

**Report to the California Horse Racing Board
Medication Committee**

March 22, 2006

**Untimely Administration of Furosemide to Intercontinental
In the Palomar Handicap at Del Mar Race Track**

September 3, 2005

C. Scott Chaney

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INTRODUCTION

Approximately three weeks ago, I was contacted by California Horse Racing Board Chairman, Richard Shapiro and asked if I would conduct an independent review and investigation of the events and circumstances surrounding the untimely administration of furosemide to the race mare Intercontinental, a participant in the Palomar Handicap held at Del Mar Race Track on September 3, 2005. News of the matter had been recently circulated in many trade publications as well as local newspapers and several owners with participants in the race had expressed a desire to have this incident reviewed and requested a disqualification of Intercontinental and a redistribution of the purse money for the race. Chairman Shapiro asked that I conduct a thorough review of the factual circumstances regarding this incident because there had been allegations of wrong doing by California Horse Racing Board (hereinafter “CHRB”) officials, including stewards, the Official Veterinarian, investigative staff, as well as Executive Director Ingrid Fermin. He also asked me to analyze how current CHRB rules and regulations apply to this case and supply the appropriate information for the Medication Committee to make an informed recommendation to the full Board with respect to how to proceed in this case as well as to prevent this type of occurrence in the future. I was given access to the full resources of the Board and received no direction nor was I influenced by racing officials or the Board in any way.¹ I began my investigation on Monday, March 6, 2006 and have been working exclusively on this report since then.

In furtherance of my investigation, all relevant documentary evidence, including but not limited to all official documents and video taped evidence was collected and analyzed, and approximately thirty people were interviewed. Of those thirty people, I determined that fourteen individuals had information relevant to my review. Those fourteen individuals have submitted declarations signed under the penalty of perjury. With one exception, everyone I approached about this investigation was willing, if not eager, to speak candidly and answer every question I had. That one exception, Associate Steward Gina Powell, refused to be informally interviewed and would only agree to respond at a formal deposition. Such deposition would have required that I travel to

¹ See Letter of Understanding, page 28.

Oklahoma City, Oklahoma or have the state of California pay to have her flown here to Southern California. I requested and was denied an informal interview with her individually and through her attorney on several occasions. I did not agree to the conditions and terms insisted upon by Gina Powell because I believed it to be a poor use of taxpayer resources. Gina Powell did, however, submit two declarations on her own. One of these declarations had been widely circulated to trade publications and at least one newspaper. That first declaration was submitted about one week before a second declaration was offered. Both declarations were signed by Gina Powell under the penalty of perjury and contained statements which were materially different. Consequently, the Powell declarations lack serious credibility because some of the statements included therein impeach themselves. All of this, coupled with fourteen other declarations that basically tell the same story (and incidentally agree with much of what is consistent between the two Powell submissions) led me to piece together a relatively accurate picture of what occurred at Del Mar on September 3, 2005. The narrative is not perfect, nor could it be, based on memories of events that occurred almost six months ago. Certainly there are details that are not entirely clear and may never be, and undoubtedly there were mistakes made on that day and the days that followed. Nevertheless, I am both comfortable and confident in saying that I do not believe that a cover up took place with regard to any aspect of what can be called the Intercontinental incident.

This report that includes a recapitulation of the relevant events of September 3 and the days that followed at Del Mar but at this point a distilled preview of what occurred seems in order. Intercontinental received a furosemide injection twenty minutes after the allowable time. Dr. Amy Nevens, who gave the furosemide administration, turned in a Bleeder Slip that had the intended time rather than the actual time of administration. Her assistant filled out these slips earlier in the day, a questionable practice that seems quite common among veterinarians. The private security personnel stationed at Intercontinental's stall, noted the time on her report, alerted her supervisor Wanda Roth and Director of Stable Area Security Sam Templeton. Associate Steward Gina Powell was aware of the problem through monitoring radio transmissions during that time. Templeton tried unsuccessfully to reach CHRB investigators, which was the protocol in place, and Gina Powell, the only CHRB representative who had this

