THE NEW YORK RACING ASSOCIATION, INC.

IN THE MATTER

OF

ROBERT A. BAFFERT

DECISION OF PANEL

William Alempijevic
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PROCEDURAL BACKGROUND

By letter dated May 17, 2021, the New York Racing Association, Inc. ("NYRA") temporarily suspended the trainer, Robert A. Baffert ("Baffert") from entering upon the three racetracks operated by NYRA within the State of New York, citing the suspension of Baffert by Churchill Downs Racetrack ("Churchill Downs") during the investigation of a positive drug test for the winner of the 2021 Kentucky Derby, Medina Spirit.

On or about June 14, 2021, Baffert commenced an action in the United States District Court for the Eastern District of New York seeking, among other things, a permanent injunction. By Decision dated July 14, 2021, United States District Judge, Carol Bagley Amon, granted Baffert's Motion for a Preliminary Injunction, enjoining NYRA from enforcing the aforementioned suspension of Baffert issued by letter dated May 17, 2021, (Baffert v. New York Racing Assn., No. 21-CV-3329, Slip Op.)

Consistent with Judge Amon's decision that NYRA had a common law right of exclusion but that as a state actor it violated Baffert's Fourteenth Amendment right to procedural due process in suspending him without notice and hearing, NYRA promulgated Hearing Rules and Procedures ("HRP"). The HRP provided, among other things, that NYRA may commence a proceeding by issuance of a Notice of Hearing which shall include a Statement of Charges. The respondent shall have the right to answer the Statement of Charges. Following the hearing, the Hearing Officer shall issue a Hearing Report and any party shall have the right to submit Exceptions to the Report to the Panel. The Panel, which shall be appointed by NYRA's President, shall have the right to "adopt, modify or reject any or all of the Hearing Officer's report, including, but not limited to, the appropriate disposition of the proceeding". (HRP §16(b))

A hearing in this matter was conducted on the days of January 24 through January 28, 2022, before the Hon. O. Peter Sherwood (ret.), formerly a Justice of the New York State Supreme Court, who was appointed as the Hearing Officer ("Justice Sherwood"). On April 23, 2022, Justice Sherwood rendered his Report of the Hearing which was forwarded to the parties as well as to the Panel pursuant to HRP, §14(a). The "Administrative Record" consisting of the hearing transcript and exhibits was also sent to the Panel.

Within a time limit agreed upon by the parties, Baffert submitted his Exceptions to Justice Sherwood's Report. NYRA submitted no Exceptions. By letter dated May 16, 2022, the Panel served notice upon the attorneys for the parties that pursuant to HRP, §16(c), it was extending the review period without date because of the volume of documents to be reviewed.[1] In this regard, to the extent that Baffert argues that the Administrative Record is incomplete (Baffert Exceptions p. 12), the Appendices attached to the Baffert Exceptions renders the argument moot since the Panel has now been provided with all relevant documentation. Having reviewed the Hearing Report, the Administrative Record, and Baffert's Exceptions to the Hearing Report, the Panel now renders its decision.

SCOPE OF REVIEW

The Panel, in reviewing the record and making its decision, must determine whether the findings made by Justice Sherwood are supported by the facts and whether the recommended disposition is appropriate under all of the circumstances. The Panel, consisting of one attorney and two non-attorneys, will not make any legal rulings. The Baffert Exceptions cite 130 cases and 43 statutes, rules and regulations. The Panel makes no comments upon or rulings about the

[1] The Panel received for review the Administrative Record consisting of the Hearing Transcript and Exhibits totaling more than 5,000 pages. It also received for review Baffert's Exceptions to the Hearing Report which, together with Appendices, totaled more than 2,000 pages.

applicability of any of said cases, statutes, rules or regulations. Rather, the Panel will be guided by the legal rulings made by Judge Amon and Justice Sherwood which is the law of the case:

1. NYRA's Common Law Right of Exclusion. Both Justice Sherwood (Hearing Report p. 40, ¶ 175) and Judge Amon (Baffert v. New York Racing Assn., No. 21-CV-3329, Slip Op., citing Saumell v. NYS Racing Bd., 58 NY 231) have determined that NYRA has a common law right of exclusion which is separate and apart from the power of the regulators to take action against a licensed individual. The very regulation which gives the steward the power to exclude or suspend, states: "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 therein". (9 NYCRR §4022.12.)

