BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Appeal from the Board of Stewards Official Ruling #002, Del Mar Thoroughbred Club, dated November 10, 2018 **MARIO GUTIERREZ** **CHRB License #295823** **Appellant**	Case No. SAC 18-0047

DECISION

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

The Decision is hereby remanded to the Board of Stewards to issue a ruling and order imposing a three (3) day riding suspension.

IT IS SO ORDERED ON April 18, 2019.

CALIFORNIA HORSE RACING BOARD
Chuck Winner, Chairman

Rick Baedeker
Executive Director

Patrick J. Kane, Esq.
501 West Broadway, Suite 800
San Diego, California 92101
Telephone: (858) 381-7860
Facsimile: (866) 581-9302
Email: pkane@mauricewutscher.com

BEFORE THE CALIFORNIA HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of: **Appeal of the Board of Stewards Official Ruling No. 002, Del Mar Thoroughbred Club, Dated November 10, 2018** **MARIO GUTIERREZ** **CHRB LICENSE NO. 295823** **APPELLANT**	Case No.: SAC 18-0047 **PROPOSED DECISION RE: APPEAL OF THE BOARD OF STEWARDS' OFFICIAL RULING NO. 002, DEL MAR THOROUGHBRED CLUB, DATED NOVEMBER 10, 2018** Hearing Date: February 11, 2019 Time: 9:30 a.m.

I. INTRODUCTION

This matter arises from an appeal of the Board of Stewards' Official Ruling No. 002, Del Mar Thoroughbred Club, dated November 10, 2018 (the "Appeal").

Appellant, Mario Gutierrez ("Appellant") personally appeared and was represented Roger H. Licht, Esq. The California Horse Racing Board ("Respondent" or the "CHRB") was present and represented by Robert Brodnik, Esq.

Pursuant to California Horse Racing Board Rule 1414, Hearing Officer Patrick J. Kane ("Officer") presided over this Appeal.

This Appeal hearing took place on February 11, 2019 at 9:50 a.m. at Santa Anita Park in Arcadia, California 91007 (the "Hearing"). Michelle Derieg recorded all testimony presented during the Hearing.

This matter's evidentiary record closed at the conclusion of the proceedings on February 11, 2019 at approximately 12:30 p.m.

II. EXHIBITS ADMITTED INTO EVIDENCE

A. Exhibits Entered into Evidence by the CHRB.

The CHRB entered the following exhibits into evidence:

Exhibit "1"	NOTICE OF HEARING, CASE NO. SAC 18-0047;
Exhibit "2"	LOS ANGELES SUPERIOR COURT STAY DATED NOVEMBER 14, 2018 (CASE NO. 18-ST-CP-02880);
Exhibit "3"	APPEAL AND STAY REQUEST FOR JOCKEY MARIO GUTIERREZ FROM ATTORNEY ROGER H. LICHT;
Exhibit "4"	BOARD OF STEWARDS' OFFICIAL RULING #002, DEL MAR THOROUGHBRED CLUB, DATED NOVEMBER 10, 2018;
Exhibit "5"	BOARD OF STEWARDS' MINUTES FOR NOVEMBER 9, 2018 THROUGH NOVEMBER 12, 2018;
Exhibit "6"	C.H.R.B. RULES 1699-RIDING RULES, 1766-DESIGNATED RACES;
Exhibit "7"	NOVEMBER 9, 2018, RESULTS FOR 7TH RACE, THE DEL MAR THOROUGHBRED CLUB; AND
Exhibit "8"	DVD RE: DEL MAR THOROUGHBRED CLUBE RACE NO. 7, NOVEMBER 9, 2018.

B. Exhibits Entered into Evidence by Appellant.

Appellant did not enter any exhibits into evidence.

III. LIST OF TESTIFYING WITNESSES

A. Witnesses Testifying on Behalf of Appellant.

Appellant called the following the witnesses:

- Mario Gutierrez; and
- Corey Nakatani.

B. Witnesses Testifying on Behalf of the CHRB.

The CHRB called the following the witnesses:

- The Hon. Kim Sawyer;

- The Hon. Grant Baker; and
- The Hon. Luis Jauregui.

IV. FACTUAL FINDINGS

After admitting all exhibits and testimony into evidence, this Officer makes the following findings of fact:

I.

On November 9, 2018, Appellant rode the number four (4) horse, Excellent Sunset ("Excellent Sunset" or the "Horse"), to a first-place finish in the seventh race at Del Mar (the "Race"). (Ex. 7.) The Race was a $75,000.00 stakes race run at one mile on the Jimmy Durante Turf Course. (Id.)

II.