information, believing that Templeton had contacted the appropriate people, did nothing. Intercontinental proceeded to the receiving barn where it is unclear whether or not the information about her untimely furosemide administration was relayed to the CHRB investigators. Intercontinental won the race and would go on to be given the Eclipse Award for Outstanding Turf Filly or Mare based on this and other performances. There is no direct evidence that suggests that Ingrid Fermin, Dr. William Bell, the Board of Stewards, or Del Mar management knew of the late administration until the following day or even months after the race. Ingrid Fermin, the Board of Stewards, and the California Horse Racing Board investigators all learned of the misadministration of furosemide on September 4, 2005, the day following the race. The matter was referred to the investigators, CHRB Special Investigator Doug Aschenbrenner was assigned the case, and he began interviewing witnesses and collecting documents that day. A complaint was filed against the veterinarian, Dr. Amy Nevens, and the case was heard and adjudicated at the Oak Tree racing meet.

There are more facts and questions outlined in the detailed factual analysis that follows. Where I find the information particularly important, I refer to individual declarations or documents that prove or support the contention. Clearly, there were some serious errors and mistakes made, some made on the part of individuals and others that occurred as a result of flaws in CHRB procedures. I will address these issues in my conclusions. Furthermore, there is an open question regarding what, if anything, should be done with the purse, given that Intercontinental ran despite a clear rule violation. All the stewards with whom I spoke unequivocally agree that had this information come to light before the race, as it should have, Intercontinental would have been scratched. The issue before the Board then becomes, what should happen now, both in this case and in future cases should this ever happen again? I have attempted to provide the salient legal positions in this section to aid the Board in this determination. Lastly, I have attempted to highlight issues for the Board's consideration both in terms of resolution of this case and policy changes that should be considered for the future.

FACTUAL ANALYSIS

- I. September 3, 2005
- II. September 4, 2005
- III. September 5, 2005 and Later

I. SEPTMEBER 3, 2005

As part of Del Mar Race Track's surveillance program, it contracts with Elite Show Services Inc. (hereinafter "Elite") to conduct surveillance on runners in graded stakes. On September 3, 2005, as had occurred all summer, the Elite personnel met in the morning for a briefing and stall assignments for the Palomar Handicap which was to be run as the fourth race that afternoon. Present at the briefing was Sam Templeton, Director of Stable Area Security,² CHRB Special Investigator Rick Amieva,³ possibly CHRB Senior Special Investigator Richard Guerrero who led several of the briefings that summer,⁴ and possibly Associate Steward Gina Powell, although not noted in her declaration. Also present at the briefing were Elite personnel Wanda Roth, who was the Elite supervisor that day as she had been many times that summer, and Ellen White who would later be assigned by Templeton to monitor Intercontinental's stall. Video cameras were dispensed to each of the Elite employees assigned to the five fillies and mares in the Palomar and the Elite employees were given a brief explanation on their use. Clip boards with the Elite Security Detail reports were dispensed, and each of the Elite employees was given an Elite radio by which they could communicate with each other, their supervisor Wanda Roth, and Sam Templeton. It should be noted at this point that these radios are different from the Del Mar radio system. The Del Mar radio has several frequencies, each of which is used to aid in communication among certain departments. For example, security uses one frequency and is obviously monitored twenty-four hours a day. By contrast, the Stewards, the Official Veterinarian, the Track Veterinarian, the horse ambulance, the human ambulance, the starter and the outriders all use another frequency during the races. This group typically turns their radios on about a half an hour before the races (about 1:30 p.m. on September 3, 2005). At 8:30 a.m., the Elite team dispersed and began monitoring the Palomar entrants.

² Declaration of Sam Templeton, page 82, lines 9-12.

³ Declaration of Rick Amieva, page 52, lines 9-10.