2. Right of Free Speech. Baffert contends that to the extent that Justice Sherwood used Baffert's statements made to the media as a part of his Hearing Report, he violated Baffert's free speech rights. (Respondent's Exceptions, p. 80) The First Amendment to the Constitution of the United States provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . ." The Panel accepts as a correct statement of law that Baffert's remarks to the media are not protected speech and free speech is not an issue in this case. Even the most casual sports fan knows that in the National Football League, the National Basketball Association and in other sports leagues, certain public remarks made by athletes, coaches or management often result in penalties.

3. NYRA Failed to Provide a Fair Hearing. Baffert contends, throughout his Exceptions and in a number of different ways, that NYRA failed to provide a fair hearing. The Panel will comment upon some of his contentions.

Baffert has already moved to dismiss this proceeding on many of the same grounds contained in his Exceptions (Baffert Exceptions p. 397 *et seq*.). He contends, for example, that Justice Sherwood "was chosen after a secret process within NYRA" (Exceptions p. 3) and that Justice Sherwood was biased, either because of his friendship with a present or former member of NYRA or because Baffert previously moved that Justice Sherwood recuse himself and his Motion was denied by Order dated January 19, 2022. Similarly, by letter dated May 10, 2022, by which Baffert's Exceptions were submitted to the Panel, Baffert's attorney seeks information about the Panel members in an apparent attempt to question their impartiality. The Panel declines to provide the requested information, finding nothing in the Racing, Pari-Mutual Wagering and Breeding Law which would compel a response.

Baffert contends that NYRA was motivated to exclude Baffert and to commence the instant proceeding, for anti-competitive reasons, since some of the members of the Board of Directors of NYRA own horses. The Panel believes that such an allegation, without any proof, is reckless. The Panel recognizes that many racetracks are owned by horsemen or by entities whose principals are horsemen. Such fact in no way diminishes the right of a racetrack to exclude a licensee or the racetrack's ability to conduct a fair hearing.

All other objections to the right, authority or jurisdiction of NYRA to conduct the hearing are adequately addressed in the Decision of Judge Amon dated October 25, 2021, which denied Baffert's motion for contempt and to stay the instant proceeding; the Decision and Order of Judge Amon dated January 21, 2022, which dismissed Baffert's Complaint, but left in place the injunction which enjoined NYRA from enforcing Baffert's suspension by its letter of May 17, 2021; and the Order of Justice Sherwood dated January 19, 2022, denying Baffert's motion to

dismiss. Proper deference will be given to Justice Sherwood's findings of fact and the Panel will not disturb such findings unless the Panel believes them to be clearly wrong.

DISCUSSION

Turning to the facts of this case, NYRA, in its Amended Statement of Charges (ASOC), made numerous allegations regarding seven drug-related violations occurring in Arkansas, California and Kentucky, commencing on July 27, 2019, at Del Mar racetrack and ending with the 2021 Kentucky Derby, held on May 1, 2021, at Churchill Downs. The allegations in the ASOC provide details of each of the violations, the actions of the various regulators, the suspension of Baffert by Churchill Downs and some of Baffert's public statements.

The ASOC included three charges against Baffert as follows:

Charge I: Conduct Detrimental the Best Interests of Racing

> 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.

Charge II: Conduct Detrimental to the Health and Safety of Horses and Jockeys

> 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.

Charge III: Conduct Detrimental to NYRA Business Operations

> 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.

1. NYRA's Witnesses.

NYRA presented to the Hearing Officer the testimony of eight witnesses whose testimony will be briefly summarized.

Rick Goodell[2], who was the attorney for the New York State Gaming Commission as well as its predecessor, the New York State Racing and Wagering Board, testified for NYRA. Among other things, he has prosecuted equine drug cases in connection with the administration of the rules and regulations. He was also a representative to various meetings of the Association of Racing Commissioners International (ARCI), which promulgated model rules covering, among other things, drug testing standards. He also reviewed and summarized seven violations of drug standards: Cruel Intention in California on July 27, 2019; Éclair in California on August 3, 2019; Charlatan and Gamine in Arkansas on May 2, 2020, Merneith in California on July 25, 2020; Gamine in Kentucky on September 4, 2020; and Medina Spirit in Kentucky on May 1, 2021. He explained, in detail, the various classifications of commonly used drugs and the levels above which a violation would occur if present on race day.

