

*Under Government Code Section 11517, the CHRB is required to make public any proposed decision by a Hearing Officer 30 days after it is received or immediately after the Board acts on the matter, whichever comes first. The CHRB approved the proposed decision of Hearing Officer Steffan Imhoff on May 24. Now that the Board has provided a copy of its decision to the attorney for Doug O’Neill, as required by Section 11517, the Board is obligated to make this document public, as follows:*

**BEFORE THE HORSE RACING BOARD**

**STATE OF CALIFORNIA**

In the Matter of the

**Accusation Against:**

**Douglas O'Neill**

**CHRB Case No. 10DM041**

**DECISION**

The attached Proposed Decision is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on May 29, 2012.

IT IS SO ORDERED ON May 24, 2012.

CALIFORNIA HORSE RACING BOARD  
Keith Brackpool, Chairman



Kirk E. Breed  
Executive Director

**DECLARATION OF SERVICE BY CERTIFIED AND FIRST CLASS**

Complaint: **In the Matter of the Accusation Against:  
Douglas O'Neill  
CHRB License #112723**

Case No.: **California Horse Racing Board Case Number 10DM041**

I declare: I am employed by the California Horse Racing Board, I am 18 years of age or older and not a party to this matter; my business address is 1010 Hurley Way, Suite 300, Sacramento, CA 95825. On **May 29, 2012**, I served the attached **Decision and Proposed Decision**, by placing a true copy thereof enclosed in a sealed envelope as certified mail with postage thereon fully prepaid and return receipt requested, and another copy of the **Decision and Proposed Decision**, in a second sealed envelope as first class mail with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

Law Office of Michael A. Weinbaum  
Michael A. Weinbaum, Esq.  
115 Avenida Miramar  
San Clemente, CA 92672  
**Certified Mailing No.**  
7011 3500 0002 3047 1848

Douglas O'Neill  
2307 Ocean Park Drive #1000  
Santa Monica, CA 90405  
**Certified Mailing No**  
7011 3500 0002 3047 1831

On **May 29, 2012**, I served the attached **Decision and Proposed Decision**, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Hearing Officer Steffan Imhoff  
Jerry Mosley, SDAG  
CHRB-4  
BOS -4

ARCI

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this Declaration was executed on **May 29, 2012**, at Sacramento, California.

RITA L. BAKER  
Declarant

Rita J. Baker  
Signature

**BEFORE THE  
CALIFORNIA HORSE RACING BOARD  
STATE OF CALIFORNIA**

**In the Matter of the** )  
**Accusation Against:** ) **CHRB Case No. 10DM041**  
)  
**Douglas O'Neill** )  
)  
\_\_\_\_\_ )

**PROPOSED DECISION**

On December 09, 2010 the California Horse Racing Board (CHRB) filed an Accusation against licensed trainer Douglas O'Neill. The Accusation alleges, in relevant part, that Argenta, a Filly trained by O'Neill, ran on August 25, 2010 at the Del Mar Racetrack with a 39.4 mm/l TCO2 (Total Carbon Dioxide) level in her bloodstream in violation of Rule 1843.6.

Evidence on this Accusation was heard by Steffan Imhoff, a Hearing Officer/Appellate Judge appointed under California Code of Regulations, title 4, section 19517.5(a) by the CHRB. Hearings on the Accusation were held at Del Mar, California, on August 9<sup>th</sup>, September 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> & 19<sup>th</sup>, and October 3<sup>rd</sup> & 5<sup>th</sup> at the Executive Office, 2<sup>nd</sup> Floor, of the Del Mar Thoroughbred Club.

Supervising Deputy Attorney General Jerald Mosley represented the CHRB. Micheal Weibaum & David Wiechert of the Law Offices of Weinbaum & Wiechert, San Clemente, CA. represented Respondent Douglas O'Neill.

The proceedings were transcribed by Barbara Weinstein, Hearing Reporter. Alexandra DeKoster acted as Court Clerk.

The Accusation was submitted for decision on March 30, 2012.

## INTRODUCTION

**Milkshaking:** When you combine baking soda, confectionary sugar and water you produce a concoction that has the look of a milkshake. This milkshake is sometimes given to a race horse in an attempt to manipulate the horses' TCO<sub>2</sub> (Total Carbon Dioxide) levels. This compound was previously administered by nasal tubing but more recently it has been fashionable to administer it orally. The theory is that by raising the TCO<sub>2</sub> level you can reduce the build-up of lactic-acid that occurs during a race. In essence the build-up of lactic acid that causes muscle fatigue is neutralized and performance is enhanced. Whether performance is actually enhanced is the subject of debate, with the Board taking the position that elevated TCO<sub>2</sub> is a performance enhancer and O'Neill arguing that this proposition is unproven.

In any event the Board felt that this practice was not in the best interest of racing and was determined to stop it. Complicating that effort was the fact that TCO<sub>2</sub> occurs naturally in a horse's bloodstream because it is part of the systems that controls the acid/base balance in the blood. The challenge was to find a level of TCO<sub>2</sub> that demonstrated manipulation without implicating non-manipulated horses that had a naturally high TCO<sub>2</sub> level.

Based on an agreement between the TOC (Thoroughbred Owners of California), the CTT (California Thoroughbred Trainers), Del Mar Race Track and Oak Tree at Santa Anita, data was gathered on the pre-race TCO<sub>2</sub> level on every horse that raced during a specified time. Subsequently the CHRB held public hearings and using this data, as well as scientific evidence presented at these hearings, a regulation was adopted in 2005 that prohibited TCO<sub>2</sub> levels above 37.0 millimoles per liter (mm/l) (Rule 1843.6). TCO<sub>2</sub> levels above that number were classified as a Class III drug violation. Significantly Rule 1843.6 did not specifically prohibit TCO<sub>2</sub> manipulation per se, but rather it attempted to eliminate the practice by setting a maximum allowable TCO<sub>2</sub> level at 37.0 mm/l. TCO<sub>2</sub> readings above that level were assumed to be caused by trainer manipulation.

It is uncontested that Lasix, an anti-bleeding medication that most California race horses run on, raises TCO<sub>2</sub> levels. This is called the "Lasix Bump." Some jurisdictions impose a two tier system where the few non Lasix horses are limited to 37.0 mm/l and

Lasix horses are allowed up to 39.0 mm/l of TCO<sub>2</sub>. The Board has chosen not to adopt this two tier system.

O'Neill presented expert testimony that the 37.0 mm/l limit, particularly without accounting for the "Lasix Bump," renders Rule 1843.6 irrational and thus violates his right to due process. The AG rejects this contention and argues that the Board did consider the "Lasix Bump" in adopting the rule. In addition they offered their own expert testimony that the 37.0 mm/l level does separate those horses that have been alkalized by something other than Lasix from those horses that have not been manipulated. Thus the AG contends that Rule 1843.6 is a rational exercise of a Legislative prerogative that complies with due process and should be upheld.