⁴ Declaration of Richard Guerrero, page 60, lines 9-11.

It should be noted that CHRB Executive Director Ingrid Fermin may have been at Del Mar in her office on the frontside as she worked many weekend mornings but was not present for the afternoon or the races.⁵ Elite employee Ellen White informs her supervisor that the furosemide administration is nearly late. At this point, somewhere around 11:45 am, Templeton stops by the Bobby Frankel's barn to check on White, who is monitoring Intercontinental and learns that she has not yet received her furosemide injection.⁶ After conducting other business, Templeton stops back at the Frankel barn and learns from White that the administration of furosemide is late. He immediately notifies Bobby Frankel's assistant trainer Humberto Ascenio about the problem.⁷ Frankel is not present at Del Mar and would not learn of late furosemide until it appears in press reports months later. Ascenio immediately calls Dr. Von Bleucher, who is Frankel's private veterinarian, who in turn calls his associate Dr. Amy Nevens who is administering furosemide that afternoon. Dr. Nevens, who has already treated two Palomar entrants some distance from Frankel's barn, becomes busy at another barn, and doesn't realize that the furosemide is late until she gets the call from Dr. Von Bleucher.⁸ Dr. Nevens immediately goes to Frankel's barn and treats Intercontinental. The time is 12:10 p.m., twenty minutes after the permissible grace period for furosemide. During this period, Associate Steward Gina Powell is monitoring various transmissions between Templeton, White, and Roth with respect to Intercontinental on her Security radio from her backstretch office.⁹ Interestingly, Powell in her declaration claims to be listening to these communications on her Security radio and individuals such as the stewards, CHRB investigators, Dr. Bell, and others have access to these transmissions. However, White and Roth do not have Security radios, they have Elite radios, so it would be impossible to monitor any of these transmissions on the Security radios even in the unlikely event that they were on and tuned to the correct frequency. At any rate, Templeton stops by the Frankel barn and confirms with White that Dr. Nevens has administered furosemide to Intercontinental and determines that the late administration is appropriately noted in the

⁵ Declaration of Ingrid Fermin, page 57, lines 11-12.

⁶ Declaration of Sam Templeton, page 82, lines 13-15.

⁷ Declaration of Sam Templeton, page 82, lines 16-20.

⁸ Declaration of Amy Nevens, page 63.

⁹ Declaration of Gina Powell, March 8, 2006, page 67, lines 24-25; page 68, lines 1-7.

Elite Security Detail report.¹⁰ At the same time, Powell, while monitoring the security radio transmissions learns that the furosemide injection has been administered.¹¹ At 12:20 pm, Powell attempts unsuccessfully to contact Fermin to apprise her of the situation.¹² Shortly after trying to radio Fermin, Powell contacts Templeton and confirms the late furosemide. Powell claims that Templeton states he has forwarded the information to the Board of Stewards, CHRB investigators and Fermin.¹³ However, Templeton says that he did not discuss the Intercontinental matter with Powell and doesn't recall seeing her that afternoon.¹⁴ He also states that he never forwarded any information to or contacted the stewards, CHRB investigators or Fermin.¹⁵ Templeton does make repeated attempts to contact a CHRB investigator but is unsuccessful.¹⁶ What is clear, despite these conflicting stories, is that Powell never claims to have contacted the stewards, who are the only people who can scratch Intercontinental. About this same time, Dr. William Bell, the Official Veterinarian receives the Bleeder Treatment Report for all horses in the Palomar Handicap including Intercontinental and finds nothing irregular in the reports¹⁷ because Dr. Nevens' assistant had filled out the Bleeder slip at the beginning of the day before knowing that the administration would end up late.

