or detrimental to the best interests of racing, shall enter or remain upon the premises of any licensed association conducting a race meeting under the jurisdiction of the commission; and all such persons shall upon discovery or recognition be forthwith ejected.

9 NYCRR § 4003.46; *see also id.* § 4022.12 (regulation addressing power of a steward to exclude persons from the racetrack or suspend a license for up to 60 days, concludes with the following statement: "Nothing in this section shall be construed to limit any racing association or track licensee's power to exclude or deny any individual from its grounds or privileges thereon.").

175. The New York Court of Appeals has affirmed and reaffirmed NYRA's authority to exclude licensees from its Racetracks. *See, e.g., Saumell,* 58 NY at 234 ("The common-law right of . . . NYRA . . . to exclude persons from its premises includes the right when there is reasonable cause to believe a jockey licensed by the New York State Racing and Wagering Board guilty of misconduct to deny him access."); *Jacobson.,* 33 NY 2d at 150 (NYRA permitted to exclude licensees "in the best interests of racing generally" and in the exercise of "a reasonable discretionary business judgment").[7]

176. The Court of Appeals has ruled also that the state's power to discipline a licensee is "independent of and separate from NYRA's common-law right to exclude a licensed person in the best interests of racing." *Saumell,* 58 NY 2d at 239; *see also Rahner* v. *Yonkers Racing*

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[7] Federal courts, construing New York law, have similarly so held; most recently Judge Carol Amon in *Baffert v. New York Racing Assn.,* No. 21-CV-3329, slip op., at 13-14 (EDNY July 14, 2021) (finding that Respondent's claim that NYRA lacked authority to suspend him was foreclosed by the Court of Appeal's decision in *Saumell*); *see also Galvin v. New York Racing Assn.,* 70 F Supp 2d 163, 181 (EDNY 1998) ("In cases involving violations it considers more serious, NYRA management has jurisdiction to convene its own panel to determine whether NYRA should sanction the credential holder."), *aff'd without opn.,* 166 F 3d 1200 (2d Cir 2000).

Corp., No. 78 Civ 3967, 1978 US Dist LEXIS 15632, at *2 [SDNY Sept. 11, 1978] [Leval, J.] ["The fact that the New York State Racing and Wagering Board, having not yet made a determination on its hearing, has not entered any order affecting plaintiffs' racing privileges in New York generally is irrelevant to the right of Yonkers Raceway to protect itself by lawful procedures which respect the due process rights of affected persons."]).

177. NYRA remains a private corporation, at liberty to deal or reasonably to refrain from dealing with licensed trainers, owners, and jockeys, in accordance with its sound business judgment (*see Jacobson,* 33 NY 2d at 148-50 [a licensee complaining of a racetrack's action in excluding him or her from participation in races has a "heavy burden to prove that [exclusion]" is "not a reasonable discretionary business judgment but was actuated by motives other than those relating to the best interests of racing generally"]).

178. The Court of Appeals has also affirmed that a licensee cannot be excluded "with impunity - that is, arbitrarily or without cause". *Id.* at 149; see also *id.* at 150 (noting that NYRA does not have "an absolute immunity from having to justify the exclusion of an owner and trainer whom the state has deemed fit to license").

179. However, NYRA may exclude a licensee if the decision to do so constitutes a reasonable discretionary business judgment. (*see Jacobson,* 33 NY 2d at 150 [a licensee complaining of a racetrack's action in excluding him or her from participation in races has a "heavy burden to prove that [exclusion]" is "not a reasonable discretionary business judgment but was actuated by motives other than those relating to the best interests of racing generally"]).

III. Obligation to Supervise Racing Activities Nationwide

180. NYRA maintains that it has a vital business interest and obligation, in protecting its investment, brand and reputation, and supervising activities at its Racetracks so that its patrons have confidence that the sport is conducted in an honest and safe manner.

181. A breach of this obligation of proper supervision, especially with respect to matters of equine and jockey safety, may result in revocation of NYRA's franchise.

