

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED and SHARON JOHNSON,

Appellants,

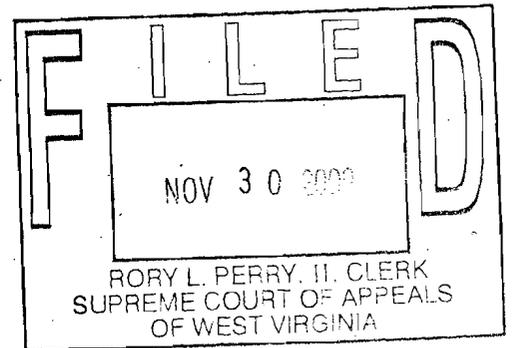
v.

Appeal No. 35285

BOARD OF STEWARDS OF  
CHARLES TOWN RACES,

Appellee.

BRIEF OF APPELLANTS



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**BRIEF OF APPELLANTS**

COME NOW, Appellants, Fred and Sharon Johnson, by counsel, and file the following Brief, and state in support thereof as follows:

**I. KIND OF PROCEEDING AND NATURE  
OF RULING IN THE LOWER TRIBUNAL**

This appeal arises from the March 11, 2009 Order of the Circuit Court of Jefferson County, affirming the West Virginia Racing Commission's Order of July 7, 2008, disqualifying the winner of the 2007 West Virginia Breeders Classic (the "Classic") for an alleged positive test for caffeine, in a quantity equivalent to the ingestion of a teaspoon of coffee. The Petitioners here, Fred and Sharon Johnson (the "Johnsons"), appealed the November 29, 2007 decision of the Board of Stewards (Decision 302) to the West Virginia Racing Commission (the "Racing Commission"). After a hearing before the Racing Commission on June 17, 2008, the Racing Commission affirmed the Board of Stewards by written Findings of Fact and Conclusions of Law on July 7, 2008. The Johnsons timely appealed the Racing Commission's Findings of Fact and Conclusions of Law to the Circuit Court of Jefferson County on July 14, 2008, in accordance with West Virginia Code Section 19-23-17. The Circuit Court affirmed the Racing Commission

without precisely addressing the constitutional issues raised on appeal. This Petition for Appeal is timely filed.

In the June 17, 2008 hearing, the Racing Commission made certain Findings of Fact, including, specifically, that the horse's trainer, Fred Johnson, did not administer caffeine to his horse; therefore, there was no violation of the trainer responsibility rule, Section 178-32.1 of the Rules of Racing. The Racing Commission also concluded that Eastern Delite tested positive for caffeine but did not make a Finding of Fact that caffeine was a "drug substance, metabolite or analog" prohibited by Section 178-1-66.5. Nevertheless, the Racing Commission affirmed the disqualification of Eastern Delite. The Jefferson County Circuit Court agreed with the Racing Commission, holding that the record was sufficient to conclude that (1) caffeine was a drug; (2) Section 178-1-66.5 was rationally related to legitimate state interests; and (3) Section 178-1-66.5 was not arbitrary and capricious as a matter of law, without distinguishing the facts and circumstances herein from the decision in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff'd Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981).

Decisions made by the Appellee and the Racing Commission are subject to the Administrative Procedures Act, West Virginia Code 29A-1-1 et seq. This Honorable Court reviews decisions made by the Racing Commission with the same standard of review as applied by the Circuit Court, giving deference to the Commission's purely factual determinations and applying *de novo* review to legal determinations. See *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311, 315 (2008).

## II. STATEMENT OF FACTS

Eastern Delite won the Classic and tested positive following the race for caffeine. The Johnsons appealed this finding to the Stewards at Charles Town Race Track (the "Stewards"), and a hearing was conducted on November 27, 2007. At that hearing, the Johnsons presented evidence that the quantity of caffeine in Eastern Delite, as shown in the post-race testing, had no pharmacological impact on the performance of Eastern Delite in the running of the Classic. In fact, the Stewards accepted a report from Dr. Thomas Tobin, a world-renowned veterinary pharmacologist, who stated his expert opinion that the test results for Eastern Delite did not reflect a true "*positive call for caffeine*" and should be treated administratively as a "*negative result*." Dr. Tobin's expert report stated that caffeine is an environmental substance which has no impact upon a horse with concentrations of less than 2,000 ng/ml in blood or 10,000 ng/ml in urine.<sup>1</sup> Dr. Tobin also opined that the most likely explanation for the presence of caffeine in Eastern Delite's plasma and urine was environmental contamination. Dr. Tobin's opinions on these issues were uncontroverted.

The Johnsons subsequently appealed the Stewards' Ruling to the Racing Commission which conducted a hearing on June 17, 2008. At that hearing, the Racing Commission submitted the testimony of Charles Town's Chief Steward, Danny Wright; chemical testing analyst, Joseph Strug; and track veterinarian, Dennis Dibbern. All three (3) of the Stewards' witnesses testified that they (i) were not familiar with equine pharmacology; and (ii) did not know what, if any, impact the level of caffeine found in Eastern Delite had on the horse's performance in the Classic.

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<sup>1</sup> Nanograms per milliliter is a metric system measurement equivalent to one part per billion. Accordingly, 2,000 parts per billion is two (2) parts per million. Because the description "*parts per billion*," compared to "*nanograms per milliliter*" can be readily understood without reference to a scientific journal, this measurement will be referred to here as "*parts per billion*."

The Johnsons presented their own testimony, as well as correspondence of witnesses showing suspicious activity the night before the race; the testimony of Dr. Thomas Tobin, together with his expert reports and the entire record submitted to the Stewards. In fact, the entire record, including the transcript of the hearing before the Stewards was admitted into evidence by the Racing Commission.

**A. From the Time of the Stewards' Hearing, Notice was Given by the Johnsons that the Amount of Caffeine in Eastern Delite Had No Impact on Performance**

From the time of the Stewards' hearing on November 27, 2007, the Stewards were on notice that the Johnsons were asserting, through Dr. Tobin, that the presence of caffeine was due to environmental contamination and, more importantly, that the level of caffeine found in Eastern Delite had no effect on equine performance. Although this issue was first raised at the November 27, 2007 Stewards' hearing, at the June 17, 2008 hearing before the Racing Commission, the Stewards made no attempt to contradict or address the expert opinion of Dr. Tobin, that the level of caffeine present in Eastern Delite had no effect on performance in the race.

Therefore, based upon the evidence presented at both hearings, the scientific conclusion that Eastern Delite ingested caffeine equivalent to a teaspoon of coffee was and is an uncontested issue of fact.

Dr. Tobin's clear testimony at the Racing Commission hearing was that Eastern Delite's highest caffeine levels from any testing were consistent with the horse ingesting 1/100<sup>th</sup> of an eight (8) ounce cup of coffee. The Johnsons respectfully request that this Court take judicial notice that one percent (1%) of an 8 ounce cup of coffee is 0.16 of an ounce or a teaspoon.<sup>2</sup> Dr.

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<sup>2</sup> Accordingly, a teaspoon of coffee would yield 350 to 500 parts per billion of caffeine, or 0.35 to 0.50 parts per million.

Tobin testified that to have any impact on equine performance, a 1,500 pound horse would have to ingest twenty (20) times more caffeine that Eastern Delite had in its system on the date of the Classic.

Further, Dr. Tobin testified that the caffeine found in Eastern Delite would be equivalent to a 1/7<sup>th</sup> dose of the same substance in a human being. The amount of caffeine in Eastern Delite was equivalent to a teaspoon, while the same dose in a human being would be 1/7<sup>th</sup> of a teaspoon or 0.023 of an ounce. Both science and logic lead to the conclusions that a human being's ingestion of twenty-three one thousandths of an ounce of coffee would have no impact on a human, just as a teaspoon of coffee had no impact on Eastern Delite's performance.

**B. Eastern Delite's Performance in the Race Following the Classic, with Negative Tests for Caffeine, was Consistent with Performance in the Classic**

The Stewards received Dr. Tobin's expert report on the date of the hearing — November 27, 2007. At that hearing, the Stewards made no attempt to counter the evidence in Dr. Tobin's report that the amount of caffeine found in Eastern Delite had no impact on equine performance. The transcript of the Stewards' hearing was submitted to the Racing Commission as Stewards Exhibit 6.<sup>3</sup> It is compelling that in the Stewards' hearing, Chief Steward Danny Wright acknowledged that Eastern Delite's performance on the night of the Classic, with a positive test for caffeine, was no different than Eastern Delite's performance in a subsequent race where Eastern Delite prevailed against the horse that ran second in the Classic by four (4) lengths. At that hearing, on pages 17 and 18 of the transcript, Chief Stewart Wright acknowledged that he was aware of Eastern Delite running a similar race several weeks after the Classic. He acknowledged that Eastern Delite, "*ran a great race, no question.*" Later in the transcript when

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<sup>3</sup> At the hearing, Stewards Exhibits 1 and 3 through 7 were admitted into evidence; Stewards Exhibit 2 was not admitted by the Racing Commission; and Johnson Exhibits 1 through 11 were admitted. It is not clear from the record whether or not Johnson Exhibit 12 was admitted. See RCT at page 228.

referring to the race subsequent to the Classic, Chief Steward Wright acknowledged the athleticism of Eastern Delite:

*It just proves that your horse is as competitive as anything around here right now and believe me, we watched the race with great anticipation. With that said, we now have a job to do obviously. We will, as I said, read the information that you gave us and we will deliberate and we will come up with a ruling.*

Transcript pages 21-22 of Stewards Exhibit 6.

**C. The Stewards Did Not Contest the Johnsons' Scientific Evidence that Caffeine, Equivalent to a Teaspoon of Coffee, Had No Impact on Eastern Delite's Performance**

At the June 17, 2008 hearing before the Racing Commission, none of the Stewards' witnesses were able to provide testimony about the impact (or lack thereof) of caffeine upon Eastern Delite's performance in the Classic.