Dr. Pierre-Louis Toutain, a French veterinarian who specializes in veterinary pharmacology, gave opinions as to the use of Phenylbutazone and other non-steroidal anti-inflammatory drugs. He opined that the presence of 510 nanograms of Phenylbutazone present in Cruel Intention was capable of affecting the performance of the horse. He testified about Betamethasone, another commonly used therapeutic drug, which has the effect of masking an injury and could lead to a catastrophic result - and that the presence of 21 picograms of

[2] Mr. Goodell's name appears to have been incorrectly spelled in the Hearing Transcript.

Betamethasone discovered in the post-race test of Medina Spirit had the capacity to affect the performance of the horse. Dr. Toutain also explained the effect of Lidocaine on a horse and particularly that the 185 picograms found in the post-race test of Gamine had the capacity to affect the horse's performance.

Dr. Camie Heleski testified on behalf of NYRA. Dr. Heleski has a PhD in animal science. She testified about the concept of a "social license to operate" which she defined as the public acceptance which grants or implies permission for an organization to conduct its activity. She explained that when an activity has lost its social license, such as Greyhound racing, it adversely affects the public acceptance of the activity. Social license is built upon the public perception of how the activity is conducted.

Jeffrey Cannizzo, the Senior Director of Government Affairs for NYRA, testified that he is responsible for all interactions between NYRA and various regulatory, governmental and legislative agencies. He explained that the franchise agreement between NYRA and the State of New York contains performance standards relating to, among other things, equine safety and health, as well as safety of the jockeys. He explained that there is a bill pending in the New York State Assembly that would deprive NYRA of its funding from other gaming sources and that the bill memo discusses performance enhancing drugs as a reason why the funding source should be ended.

Anthony Patricola, NYRA's Lead Equine Safety Investigator, explained that he was responsible for inspecting the barns and stable areas. He observes whether a horse might be exhibiting any physical problems. If so, he would bring it to the attention of the veterinarians or the stewards. He testified that the improper use of therapeutic medication might mask the symptoms and cause a catastrophic injury.

Dr. Anthony Verderosa, the Director of NYRA's Veterinary Department, explained that an examining veterinarian would go to the racetrack early in the morning for workouts or to do a pre-race examination for a horse entered to race on that day. He testified that Phenylbutazone, Hydroxylidocaine and Betamethasone (all allowable drugs) can mask an injury and would make it difficult to determine if a horse was fit to race.

Matthew Feig, the General Manager of NYRA Bets, explained the workings of internet wagering. It is a national platform with approximately 200,000 customers. NYRA Bets accepts wagers on almost all racetracks. As a result of the disqualification of Medina Spirit, as winner of the 2021 Kentucky Derby, NYRA Bets received higher than normal communications from its customers because of the complications attendant to the disqualification of the winning horse.

Donald Scott, the Vice President of Marketing for NYRA and NYRA Bets, is responsible for, among other things, maintaining brand awareness of NYRA. One of his objectives is to generate revenue for NYRA, both on track and off track. When the news broke that Medina Spirit, the horse who finished first in the 2021 Kentucky Derby, tested positive for drugs, there was a significant increase in complaints from fans on Twitter, Instagram and Facebook, asking about the story. Some of the fans were very upset and wanted to know NYRA's position with respect to the disqualification.

2. Baffert's Witnesses.

Two well known jockeys, **Mike Smith and John Velazquez**, testified on behalf of Baffert. Both had ridden many of the horses trained by Baffert and both agreed that he is an outstanding trainer. Neither has seen Baffert act outside the rules of racing. They agree that he runs a first class operation and that he is not a threat to the safety of horses or jockeys, or to racing in general.

Steven Lewandowski was the former steward employed by New York Racing and Gaming, having retired from that position in 2019. Part of his responsibility was to enforce the rules. During the five years from 2014 to 2019, when he was the State Steward, there were never any issues brought to his attention with regard to compliance by Baffert in New York. The witness called Baffert at some point in time after NYRA began to take action to offer Baffert his support because the witness felt that he was being taken advantage of (Hearing Transcript pp. 950-953). The Panel notes that Mr. Lewandowski had been previously admonished by the New York State Joint Commissions on Public Ethics for writing a letter to the New York State Gaming Commission within two years following his retirement advocating for the reinstatement of the license of trainer, Richard Dutrow. The letter was in violation of the Public Officers Law (NYRA Exhibit 148).