182. Specifically, the Franchise Agreement provides that NYRA must use its best efforts to meet various performance standards. (*See* NYRA Ex. 135, § 2.2)

183. Pursuant to one of these performance standards, NYRA "shall embrace objectives to encourage growth in on- and off-track handle" and "use its reasonable best efforts to maximize attendance at each of the Racetracks." (*Id.* § 2.2[h])

184. A separate performance standard requires NYRA to "consider . . . steps in consultation with industry experts to ensure jockey and equine safety." (*Id.* § 2.2(d))

185. Accordingly, NYRA's failure to abide by these performance standards could result in the revocation of its franchise. Racing Law § 244 ("The state racing and wagering board may revoke a license issued by it under this chapter or a franchise granted pursuant to section two hundred six of this article if the corporation to which such license or franchise shall have been issued, or its officers or directors, shall not conduct racing at its track, including pari-mutuel betting on races thereat, in accordance with the terms and conditions of such license or franchise, with the rules of such board and with the provisions of this chapter[.]").

186. This is not only crucial to NYRA, but also the public and patrons of the Racetracks, who wager on races and depend on NYRA to conduct races in a fair and honest manner.

187. Thus, a failure by NYRA to diligently protect the safety of horses and jockeys and the integrity of sports can result in adverse actions taken against NYRA by state regulators.

IV. Whether NYRA Has Sustained Its Burden of Proof

188. On December 23, 2021, NYRA served an Amended Statement of Charges.

189. The Amended Statement of Charges sets forth facts in 49 numbered paragraphs, most of which were not contested at the hearing and all of which NYRA has established through the testimony and exhibits introduced into evidence at the administrative hearing in this matter.

190. By the Amended Statement of Charges, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Baffert from entering or stabling horses on the grounds it operates, or any portion of such grounds, based on the conduct described above.

191. In the Amended Statement of Charges, NYRA sets forth three charges against Baffert for engaging in conduct detrimental to: (1) the best interests of racing; (2) the health and safety of horses and jockeys; and (3) NYRA business operations.

192. NYRA has met its burden of proof with respect to each of these charges.

A. Charge I: Detriment to Thoroughbred Racing

193. Charge I in the Amended Statement of Charges states as follows:

> Respondent is charged with engaging in conduct detrimental to the best interests of Thoroughbred Racing. Respondent's conduct has harmed the reputation and integrity of the sport, as well as the public's perception of the sport's legitimacy. As a result of Respondent's conduct, NYRA seeks to exercise its reasonable

discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

194. NYRA has concluded in its business judgment that Baffert's conduct has harmed the reputation and integrity of the sport and the public's perception of the sport's legitimacy. The record contains evidence to support that judgment.

195. Other racing industry enterprises and regulators have reached similar conclusions (*see*, e.g. Findings at ¶ 109 quoting CDI ["Mr. Baffert's record of testing failures threatens public confidence in Thoroughbred racing and the reputation of the Kentucky Derby:]). Similarly, the KHRC advised the court in Baffert's challenge to a 90-day suspension that "horse racing in the Commonwealth is built on honesty and integrity, which includes the safety of horses racing in the Commonwealth "(the Kentucky Decision at 18). And the court itself recognized "the public interest in protecting the horses racing in the Commonwealth" is of the "highest importance". (Id)

196. Baffert disputes these conclusions but has not shown them to be invalid.

197. NYRA maintains (and the record shows) that Baffert has engaged in a pattern and practice of unlawful conduct that has no parallel in the modern history of Thoroughbred racing.

198. Over a 14-month period, racing regulators in three state, found that Baffert violated equine drug regulations in seven different races.

199. The most recent of those races was the 2021 Kentucky Derby. Two other races were Grade 1 stake races, including the preeminent race for 3-year-old fillies (Kentucky Oaks).