**1. The Testimony of Chief Steward Danny Wright**

At the hearing before the Racing Commission, the first witness called by the Stewards was Chief Steward Danny Wright. Wright testified that he had been in the racing industry for most of his adult life, having been a jockey before becoming a racing official. See June 17, 2008 Racing Commission Transcript (the "RCT") at pages 20 and 21.

Wright was qualified as an expert witness in the area of horse race officiating (see RCT at page 21, lines 17-25 and page 22, line 1), and was asked about his knowledge of caffeine at the hearing. RCT, page 26:

*Q. To your knowledge, does caffeine occur or exist naturally in a race horse?*

*A. To my knowledge, no.*

*Q. And is caffeine prohibited under the West Virginia rules of racing?*

*A. Any drug foreign to the horse's naturalness is considered a drug.*

Wright testified about his receipt of correspondence from Delare Associates, the Stewards' drug testing laboratory contractor, indicating that Eastern Delite's blood and urine samples tested positive for caffeine. *See* RCT at page 31, lines 12-25 and page 32, lines 1-7.

Wright testified that he personally was unaware of any previous positive test for caffeine since he became a track steward in 2000 (*see* RCT at page 44, lines 1-6), but identified a previous decision of the Stewards disqualifying a horse that had tested positive for caffeine (*see* RCT at page 44, lines 6-12).

Wright testified that West Virginia had a "zero tolerance" policy prohibiting all substances foreign to the "naturalness" of the horse. However, Wright could not identify any written regulation of the Racing Commission that created the zero tolerance policy:

*Q. Okay. Let me rephrase my question carefully, and I hope you'll listen to it carefully. Isn't it true there's no written regulation adopted by the Racing Commission or anyone else that you are aware of with regard to this zero tolerance policy?*

*A. I have not read it.*

*See* RCT at page 64, lines 9-14.

Wright also confirmed that the Stewards do not attempt to quantify the amount of caffeine, or for that matter any foreign substance, found in the body of a horse:

*Q. Okay. And when you received a copy of the Dalare<sup>4</sup> report, did you make any inquiry as to whether or not that report was tested at a zero tolerance level or some level about that?*

*A. No ma'am. There again, we don't quantitate. We don't require quantitation for a drug. It is either there or it is not there.*

*Q. So you are saying that the Dalare data did not quantify the drug?*

*A. No, I'm saying that we don't require it to be quan . . . quantitative.*

*See* RCT at page 52, lines 18-25 and page 53, lines 1-3.

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<sup>4</sup> The RCT misspells the name of Delare Associates by spelling it "Dalare." In this Brief, we will maintain the incorrect spelling where quoted, but will refer to it in argument by the correct spelling.

Although quantifying the amount of caffeine was not required, Wright testified that Delare had provided testing results showing the quantity of caffeine in urine and plasma in Eastern Delite. The testimony of Mr. Wright on page 53 of the RCT is interesting:

*Q. And what did they inform you about the quantity?*

*A. Just what we said previously, the one, the finding in the note.*

*Q. And the letter spoke about a 100 nanogram level in plasma. Is that correct?*

*A. Correct, yes, ma'am.*

*Q. And did you inquire as to what that level meant?*

*A. No ma'am. As I say, my --- we're constrained it's either there or it's not there. Quantitative levels.*

See RCT at page 53, lines 10-21.

*Q. Okay. But you didn't ask them what 100 meant and above that or below it?*

*A. I'm just not an expert in the area. It --- it would be irrelevant to me.*

*Q. Where is it written in the rules of racing or anywhere that this is a zero --- zero tolerance state?*

*A. It's always been, since I've been on board, a zero tolerance.*

*Q. Where is it written?*

*A. I don't know that it is written. Just been an acceptable practice from my --- this Board of Stewards and all my previous stewards before.*

See RCT at page 54, lines 6-17.

On pages 55, 57, 61 and 64 of the RCT, Wright again confirmed his understanding that there was no written regulation addressing the so-called "zero tolerance" policy.

Finally, from the perspective of equity, prior to the positive caffeine test for Eastern Delite, the Johnsons had not had even a single infraction or violation during their many years in the racing business and they were clearly "good for racing." See RCT at page 46 and page 48, lines 1-10.

## 2. The Testimony of Joseph J. Strug, Jr.

The second witness called by the Stewards at the Racing Commission hearing was the chemist from Delare Associates, Joseph J. Strug, Jr. Strug testified about his background and was qualified as an expert witness in the area of chemistry. Strug specifically acknowledged that he was a "chemist," not a pharmacologist. See RCT at page 77, line 10.

Strug testified regarding his understanding about the prohibited substances in West Virginia:

- A. *It is my understanding that anything that we would find that is considered a drug would be recorded as a positive.*

See RCT at page 80, lines 2-4.

Strug testified unequivocally that the samples of blood and urine contained caffeine and that he actually tested for quantity, not mere presence.<sup>5</sup> See RCT at page 84, lines 7-20.

Notwithstanding his testing for quantity, Strug was not familiar with the comparison with the amount of caffeine in an eight (8) ounce cup of coffee as compared to the amount of caffeine found in the urine and plasma of Eastern Delite:

- Q. *From the quantitative perspective, on the caffeine found in this horse in your testimony, isn't it true that you all can calculate how that quantity of caffeine would compare to, say, the cup of coffee I've been drinking?*

A. *Yes.*

- Q. *Isn't it true that, from a quantitative perspective, that the amount of coffee found in [sic] the blood from this horse would be consistent with approximately 1 percent of an 8 ounce cup of coffee?*

A. *I would have to do the math, but . . . so I couldn't say.*

- Q. *Okay. So, you don't know whether or not the amount of caffeine detected would be consistent with 1 percent of an 8 ounce cup of coffee or not?*

A. *Not off the top of my head, no.*

- Q. *Okay. And that's probably because you have not studied how much caffeine is in a normal 8 ounce cup of coffee?*

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<sup>5</sup> Strug did not explain the detection levels utilized and how such decisions were made.

A. *That's correct.*

Q. *So it's not something you are prepared to opine about today?*

A. *That's correct.*

Q. *Okay. So you are not familiar with . . . you can't help us understand what quantity of caffeine these test results were linked to when compared, for example, to this cup of coffee that I'm drinking?*

A. *That's correct.*

Q. *Okay. And so, if it would be something equivalent to less than 1 ounce of a cup of coffee --- right --- you can't help us with that?*

A. *That's correct.*

See RCT at page 85, lines 6-25 and page 86, lines 1-12.

Strug was questioned about the Racing Commission International's ("RCI") recommended guidelines and the impact certain levels of caffeine in a horse would have on performance. Strug stated that he understood that test results below certain levels "*could be environmental contamination and would have no effect on the performance of the horse.*" See RCT at page 89, lines 3-6. However, when asked if he agreed with the RCI's recommendation, Strug testified as follows:

A. *I can't express an opinion on that. I'm not a pharmacologist.*

See RCT at page 89, lines 8-9.

Strug testified that caffeine findings were rare. In fact, he testified that he was unaware of a positive caffeine test in any jurisdiction within the last seven (7) years. See RCT at page 90, lines 1-4.

Strug confirmed the expert credentials and reputation of Dr. Thomas Tobin:

Q. *Do you know Dr. Tobin?*

A. *I sure do.*

Q. *Okay. And what is your opinion of Dr. Tobin?*

A. *He's an expert in pharmacology and equine medicine.*

- Q. And has he written extensively in terms of equine pharmacology?*  
*A. Much so, yes.*
- Q. And in peer review writings?*  
*A. Yes.*
- Q. Would you consider him an expert?*  
*A. Absolutely.*
- Q. Are you aware of his work on-threshold levels on testing of equines?*  
*A. Yes.*
- Q. And would you consider him an expert in respect to the development of threshold levels?*  
*A. I would.*
- Q. And just for the Commission's benefit, because you mentioned this environmental contamination, caffeine is --- is something that is in your environment and is used by humans. Correct?*  
*A. It is quite prevalent, yes.*

See RCT at page 91, lines 2-25 and page 92, lines 1-17.

Finally, Strug was also questioned about the impact of the caffeine on Eastern Delite:

- Q. And at some level, would you also agree that if a horse has it in its system, it has no effect and as a result, it is not a positive?*

*Mr. Smith: Objection.*

*A. I wouldn't comment on the effect, because I'm not a pharmacologist.*

*Chairman: I'll sustain the objection.*

See RCT at page 92, line 25 and page 93, lines 1-7.

### **3. The Testimony of Dr. Dennis Dibbern**

Although the final witness called by the Racing Commission was track veterinarian, Dr. Dennis Dibbern, he was not a fact witness regarding the Classic because he was not employed at the racetrack at that time. However, Dr. Dibbern testified about his understanding that the so-

called zero tolerance policy that Mr. Wright could not locate is in Racing Commission Rule 178-66.5. See RCT at page 123, lines 8-24.

Dr. Dibbern testified about the role of the track veterinarian and that horses were frequently given other foreign substances that were prohibited under Rule 178-66.5, such as antibiotics (see RCT at page 132, lines 14-17) and worming substances (see RCT at page 136, lines 1-7).

Dr. Dibbern's most significant testimony to this appeal appears on pages 137 and 138:

*Q. All right. And it's your testimony that this Commission should consider a wormer in a horse as a positive requiring a purse distribution?*

*A. Under that rule, yes.*

*Q. And . . .*

*A. Absolutely. If it is detected, it should be.*

*Q. And if it is not detected . . . it's not tested for?*

*A. There are other drugs that are not tested for also.*

*Q. All right. So it's not tested for, but you're saying it is still a positive?*

*A. It is . . . if it was . . . it's positive if the chemist detects it.*

*Q. And . . .*

*A. And he reports it. If the chemist reports it, then it's positive.*

*Q. And who's making the decision of what's being reported?*

*A. I don't know.*

*Q. The Racing Commission?*

*A. I don't know that.*

*Q. Okay. So, you don't know who's . . .*

*A. I --- I ---*

*Q. . . . who's saying what to look for?*

*A. I've questioned that many times*

See RCT at page 137, lines 12-25 and page 138, lines 1-12. (Emphasis added.)