During the Race's stretch run, Excellent Sunset failed to maintain a straight course, drifted towards the rail, and impeded the number nine horse (9), "Escape Clause." (Hearing Transcript ("H.T.") at p. 55; Exs. 4, 8.) Specifically, Excellent Sunset progressively drifted in "three or four paths" from the center of the track towards the rail causing Escape Clause "to check to stay off heels" (the "Conduct"). (H.T. at p. 55, 69-71.) Excellent Sunset's Conduct caused Escape Clause to steady and lose momentum to avoid "clipping heels" with Excellent Sunset. (H.T. at p. 55, 69-71; Ex. 5 at p. 5.)

III.

Immediately after the Race's conclusion, the Board of Stewards ("Stewards") posted an inquiry concerning Excellent Sunset's Conduct. (H.T. at p. 71; Ex. 5 at p. 5.) After reviewing the Race, the Stewards unanimously determined that:

> [At] the 1/16th mile marker…the leader and eventual first place finisher Excellent Sunset drifts in and takes the path of original second place finisher Escape Clause. This action forced [Escape Clause's jockey] to steady his mount and lose momentum which he eventually regained before beaten half-length at the finish line… [t]he Stewards unanimously ruled that this incident afforded Escape Clause an opportunity for a better placing. Excellent Sunset was disqualified and placed second. (Ex. 5 at p. 5.)

IV.

On November 10, 2018, a representative for Appellant appeared before the Stewards to review film of Appellant's ride during the Race. (H.T. at p. 71 Ex. 5 at p. 6.) After analyzing the Race's replay and discussing the Conduct with Appellant's representative, the Stewards unanimously determined that: (1) Excellent Sunset drifted in at "mid-stretch"; (2) Excellent Sunset already began drifting in when Appellant struck the Horse with his riding crop (right-handed); (3) the Conduct caused Escape Clause to steady and nearly clip heels with Excellent Sunset; and (4) Appellant's Conduct was deemed careless. (Ex. 5 at p. 6.)

Accordingly, on November 10, 2018, the Stewards unanimously issued Official Ruling DFTD No. 002 (the "Ruling"), which stated the following:

> Jockey MARIO GUTIERREZ, who rode EXCELLENT SUNSET (IRE) in the seventh race at Del Mar Race Track on November 9, 2018 is suspended for THREE (3) racing days (November 17, 18, and 22, 2018) for failure to make the proper effort to maintain a straight course in the stretch, causing interference which resulted in the disqualification of his mount from first to second position. This constitutes a violation of California Horse Racing Board Rule #1699 (Riding Rules – Careless Riding). Pursuant to California Horse Racing Board Rule #1766 (Designated Races), the term of suspension shall not prohibit participation in designated races. (Ex. 4).

V.

On November 12, 2018, Appellant timely filed a "Notice of Appeal" with the CHRB and simultaneously sought a stay of the Ruling's three-day suspension. (Ex. 3.) Appellant identified the following issues as to why the CHRB should grant both the Appeal and request for a stay:

> (1) Excellent Sunset only deviated from his path slightly; (2) the movement was the result of a lead change and not the result action by the jockey; (3) Cal. Code Regs. Tit. 4 § 1699 is arbitrary, capricious, ambiguous and not in the best interest of racing, as if a jockey puts forth his best effort, that should be sufficient to avoid a penalty…the Horse is the major cause of the foul; (4) the Stewards' assessment of failing to maintain a straight course may well have been accurate, but it was not due to jockey malfeasance; (5) Appellant was unable able to properly prepare for the hearing; (6) the Ruling was issued without substantial basis in fact; and (7) that there was no violation of Cal. Code Regs. Tit. 4 § 1699. (Ex. 3.)

VI.

The CHRB subsequently denied Appellant's request for a stay. Appellant proceeded to file an Ex Parte Application in the Superior Court of California for the County of Los Angeles seeking a stay of the Ruling. (Ex. 2.) On November 14, 2018, the Court granted Appellant's Ex Parte Application. (Id.)

VII.

On January 29, 2019, the CHRB set this Appeal for hearing on February 11, 2019 at Santa Anita Park. (Ex. 1.)

V. ISSUES ON APPEAL AND CONTROLLING LAW

The issue before this Officer is whether Appellant met the burden of proof necessary to overrule the Stewards' unanimous Ruling, that during the stretch run of the Race, Appellant failed to make proper effort to ensure Excellent Sunset maintained a straight course resulting in the Horse interfering with Escape Clause, in violation of Cal. Code Regs. Tit. 4 § 1699 ("Section 1699").