Respondent further argues that he has presented overwhelming evidence that he did not milkshake Argenta, the Filly at issue in this case. To uphold this Accusation when he is innocent of any intentional wrongdoing would also be a due process violation.

Conversely, the AG contends that overwhelming evidence was presented that Argenta's TCO<sub>2</sub> levels were manipulated by O'Neill and that therefore he should be held to account for his misconduct whether it be intentional or negligent.

Resolving these Factual and Constitutional Claims are the principle tasks of this Proposed Decision.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I. THE RACE**

On August 25<sup>th</sup>, 2010, Argenta, a four year-old Filly trained by Respondent Douglas O'Neill, a licensed trainer (Lic. No. 112723) ran in the 6<sup>th</sup> race at Del Mar racetrack. She was ridden by jockey Kerwin John. The conditions were a \$10,500 to \$12,500 claiming race for Thoroughbred Fillies and Mares, 3 year olds and upward, who were non-winners of two races lifetime. The race was run at six and half furlongs on the all-weather track. Argenta finished a bad eighth coming into the lane three wide with no rally and only beating three rivals home. She earned a \$400 "appearance fee" for finishing 8<sup>th</sup>.

## II. DEFINITIONS

- (1) **TCO<sub>2</sub>:** The total concentrations of all forms of carbon dioxide (total Carbon Dioxide) in the sample including bicarbonate and carbonate as well as dissolved CO<sub>2</sub>. The TCO<sub>2</sub> of the plasma or serum is used for regulatory purposes. The dissolved carbon dioxide is only a small fraction (about 3% of the total carbon dioxide).
- (2) **Total CO<sub>2</sub> Analyzer:** A TCO<sub>2</sub> analyzer adds acid to the plasma or serum sample thereby converting all the carbonate, bicarbonate and carbonic acid to water and CO<sub>2</sub>. The concentration of CO<sub>2</sub> that is measured represents the total concentration of available CO<sub>2</sub> in the sample TCO<sub>2</sub>.
- (3) **Measurement Uncertainty (MU):** The measurement uncertainty is a value (with units of concentration) that is determined experimentally and characterizes the variability of the analytical process. The measurement uncertainty is used to eliminate all reasonable variability originating from the measurement process. The measurement uncertainty is a property of the method and is therefore unique to each laboratory unless measures have been taken to standardize methods between laboratories.
- (4) **Regulatory Threshold:** The threshold is the maximum permitted concentration of TCO<sub>2</sub> that has been established by the regulatory body. The 37 mm/l regulatory threshold for TCO<sub>2</sub> is a statistically based threshold designed to identify a state of metabolic alkalosis in horses. Most racing regulators in the U.S. apply a threshold of 37 mm of total carbon dioxide per liter of plasma/serum. The decision level for the regulation of TCO<sub>2</sub> is 37 mm/l plus the measurement uncertainty.
- (5) **Decision Level:** The regulatory threshold including the measurement uncertainty is the decision level. For TCO<sub>2</sub> the decision level is the regulatory threshold level plus the measurement uncertainty for the laboratory providing the testing.

### III. THE STIPULATION

The TCO<sub>2</sub> testing of Argenta was covered by a stipulation between the parties, and the facts will be taken by the Court as true. The stipulation, in relevant part, provides:

- (1) On August 25, 2010 the Del Mar Thoroughbred Club, in Del Mar, California, conducted a licensed thoroughbred race meeting. The horse Argenta was regularly entered in the 6<sup>th</sup> race of that meeting.
- (2) On August 25, 2010, respondent O'Neill was the trainer of Argenta.
- (3) At all relevant times herein O'Neill has held a license as a trainer issued by the Board (License Number 112723).
- (4) At an appropriate time within approximately 40 minutes before the 6<sup>th</sup> race at Del Mar on August 25, 2010, a blood sample was taken from Argenta and labeled sample number TC 222699L.
- (5) The University of California, Maddy Analytical Laboratory (Maddy Lab), the official testing laboratory for the California Horse Racing Board, tested sample number TC 222699L and reported the sample to contain 39.4 mm/l of TCO<sub>2</sub>.
- (6) On September 4<sup>th</sup>, 2010 James Hamilton, investigator for the Board, personally notified O'Neill of the positive test.
- (7) On September 5<sup>th</sup>, 2010, James Hamilton, investigator for the Board, appropriately and timely mailed written notifications of the high positive test to the owners of Argenta.
- (8) On December 15<sup>th</sup>, 2010, James Hamilton, investigator for the Board, personally served on O'Neill the Accusation in this matter with its accompanying Statement to Respondent, Notice of Defense (2 copies), a copy of Government Code Sections 11507.5, 11597.6, and 11507.7 and a Request for Discovery in Support of Accusation.

Respondent O'Neill has denied the allegations in the Accusation.

#### **IV. PROCEDURAL BACKGROUND**

**Complaint:** The following Complaint against O'Neill (No. 10DM041) alleging a violation of Rules 1843(a), 1843.6(d)(1)(2) and 1887(a) on August 25, 2010 was filed on September 3, 2010 :

**THE OFFICIAL BLOOD SAMPLE #TC 222699L TAKEN ON AUGUST 25, 2010 AT DEL MAR THOROUGHBRED CLUB WAS REPORTED BY SCOTT STANLEY OF U.C. DAVIS LABORATORIES TO CONTAIN 39.4 MILLIMOLES PER LITER OF TOTAL CARBON DIOXIDE (TCO<sub>2</sub>). THIS PRE RACE BLOOD SAMPLE WAS OBTAINED FROM THE HORSE "ARGENTA" WHICH RAN IN THE 6<sup>TH</sup> RACE AT DEL MAR FINISHING OUT OF THE MONEY. THE TRAINER OF RECORD IS DOUGLAS O'NEILL.**

- (1) **Federal Court:** O'Neill's Federal action against the CHRB was voluntarily dismissed by the 9<sup>th</sup> Circuit under Federal Rule of Appellate Procedure 42(b) on November 3, 2011 (No. 55776).
- (2) **Accusation:** The Accusation in this case (CHRB Case No. 10 DM041) was filed December 9, 2010. It contained essentially the same charges as the Complaint. O'Neill has denied the charge that he violated CHRB's TCO<sub>2</sub> Rule (1843.6) and the related charges.
- (3) **Trial Date:** The trial on this matter began on September 14, 2011 and also was heard on September 15<sup>th</sup>, 16<sup>th</sup> and 19<sup>th</sup> as well as October 3<sup>rd</sup> and 5<sup>th</sup> 2011. All hearings were before Hearing Officer Steffan Imhoff at the Executive Offices of the Del Mar Thoroughbred Club. Prior to the start of the trial the court considered discovery motions:
- (4) **Discovery Motions:** Both sides brought pretrial discovery motions which were heard on August 9<sup>th</sup>, 2011. Most issues were resolved prior to trial. Some of the Exhibits were examined for privilege by the Court and a few remain under seal. None of the discovery rulings have been challenged in the written briefs and the court sees no reason to change or modify those rulings.