**D. The Johnsons' Testimony, Exhibits and the Record of the Stewards' Hearing**

The Stewards offered into evidence the transcript of the November 27, 2007 Stewards' hearing without objection. *See* Stewards Exhibit 6 and RCT at page 42, lines 12-14. The Johnsons offered into evidence the remaining exhibits from the November 27, 2007 Stewards' hearing, including specifically Dr. Tobin's November 27, 2007 expert report. *See* Johnson Exhibit 10.

These facts are important for two (2) reasons. First, the Stewards' hearing provides corroboration that Eastern Delite's performance was not enhanced at the running of the Classic because Eastern Delite ran in similar fashion several weeks afterwards, when it once again defeated the horse that ran second in the Classic. *See* pages 21-22 of Stewards Exhibit 6. Second, the record before the Stewards is important because it includes the initial report and all the supporting documentation from Dr. Tobin. Dr. Tobin's report and supporting scientific data make it clear that the quantity of caffeine found in Eastern Delite had absolutely no impact on the horse's performance on the day of the running of the Classic.

Mr. and Mrs. Johnson and members of their racing team also testified at the Racing Commission hearing on June 17, 2008. Mr. Johnson testified that he had been involved in the racing business for twenty-five (25) years. *See* RCT at page 25 and 144, lines 1-2. He also described the "*receiving barn*" process on the date of the Classic. Specifically, Eastern Delite was delivered to the receiving barn before 9 a.m. on the day of the race and remained in the control of Racing Commission officials that entire day. Mr. Johnson testified that caffeinated beverages, such as coffee and soft drinks, were always on the rails to the horse's stalls in the receiving barn and would frequently be spilled onto the hay or straw in each horse's stall. *See* RCT at pages 146-47. Simply stated, even on race day for the Classic, the opportunity existed

for unintended contamination of hay or straw, after a spill, to be ingested by horses, by virtue of the Racing Commission staff permitting caffeinated beverages for humans in the receiving barn.

Caffeine equivalent to a teaspoon of coffee, as a matter of undisputed science, did not have any impact upon the performance of Eastern Delite – just as the ingestion of 1/7<sup>th</sup> of a teaspoon of a coffee would have any impact on a human being. The scholarly papers, excerpts of scientific journals and submissions provided to the Stewards by Dr. Tobin, and provided to the Racing Commission as Johnson Exhibit 10, confirm undisputed scientific facts, including the following:

1. The *“analytical result is scientifically indistinguishable from a RMTC administrative ‘negative’ for caffeine . . .”* See Tobin’s November 27 expert report at page 2;
2. Caffeine has a *“long plasma half-life in the horse. As such, entirely inadvertent and for all practical purposes, uncontrollable exposure to small amounts of caffeine, that is, amounts far too low to give rise to a pharmacological or performance effect in a horse, can given rise to readily detectable concentrations of caffeine in the plasma or urine of horses.”* See Tobin’s November 27 expert report at page 3;
3. The scientific methods utilized for the testing of Eastern Delite’s blood and plasma have an error range of plus or minus twenty percent (20%). See Tobin’s November 27 expert report at page 3; and
4. As a matter of science and equine pharmacology, *“concentrations of caffeine in the order of 1,000 to 2,000 or greater nanograms per milliliter in plasma are required for a pharmacological response to caffeine”* and

*“there is no possibility of the concentrations of caffeine identified in this horse having a pharmacological or performance effect of the time the race in question, and finding is therefore, by definition, a trivial analytical finding and of no regulatory or forensic significance.”* See Tobin’s November 27 expert report at page 4. (Emphasis added.)

**E. The Testimony and Evidence of Dr. Thomas Tobin**

Dr. Thomas Tobin was qualified at hearing before the Racing Commission as an expert witness in the fields of equine pharmacology and equine veterinary medicine. Several of the Racing Commissioners and Joseph Strug were familiar with Dr. Tobin’s credentials as a foremost authority in the field of equine pharmacology.

In the Opposition to the Petition, the Stewards asserted that Dr. Tobin’s testimony was difficult to follow. The context of Dr. Tobin’s testimony is significant in this regard. First of all, much of the time expended during the Racing Commission hearing concerned whether or not Dr. Tobin’s evidence would be received by the Racing Commission. The Racing Commission twice reconsidered the admission of Dr. Tobin’s testimony – first deciding whether or not the caffeine found in Eastern Delite had any effect was not relevant. Because of the holding by the Illinois Supreme Court in *Kline v. Illinois Racing Board*, 127 Ill.App. 702, 469 N.E.2d 667 (1984), this evidence is critical, particularly on appellate review. Impassioned arguments were conducted before the Racing Commission as to whether or not Dr. Tobin’s evidence would even be received. By the time he testified, it was clear that the Racing Commission was anxious to conclude the hearing.<sup>6</sup>

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<sup>6</sup> In fact, Dr. Tobin’s testimony was interrupted by the Racing Commission before he concluded his testimony, as if the Commission did not care to hear the balance of his testimony. See RCT at page 233, line 13.

While the Racing Commission may assert that the testimony was difficult to understand, Dr. Tobin's testimony on the following subjects was unequivocal and clear:

- *"Zero tolerance testing does not exist." See RCT at page 201, line 23.*
- *"... your testing is determined by the chemist. It is arbitrary and the duration for which it is detected, concentrations which are detected, and the potential to affect the performance in the race are entirely unrelated to actual scientific facts." See RCT at page 202, lines 12-17.*
- *Caffeine is "not considered a drug. It's not regulated by the Food and Drug Administration. It's a ... its ... a natural substance that has ... has been used by humans for 700, 800 years or thereabouts and is widely used throughout the world." See RCT at page 202, lines 24-25 and page 203, lines 1-3.*
- *"Caffeine will remain in that horse for about 60 days, give or take. It takes that long to eliminate the substance completely." See RCT at page 203, lines 24-25 and page 204, line 1.*
- *"When I say completely, I'm talking about a mathematical detection projection down to zero. How long the chemist will detect it will depend upon the technology he uses." See RCT at page 204, lines 2-5.*
- *"The concentration to effect the performance of a horse doesn't ... it doesn't begin to effect the performance of a horse until you get to about 2,000 ng/ml." See RCT at page 205, lines 3-6.*
- *With regard to Eastern Delite, "the highest estimate we have on the books, there's no ... there's no possibility whatsoever of it effecting the performance of the horse at the time of the race, based on what we see." See RCT at page 205, lines 12-16.*

- There was an “overwhelming probability” that caffeine got into Eastern Delite by “inadvertent exposure” and that there was “no possibility of an effect on performance . . .” See RCT at page 209, lines 2-9.

- In regard to the science of testing, “there is no absolute zero on caffeine in a horse. That’s just a given. If you test every horse . . . my . . . my expert opinion would be that if you test every horse at zero tolerance for caffeine running this track, you would get some level of it. It will be low, but it will be there.” See RCT at page 211, lines 16-21.

- Caffeine exposure has occurred in the food chain inadvertently, such as with honey. In one example, specifically bees “land on your coffee cup and then they go off and make their honey, because caffeine has shown up in honey.” See RCT at page 212, lines 22-25.

- Caffeine is a “stimulant in horses” only if the amount of caffeine in the horse is “20-fold or greater” than the amount of caffeine found in Eastern Delite. See RCT at page 231, lines 23-24.

- Caffeine found in Eastern Delite’s plasma ranged from 350 ng/ml to 500 ng/ml. See RCT at page 233, lines 3-6.

- The amount of caffeine found in Eastern Delite was less than one percent (1%) of an 8 ounce cup of coffee:

Q. The quantity . . . the quantity of ingestion compared to, say, a caffeinated beverage, how much is the quantity is the level found in the horse at all testing ranges consistent with, say, the ingestion of a quan . . . a caffeinated beverage such as coffee?

A. This is a critical point that I’ve been trying to get across. I pulled down figures on the Starbuck’s coffee, 1 to 2 grams, I assume in one of these giant Starbuck’s of caffeine going into a human. 20 mg which is considerably less than going into a horse would produce these concentrations.

So, a relatively small amount of caffeine into a horse would produce these concentrations, much less than what you

*would take in coffee at Starbuck's. And if you give me a second, I'll do the math . . . 200 . . . about 100-fold less than . . . that the . . . than what you have in a Starbuck's coffee.*

*Q. 100 times less than what's in a coffee cup?*

*A. Approximately in a . . . in a good solid Starbucks coffee.*

*Q. 1 percent of a coffee cup?*

*A. Of a . . . yes.*

See RCT at page 240, lines 16-25 and page 241, lines 8-12. (Emphasis added.)

**F. The Johnsons Did Not Contaminate Eastern Delite with the Use of Super Creatine**

Creatine is a natural substance found in our muscle cells, especially around the skeletal muscle with about 95% of the body's creatine supply, and the remaining 5% is stored in other parts of the body.<sup>7</sup> Creatine is a metabolite produced in the body which mainly consists of three amino acids namely — methionine, arginine, and glycine. Creatine is a naturally occurring element inside the body, which helps in supplying energy to body muscles. Creatine is produced in pancreas, kidneys, and liver prior being transported to the blood, and then is converted into phosphocreatine to rejuvenate the muscles. Creatine monohydrate is a dietary supplement that athletes and many bodybuilders use to increase high intensity exercise performance, increased strength, have fuller looking muscles, increase body mass and faster post workout muscle recovery.