Dr. Clara Fenger, a veterinarian, testified for Baffert. At one time she was a state veterinarian in Kentucky, employed by the Kentucky Horse Racing Commission. Dr. Fenger explained the five classifications of drugs currently listed by ARCI, Class 1 being the most serious, applicable to drugs that are entirely banned, and Class 5 being the most benign. She also explained that a number of the Class 4 drugs, including Phenylbutazone, are often used therapeutically. With respect to both Cruel Intention and Éclair, she opined that the level of Phenylbutazone would not be performance enhancing. With respect to Charlatan and Gamine, Dr. Fenger stated that the amount of Lidocaine detected in their systems would not have enhanced their performance. With respect to the horse Merneith, she explained that Dextrophan, a Class 4 drug, would have had no pharmacological effect on the horse at the level found. Similarly, the amount of Betamethasone found in Gamine, after the Kentucky Oaks, had no pharmacological effect on the horse. Medina

Spirit, who was first in the 2021 Kentucky Derby, tested positive for Betamethasone following the race. She believed that the topical medication Otomax may have been the source of the drug.

Dr. Steven Barker, who has a background in pharmacology, also testified on behalf of Baffert. He was instrumental in establishing a laboratory in Louisiana for equine drug testing. He also worked on classification of drugs and penalties for violation. Phenylbutazone, a non-steroidal anti-inflammatory drug, is commonly used in racehorses. He stated that the 510 nanograms of Phenylbutazone found in Cruel Intention would have no performance enhancing effect, nor would it have the ability to mask an injury. Similarly, he opined that the level of Phenylbutazone found in Éclair had no performance enhancing effect. The drug Lidocaine found in Charlatan and Gamine in Arkansas also, in his opinion, would have no performance enhancing effect. He had also reviewed the records for Gamine in the Kentucky Oaks and Medina Spirit in the Kentucky Derby and was of the opinion that neither horse had a sufficient level of drugs to have affected the outcome.

Baffert testified at length on his own behalf. He testified to his long experience with NYRA. With respect to Cruel Intention and Éclair, neither he nor anyone in his barn administered Phenylbutazone. His veterinarian, Dr. Vince Baker, was the person who would have administered any drugs to his horses. He testified that no one associated with his stable had ever administered Lidocaine to either Charlatan or Gamine. When he learned that his horse, Merneith, had tested positive for Dextrorphan, a cough suppressant, he explained that one of his grooms had been taking DayQuil and NyQuil, had urinated in the stall and that this may have been the source of the drug found in Merneith. Betamethasone had been prescribed for the horse, Gamine, who was injected 18 days prior to the Kentucky Oaks. He claims to have followed the rules in terms of the timing of the administration of the drugs, but accepted the penalty. He also explained that the drug,

Betamethasone, found in Medina Spirit, possibly came from the topical drug, Otomax. On cross-examination, he admitted that some of his public utterances were mistakes.

CONCLUSION

1. Burden and Standard of Proof. The HRP provides that NYRA has the burden of proof with respect to all of its charges. Baffert, however, has the burden of proof with respect to his affirmative defenses. Both parties must sustain the burden by a preponderance of the evidence.

The Panel concurs with Justice Sherwood that NYRA has sustained its burden of proof by a preponderance of the evidence. The hearing consisted of the testimony of 14 witnesses presented over a period of five days. Both parties were given ample opportunity to present all of the relevant facts. Some of the witnesses contradicted each other and Justice Sherwood had the task of determining what evidence to accept. As the trier of the facts, Justice Sherwood was in the unique position of determining credibility of the witnesses.

The Panel recognizes that NYRA's charges are not as precise as would be required in an administrative proceeding before a state regulatory body. Nevertheless, NYRA, as a major stakeholder in the racing industry, has a keen interest in the welfare of the sport of racing in general and its own business operation in particular. Such interest obviously includes the health of the equine athletes and the jockeys as well as the public perception and acceptance of the sport. The concept of "social license to operate" is and should be a concern of the racing industry and is relevant to all three of the charges in NYRA's ASOC. The Panel agrees with Justice Sherwood that Baffert's actions "harmed the reputation and integrity of the sport, as well as the public's perception of the sport's legitimacy". (Hearing Report p. 43, ¶ 193)