- (5) **Exhibits:** Both the Board and the Respondent filed numerous exhibits. Only a few objections to the Exhibits were lodged. The Boards Exhibits A-Z, aa-dd and P1 were admitted, Respondents Exhibits 1-35, 38-44 and P2-P7 were also admitted. In his post-trial brief O'Neill moves to exclude the Board's Exhibits O, Z, BB and P1. The Court has already ruled that these exhibits and the companion testimony are not admissible to show bad character, Evidence Code Sec. 1101(a). We reiterate that ruling. Nevertheless the evidence and testimony are admissible to show intent, Evidence Code Sec. 1101(b) and Government Code Sec. 11513(c).
- (6) **Briefing:** Simultaneous Opening Briefs were filed on February 1, 2012. Simultaneous Closing Briefs were filed on or about March 30, 2012.
- (7) **Penalty:** The Penalty Phase was litigated by Declarations which were filed by the parties on or about November 21, 2011 (Exhibits P1-P7). Both sides agreed to waive the right to Hearsay Objections and Cross Examination of the Declarants.

## V. EVIDENCE OF PRIMA FACIE CASE

- (1) **Trainer of Record:** Respondent Doug O'Neil, trainer Lic. No. 112723, was at all relevant times the trainer of record for the 4 year Filly Argenta.
- (2) **Del Mar Race:** Argenta ran in the 6th race at Del Mar on August 25, 2010. She finished 8<sup>th</sup> beaten some 8 lengths in a claiming race run at Sixth and One Half Furlongs on the all weather track. Doug O'Neill was Argenta's trainer for the race.
- (3) **Testing Her Blood:** A sample of Argenta's blood was drawn at the Del Mar receiving barn at approximately 40 minutes before the 6<sup>th</sup> race. The sample was designated as number TC 222699L and sent to U.C. Davis for processing and testing for TCO2.
- (4) **Chain of Custody and Identity of Sample:** Respondent has not questioned the chain of custody of sample number TC 222699L and we find there is no chain of custody issue.
- (5) **Results of Testing by the Maddy Lab of Argenta's Blood for TCO2:** The Maddy Lab tested sample number TC 222699L and reported the sample to

contain 39.4 mm/l of TCO<sub>2</sub>. As we shall explain below O'Neill's challenge to this 39.4 number is rejected.

- (6) **Prima Facie Case:** The effect of the parties' stipulation was to establish a *prima facie* case proving the Accusation under the Trainer Insurer Rule.
- (7) **TCO<sub>2</sub> Rule:** Rule 1843.6 the "Total Carbon Dioxide Testing Rule" provides that "TCO<sub>2</sub> levels in the blood serum or plasma shall not exceed 37.0 mm/l of serum or plasma."
- (8) **"Trainer Insurer Rule":** The "Trainer Insurer" rule states that the trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties.... If the chemical or other analysis of ...blood test samples....prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his...license suspended or revoked, or be ruled off (Rule 1887).

Here the Board has proven all the elements necessary to make out a *prima facie* violation of Rules 1887 and 1843.6 as alleged in the Accusation. We reject O'Neill alternative reading of Rule 1887 that would limit the trainer insurer rule to acts of 3<sup>rd</sup> parties. Rules 1843.6 and 1887 specifically makes the trainers responsible for their horses TCO<sub>2</sub> overage. We agree with the California Supreme Court as to the basic validity of Rule 1887, *Sandstrom v. California Horse Racing Bd.* ( 1948) 31 Cal.2d 401), and reject Respondent's challenge to that case. In any event, as a court of inferior jurisdiction we are required to follow *Sandstrom*.

"Under the doctrine of *stare decisis* all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction," *Auto Equity Sales v Superior Court* (1962), 57 Cal2d 450,456.

- (9) **Conclusion:** We find that the Filly, Argenta, trained by Doug O'Neill, ran in the 6<sup>th</sup> race at the Del Mar Racetrack on August 25, 2010 with an excessive amount of TCO<sub>2</sub> in her system (39.4 mm/l). Nothing further is necessary to establish a *prima facie* case under Rules 1843.6 and 1887. Therefore the burden has now shifted to Respondent to prove his Due Process Defense by a preponderance of the evidence (Evidence Code Sec. 602, Rule 1764).

## VI. RESPONDENT DEFENSES

### (1) Due Process Defense – Unconstitutional on its Face

#### A) A Short History of Due Process

Initially English common law did not provide for any restraints on the power of the King. In 1215 a group of noblemen forced King Henry III to sign the Magna Carta, and for the first time a sovereign's power was restricted by law. When the United States Constitution was being formulated it was the Due Process clause that the founders relied on to protect the citizenry against government tyranny. However it was unclear whether the Due Process clause would be a substantive protection or a procedural one. The Supreme Court answered that question in the *Dred Scott* case, a due process challenge to The Missouri Compromise of 1820. This federal law abolished slavery in the American Territories. The Supreme Court, in what is widely considered the Court's worst opinion, held that slave owners had a due process right to own slaves and because the Missouri Compromise restricted that right it was struck down. *Dred Scott v Sanford*, 60 U.S. 393 (1856).

The first modern formulations of Due Process were put forth by Justice Stephen Fields in his dissent in the *Slaughter House Cases* 83 U.S. 36 (1873). He argued for a broad interpretation of the 14<sup>th</sup> Amendment. In his view the Constitution protects all of the fundamental rights and liberties of all citizens against state, as well as federal interference.

In more recent times the protection of the due process clause has divided into two branches. One branch involved restrictions on the behavior of the police. Thus in *Rochin v. California* 342 U.S. 165 (1952) the Supreme Court held that the involuntary pumping of a suspect's stomach to obtain evidence "shocked the conscious and violated the decencies of civilized conduct." This behavior offended the due process clause.

The other due process consideration, which is more germane to our inquiry, had to do with evaluating the validity of state legislation. In *Griswold v. Connecticut* 381 U.S. 479 (1965) the US Supreme Court held that due process created a confluence of Bill of Rights protections that resulted in a penumbra cloaking the citizen in a zone of privacy in their home. Thus a state statute prohibiting the use of

contraception among a married couple in their own home was struck it down (see also *Perry v. Brown* No.11-16577 (9<sup>th</sup> Cir. 2012)).