The Stewards assert that Mrs. Johnson contaminated Eastern Delite with caffeine by virtue of the use of Super Creatine, a creatine monohydrate. The scientific evidence from Delare Associates and Dr. Tobin do not support this conclusion. While it is undisputed that Sharon

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<sup>7</sup> Information about creatine and creatine monohydrate can be located at <http://www.mayoclinic.com/health/creatine> and [www.nlm.nih.gov/medlineplus/druginfo/material/patient-creatine.html](http://www.nlm.nih.gov/medlineplus/druginfo/material/patient-creatine.html) (U.S. National Library of Medicine). All creatine information cited herein was derived from those sources.

Johnson administered Super Creatine to Eastern Delite, it is likewise undisputed that the Super Creatine did not contain the levels of caffeine found in Eastern Delite.

Johnson Exhibit 5 presented to the Racing Commission was a transmittal by the Johnsons' counsel to the LSU laboratory seeking to have Super Creatine tested for the presence of caffeine. Johnson Exhibit 6 includes a photograph of the listing of ingredients for the product. Caffeine is not listed on the label of ingredients. Johnson Exhibit 7 to the Racing Commission is a letter dated April 11, 2008 from LSU indicating that Super Creatine tested positive in a range of 4.8 to 5.7 parts per billion for caffeine, while the test results from LSU and Delare showed a range of 350 to 500 parts per billion. Simply stated, there is no basis for suggesting that a supplement containing approximately 5 parts per billion could explain a finding of 350 to 500 parts per billion in Eastern Delite.

Johnson Exhibit 8 to the Racing Commission is of likewise critical importance. Super Creatine's manufacturer, Equine Botanica LLC, asserted that their product was negative for caffeine because the testing parameters they utilized were in the range of 190 to 360 ng/ml. In other words, their testing process would not even detect caffeine as a substance in their product unless it contained 190 to 360 parts per billion. See Johnson Exhibit 8 to the Racing Commission Hearing. By way of example, the manufacturer did not consider 180 parts per billion to be even the "existence" of caffeine in their product.

Johnson Exhibit 8 to the Racing Commission also corroborates Dr. Tobin's testimony that testing parameters and threshold levels of detection are of critical importance in chemistry. Just as Dr. Tobin testified that caffeine equivalent to a teaspoon of coffee had no impact on Eastern Delite, Equine Botanica asserts that the presence of caffeine below the range of 190 to 360 parts per billion is not considered a substance in their product that merits disclosure.

### III. ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in the determination that the “zero tolerance policy” embodied in Rule 178-1-66.5 was not arbitrary and capricious for the reasons that the Florida Supreme Court found essentially identical language to be constitutionally infirm in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff’d Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981)?

2. Whether the Circuit Court erred in its determination that caffeine is a drug when the Racing Commission made no such Finding of Fact, and the Racing Commission’s Conclusion of Law that caffeine is a drug is unsupported by any regulation, statute or declaration from any court?

3. Whether the Circuit Court erred in its conclusion that the Racing Commission did not improperly delegate its rule making authority to the private testing laboratory, which laboratory, and not the Racing Commission, decides which substances will be tested for, as well as the parameters of all such testing?

### IV. SUMMARY OF THE ARGUMENT

The zero tolerance rule asserted by the Racing Commission and the Board of Stewards can only arise from Section 178-1-66.5 of the West Virginia Rules of Racing, which prohibits drug substances, metabolites and analogs “foreign to the natural horse.”

The Florida Supreme Court in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) affirmed the Florida District Court of Appeals’ decision (*Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981)) invalidating nearly identical “foreign to the natural horse” language in Florida’s

horse and dog racing statute. The Florida Court invalidated the statute because such a broad prohibition lacked a rational basis because horses could be disqualified for ingesting substances that have no impact on racing or equine performance. Following the decision in Florida, the Appellate Court for the State of Illinois in *Kline v. Illinois Racing Board*, 127 Ill.App.3d 702, 469 N.E.2d 667 (1984) distinguished a very similar “foreign to the natural horse” regulation from the Florida statute, finding the Illinois regulation to have a rational basis. The Illinois Court determined that additional regulations corrected the problem identified by the Florida Supreme Court in *Simmons*. The safety valve found in the Illinois regulation does not exist in the West Virginia Rules of Racing.<sup>8</sup> Therefore, this Honorable Court should follow the rationale of the Florida Court and invalidate the foreign substance regulation as applied in this case.

Further, this Court may take judicial notice of foreign substance regulations that have a rational basis, and which are not “palpably arbitrary and capricious” as have been adopted in our four sister states where horseracing is most important: California, Kentucky, Maryland and New York. In these states, the substances prohibited are defined and specifically identified, while the West Virginia rule does not even define what a “drug substance, its metabolite or analog” is or is not.

Even if West Virginia’s foreign substance rule passed constitutional muster, the precise language of the rule and the precise findings of the West Virginia Racing Commission mandate reversal of the disqualification of Eastern Delite. Clearly and unequivocally, the West Virginia Rule prohibits any “drug substance, its metabolites or analog.” Following the hearing on June 17, 2008, the West Virginia Racing Commission issued Findings of Fact and Conclusions of

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<sup>8</sup> The Illinois Court also specifically noted that no evidence was submitted to the Illinois State Racing Board by “any chemist, veterinarian or other expert with regard to the nature . . . [of the detected substance] . . . nor its alleged effects on horses generally . . .” or the effect on the performance of the disqualified horse in the race. See *Kline* at 65.

Law on July 7, 2008. The Racing Commission did not conclude that the substance located in Eastern Delite's blood and urine, caffeine, was a "*drug substance, its metabolite or analog.*"

Although no factual finding was made that caffeine was a prohibited substance, in its Conclusions of Law, the Racing Commission determined that "*caffeine is a stimulant and is a banned substance.*" This Conclusion of Law is not supported by any statute, regulation or the common law and, thus, is error. Further, the foreign substance rule embodied in 178-1-66.5 does not prohibit stimulants unless they are a "*drug substance, its metabolite or analog*" and cannot be a basis for disqualification.

Finally, the record presented at the Racing Commission hearing demonstrates clearly that the Racing Commission has improperly delegated its rule-making authority regarding the testing of horses to the laboratory with whom it contracts. This improper delegation mandates a reversal of the disqualification of Eastern Delite.

## V. ARGUMENT

### A. **The Foreign Substance Rule (Zero Tolerance) is a Standard Without Rational Basis Which is Palpably Arbitrary and Capricious (Assignment of Error No. 1)**

The so-called "*zero tolerance rule*" emanates from Section 178-1-66.5 of the Rules of Racing and provides as follows:

*No horse participating in a race shall carry in its body any drug substance, its metabolites, or analog, which are foreign to the natural horse except as provided, by this rule.*

Fred and Sharon Johnson respectfully submit that this regulation does not have a "*rational basis*" and that any regulation not having a rational basis is "*wholly, clearly and palpably arbitrary*" and cannot be enforced. See *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

## 1. This is An Issue of First Impression

There are two West Virginia cases that address the rules prohibiting the presence of drugs in post-race urine samples. Neither addresses the precise issues contained in this appeal. The first, *State ex rel. Morris v. West Virginia Racing Commission*, 133 W.Va. 179, 55 S.E.2d 263 (1949), involved the following rules, which were in effect at the time the case was decided:

*245: No narcotic, stimulant or drug shall be used, no drench of anything shall be administered and no electrical, mechanical or other appliances other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in the race. Any person so offending shall be suspended for not less than six (6) months, and also any horse showing positive from a saliva test or urine test, containing drugs or stimulant shall be disqualified.*

*249: The veterinarian, as soon as possible, shall send or deliver to the chemist . . . a sample of such saliva and/or urine for analysis, and said chemist shall report to the Stewards the result thereof. Should the report of such chemical analysis disclose a positive result indicating a narcotic, stimulant or drug has been administered, or should any chemical analysis of other excretions or body fluids taken from any horse which has run in any race disclose beyond doubt that a narcotic, stimulant or drug has been used, any person so offending shall be punished at the discretion of the Stewards, by suspension of not less than six (6) months.*

*Morris* at 182, 55 S.E.2d at 265 (Emphasis added).

*Morris* also involved the trainer liability rules that were in effect at the time that case was decided.

In *Morris*, a winning horse had a positive sample, which the chemist identified as “Atropine, Hyoscyamine, or Hyoscine and possibly some other drug.” *Morris* at 191, 55 S.E.2d at 269. Because these chemicals were synthetic compounds not ubiquitous or commonly occurring in a horse’s natural environment, there was no question that the substances identified in *Morris* were in fact drugs, narcotics or stimulants, as prohibited by the rules. Consequently, the decision did not address whether the horse tested positive for a drug, but instead focused on whether the Racing Commission had the power to promulgate the rules prohibiting certain

substances in race horses, and if so whether the resulting punishments violated state and federal constitutional protections.

This Court in *Morris* held that the legislature intended to grant broad discretion to the Racing Commission because it is impossible to set forth specific laws to adequately protect against fraud and deceit. This Court further held that the Racing Commission has the authority to promulgate rules that hold trainers and owners liable, which includes the ability to revoke licenses and issue suspensions. The Court reasoned that a license to race horses is a privilege that the State may revoke for good cause; therefore, the Racing Commission was exercising the State's legitimate police powers by promulgating trainer and owner liability rules. *See Morris* at 194, 55 S.E.2d at 271. Specifically, the Court held that the Racing Commission did not exceed the power granted by the legislature by making the owner-trainer or trainer responsible for the condition of his horse.

Although the public policy goal of drug-free racing has remained the same, the language of the rules has changed since the *Morris* decision. Therefore, this Court has not had the opportunity to address the constitutionality of Rule 178-1-66.5. Additionally, despite affirmation of the drug testing rules generally, the *Morris* Court did not address the specific issue of whether the rules prohibiting drugs were too vague, thus arbitrary and capricious, nor did the Court look at whether application of the rules, by allowing a privately employed chemist to decide which substances were to be tested and the level at which samples were considered positive, was an improper delegation of authority. Finally, the *Morris* Court did not look to whether the alleged zero tolerance policy set forth in the current rule, without regard to drugs' affects on performance, was arbitrary and capricious.