200. The medication violation at the Kentucky Derby resulted in a two-year suspension of Baffert from Churchill Downs and exclusion of any horse trained by him racing in the Kentucky Oaks and Kentucky Debry through 2024.

201. NYRA also proved that each time Baffert was charged with a violation he provided an implausible excuse, and blamed others for conduct that he, as the trainer, was responsible for as a matter of law.

202. After the positive test of Medina Spirit, Baffert gave a series of inconsistent public statements that, among other things, denied (falsely) giving the horse betamethasone, attacked (unfairly) regulators, and floated (meritless) conspiracy theories to deflect attention from his own misconduct.

203. His misbehavior unleased a torrent of negative media coverage on the sport.

204. NYRA has reasonably concluded that it will not condone Baffert's reckless practices, outrageous behavior and substance violations, each of which compromises the integrity of the sport. I conclude that NYRA has reasonably determined that he should be excluded from the Racetracks for a lengthy period.

205. In NYRA's judgment, imposition of forceful action in response to these violations will serve to reassure racing fans of the integrity of the sport and NYRA's commitment to protect horses, jockeys, and the betting public. NYRA's actions will also reassure fans and betters that the industry can and will police itself, take stern action when doping is found and protect horses from mistreatment.

206. In NYRA's reasonable judgment, a failure to suspend Baffert could result in public scandal and ultimately a decrease in spectatorship, loss of revenues to the State and

NYRA's Racetracks, and even a decline of Thoroughbred racing as a sport. I find that NYRA need not continue to suffer Baffert's defaults and to bear the risk of loss of public confidence.

207. Charge I is sustained.

B. Charge II: Detriment to the Health and Safety of Horses and Jockeys

208. Charge II in the Amended Statement of Charges states:

> Respondent is charged with engaging in conduct detrimental to the health and safety of horses and jockeys. Certain prohibited or otherwise regulated substances, such as betamethasone, have the potential to mask injuries when used in Thoroughbred racing when they exceed the threshold levels legally permitted for a horse at race time. A substance's ability to mask injuries allows a horse to compete in a race when it otherwise should not, which increases the risk of catastrophic injury to horses and jockeys. Accordingly, Respondent's use of betamethasone and other drugs above state mandated threshold limits put the health and safety of horses and jockeys at risk. As a result, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

209. The evidence establishes that Baffert has engaged in conduct that is detrimental to the best interests of Thoroughbred Racing in that he has harmed the reputation and integrity of the sport, as well as public's perception of the sport's legitimacy.

210. The use of phenylbutazone, lidocaine, betamethasone, and dextrorphan in horses on race day is carefully regulated given the potential of the drugs to affect race day performance and to mask injury. Proof at the hearing confirmed that horses that race while injured are in danger of further - - even catastrophic - - injury.

211. Cruel Intention, Éclair, Charlatan, Gamine, Merneith and Medina Spirit all had substances in their bloodstreams at prohibited levels on race day. Those banned substances had the capacity to affect their performance.

212. Multiple witnesses, including Dr. Toutain, an internationally renowned expert on pharmacology and toxicology; Dr. Anthony Verderosa, the Director of NYRA's Veterinary

Department; and Anthony Patricola, NYRA's Lead Equine Safety Investigator, testified as to the effects of Baffert's conduct, placing horses he trained at risk of injury.

213. I conclude that NYRA has acted within its discretionary powers when it determined to exclude Baffert from the Racetracks.

214. Given Baffert's behavior and his substance violations, NYRA properly exercised its authority to exclude Baffert from the Racetracks.

215. Charge II is sustained.

C. Charge III: NYRA's Business Operations

216. Charge III in the Amended Statement of Charges states:

> Respondent's conduct has impeded NYRA's ability to effectively supervise the activities at the racetracks it operates so that its patrons have confidence that the sport is honestly conducted, protecting competitors from the participation in tainted horse races, and safeguarding the wagering public. As a result of Respondent's conduct, NYRA seeks to exercise its reasonable discretionary business judgment to exclude Respondent from entering or stabling horses on the grounds it operates, or any portion of such grounds.