The Attorney General has pointed out that the present standard for evaluating a due process challenge is the “rational basis test.” A law is **Constitutional if it is rationally related to a proper legislative goal**, *Buhl v Hannigan* (1993) 16 CA 1612, 1619. Respondent agrees that a law must be found to be irrational before it may be found to be Unconstitutional. Furthermore the law will be upheld even if it is unwise and results in some inequality. Those challenging the constitutionality of a law must carry the heavy burden of negating every conceivable basis which might support the law even if not found in the record, *Heller v Doe by Doe* (1993) 509 U.S. 509 U.S.312,320-321.

#### **B) The Legitimate Goals of Rule 1843.6**

We find in this case that Rule 1843.6 has legitimate goals which are enumerated in Rule 1843 and include (1) protecting the integrity of horse racing, (2) guarding the health of the horse and (3) safeguarding the safety of the horse racing participants. We also find the more specific concerns are (1) the unfair advantage enjoyed by a horse with an elevated TCO2 level, (2) the public perception of such advantage and (3) the deleterious effect of that perception on the gaming industry. These are also held to be legitimate state interests.

#### **C) Adoption of TCO2 Rule**

##### **i. Argument:**

Respondent argues that the Board by failing to account for the Lasix Bump and failing to provide a TCO2 quarantine barn made 1843.6 irrational on its face. This is true the argument goes, even if the law had a legitimate social goal. In fact, O’Neill concedes that the TCO2 Rule does have a legitimate goal. We will now consider Respondent’s argument.

##### **ii. TCO2 Effect:**

In 2005 the Board held hearings concerning the proposed adoption of a rule that would impose a limit on the amount of TCO2 allowed in a horse’s blood or plasma on race day. The testimony made it clear that such a rule was necessary. There was, in the first instance, evidence that elevated TCO2 enhanced

performance. Both Dr. Arthur and Dr. Stanly testified to their studies which indicated that TCO2 levels above 37.0 mm/l could result in an improved effort. Dr. Foreman testified in this case that previously it was thought that this elevated TCO2 effect would only manifest itself after 2 minutes of strenuous exercise. It was now believed that the effect could kick in much sooner. This is significant because very few Thoroughbred races last over 2 minutes. We agree that there is sufficient evidence for the Board to conclude that elevated TCO2 is a performance enhancer for race horses and that reducing TCO2 enhancement is an important goal for regulators.

iii. **37.0mm/l TCO2 Maximum:**

As to the adoption of 37.0mm/l as the maximum allowable amount there were several reasons. Dr. Rick Sams from Ohio testified as to the success they enjoyed using that limit for several years. The Ohio trainers had no trouble adapting to their Rule. The Board also considered the Rohr study of Standardbred in Australia. Rohr reported that prior to a TCO2 rule being adopted about 17.7% of the horses were exceeding the 37.0mm/l maximum. After the rule went into effect the number of overages went down to zero. A similar result was reported by Dr. Arthur concerning the TCO2 tests being done at Del Mar and Oak Tree at Santa Anita. Prior to a rule being adopted about 20% of the race horses were coming in with TCO2 readings above 37.0mm/l. After a rule was adopted the overages went down to almost zero. In addition, a recent Australian study (Vine paper) calculates that the chance of a non-manipulated horse exceeding 37.0mm/l is one in 2,020,000.

In spite of these daunting statistics O'Neill argues that the 37.0mm/l ceiling is irrational because it fails to take into account the Lasix Bump. It is well known the Lasix raises a horses TCO2 level but it remains unclear how much this "Bump" is and whether or not the effect depends on the dosage. A fair reading of Dr. Arthur's testimony before the Board shows that the Board was cognizant of the Lasix issue yet it chooses to adopt a one tier rather than a two tier system. We are aware of no requirement that a legislative body must respond to every perceived flaw in a law. Disagreeing with the Board's approach does not make the

TCO2 Rule irrational. Especially when the statistical evidence, cited above, overwhelmingly supports the 37.0mm/l limit.

O'Neill presents studies by Dr. Waller that show a natural fluctuation of TCO2 levels including measurements above the 37.0mm/l limit. These tests show that variations in exercise, time of day, type of feed, electrolytes or dehydration can result in TCO2 overages. Dr. Waller did a number of tests with 16 horses to see if she could quantify these factors. It was her conclusion that just through natural fluctuation that 9.85% of the time these horses, without being manipulated, would exceed the 37.0mm/l TCO2 threshold. In other words almost 10% of the time you would get a TCO2 false positive.

Dr. Waller was neither a Veterinarian nor did she have experience with regulatory medicine. However Professor Foreman is a Veterinarian and is very well qualified in Equine Regulations. He testified in support of Dr. Waller's work. The problem is that neither witness was willing to apply these results to California racing. The reason is obvious. The numbers just don't work. In the last four years the Maddy Lab has tested approximately 115,000 blood samples for TCO2 content. If Dr. Waller's numbers were applicable to California Racing than we would have had 11,327 TCO2 positives (115,000 x 9.85%). In fact we have only had **four**. We do not know if these were 4 false positives or 4 horses that had been manipulated. We do know that TCO2 scores above 37.0mm/l have become extraordinarily rare events in California. Most importantly there has been no explanation for this gross disparity.

In fact there are additional reasons to believe that Dr. Waller's TCO2 numbers are not accurate. There was evidence that Dr. Waller's Nova Instrument scored higher and was less reliable than the Beckman used at the Maddy Lab. The Nova had no internal calibration which affected its accuracy. Also there was no evidence that Dr. Waller applied a measure of uncertainty. That would have produced higher numbers and inaccurate predictions of Lasix induced TCO2 overages.

At least 95% of Thoroughbreds in California run on Lasix. So one wonders where are all of these TCO2 cases that are being bumped over the limit by Lasix.

For example, Dr. Waller uses an average TCO2 of 33.4mm/l for an un-manipulated horse. Dr. Kline, in a paper submitted by Respondent, claims that the Lasix bump is 4.9mm/l. This equals an average TCO2 reading of 38.3mm/l. This means that virtually every race horse in California should be earning a TCO2 positive. Instead it is more like .0001%.

We conclude that Dr. Waller's studies are not transferable to California Racing and that Lasix is not producing false positives.