This Court also addressed the Racing Commission's drug prohibition rules in *State ex rel. Spiker v. West Virginia Racing Commission*, 135 W.Va. 512, 63 S.E.2d 831 (1951). In *Spiker*, the winning horse tested positive for procaine; therefore, the question of whether the positive result indicated the presence of a drug or its metabolite was not at issue. The Court merely reaffirmed the *Morris* decision, holding that the Racing Commission had the authority to draft the drug prohibition rules and that the owner and trainer strict liability rules did not violate state or federal constitutional protections.

2. **The 1949 Regulation in *Morris* and  
The 1951 Regulation in *Spiker* Clarify the  
Arbitrary and Capricious Nature of the  
"Foreign to the Natural Horse" Rule**

In *Spiker*, the West Virginia Supreme Court of Appeals concluded that a racing rule which provided for the forfeiture of a purse when saliva or urine discloses "*the presence of any narcotic, stimulant or drug*" in a horse "*found to be stimulated*" or "*affecting his speed in any way in a race*" did not violate any provision of the Constitution of the United States or the West Virginia Constitution. However, Rule 268, which was the subject of the Court's analysis in *Spiker*, is far different than Section 178-1-66.5. Rule 268 at issue in *Spiker* is reproduced as follows:

*268. No narcotic, stimulant or drug shall be used, no drench of anything shall be administered, and no electrical, mechanical or other appliance other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in any way in a race. Any person so offending shall be suspended for not less than six months, and, also, any horse showing positive from a saliva and/or urine test shall be suspended, and the case referred to the West Virginia Racing Commission for any further action deemed necessary. (Emphasis added.)*

*Id.* at 518.

The Johnsons respectfully suggest that Rule 245 in *Morris* and Rule 268 in *Spiker* each had a far more appropriate and rational basis than Section 178.1-66.5, because Rules 245 and

268 required *stimulation affecting speed in a race*. On the other hand, Section 178.1-66.5 states the following:

*No horse participating in a race shall carry in its body any drug substance, its metabolites, or analog, which are foreign to the natural horse except as provided, by this rule.*

In *Spiker*, a challenge was made that the Racing Commission had exceeded the authority granted to it in adopting rules relating to the testing of saliva and urine. The *Spiker* Court confirmed that the regulations involved had been previously evaluated and held to be a valid delegation by the legislature to the Commission in *Morris v. West Virginia Racing Commission*, 133 W.Va. 179, 55 S.E.2d 263, 271 (1949). In *Morris*<sup>9</sup> and *Spiker*, the Supreme Court affirmed that the Racing Commission had been properly delegated the authority to adopt regulations.

However, the principal reason that *Morris* and *Spiker* are not applicable to the facts at hand is because the language of Rule 245 in *Morris* and Rule 268 in *Spiker*, were each radically different from the language in Section 178-1-66.5. The regulations in effect in 1949 and 1951 required that the substance provided to a horse have a "*stimulation affecting speed in a race*."

Further, the Illinois Supreme Court in *Kline v. Illinois Racing Board*, 127 Ill.App.3d 702, 469 N.E.2d 667 (1984) distinguished the Illinois "*foreign to the natural horse*" rule from the Florida regulation, because the Illinois regulation had a safety valve that allowed certain substances. The Illinois Court also specifically acknowledged that the Illinois Board of Racing was not presented with any evidence in that case regarding the alleged impact of the substance detected upon the performance of horse that was disqualified. See *Kline* at 65. Rule 269 of the

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<sup>9</sup> *Morris* dealt principally with the trainer responsibility rule. A horse was disqualified and the trainer suspended for the presence of four (4) drugs that had a depressing affect or would negatively impact speed. In *Morris*, the Supreme Court noted that express standards to guide discretion would not be required in circumstances where it is "*impractical to lay down a definitive comprehensive rule*." *Id.* at 193, 270. The regulations from California, Kentucky, Maryland and New York demonstrate conclusively that it is, in fact, practical to lay down a definitive rule for drug testing in horseracing. Therefore, this *dicta* in *Morris* is not applicable to the facts at hand.

Racing Regulations in effect in 1951 had a safety valve very similar to the Illinois rule. Rule 269 as quoted in *Spiker* provides as follows:

*269. Any trainer, who injects, gives, uses or administers any drugs or medicines of any kind whatsoever, or who authorizes, allows or permits any other person to give, inject or administer any drugs of any kind whatsoever to a horse within forty-eight hours prior to the running of a horse in a race, must give notice to the stewards of the use, injection or administering of said drugs or medicines prior to the running of said race. Any trainer failing to give such notice may be suspended or his license revoked. (Emphasis added.)*

*Id.* at 519.

Simply stated, this Honorable Court's decisions in *Morris* and *Spiker* did not constitute any evaluation as to whether or not Section 178-1-66.5 is or is not "*wholly and palpably arbitrary and capricious*," because Rules 245 and 268, as addressed in both *Morris* and *Spiker*, banned substances which stimulated horses and impacted their speed in a race. Clearly, such a regulation banning substances which affect "*speed in a race*" is rationally based and appropriate, as compared to the "*foreign to the natural horse*" rule which prohibits even the kinds of substances that were permitted in 1951 under Rules 268 and 269, and are which apparently permitted in West Virginia's dog racing industry.<sup>10</sup> By way of example, under the rules in effect in 1949 and 1951, a horse which had ingested a teaspoon of coffee, even if caffeine were then considered a drug or stimulant, would not be disqualified unless the horse was stimulated and the stimulant impacted the horse's speed in a race.

Because the rules have changed and the precise issues contained in this appeal have not been addressed, this Court must take a fresh look at the enforceability of the drug prohibition rules that have been drafted and applied by the Racing Commission.

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<sup>10</sup> Curiously, the West Virginia Rules of Racing for greyhounds does not have "*foreign substance*" rules, but permits veterinarians to administer "*analgesics or drugs*" with notice to ruling judges "*prior to the running of the race.*" See Section 178-2-46.1.

3. **The “Foreign to the Natural Horse” Rule is Arbitrary and Capricious**

It is well-settled in West Virginia that a legislative rule promulgated by an administrative agency such as the Racing Commission is enforceable only if the same is rational. Simply stated, arbitrary standards cannot be enforced. The authority granted to the Commission to make such rules has been promulgated by the legislature in West Virginia Code Section 19-23-6(3). West Virginia Code Section 19-23-6(11) specifically identifies the obligation of the Commission to provide the facilities for testing of horses to assure that racing is fair. While the power to regulate horse racing has been legitimately conferred upon the Racing Commission, the Commission’s implementation of its rule making authority is arbitrary and capricious with regard to its drug prohibition policy.

Statutes and regulations must specifically set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence knows what conduct is prohibited and the penalty if he transgresses these limitations. *See State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002). As a matter of basic procedural due process, a law is void on its face if it is so vague that persons must guess at its meaning and differ as to its application. *See State ex rel. White v. Todt*, 197 W.Va. 334, 475 S.E.2d 426 (1996). This allows a person to know what is prohibited so that he or she may act accordingly and “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997). The “rule reflects the common law and has, by the Supreme Court of the United States, been molded into ‘a rule of constitutional law, holding that such definiteness is necessary to satisfy the due process requirements of the Fourteenth Amendment.’” *Gooden v. Board of Appeals of West Virginia Dept. of Public Safety*, 160 W.Va.

318, 234 S.E.2d 893 (1977)(quoting *State v. Flinn*, 208 S.E.2d 538 (W.Va. 1974)). A statute or rule can be so vague that its application is necessarily arbitrary and capricious.

This doctrine was first applied to criminal statutes, but it has been extended to statutes and ordinances involving matters in which criminal penalties are not at issue. See *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984). For example, the failure to define the term "impecunious candidate" in a filing fee exemption for political candidates rendered the rule unenforceable due to vagueness. See *Garcelon v. Rutledge*, 173 W.Va. 572, 318 S.E.2d 622 (1984). In *Garcelon*, this Court reasoned that the "total absence of any criteria for determining when potential candidates qualify for the waiver of filing fees leaves persons of common intelligence who aspire to public service to necessarily guess as to whether they are legally entitled to ballot access without the payment of a filing fee." *Id.* at 575, 318 S.E.2d at 626 (internal citations omitted).

Fred Johnson testified at the June 2008 hearing that he did not know that caffeine was a prohibited substance prior to his horse having a positive test following the Classic. Certainly, it is not surprising that Mr. Johnson would not be on notice given the lack of clarity in the West Virginia Rules of Racing, and the lack of understanding of those Rules by the West Virginia Racing Commission and its Stewards.

At the June 2008 hearing before the Racing Commission, substantial evidence was presented that many "foreign substances" are, in fact, administered routinely to horses that participate in racing. The examples noted at the hearing were the administration of antibiotics and worming elements which are clearly "foreign to the natural horse", but are not the subject of testing.

Danny Wright, the Chief Steward at Charles Town, testified about his knowledge of the “zero tolerance” policy, but could not identify any written regulation or interpretation documenting such a policy. The Johnsons respectfully contend the lack of reasonable guidance as to what constitutes a drug substance, its metabolites or analog, or clear authority establishing a zero tolerance policy, renders the rule unconstitutionally arbitrary and capricious.

4. **Florida Has Invalidated the Foreign Substance Rule, *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982)**

In *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982), the Florida Supreme Court found nearly identical “foreign to the natural horse” language to be unconstitutional and unenforceable as a matter of law. In *Simmons*, the Florida legislature had adopted a statute that contained nearly identical language to the above-stated West Virginia rule. The Florida statute, part of Section 550.241 provides as follows:

*The racing of an animal with any drug, medicine, stimulant, depressant, hypnotic, narcotic, local anesthetic, drug masking agent, or any substance foreign to the natural horse or dog is prohibited.*

In *Simmons*, horsemen challenged this statutory provision, as well as others, relating to the regulation of horseracing. The Florida Supreme Court specifically incorporated by reference a decision of the Florida District Court of Appeals in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981). The specific reasoning for invalidating the foreign substance rule as set forth in greater detail in the opinion of the Florida District Court of Appeals.