Section 1699 states, in pertinent part, that during the running of a race:

> (a) A horse shall not interfere with any other horse. Interference is defined as bumping, impeding, forcing or floating in or out or otherwise causing any other horse to lose stride, ground, momentum or position.
>
> (b) A horse which interferes with another as defined in subsection (a) may be disqualified and placed behind the horse so interfered with if, in the opinion of the Stewards, the horse interfered with was not at fault and due to the interference lost the opportunity for a better placing.
>
> (c) Jockeys shall not ride carelessly, or willfully, so as to permit their mount to interfere with any other horse.
>
> (d) Jockeys shall not strike or strike at another horse or jockey so as to impede, interfere with, intimidate, or injure.
>
> (e) If a jockey rides in a manner contrary to this rule, the mount may be disqualified and the jockey may be suspended or otherwise disciplined by the Stewards.
>
> (f) When suspending a jockey for riding contrary to this rule, the Stewards shall issue a minimum suspension of two riding days, and shall issue a suspension greater than the minimum for (1) more than one infraction of this rule by the jockey within any contiguous 60 day calendar period or (2) any infraction which, in the opinion of the stewards, jeopardized the safety of another horse or jockey.

Moreover, Business and Professions Code Section 19517(a) states, in relevant part, that:

> The board, upon due consideration, may overrule any steward's decision...if a preponderance of the evidence indicates any of the following: (1) the stewards mistakenly interpreted the law; (2) new evidence of a convincing nature is produced: (3) the best interests of racing and the state may be better served.

However, if the appellant solely disputes whether the evidence supports the stewards' official ruling, said ruling will not be disturbed on appeal, unless the appellant demonstrates that substantial evidence does not support the stewards' official ruling.

Put differently, if substantial evidence supports the stewards' ruling, then it cannot be overturned simply because a contrary finding would have been equally or more reasonable. (See e.g., *In the Matter of the Appeal of Brian Koriner,* C.H.R.B. Case No. SAC98-033, OAH No. N1998070296 ["An appeal pursuant to Rule 1761 from a stewards' decision following a...hearing, the standard of review to be applied concerning the evidence is the substantial evidence test."]; *Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 829 [If a decision is supported by substantial evidence, it will not be overturned "merely because a contrary finding would have been equally or more reasonable."].)

"In general, substantial evidence has been defined in two ways: first, as evidence of ponderable legal significance… reasonable in nature, credible, and of solid value; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion" (*Ogundare*, supra, 214 Cal.App.4th at 830, citations omitted.).

Appellant has the burden to prove the facts necessary to sustain his Appeal. (See, Cal. Code Regs. Tit. 4 § 1764 ["The burden shall be on the appellant to prove the facts necessary to sustain the appeal."].)

Because this Appeal solely concerns whether the evidence presented supports the Ruling, that Appellant failed to ensure Excellent Sunset maintained a straight course in the stretch of the Race, Appellant must demonstrate that substantial evidence does not support the Ruling.

VI. SUMMARY OF EVIDENCE PRESENTED

A. Summary of Testimony Presented by Appellant.

In support of his Appeal, Appellant testified on his own behalf and separately called jockey Corey Nakatani ("Nakatani") to provide expert testimony that no Section 1699 violation occurred.

Appellant is a Southern California based jockey who has been licensed in California since approximately 2008. (H.T. at p. 9.) Over the course of his career, Appellant has ridden in

"thousands of races." (H.T. at p. 16-17.)

While conceding Excellent Sunset "deviated from a straight path," Appellant contends he did everything to "correct" Excellent Sunset's inward drift. (H.T. at p. 12-13.) Specifically, Appellant testified he did not violate Section 1699 because he: (1) ceased using the riding crop once he felt Excellent Sunset "floating inward towards the rail in front of [Escape Clause]"; and (2) grabbed the right rein to correct the Conduct so that Excellent Sunset "maintained a straight line." (H.T. at p. 12-14, 21-25.)

In further support that no Section 1699 violation occurred, Appellant called Nakatani to testify on his behalf. Nakatani is a Southern California based jockey who has ridden in over 30,000 races and won approximately 4,000 of those races. (H.T. at p. 32.)

Concerning whether Appellant violated Section 1699, Nakatani, while viewing the Race's replay, opined that: (1) Appellant reacted to the Conduct by "grabbing the Horse" and turning its head outward as quickly as possible to correct Excellent Sunset's path; (2) Appellant should not be penalized for the Horse's actions because Appellant attempted to correct the Conduct as quickly as he could; and (3) Appellant did everything he could do to correct the Conduct. (H.T. at p. 36-37.)

Nakatani separately testified it would have been careless if Appellant did not "grab" Excellent Sunset as she "drifted in" while simultaneously using the riding crop. (H.T. at p. 45.) However, because Appellant "did what he could to stop the [Conduct]," Nakatani concluded that Appellant did not violate Section 1699. (H.T. at p. 47-48.)