**iv. Conclusion – Lasix Bump:**

**We find that the Board's Decision to not allow a special provision in the TCO2 Rule (1843.6) for Lasix does not render that Rule Irrational or Unconstitutional on its face.**

O'Neill's additional argument that the Board's failure to provide a TCO2 Detention Barn results in an illogical and Unconstitutional Rule is easily disposed of. The desirability of such a facility is open to debate and has not been uniformly adopted. The information concerning Detention Barns in other states is fragmentary and unreliable. We do not have evidence on barn security or a measure of uncertainty or type of instrument used in calculating the TCO2 figures. Nor do we have statistics on the number of horses tested for TCO2 or the number of horses that ultimately failed the TCO2 test. In addition most of the data provided is non-expert opinion hearsay.

**v. Conclusion – Detention Barn:**

**We find that the Board's decision to not include a Detention Barn provision in their TCO2 Rule (1843.6) was not illogical or irrational.**

**vi. Board Adopting Rule 1843.6:**

**Furthermore nothing that was presented convinced the Court that Rule 1843.6 is Irrational or Unconstitutional on its face. We therefor reject O'Neill's argument that the TCO2 Rule should be set aside in its entirety.**

## VII. DUE PROCESS AS APPLIED TO O'NEILL IN THIS CASE

### (1) O'Neill's Evidence on Milkshaking:

O'Neill argues that he has established that Argenta was not milkshaked before she ran in the August 25, 2008 race at Del Mar. He urges that the purpose of Rule 1843.6 is to prevent milkshaking. It would be irrational, argues the Respondent, to hold that he had violated the TCO2 Rule if he proved that she had not been milkshaked. If the legislation was irrational it would be a violation of the Respondent's due process rights (*Buhl v Hannigan*, supra 6 Cal App.4<sup>th</sup> 1612). Without ruling on the correctness of the legal argument we turn to the factual issue of who has proved what concerning milkshaking.

In pressing his point Respondent relied on his expert witnesses Dr. Waller and Professor Foreman. The Board relied on the expert testimony of its Equine Medical Director, Rick Arthur and Dr. Scott Stanley, director of the Maddy Lab at UC Davis.

In this case there is no direct evidence, no eye witnesses or videotapes of a milkshake being consumed by or forced on Argenta. Any evidence on this point must necessarily be circumstantial.

Respondent offers several theories as to how Argenta could have achieved a 39.4mm/l TCO2 without her having been manipulated however we need only consider one issue at this time. That issue concerns the recorded levels at the Maddy Lab for the day in question.

#### A) TCO2 Test at the Maddy Lab

We start with Dr. Stanley's testimony concerning the analysis of Argenta's blood sample. Dr. Stanley supervises all TCO2 testing at the Maddy Lab including the analysis of Argenta's blood sample TC222699 from August 25, 2010 which was tested on August 27, 2010. The process begins with the instruments being calibrated. Then a value is measured and recorded twice for each blind sample. Those values are reduced by 2.1 the level of uncertainty for this test. After this reduction Argenta had an average value of 41.55.

All scores over 36.0mm/l TCO2 are considered a "failing" score and are readied for confirmation. Before undertaking the confirmation test the instrument is recalibrated and determined to be accurate, Argenta's sample at 41.55mm/l exceeds

the 36.0mm/l score that divides a passing number from a failing number. Therefore her sample was then divided into 4 parts and each part was tested twice for a total of 8 values. Each value has the 2.1 level of uncertainty deducted. The raw values were 41.2, 41.4, 40.8, 41.7, 41.8, 41.7, 41.8 & 42.2. After correction for measure of uncertainty the scores were 39.10, 39.00, 38.70, 39.60, 39.70, 39.60, 39.70 & 40.10. All of these scores must exceed 37.0 to have a failed test. They do. The average, rounded off score of 39.44mm/l was then reported to the CHRB as a TCO2 overage for sample TC 222699.

We recognize that O'Neill has challenged the reliability of this 39.44mm/l score. The crux of his argument is that because the average screening score for Del Mar that day were the 2<sup>nd</sup> highest for the year that this invalidates the TCO2 tests for that day. It is true that the average TCO2 score on August 25, 2010 at Del Mar was 33.46mm/l. This number was exceeded at Santa Anita on February 24, 2010 when the average TCO2 reading was 33.71mm/l. We find no solid evidence to support the theory that the results from Del Mar on August 25 are somehow tainted and need to be discarded. We instead find credible the testimony of Dr. Stanley who has been the head of the Maddy lab for 13 years and has supervised hundreds of thousands of TCO2 tests. Dr. Stanley convincingly defended the reliability of the TCO2 test in this case, as did Dr. Arthur.

Dr. Forman testified that the Del Mar TCO2 scores for August 25<sup>th</sup> had a standard deviation for a positive of 2.6mm/l. However these numbers come from race day calculations. We have no way of knowing if they have been subject to manipulation or if so to what extent. Even this flawed standard deviation indicated a chance of 175 to 1 of a false positive. These are not short odds. For example, we have taken notice from Equibase that on May 11<sup>th</sup>, 1991, the gelding Uppie Duppie won a race at Hollywood Park Racetrack at odds of 173 to 1. In the 21 years since that event no winner has matched those odds. We are convinced that taking the program as a whole the odds are much higher than 175 to 1. We also believe that being near one end of the bell curve does not automatically render the TCO2 number as that of an outlier.

Most significantly as stated above we find Dr. Stanley's and Dr. Arthur's testimony as to the integrity of the August 25<sup>th</sup> Del Mar TCO2 test more credible than Professor Foreman's statistical speculations.

**B) Conclusion on Reliability of 39.4mm/l Value**

**We hold therefore that the TCO2 score of 39.4 millimoles per liter is an accurate and reliable calculation by the Maddy Lab for the amount of TCO2 in Argenta's blood serum or plasma on August 25, 2010.**

**C) NA and CL Tests at the Maddy Lab**

Besides scoring a 39.4mm/l TCO2 reading, the Maddy Lab also on the same confirmation page determined Argenta's sodium and chloride level. There were 8 confirmation readings for sodium that ranged from 138.0 to 141.6 with a mean of NA139.88mm/l. The chloride also had 8 confirmation readings. They varied from 92.3 to 94.7 with the average being CL93.80mm/l.

Dr. Waller, Dr. Foreman and Dr. Arthur agreed that 139.88mm/l was a normal sodium reading. These experts also agreed that if Argenta had been milkshaked with baking soda (NaHCO<sub>3</sub>) this would have resulted in a highly elevated sodium level.

As to the CL reading a normal amount in the blood would be around 100-101 mm/l. Argenta's CL level showed serious depletion probably as a result of a Lasix injection or sweat-induced dehydration.

Therefore, this normal sodium level and low chloride level establish in the view of Dr. Waller and Dr. Foreman that Argenta was not milkshaked with a sodium based alkalizer.