The Florida District Court of Appeals affirmed certain portions of the racing regulation relating to drugs, but invalidated the clause relating to “any substance foreign to the natural horse . . .” because the language was not rationally related to the objectives of the legislature in

seeking that horseracing be fair and untainted. The District Court explained that the prohibition of "any substance foreign to the natural horse" was "arbitrary and unreasonable" and "not rationally related to the purpose of the act." In so finding, the Court explained that the offending language did not distinguish between

*the helpful and the harmful, the beneficial and the detrimental, the benign and the deleterious. When measured against the articulated reasons for the enactment of the statute, that part of the statute banning any foreign substance cannot be said to bear a fair and substantial relationship to the objectives sought.*

*Simmons* at 271.<sup>11</sup>

While the Florida Court invalidated a statute, rather than a regulation, the rationale for the invalidation in *Simmons* is completely applicable to the West Virginia rule. The Stewards have argued that the Florida Court in *Simmons* upheld the prohibition against the use of drugs. While this is true, the Florida statute, specifically 550.24, defined what was a "drug," for the purposes of the statute declaring the same to be "any drug prohibited by law." See *Simmons* at 269.

Accordingly, when the Florida Court upheld the prohibition against drugs, it did so with references to drugs otherwise prohibited by law. Given the status of a ubiquitous substance such as caffeine, this is troublesome with regard to the West Virginia rule. As noted in Dr. Tobin's testimony, caffeine is not regulated by the Food and Drug Administration.<sup>12</sup> As noted later in this Brief, the legislature in West Virginia has not sought to regulate caffeine; nor has any West

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<sup>11</sup> The Florida Supreme Court affirmed this ruling specifically in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982).

<sup>12</sup> The fact that the FDA does not regulate caffeine is remarkable given how vast their regulatory province is. Pursuant to Title 21 CFR Part 110.110, the FDA has the authority to regulate such things as the maximum contamination of a variety of food and drug substances. They have established an Official Method of Analysis pursuant to the Association of Official Analytical Chemist ("AOAC"). The AOAC has adopted a nearly endless list of testing parameters for contamination of products, including everything from the level of rodent excrement permitted in cornmeal (AOAC 981.19) to the amount of mammal excrement permitted in ordinary fruit juice (AOAC 970.72). As to the assertion to be made by the Stewards that caffeine is clearly a drug, it is remarkable that the FDA simply ignores the substance.

Virginia state agency. Caffeine seems not to meet the definition of a drug by any working definition.

Accordingly, the portions of the Florida rule upheld in *Simmons* can be distinguished from the West Virginia rule as Florida, because Florida in its statute, declared “*drugs*” to be those substances prohibited by law.

5. **The Reasons that the Illinois Court Upheld the Illinois Rule is Persuasive Authority that the West Virginia Rule is Invalid, *Kline v. Illinois Racing Board*, 127 Ill.App.3d 702, 469 N.E.2d 667 (1984)**

The Illinois Supreme Court interpreted very similar language in an Illinois racing regulation prohibiting substances “*foreign to the natural horse,*” in *Kline v. Illinois Racing Board*, 127 Ill.App.3d 702, 469 N.E.2d 667 (1984), the Illinois Court found the language to be constitutionally firm but distinguished the Illinois regulation from the Florida statute in *Simmons*. *Kline* at 671.

Although the Illinois regulation contained the “*foreign substance*” rule, other regulations adopted in Illinois created a process by which additional regulations could be promulgated to approve the use of “*foreign substances*” which did not have an improper impact on equine performance. The Illinois Court noted that this reasonable procedure permitted “*an orderly amendment of the rules to allow foreign substances to be added to the Board’s list of permitted substances after a demonstration that the substance has been shown to have accepted therapeutic effects. . .*” Because of this reasonable process, the Illinois Court found the foreign substance rule to be “*rational*” and a proper exercise of the police power, when read in conjunction with other rules that permitted benign or helpful foreign substances to be administered to horses. *See Kline* at 672.

6. **The Facts Before the Court are Persuasive  
That the Florida Ruling Should be Applied**

The West Virginia rule is far closer to the Florida statute criticized in *Kline* than to the Illinois regulation. There is no “*safety valve*” for permitted substances.<sup>13</sup> Therefore, the regulation lacks a rational basis and is unconstitutional and unenforceable. In the facts and circumstances of this case, the Johnsons respectfully request that this Court adopt the Florida Court ruling and invalidate West Virginia’s foreign substance rule.

In *Kline*, the Illinois Court noted that there was “*no attempt by Plaintiff to introduce any evidence whether by testimony or other means by any chemist, veterinarian or other expert with regard to the nature . . .*” of the drug at issue in that case and whether or not that drug had any impact on equine performance. In other words, no evidence was offered regarding the benign effect of the substance at issue in *Kline*. See *Kline* at 65.

World-renowned equine pharmacologist, Thomas Tobin, M.D. testified unequivocally that the amount of caffeine ingested by Eastern Delite was equivalent to one percent (1%) of an 8 ounce cup of Starbucks coffee, which mathematically is equivalent to a teaspoon of coffee. Dr. Tobin also testified that caffeine is a “*common environmental substance*” that is present nearly everywhere in the world, and testified unequivocally that the amount of caffeine in Eastern Delite, to wit, a teaspoon of coffee, had *absolutely no impact* on performance based upon well-accepted peer-reviewed research.

While Dr. Tobin testified that caffeine was a naturally occurring environmental substance, the Racing Commission concluded, as a matter of law, that caffeine was a “*stimulant and banned substance that is not naturally occurring in horses.*” The Racing Commission’s

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<sup>13</sup> While Lasix, phenylbutazone and oxphenylbutazone are permitted at certain quantitative levels, no process is identified in the West Virginia regulations regarding other “*benign or helpful*” substances, as was the basis for the Illinois Court distinguishing the Illinois rule from *Simmons*.

conclusion was wholly unsupported by any regulation, statute or court ruling allowing such a conclusion of law to be formulated. The Racing Commission did not make a finding of fact or conclusion of law that caffeine is a drug.

7. **The Prohibition of a Drug Substance, Metabolite or Analog Without Definition is Palpably Arbitrary**

The language in Section 178-1-66.5 does not ban stimulants.<sup>14</sup> Rather, the language in Section 178-1-66.5 bans “*any drug substance, its metabolites, or analog . . .*” The West Virginia Rules of Racing do not define what is and what is not a drug for the purposes of the Rule.

In a vacuum, it may appear that such a regulation has a rational basis until one considers what is and what is not a drug substance. *Black's Law Dictionary* defines a drug as being an “*article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals and any article other than food intended to effect the structure or any function of the body of man or other animals.*” *Black's* derives this definition from 21 U.S.C.A. Section 321(g)(1).

The definition set forth in the United States Code and in *Black's Law Dictionary* is incredibly broad. Nothing in the record before the Racing Commission would indicate that caffeine is a drug given the definition pursuant to 21 U.S.C.A. Section 321(g)(1) and/or *Black's Law Dictionary*.

Because the use of the language in the offending regulation, i.e., “*drug substance, metabolite or analog,*” is so terribly broad, the regulation is palpably arbitrary and capricious and lacks a rational basis. One need only look to the regulations and statutes adopted in our sister states where horse racing is a significant industry, to understand the inadequacy of Section 178-

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<sup>14</sup> It is common knowledge that many substances that are not drugs have a stimulating effect, including, but not limited to, the obvious — sugar.

1-66.5. The states where the legs of the Triple Crown are raced are most important in racing. Their respective regulations are instructive. Because of the Breeders Cup, California is also undoubtedly an important horse racing state. Accordingly, the Johnsons submitted the relevant horse racing regulations for the Commonwealth of Kentucky; State of Maryland; State of New York; and State of California to the Circuit Court for consideration.

As requested in the Circuit Court, the Johnsons respectfully request that this Court take judicial notice of the racing regulations in Kentucky; Maryland; New York; and California, because those regulations clarify how inadequate it is to ban something identified only as being a "*drug substance, its metabolite or analog*" when such words are practically meaningless.

8. Regulations from Four of Our Sister States

This Court may take judicial notice of foreign substance regulations of the sister states that have a rational basis, and which are not "*palpably arbitrary and capricious*" in considering the propriety of West Virginia's "*zero tolerance*" policy. In Exhibits A through D to their Brief in Support of the Appeal in the Circuit Court, the Johnsons provided the racing regulations for Kentucky (A), Maryland (B), New York (C) and California (D). The regulations for these sister states address the circumstance of prohibited substances in horses and testing for such substances. The substances prohibited are defined and specifically identified, while the West Virginia regulation does not even define what a "*drug substance, its metabolite or analog*" is or is not. The regulations in our sister states provide guidance to racing participants about what is and is not permitted in the context of administering substances to the race horses. Moreover, each jurisdiction has promulgated rules which address penalties, alternative penalties and the requirement that the respective authorities consider mitigating and aggravating circumstances in assessing penalties related to a violation of the regulations and/or a positive test result.

a. **The Kentucky Regulations**

The Kentucky Horse Racing Commission promulgated regulations that classify certain drugs into classes that include a “*drug, medication or substance*” as set forth in a detailed schedule. See 810 KAR 1:028, Section 1. Pursuant to the Kentucky Regulations, caffeine is classified as a “*Class B Drug*”. Class B Drugs are defined in pertinent part as:

*Those that may have a legitimate therapeutic indication in the equine athlete but also have a high potential to influence performance based on their presence in Classes 2 or 3 in the Racing Commissioners International Uniform Classification of Foreign Substances .... Potential contaminant substances are included in this category to provide flexibility pending the outcome of an investigation in the origin of the positive test.*

*Kentucky Horse Racing Authority Uniform Drug and Medication Classification Schedule.*

Kentucky Regulation 1:018 prohibits certain practices and proscribes testing procedures that govern all horse racing, and specifically prohibits the following:

*Section 2.*

*(2) Except as otherwise provided in Sections 4, 5, 6, and 8 of this administrative regulation, while participating in a race, a horse shall not carry in its body any drug, medication, substance, or metabolic derivative, that:*

- (a) Is a narcotic;*
- (b) Could serve as an anesthetic or tranquilizer;*
- (c) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse; or*
- (d) Might mask or screen the presence of a prohibited drug, or prevent or delay testing procedures.*

*(3) Therapeutic medications shall not be present in excess of established threshold concentrations set forth in this administrative regulation. . . .*

*(4) A substance shall not be present in a horse in excess of a concentration at which the substance could occur naturally if it affects the performance of the horse. It shall be the responsibility of the commission to prove that the substance was in excess of normal concentration levels and that it affected the performance of the horse.*

810 KAR 1:018, Section 2 (Emphasis added).

Importantly, the Kentucky Regulations require that in a “*positive finding*” not only the presence of a drug, substance, or medication the use of which is prohibited or restricted, but also that the finding be in excess of established concentration levels provided for in the regulations for the finding to be considered positive. 810 KAR 1:018, Section 1 (6)(a). Further, the regulation allows a positive finding for “*substances present in the horse in excess of concentrations at which the substances could occur naturally.*” 810 KAR 1:018, Section 1 (6)(b)(1).