2. The Absolute Insurer Rule. With respect to the Absolute Insurer Rule, Baffert contends, among other things, that Justice Sherwood incorrectly applied the Rule and that the Rule

was not enunciated in NYRA's HRP (Baffert Exceptions p. 16 *et seq.*). The Panel disagrees. The Absolute Insurer Rule imposes strict liability upon the trainer to ensure that the rules promulgated by the regulators are followed and if a violation is found, the trainer is responsible. With respect to drug violations, it is not necessary to prove that a) the trainer administered the drug; b) the trainer directed that the drug be administered; or c) the trainer had knowledge of the administration of the drug. If such proof were necessary, it would be virtually impossible for the regulators to properly monitor the sport of horse racing. While Baffert correctly points out that there was no proof that he engaged in personal misconduct, i.e., that he administered, directed to be administered, or had knowledge of the administration of the drugs, the Panel believes that it is a distinction without a difference. While it may be considered in mitigation, the Hearing Officer made no error in the way in which he applied the doctrine. The Panel also finds that there was no reason for NYRA to include in the HRP any reference to the Absolute Insurer Rule since it is widely accepted in the industry and well known to the trainers.

3. **<u>Doping</u>.** While the Panel agrees with Justice Sherwood that NYRA has sustained its burden of proof and, further, that Justice Sherwood's Hearing Report is supported by the facts, we hereby clarify that Baffert was not charged with "doping" in any jurisdiction. Justice Sherwood's finding that Baffert was guilty of "multiple instances of *doping* (emphasis added) horses he entered in races" (Hearing Report p. 38, ¶ 171) is incorrect. In the lexicon of performance enhancing drugs, "doping" refers to the use of substances or methods which allow the athlete, human or equine, to perform beyond the normal level because it permits the body to build muscle mass or increase endurance. Such substances or methods are completely banned from use in any sport. On the other hand, the drugs for which use Baffert was cited in three jurisdictions are allowed and commonly used but are nevertheless performance enhancing in the

sense that they may suppress injuries and may allow the horse to perform at a normal level in spite of the injury if they are found to be at a level above the allowable threshold. For this reason, the regulations either proscribe or limit the presence of such drugs in a horse on race day. The distinction is important and the Panel corrects the record accordingly.

DISPOSITION

The HRP requires the Hearing Officer to issue a report which recommends a disposition, assuming that the charges are upheld. Neither Justice Sherwood nor the Panel has precedent or guidelines to assist in determining the appropriate length of time of a revocation or suspension. In contrast to a regulatory body, the owner or operator of a racetrack, in the exercise of its common law right of exclusion, can consider more than what penalties might be imposed under the ARCI guidelines. Such consideration would include the severity and number of violations as well as any mitigating circumstances. NYRA proposed an exclusion "for a lengthy period" while Baffert argued for a lesser penalty. Justice Sherwood appears to have relied principally upon Churchill Downs' two-year exclusion of Baffert. The Panel notes, however, that there was no pre-suspension hearing which led to the suspension of Baffert by Churchill Downs and the Panel is not persuaded that, had there been such a hearing in the Churchill Downs matter, a hearing officer would necessarily have imposed such a penalty. The Panel disagrees with Justice Sherwood's statement that "Baffert has engaged in a pattern and practice of unlawful conduct that has no parallel in the modern history of Thoroughbred racing" (Hearing Report p. 44, ¶ 197), as there is scant support in the record for such a statement.

The Panel is also aware that Baffert has been suspended for a period of 90 days by the Kentucky Horse Racing Commission and that, by reason of reciprocity among the horse racing jurisdictions, he has also been suspended in New York for the same period of time rendering him

ineligible to participate at any NYRA racetrack. The Panel finds that the appropriate length of time that Baffert be prevented from entering horses in races and occupying stall space at the three racetracks operated by NYRA is 365 days commencing on the date of this Decision and that Baffert should have credit for the 59 days he was previously excluded by NYRA in 2021 as well as the 90 days when his New York license was suspended. Thus, Baffert's exclusion from NYRA's tracks shall terminate on January 25, 2023 at 11:59 p.m., and the Hearing Report is accepted as modified herein.

The above constitutes the unanimous Decision of the Panel made the 23rd day of June, 2022.

Respectfully submitted,

By: William Alempijevic
John J. Carusone, Jr.
Humberto Chavez

Service of this Decision shall be made upon the attorneys for the parties in accordance with HRP §16(d).