**D) Conclusion on Milkshaking of Argenta**

**We adopt these facts and opinions and hold that the Filly Argenta was not milkshaked with a NaHCO<sub>3</sub> solution prior to the August 25, 2010 race at Del Mar. The same chemistry from the Maddy Lab that establishes Argenta's TCO2 level at 39.4 mm/l also establishes, by the NA and CL readings, that she did not receive a NaHCO<sub>3</sub> milkshake.**

**E) Effect of Finding on Milkshaking**

**We must now consider whether or not the finding that Argenta was not milkshaked has resulted in O'Neill being denied his due process rights. Does a finding that Argenta was not milkshaked mean upholding the accusation would violate his due process rights?**

It is important to note that the TCO2 Rule, 1843.6, does not explicitly outlaw the practice of milkshaking. In fact the Rule is silent on milkshaking or any other type of manipulation.

The Board could have prohibited any type of TOC2 manipulation. Instead the focus was on preventing the manipulation by establishing 37.0mm/l as the maximum TOC2 level allowed in the blood serum or plasma of a horse on race day.

Rule 1843.6 (d):

(d)TCO2 levels in the blood serum or plasma shall not exceed:

(1) 37.0 millimoles per liter of serum or plasma;

(2) TCO2 levels in excess of 37.0 millimoles shall be considered a

Class three-medication violation for administrative purposes.

**F) Argenta's Elevated TCO2 Level Was Caused Negligently by Doug O'Neill.**

A trainer can manipulate his horses' TCO2 level on race day without administering a sodium based (NaHCO3) milkshake. We have previously demonstrated with the Ruhr study and the Del Mar/Oak Tree trial that the TCO2 level can and does go from around 20% noncompliance to almost 0 noncompliance after a 37.0mm/l maximum rule is put in place.

Looking at some of the TCO2 statistics demonstrates the control O'Neill has over these numbers. On August 25, 2010 at Del Mar we know that Argenta had the highest TCO2 score of 39.4mm/l. In addition Bandier Union another horse trained by Respondent had the 2<sup>nd</sup> highest score (37.80mm/l). To complete the trifecta a 3<sup>rd</sup> horse trained by Respondent, Hey Elvis (AUS) had the third highest TCO2 score (37.35mm/l). The odds of this being a random event are 41,664 to 1. The trainer controls the TCO2 levels. Looking at Argenta's TCO2 record while she was trained by Respondent is consistent with this theme. The Filly dropped from 39.4mm/l before O'Neill was notified of the Argenta TCO2 overage on September 4, 2010 to 29.75mm/l after he was notified of the TCO2 overage. This constituted a dramatic

shift of 9.65 mm/l. We believe these dramatic shifts are possible because there are several factors that affect TCO2 levels that are under the trainer's control (Waller study, Arthur paper).

#### **G) TCO2 LEVELS UNDER THE CONTROL OF THE TRAINER**

Of course the most dramatic shift is with the use of the sodium-based milkshake, but we are excluding that tool which we have found was not used in this case. There are of course other ways of producing metabolic alkalosis. An unlikely potion can be prepared with a magnesium or potassium base but these mixtures pose significant health risks to a race horse and we have no reason to believe that they have been used by Respondent. While these mixtures are unlikely, it should be noted that to the extent that they are used at all they are completely under the trainer's control.

We have already identified Lasix as a major contributor to TCO2 levels. We believe that the more credible evidence shows a correlation between the amount of Lasix given and the effect on TCO2 levels. We reject the evidence that questions that correlation. We also accept Dr. Dowd's testimony that Argenta was given a 10cc shot of Lasix. We find that it was at O'Neill's instruction that Argenta was given the 10cc shot of Lasix, the maximum legal amount approximately 40 minutes before post time. This Lasix Bump is variable but it has been estimated to be between 2.9mm/l and 4.2mm/l (Klien study, Carlson study).

**H) It is clear, and we find, that a trainer can to some degree control his horses TCO2 levels by the amount of Lasix given.**

i. We also find clear evidence that the kind and amount of feed given can affect the horses TCO2 levels (RMTC Report, Waller study).

Again it is indisputable, and we so hold, that the trainer controls his charges diet and thus controls the TCO2 level affected by diet

ii. Exercise, it is known, can have an effect on TCO2 levels (Waller study).

We hold that to the extent a horse's exercise program (how far, fast and often they work) affects TCO2 levels on race day the schedule is completely under the control of the trainer.

iii. Lastly we consider sweating and dehydration, which we believe can have a serious effect on TCO2. Respondent has put on evidence that Argenta shipped over in a van from Hollywood Park on an extremely hot day. Race day was also very hot and the Filly may have been sweating and dehydrated. Of course the main responsibility for the condition of the Filly falls on her trainer. It was up to O'Neill to make certain Argenta was ready to run. We conclude that any increase in her TCO2 level caused by dehydration was under his control.

iv. Taking all these facts together we find that the factors leading to Argenta's TCO2 overage were all under her trainer's dominion and control. Rule 1843.6(d) simply prohibited Argenta from running with a TCO2 level above 37.0mm/l. Her reading of 39.4mm/l is well above the allowable level. The factors putting her over were under her trainer's control and we find that Respondent negligently allowed this overage to occur. Under these facts we must find that Mr. O'Neill has not been denied his due process rights in the way Rule 1843.6 and other related CHRB Rules have been applied to him in this case.

v. Conclusion

We have concluded that by stipulation the Attorney General has made out a prima facie case of a TCO2 overage of the Filly Argenta under Rule 1843.6 and Trainer Doug O'Neill's responsibility for that violation under the "Trainer Insurer Rule." However we agreed with O'Neill that the evidence demonstrated that Argenta had not been milkshaked prior to the August 25, 2010 race at the Del Mar Racetrack. Nevertheless we found that under Rule 1843.6 we need not determine that a horse has been milkshaked if there is a reliable TCO2 overage. Conversely, without a score above the 37.0mm/l there can be no Rule 1843.6 violation regardless of the evidence of manipulation.

We rejected Respondent's well-argued due process defense primarily because of the overwhelming evidence that California trainers in general and Mr. O'Neill in particular have learned various ways to manipulate TCO2 scores without serving milkshakes. We still cannot say it was done here

intentionally. Frankly Argenta was a very poor candidate for TCO2 manipulation. According to Dr. Arthur and Dr. Stanley, the prime subject for raising TCO2 levels is a male horse running in quality races and finishing in the money. In other words the polar opposite of Argenta. She was a Filly running in the cheapest claiming races and falling so far back "she would need to sprout wings" to catch the leaders.

Then there is the question of motive. Why would Doug O'Neill, one of the leading trainers in California, risk his entire career to pump up an obscure Filly in an obscure race? Perhaps it was his failure to heed Dr. Arthur's warning that his training methods were leaving him too few standard deviations to the maximum allowed TCO2 line.