The Regulations require that the “[s]towards and the commission shall consider any mitigating or aggravating circumstances properly presented when assessing penalties pursuant to this administrative regulation.” 810 KAR 1:028, Section 2, (3). With regard to the penalties to be assessed for Class B drug violations, the Kentucky Regulation 810 KAR 1:028, Section 4 provides as follows:

(2) *A licensee who administers, or is a party to or responsible for administering a Class B drug to a horse, in violation of 810 KAR 1:018...shall be subject to the following penalties:*

(a) *For the first offense:*

1. *A suspension or revocation of licensing privileges from zero to sixty (60) days as deemed appropriate by the commission in keeping with the seriousness of the violation and the facts of the case.*

2. *The licensee whose licensing privileges may be suspended or revoked and the commission may enter into an agreement to mitigate the suspension or revocation by agreeing to any or all of the following actions:*

- a. *Payment of a fine of \$500 to \$1,000; or*
- b. *Forfeiture of purse money won.*

Clearly, the Kentucky Regulations require both a positive finding of a prohibited substance at a particular level and contemplate the presentation of mitigating and aggravating circumstances as well as differing penalties depending upon the severity of the infraction. In

new Kentucky legislation since the Johnsons' appeal was filed with this Court, a Kentucky Equine Drug Research Council was created, effective June 26, 2009, whose responsibility includes, inter alia, 1) advising the Kentucky Horse Racing Authority and making recommendations for establishing an effective drug regulatory policy for Kentucky racing and 2) reporting to the General Assembly any needed changes regarding the regulation of drugs in horse racing in the Commonwealth of Kentucky.

**b. The Maryland Regulations**

The Maryland Racing Regulations provide that "*a horse participating in a race may not carry a drug in its body.*" COMAR 09.10.03.04 (C). However, the definitions of the Maryland Racing Regulations state in pertinent part that:

- B(1)(a).... "drug" means a substance:*
  - (i) which does not exist naturally in the untreated horse at a normal physiological concentration;*
  - (ii) Defined as a controlled dangerous substance under Criminal Law Article....;*
  - (iii) Intended to be used for the diagnosis, cure, mitigation, treatment, or prevention of diseases affecting a human or other animal;*
  - (iv) Other than food, intended to affect the structure or a function of the body of a human or other animal.....*
- (b) Except as provided [above], "drug" does not include:*
  - (iii) Caffeine quantitated at less than 100 nanograms per milliliter of blood plasma...*

COMAR 09.10.03.01.

Under the Maryland Racing Regulations, the stewards or judges "*may order*" return of the purse received by the owner of a horse found to have carried a drug in its body during the race, COMAR 09.10.03.04G, and/or the individual may be subject to a fine up to \$2,500, suspension of any license for a period of up to ninety (90) days and referral to the Racing

Commission for additional sanctions if the stewards or judges determine that a greater sanction is warranted than they are empowered to impose, COMAR 09.10.03.02.

**c. The New York Regulations**

The New York Racing Regulation is likewise tiered in approach for positive test results in race horses, providing for different levels of violations and penalties. However, the New York Regulations do not mention caffeine nor is caffeine included in the detailed provision pertaining to "*restricted use of drugs, medications and other substances.*" See New York Racing Regulations Section 4043.2. The definitions provision of the New York Racing Regulations provides that "*drug*" is "*any substance or its metabolites which does not exist naturally in the untreated horse and which can have a pharmacological effect on a horse.*" Section 4043.1(c). Indeed, under the provisions of the New York Racing Regulations, substances that can be used any time up to race time include "*antibiotics, vitamins, electrolytes, and other food supplements as long as they are administered orally and as long as they do not contain any other drug or by their nature exhibit drug-like actions or properties.*" Section 4043.2 (a) (2).

Under the New York Regulations, a horse may be disqualified from a race and from any share of the purse in the event of any violation of the prohibitions of the regulations. Section 4043.5.

**d. The California Regulations**

The California Racing Regulations are the most comprehensive of the sister state regulations referenced by the Johnsons. Under the California Regulations, the finder of fact is tasked with considering the classification of the substance as referenced in the California Horse Racing Board (CHRB) Penalty Categories which is based on the Association of Racing Commissioners International (ARCI) Uniform Classification Guidelines for Foreign Substances.

Section 1843.2. The CHRB classifies caffeine as a “Class 2” substance which includes “*drugs that have a high potential to affect performance, but less of a potential than Class 1*”. The “*penalty class*” for caffeine according to the CHRB is Class B penalty, which means that for the first offense, the trainer could be subject to a minimum 30 day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60 day suspension. In lieu of or in addition to the foregoing Class B penalty for the trainer, there could be a minimum fine of \$500 absent mitigating circumstances with aggravating factors possibly causing the imposition of a maximum fine up to \$10,000. For the owner, the first offense could result in disqualification of the horse and loss of purse.

The California Regulations include in the provision for “*penalties for medication violations*” a requirement that the finder of fact consider any aggravating and mitigating circumstances. Section 1843.3. Specifically, the penalty provisions state that “[*d*]eviation from these penalties is appropriate where the facts of the particular case warrant such a deviation, for example: there may be mitigating circumstances for which a lesser or no penalty is appropriate.” Section 1843.3. Some of the mitigating circumstances and aggravating factors set forth in a non-exhaustive list which **must be considered** by the finder of fact include:

- The past record of the licensee regarding violations;
- The potential of the drug(s) to influence a horse’s racing performance;
- Whether there is reason to believe the responsible party knew of the administration of the drug or intentionally administered the drug;
- The probability of environmental contamination or inadvertent exposure to human drug use or other factors; and
- The purse of the race.

**B. Neither the Stewards Nor the Racing Commission Presented Evidence that Caffeine is a “Drug Substance, Metabolite or Analog” Prohibited Pursuant to 178-1-66.5 (Assignment of Error No. 2)**

Should this Honorable Court decline to follow the lead of the Florida Court by invalidating the subject foreign substance rule, then the Court must reverse the Racing Commission because of the absence of evidence that environmental exposure to caffeine constitutes the presence of a drug in a horse.

The trainer responsibility rule, Section 178-1-32.1, is the only portion of the Rules of Racing that identifies a “*stimulant*” as a banned substance. However, the trainer responsibility rule is not an issue in this case because the Racing Commission set aside and vacated the punishment enacted on trainer Fred Johnson because there was “*no evidence that trainer Fred Johnson or anyone on his behalf administered a banned substance (caffeine) to the horse Eastern Delite.*” Accordingly, any references to a stimulant are not relevant to this appeal.

The Stewards and the Racing Commission had the burden to prove that the substance caffeine was a “*drug substance, its metabolite or analog*” as prohibited by Section 178-1-66.5. The Racing Commission made Findings of Fact and Conclusions of Law required pursuant to the Administrative Procedures Act. This appeal is a *de novo* review on the issues of law and a review of the record below as to the factual conclusions. Because the Racing Commission did not find as a matter of fact that caffeine is a “*drug substance, its metabolite or analog*”, this matter can be readily resolved. Simply stated, if the Racing Commission did not make such a finding, then disqualification pursuant to Section 178-1-66.5 should not have been sustained. Interestingly, in the three (3) page Findings of Fact and Conclusions of Law, the words “*drug*”, “*metabolite*” and “*analog*” do not appear anywhere within the body of the document.

The Racing Commission did not find caffeine to be a "*drug, its metabolite or analog*" because no compelling evidence about caffeine was presented.<sup>15</sup> Chief Steward Danny Wright testified that he thought caffeine was a drug, but Wright was not qualified or offered as an expert witness on the issue of equine pharmacology. The Racing Commission's chemist, Joseph Strug, testified that he found evidence of "*caffeine*" in the drug test that he performed and characterized the substance as a "*drug*". However, Mr. Strug acknowledged that he was not a pharmacologist and his area of his expertise was merely in the scientific process of testing samples of blood and urine to determine what substances might be contained therein. Finally, track veterinarian Dr. Dennis K. Dibbern testified briefly about the "*zero tolerance policy*" and that all "*foreign substances*" were banned, including caffeine, antibiotics and worming medications.

On the other hand, the Johnsons presented the evidence in the form of reports and testimony of world-renowned equine pharmacologist, Dr. Thomas Tobin who identified caffeine as a naturally occurring substance used by humans principally in food and beverages.