217. NYRA has determined that Baffert's conduct was and is detrimental to NYRA's business operations. The evidence described above supports that determination.

218. NYRA has concluded that Baffert's conduct impacted adversely NYRA's national wagering presence and brand.

219. NYRA also states that allowing Baffert to enter horses in races and to stable horses at the Racetracks threatens NYRA's reputation. Its judgment in this regard is reasonable.

220. Having reasonably decided not to condone Baffert's reckless actions, outlandish behavior and substance violations, NYRA has determined that he should be excluded from the

Racetracks. NYRA has complete discretion to take all necessary steps to enforce its determination.

221. Charge III shall be sustained.

V. Remedy

222. Section 14(b) of the Hearing Rules and Procedures provides, in part that:

> The hearing report shall contain findings of fact, conclusions and recommended disposition. If the Hearing Officer finds that revocation of the respondent's NYRA credentials is warranted the determination shall state whether the revocation is permanent or, if temporary, the length of time that the revocation shall be in effect.

223. The above described findings of fact provide ample grounds for revocation of Baffert's credentials to enter horses at racing events at the Racetracks and to stable horses there. In assessing whether to recommend that the revocation be permanent or temporary, I am mindful that under New York law, NYRA has wide discretion to determine who it will admit to or exclude from the Racetracks. Here NYRA has proposed that Baffert be barred from racing or stabling his horses "for a lengthy period". NYRA Br. ¶ 236. Baffert urges that if a period of exclusion is to be imposed, that it be no longer than the reciprocal license suspension period the Gaming Commission has imposed. That suspension period matches the suspension period imposed by the Kentucky Horse Racing Commission in the wake of the Medina Spirit doping incident.

224. Rick Goodel ("Goodel") who served as an assistant counsel at the Gaming Commission for 21 years, testified that when facing penalties the Gaming Commission looks at the seriousness of the drug involved, the number of prior violations and their frequency (*see* Tr. 188:10-189:8). The Gaming Commission also considers violations in other states (*see id.* ¶ 216). It appears that the Gaming Commission bases its enforcement decision on a more

limited set of considerations then are relevant to a private entity such as NYRA (*see* Tr. 190:20-192:6).

225. Goodel testified that based on the formula the Gaming Commission uses in fully adjudicated cases, the Gaming Commission would likely have suspended Baffert for 240 days (*see* Tr. 188:1-17).

226. Notably, the Churchill Downs, a private enterprise similar to NYRA, has barred Baffert from its facilities for two years based principally on Baffert's use of prohibited drugs in Medina Spirit during the Kentucky Derby in 2021 and his "increasingly extraordinary explanation" for the presence of banned drugs in horses he entered in races (Ex. 123). Baffert has not established grounds for any shorter period of exclusion at the NYRA Racetracks. Accordingly, I recommend that the Panel revoke Baffert's credentials for entering his horses in races at the Racetracks and bar him from using stables at the Racetracks for a period of two years, commencing when Baffert obtains a valid license. This recommendation notwithstanding, the Panel may wish to consider giving Baffert credit for the 59 days he was excluded from the Racetracks by NYRA in 2021.

227. This constitutes my findings of fact and conclusions of law following a full evidentiary hearing held in New York City on January 24-28, 2022.

SERVICE

228. The NYRA Hearing Rules and Procedures ("Rules") provide for these Findings of Fact and Conclusions of Law to be submitted to all parties and a Panel convened by NYRA's President. (*See* Rules § 14[a]) In addition, a copy of the record of the hearing shall be provided to the Panel. Within fourteen days after the issuance of the report, any party may submit exceptions thereto to the Panel. (*See id.* § 15[a])

229. Accordingly, this decision has been provided to the parties and the Panel as of the date shown below. NYRA shall provide the Panel with the record forthwith.

Dated: New York, New York
April 23, 2022

Hon. O. Peter Sherwood, (ret.)
Hearing Officer