The best advice, and the most pointed warning to all trainers, may have come from Jockey Club:

"Trainers should be advised that the elevated TCO2 values, regardless of causation, are violations of the rules and those penalties for excessive TCO2 values are severe. Therefore, trainers and their veterinarians should work closely to identify any procedure or practices that may elevate the TCO2 value."

## SUMMARY

The evidence including the stipulation shows that Respondent was (1) the trainer of Argenta a Filly that ran in the 6th race on August 25, 2010 at the Del Mar race track and (2) that Argenta ran in the race with an excessive amount of TCO<sub>2</sub> in her system (39.4 mm/l). These facts established a *prima facie* violation of Rule 1887, the Trainer Insurer Rule, and Rule 1843, the TCO<sub>2</sub> Overage Rule. Therefore the burden was shifted to Respondent to prove his due process claim. We have rejected this defense as being legally and/or factually insufficient. The Respondent has failed to establish a defense by a preponderance of the evidence.

We hold that the Complaint and Accusation (10DM041) have been proven true and we consider the question of penalty.

## PENALTY

### I. CHR B AUTHORITY TO IMPOSE A SUSPENSION OR FINE ON RESPONDENT

The CHR B has the power to adopt Rules and Regulation concerning punishment (Business and Professions Code Sections 19420, 19440, and 19461). In addition Rule 1405 specifically empowers the CHR B to suspend or fine any licensee for any violation of the Rules.

More specifically Rule 1887 authorizes the CHR B to suspend or fine a trainer when a prohibited level of a substance turns up in his horse's blood:

“...If the chemical...analysis of ...blood test samples...prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off (Rule 1887).”

Rule 1843.1(b) defines prohibited drug substances to include “any drug, substance, medication or chemical authorized by this article in excess of the authorized level or other restrictions as set forth in this article.” Under Rule 1843.6(d) TCO<sub>2</sub> levels in the blood serum or plasma are limited to 37.0 mm/l. We have previously found that

Argenta's pre-race blood sample contained 39.4mm/l. Respondent, as trainer, is subject to the appropriate penalty for an excess TCO2 finding.

## II. DETERMINING RANGE OF PENALTIES

### (A) Under Rule 1843.3:

The penalties Respondent is subject to in this case are found in Rule 1843.2, "Classification of Drug Substances." Under this Rule the CHRB is directed to consider the classification chart which divides each Class I, II, III and IV drug into A, B, C and D penalty categories. A TCO2 overage is officially listed as a Class III violation with a Class B penalty rating (Rules 1843.3 and 1843.6(d)(2)).

In the charts attached to Rule 1843.3 the range of penalties are divided by letter (A-D), owner or trainer and prior record. They are also divided between an excess TCO2 finding between 37.0 mm/l and 39.0 mm/l and excess findings above 39.0 mm/l. Respondent has 2 prior violations of Rule 1843.6 (excess TCO2) in California and 1 TCO2 violation in Illinois.

The relevant potential penalties are listed under Horse Racing Rules, Trainer 3<sup>rd</sup> Offence, TCO2 (>37mm/l-<39mm/l), or Trainer 3<sup>rd</sup> Offence, TCO2 (>39.0mm/l). It is unclear which of these 2 penalty categories Respondent fits in. While it is true that Respondent's TCO2 level was above 39.0mm/l in this case it is also true that in his two previous California cases his TCO2 level was below 39.0mm/l. In addition there is nothing in the record as to the TCO2 level in the Illinois violation. This means that O'Neill has one violation above 39.0mm/l and two violations between 37.1mm/l and 38.9 mm/l. We doubt the fairness of putting Respondent in the harsher three violations above 39.0mm/l category when only one of the three violations meets the criteria. We are also guided by the Rule of Lenity the principle that ambiguities in sentencing should be resolved in favor of the person being sentenced *U.S. v. Granderson* 511 U.S. 39, 54 (1994). We hold therefore that in this case we will apply category B penalties for licensed Trainer 3<sup>rd</sup> Offence TCO2 (>37.0mm/l-<39mm/l).

Under this section Respondent is subject to "Minimum 90-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 180 day suspension." As to a potential fine a "(m)inimum

fine of \$5,000 absent mitigating circumstances is called for. The presence of aggravating factors could be used to impose a maximum fine of \$15,000.”

In addition, in accordance with Business and Professions Code Section 19582(a)(4), the fine must exceed O’Neill’s previous TCO2 fine, which was \$7,500 for the Chicks Rule violation.

We are not unaware of Section 19582.(3) (B) that states that any fine imposed shall not be based solely “on the trainer-insurer rule”. In this case any penalty imposed is based on all the facts and circumstances put in evidence. It includes our holding that Respondent negligently allowed Argenta’s TCO2 level to go over the allowable amount. A fine or its equivalent is allowable if determined to be appropriate.

**(B) Assessing Aggravating Factors and Mitigating Circumstances:**

Rule 1843.3 also provides guidance in determining the proper penalty in TCO2 violation cases. We start with the basic penalty chart that is part of the rule. As previously determined that chart before adjustments for aggravation and mitigation has a suspension range between 90 and 180 days (absent mitigation) and a fine of between \$5,000 and \$15,000(absent mitigation). Then we assess aggravation and mitigation as to the eleven specific factors listed in the rule. These factors are mandatory and must be considered when applicable.

We also are instructed to assess aggravation and mitigation for any other relevant factors for this particular case. We categorically reject the Attorney General’s position that good character evidence should not be considered in the sentencing decision. Character evidence is an important part of sentencing and O’Neill’s good character evidence will be considered, Evidence Code Sec. 401.1, *Washington v. State* 388 U.S. 14, 19 (1967).

It is important to recognize that in looking at aggravation and mitigation it is not just a question of adding up the factors on each side of the ledger. Rather it is the overall strength of the factors that leads to a conclusion of whether a deviation from the norm is required. Just one compelling aggravating or mitigating finding can outweigh everything on the other side, *People v. Grant* (1988) 45 Cal.3d 829, 857, fn.5.

Finally, the findings on aggravation and mitigation are applied to the potential penalties in Rule 1843.3.

**(C) The Mandatory Factors and Circumstances:**

**1) The past record of the licensee regarding violations of Business and Professions Code section 19581:**

Doug O'Neill's medication violation record includes a number of minor class 6 violations for which he received a small fine or a warning. He also received three TCO2 warning letters which are not considered violations. Significantly in the last 16 years as a trainer, according to records submitted by Senior Special Investigator Sharyn Jolly he has never received a class I or class II drug violation, (no information is in the record for 1988 to 1995). He has received three California TCO2 overage violations, including this case, which are class III offences. The record does not show what level the Illinois TCO2 case was.