A quick review of the ingredients label of almost any beverage and many food products is all one need do to confirm what Dr. Tobin said in his testimony. Caffeine is everywhere. It is ubiquitous and is a natural substance. Given the common perception of what is and what is not a "*drug*", the use of caffeine certainly would not be characterized as drug abuse. Otherwise, coffee drinkers at the local coffee shops in every town in this State would be perceived in a negative light.

Had the Racing Commission adopted regulations similar to those adopted in California, Kentucky, Maryland and New York, it is possible that the classification of a substance could, in fact, be a matter of law. Since the regulation that the Johnsons contend to be unenforceable is so

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<sup>15</sup> While laypersons may know of caffeine, they certainly would not know whether caffeine is a "*drug, its metabolite or analog*." Because government does not regulate caffeine, it is very much analogous to sugar, which also has stimulating properties and is ingested.

broad, whether or not caffeine is a “*drug substance, its metabolites, or analog*” is a question of fact. Likewise, whether or not caffeine is “*foreign to the natural horse*” is a question of fact. The Racing Commission’s Conclusion of Law, therefore, on this issue is clearly erroneous — although no deference is given the Racing Commission with regards to Conclusions of Law.

The Racing Commission, like all tribunals, expresses its conclusions and determinations in the decision published, as is required by the Administrative Procedures Act. See Chapter 29A, Article 5, Section 4. This Honorable Court’s review of the Racing Commission’s decision is based on the record presented and the Order or Decision rendered by the Racing Commission.

The Johnsons respectfully submit that what is and what is not “*foreign to the natural horse*” is a matter of biology and equine pharmacology. In order to provide competent evidence, the Board necessarily would have had to present an expert with appropriate training and experience to offer an opinion to the Racing Commission that caffeine was “*foreign to the natural horse.*” None of the Board’s witnesses did this at the hearing.

**C. Whether The Commission Has Improperly Delegated Rule-Making to the Chemist With Whom the Commission Has Contracted?  
(Assignment of Error No. 3)**

Based on the evidence presented at the hearing on June 17, 2008, it is clear that the West Virginia Racing Commission as not adopted any rules or regulations regarding the following:

1. A list of substances that are permitted to be in the body of a horse;
2. A list of substances that are not permitted to be in the body of a horse;
3. The identity of substances that the laboratory will seek to discover by testing;

4. The identity of substances for which no testing will be conducted (i.e., antibiotics, worming agents, vitamins); and
5. The quantitative parameters for testing.

From the evidence presented at the June 17, 2008 hearing, it is clear that Delare Associates, the Racing Commission's testing laboratory, decides what substances the chemist will seek to detect, and at what levels. This is undisputed. This is an improper abdication of the Racing Commission's authority to regulate racing as Delare Associates is not empowered to determine what tests should be run and the testing levels related thereto. *See West Virginia Code Section 19-23-6(3) and Lovas v. Consolidation Coal Co.*, WestLaw 2618925 (W.Va. May 23, 2008).

West Virginia law generally states that a legislature may delegate broad discretion to an agency or municipality for rulemaking as long as the legislature sets forth guidelines or standards to guide the agency or municipality in the exercise of its judgment or discretion in a limited area. *See e.g. State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636 (1969). This is true even when a public corporation is formed by legislative act to make broad discretionary decisions. *See id.* However, there are no West Virginia cases in which an agency or municipality improperly delegated rulemaking to a third party. Therefore, this is an issue of first impression in West Virginia.

Other jurisdictions recognize the peril associated with the delegation of statutory responsibility to private parties. Federal courts uniformly hold that an agency may not delegate its public duties to private entities. *See e.g. Sierra Club v. Sigler*, 695 F.2d 957 (5<sup>th</sup> Cir. 1983)(holding that Army Corps of Engineers did not have statutory authority to delegate preparation of environmental impact statements to private parties). "*Agencies may seek advice*

and policy recommendations from outside parties, but they may not 'rubber-stamp' decisions made by others under the guise of seeking 'advice.'" *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2<sup>nd</sup> Cir. 2008). Federal courts recognize the important distinction between subdelegation to a subordinate and subdelegation to an outside party. See *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) (holding that subdelegation to outside parties are assumed to be improper absent an affirmative showing of congressional authorization). The distinction exists because "[w]hen an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency." *Id.* at 565. However, delegation to a private party blurs the lines of accountability, "undermining an important democratic check on government decision making." *Id.*

An example of an impermissible delegation of authority is seen in *High County Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235 (D.Col. 2006), in which the National Park Service delegated a large degree of authority to the State of Colorado to decide water use within the Black Canyon National Park. The court held that the delegation was not authorized by statute; therefore, the National Park Service had sole authority to protect the park, and the state could not be delegated a portion of the responsibility.

Other states follow suit. For example, Texas courts hold that "[w]here a statute entrusts specified functions to a commission, the legislature presumably intends that only that commission will exercise the delegated functions, and the commission may not subdelegate assigned functions to its employees, as to do so would mean that the commission acted outside of its statutory authority, and its employees' actions would be invalid for want of authority." *Schade v. Texas Workers' Compensation Com'n*, 150 S.W.3d 542 (Tex.App. 2004). Likewise, Michigan courts hold that, "[i]t is well settled that an administrative agency may not subdelegate

*the exercise of discretionary acts unless the Legislature expressly grants it authority to do so.”* *Detroit Edison Co. v. Corporation & Securities Comm.*, 105 N.W.2d 110 (Mich. 1960). New Jersey also recognizes that the “[p]ower or duty delegated by statute to administrative agency cannot be subdelegated in absence of any indication that Legislature so intends, especially when the agency attempts to subdelegate to a private person or entity, since such person or entity is not subject to public accountability.” *Application of North Jersey Dist. Water Supply Commission*, 417 A.2d 1095 (N.J.Super.App. 1980).

West Virginia recognizes the “*Chevron doctrine*,” in which agency decision making is granted substantial deference in absence of express direction from the legislature on how to implement the delegated authority. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). “*Thus, an agency's interpretation will stand unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'*” *Appalachian Power Co. v. State Tax Dep. of West Virginia*, 195 W.Va. 573, 589 (1995). However, *U.S. Telecom Ass'n* points out that agency authority does not include the power to subdelegate beyond subordinates. Therefore, deference should not be given when a power does not exist. *See U.S. Telecom Ass'n* at 566. In other words, statutory silence does not “*create a statutory ambiguity of the sort that triggers Chevron deference.*” *Id.* The Supreme Court of Appeals of West Virginia echoed this sentiment in *Appalachian Power* when it stated that, “*our commitment to agency discretion does not authorize the agency to exceed its authority.*” *See Appalachian Power* at 589, n.19.

## V. CONCLUSION

The Johnsons stand to lose nearly \$300,000 in purse money because their horse, Eastern Delite, was contaminated with caffeine sometime prior to the running of the 2007 West Virginia Breeders Classic. The Johnsons have been exemplary participants and role models in the horse

racing industry for more than twenty-five (25) years and have not previously had even a single racing violation during their long racing career.

The law must always be fair. It is fundamentally unfair for a horse racing regulation to result in disqualification when the microscopic amount of caffeine in Eastern Delite's body was equivalent to a teaspoon of a cup of coffee. The circumstantial evidence clearly indicates that the source of that caffeine was most likely a spilled caffeinated beverage in the receiving barn on the day of the race.

This Honorable Court, as with all courts, may apply common sense to the facts and circumstances. While the science is undisputed that Eastern Delite ingested the equivalent of a teaspoon of coffee, the human equivalent would be by 1/7<sup>th</sup> of that measurement. No human being would be impacted, in any respect, after ingesting 1/7<sup>th</sup> of a teaspoon of coffee. The science is likewise undisputed that the teaspoon equivalent of caffeine in Eastern Delite had the same impact on the horse's speed during the running of the Classic as 1/7<sup>th</sup> of a teaspoon of coffee would have on any member of this Honorable Court — absolutely none.

Caffeine had no effect on Eastern Delite's performance during the running of the Classic. The Johnsons did not unlawfully knowingly administer a banned substance to their horse. Eastern Delite is a remarkable equine athlete who bested the horse who ran second in the Classic a second time just weeks later as confirmed at the Stewards' hearing.

Perhaps sixty years ago, it would have been difficult to determine which substances have an impact on horses and which substances do not. That time has come and gone. Equine pharmacology and veterinary chemistry allow for a more exacting view as evident from the regulations in Kentucky, Maryland, New York and California, which would have allowed a different result than in West Virginia. The purpose behind the regulations is fairness. The

purpose is to make sure that the betting public is not cheated. The regulations should also be fair to good, hard-working horsemen such as the Johnsons.

The West Virginia Racing Commission once had a regulatory scheme that was fair, because it required an unfair advantage or “*impact of the speed of a horse in a race*” in order to result in disqualification. The so-called zero tolerance policy does not make racing more fair — it just makes testing arbitrary and capricious. Dr. Dennis Dibbern said it best in his testimony before the Racing Commission. Dibbern noted that he too often wondered who was making the decision about what to test for and at what detection levels. This discretion cannot be properly delegated to Delare Associates.

The Johnsons respectfully assert that, as a matter of equine pharmacology, caffeine equivalent to a teaspoon of a cup of coffee had absolutely no affect on the performance of their horse in the Classic. The Johnsons respectfully assert that West Virginia’s foreign substance rule as embodied in 178-1-66.5 is unconstitutionally infirm for the reasons that the Florida Supreme Court invalidated a nearly identical rule in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff’d Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981).

#### **VI. RELIEF SOUGHT AND REQUEST FOR ORAL ARGUMENT**

Fred and Sharon Johnson respectfully request that the Circuit Court’s March 11, 2009 Order affirming the Racing Commission be reversed; that this Honorable Court provide the racing industry and the Racing Commission with guidance regarding arbitrary and capricious regulations; and that Eastern Delite be restored its victory and purse in relation to the Classic.

Fred and Sharon Johnson respectfully request to be heard orally by this Honorable Court on the issues raised in this Brief.

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CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

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Item Served: Brief of Appellants



James P. Campbell

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