B. Summary of Testimony Presented by the CHRB.

In support of its position that Appellant violated Section 1699, the CHRB called Stewards Kim Sawyer ("Sawyer"), Grant Baker ("Baker"), and Luis Jauregui ("Jauregui"). Sawyer, Baker, and Jauregui were the on-duty stewards during the Race and issued the unanimous Ruling.

Regarding Steward Sawyer's testimony, while viewing the Race's replay, she explained that:

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(1) Once Appellant "threw the reins," Excellent Sunset began drifting inwards (H.T. at p. 55-56); (2) Appellant should have been aware of and corrected the Conduct once he felt the Horse drifting inward, which he failed to do (Id. at p. 56, 59, 62); (3) Excellent Sunset was controllable throughout the Race (Id. at p. 58-59); (4) by not correcting the Conduct sooner, Appellant caused Escape Clause to "check to stay off heels" (Id. at p. 55-58); and (5) Appellant rode carelessly in violation of Section 1699 (Id. at p. 55).

Furthermore, Steward Baker provided the following testimony:

(1) That Excellent Sunset "drifted in" three to four paths interfering with Escape Clause and caused that rival to lose position (H.T. at p. 69, 71); (2) Appellant did not correct the Conduct until "after the damage [was] done to [Escape Clause]" (Id. at p. 70); and (3) the Conduct resulted from Appellant's careless riding because Appellant should not have "struck the Horse after [Excellent Sunset] was already drifting in." (Id. at p. 72, 75-76).

Lastly, Steward Jauregui testified that:

(1) Appellant acted carelessly by allowing the "right rein to be a little bit loose" at the time Appellant "un-cocked" the riding crop, which caused the Horse to "drift in" (H.T. at p. 77-78); (2) when Appellant "started throwing crosses," Excellent Sunset's "head comes up" allowing the Horse to drift (H.T. at p. 78.); (3) Appellant should have "grabbed [the right] rein and snugged it up" before using the riding crop (Id. at p. 79-80); (4) Excellent Sunset was very controllable (H.T. at p. 79); and (5) Appellant violated Section 1699 by failing to correct the Conduct as soon as Appellant felt the Horse drifting. (Id. at p. 80, 82.)

VII. DISCUSSION

Based upon the evidence presented, substantial evidence supports the Stewards' unanimous Ruling that Appellant violated Section 1699. As such, Appellant failed to meet his required burden of proof.

Indeed, the evidence presented shows Appellant failed to promptly correct the Conduct when he initially felt Excellent Sunset beginning to drift inwards. Specifically, the Race's replay and testimony presented demonstrate that Appellant allowed Excellent Sunset to drift three to four paths inward before he corrected the Horse's Conduct. In fact, substantial evidence reveals that Excellent Sunset had already started drifting inwards at the time Appellant began using the riding crop. This caused the Horse to severely "drift in" and impede Escape Clause.

As the Stewards stated, Appellant is expected to immediately correct a horse's path when he feels it is beginning to drift. (H.T. at p. 55, 80, 82.) However, instead of immediately correcting Excellent Sunset, Appellant used the riding crop which caused the Conduct to occur.

(Id. at p. 59, 72, 75-76, 78.)

To the extent Appellant claims the Conduct was a result of Excellent Sunset's inability to be controlled, it is belied by the record. Rather, the evidence indisputably demonstrates that Excellent Sunset was easily controlled as the Horse reacted each time Appellant pulled on the reins. (H.T. at p. 58-59, 79.) Despite this, Appellant did not immediately pull on Excellent Sunset's reins when the Horse began drifting inwards.

Accordingly, substantial evidence supports the Stewards' unanimous Ruling that Appellant "failed to make the proper effort to maintain a straight course in the stretch, causing interference" in violation of Section 1699.

VIII. CONCLUSION

Because substantial evidence supports the Stewards' finding that Excellent Sunset was controllable at all relevant times, and because Appellant failed to take enough action to correct Excellent Sunset's Conduct that caused Escape Clause to steady and lose momentum, Appellant failed meet the burden of proof necessary to sustain his Appeal.

WHEREFORE, it hereby recommended that Appellant's Appeal of SAC 18-0047 be overruled, and that Appellant's three-day suspension for violating Section 1699 be upheld and reinstated.

Dated: April 4, 2019

Patrick J. Kane, Esq.
Hearing Officer
501 West Broadway, Suite 800
San Diego, California 92101
Telephone: (858) 381-7860
Facsimile: (866) 581-9302
Email: pkane@mauricewutscher.com

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