The three California cases are already being used to put this offence in a more punitive category with harsher sentences. Further aggravation of the sentence is unnecessary and would constitute double punishment.

**We find that past record was a neutral factor.**

**2) The potential of the drug(s) to influence a horse's racing performance:**

We have held that elevated TCO2 can result in enhanced performance. Clearly Argenta's poor performance, finishing 8<sup>th</sup> of 11 was not enhanced.

**However because the factor is framed in terms of "potential to influence" we find that this was an aggravating factor**

**3) The legal availability of the drug:**

This is aimed at preventing trainers from obtaining and using unlawful drugs. Bicarbonates are legal and easily obtainable. We have already ruled that Argenta was not milkshaked by O'Neill. So this factor is not applicable.

**This is a neutral factor.**

**4) Whether there is a reason to believe the responsible party knew of the administration of the drug or intentionally administered the drug:**

This section is designed to assign additional culpability to a trainer who is directly involved in the administration of an illegal drug as opposed to negligence in

allowing it to happen. We have proceeded under the trainer insurer rule and in any event have ruled that Argenta was not milkshaked by Respondent.

**This is a neutral factor.**

**5) The steps taken by the trainer to safeguard the horse:**

Not applicable to these facts.

**This factor is neutral.**

**6) The steps taken by an owner to safeguard against subsequent medication violations including, but not limited to, the transfer of the horse(s) to an unaffiliated trainer:**

Not applicable to these facts.

**This factor is neutral.**

**7) The probability of environmental contamination or inadvertent exposure due to human drug use or other factors:**

No evidence was presented on this issue.

**This is a neutral factor.**

**8) The purse of the race:**

The purse of the race was \$9,000 to the winner. This is not significant enough to provide an inducement to cheat.

**This is a mitigating circumstance.**

**9) Whether the drug found to be present in the official test samples was one for which the horse was receiving treatment as determined through the process described in Rule 1842 of this division:**

Rule 1842 describes the Official Veterinarian Report. It is not applicable in a TCO2 case.

**This factor is neutral.**

**10) Whether there was any suspicious wagering on the race:**

There was no evidence of any suspicious wagering.

**This is a circumstance in mitigation.**

**11) Whether the licensed trainer was acting under the advice of a licensed veterinarian:**

O'Neill was making medication decisions in consultation with his veterinarian Dr. Dowd.

**This is a circumstance in mitigation.**

**(D) Discretionary Factors**

**1) O'Neill's Good Character:**

O'Neill presented several Declarations attesting to his good character. Most of the information was focused on his charitable work some of which was in the equine world and some of which involved O'Neill helping children. Three of the Declarations came from the directors of organizations that help retired race horses: Bonnie Adams of "TROT", Sharla Sanders of "The Second Race" and Madeline Auerbach of "CARMA" who is a well-known and respected horse owner and breeder and member of the Jockey Club. All of these ladies commented on O'Neill's integrity and generosity.

We have also received a Declaration from Andrew Macias who told of O'Neill's strong participation in "Danny's Shoes" a charity that provides Christmas toys for orphans.

In addition we have received a Declaration from Mark Verge, CEO of Santa Anita and owner of Argenta. He vigorously denies any plot to manipulate the Filly. He also affirmed the Declaration of Dr. Kathy Sakamoto Division Chief of Pediatric Hematology and Oncology at Mattel Children's Hospital UCLA (MATTEL). As the name implies Mattel is a Hospital for the treatment of children with blood disorders or cancer. Dr. Sakamoto and Mr. Verge report that O'Neill not only supports Mattel financially in numerous ways but he also frequently visits the children bringing them gifts and special guests such as jockeys. She finds O'Neill to be compassionate, generous and honest as does Verge.

**2) Dr. Arthur Declaration:**

Dr. Arthur argues that "O'Neill knew of, or was responsible for, manipulating Argenta's TCO2 level." We have ruled that Respondent did not milkshake Argenta nor did he intentionally manipulate her TCO2 level, so this information is not at this point relevant.

Dr. Arthur also directs us to O'Neill's medical violation record. We have considered that as part of mandatory factors #1 and concluded that the factor was neutral.

**We find that the Discretionary Factors constitute Mitigating Circumstances.**

### **CALCULATION OF PENALTY**

**We make the following findings regarding penalty:**

- A) Under Rule 1843.3(b) (1)-(12) the Mitigating Circumstances in this case outweigh the Aggravating Factors.**
- B) The Penalty should be progressive. The 1<sup>st</sup> TCO2 violation on May 27, 2006 was for Wisdom Cat. Respondent was assessed a \$3,000 fine. The 2<sup>nd</sup> TCO2 violation on January 17, 2008 was for Chicks Rule. The Penalty was a \$7,500 fine and a 30 day stayed suspension. The 3<sup>rd</sup> TCO2 violation was in Illinois. It occurred on June 30, 2002 and resulted in a \$1,000 fine and a 15 day suspension. The fine and penalty should be meaningful.**
- C) O'Neill's past record indicates that he requires a long term of probation with a substantial penalty if probation is violated.**

**Based on this prior TCO2 overage record O'Neill should receive a fine of more than \$7,500, and a suspension of more than 15 days.**

**Keeping these points in mind as well as all of the facts and circumstances of this case we reach the following conclusion.**

### **CONCLUSION**

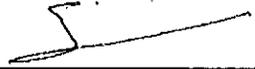
**Complaint and Accusation No. 10DM041 charging trainer Douglas O'Neill, Lic. No. 112723 with violating CHRB Rule 1843.6(d)(1)(2), 1843(a), and 1887(a) in that ARGENTA, a Filly trained by O'Neill ran in the 6th race at Del Mar on August 25, 2010 with an excess level of TCO2 in her system (39.4mm/l) has been found TRUE. Therefore the CHRB enters the following order:**

**ORDER**

- 1) Trainer Douglas O'Neill's license is placed on 18 months probation. His license is suspended for a period of 180 days with 135 days stayed, 45 days to be served. The stay shall become permanent upon successful completion of probation without a further Class I, II, or III violation in California or an equivalent violation in any United States or International Racing Jurisdiction.
- 2) Trainer Douglas O'Neill will pay a fine of \$15,000.
- 3) Trainer Douglas O'Neill will meet with Dr. Dowd or whoever his present veterinarian is and with Dr. Rick Arthur, the Board's Equine Medical Director to work out a program to insure that his horses do not, on race day, exceed the TCO2 level of 37.0 millimoles per liter.
- 4) Executive Director Kirk Breed will set the deadlines for complying with this order.

**IT IS SO ORDERED**

4-30-12  
**DATED**

  
**STEFFAN IMHOFF,**  
**Hearing Officer**