At about 3 p.m., Intercontinental and the other fillies and mares in the Palomar Handicap arrive at the receiving barn where Templeton first recalls communicating to CHRB Investigator Richard Guerrero the information that the furosemide was late.¹⁸ Guerrero may have been at the receiving but does not recall receiving any information about the late furosemide from Templeton.¹⁹ CHRB Investigator Amieva is at the receiving barn collecting video cameras and Elite Security Detail reports for transport to the CHRB frontside office but does not learn of the late furosemide nor does Templeton claim to have told him.²⁰ Clearly there is some discrepancy here with respect to whether

¹⁰ Declaration of Sam Templeton, page 82, lines 21-24.

¹¹ Declaration of Gina Powell, March 8, 2006, page 68, lines 13-15.

¹² Declaration of Gina Powell, March 8, 2006, page 68, lines 17-22.

¹³ Declaration of Gina Powell, March 8, 2006, page 68, lines 23-26; page 69, line 1.

¹⁴ Declaration of Sam Templeton, page 83, lines 1-2.

¹⁵ Declaration of Sam Templeton, page 82, lines 28-30.

¹⁶ Declaration of Sam Templeton, page 82, lines 25-27.

¹⁷ Declaration of Dr. William Bell, page 53, lines 13-16.

¹⁸ Declaration of Sam Templeton, page 83, lines 3-6.

¹⁹ Declaration of Richard Guerrero, page 83, lines 12-14, 17-19.

²⁰ Declaration of Rick Amieva, page 52, lines 11-13.

any information regarding the late furosemide is communicated at the receiving barn. Did Templeton in fact tell someone then, or did he inform an Investigator later? Did a CHRB investigator get the information twenty minutes before the race and fail to act? Both of these are possibilities but if either understood the importance of this information, one would think that they would have informed the stewards immediately rather than be responsible for delaying the communication of information of this gravity. Most likely, Templeton failed to report the information and if he did, none of the parties understood its significance until much later. Finally, it is important to note at this point that the Board of Stewards neither collectively nor individually learn of the untimely administration of furosemide to Intercontinental.²¹

II. SEPTEMBER 4, 2005

In the early morning hours of September 4, 2005, Powell claims to have spoken to Templeton regarding Intercontinental, who told her that Del Mar Race Track management had told him not to speak to anyone and direct all inquiries to Ingrid Fermin.²² Templeton has no recollection of speaking with Powell and states that Del Mar Race Track management never told him not to remain silent about the incident.²³ There is, in fact, no evidence that Del Mar Management knows anything about this episode at this time. Next, CHRB Chief Investigator Frank Moore first learns of the untimely administration of furosemide. He learns this information from the stewards, Templeton, and/or a member of his investigative staff.²⁴ After learning of the matter, Moore calls a meeting with several members of the investigative staff and assigns the case to CHRB Special Investigator Doug Aschenbrenner who begins investigating the matter that day.²⁵ Sometime that morning, Amieva overhears Templeton tell Moore about the late furosemide administration—this is the first he hears of the incident²⁶—in all likelihood early in the morning before the meeting with other investigators.

²¹ Declaration of Dennis Nevin, page 65, lines 7-8; Declaration of Kim Sawyer, page 80, lines 7-8; Declaration of George Slender, page 81, lines 7-8.

²² Declaration of Gina Powell, March 8, 2006, page 69, lines 23-26; page 70, line 1.

²³ Declaration of Sam Templeton, page 83, lines 1-2.

²⁴ Declaration of Frank Moore, page 62, lines 15-17.

²⁵ Declaration of Frank Moore, page 62, lines 18-20.

²⁶ Declaration of Rick Amieva, page 52, lines 14-19.

At this point, Associate Steward Gina Powell begins some investigating of her own. Powell has published two declarations, both under penalty of perjury, that contain conflicting information. This is highly unusual and certainly damages if not vitiates the credibility of both. In the widely distributed first declaration, Powell contacts CHRB Special Investigator Frank Fink and together they view the Elite Security video of the furosemide administration from the previous afternoon. Powell notes the time stamp,²⁷ confirms the furosemide is late, then reviews with Fink the Elite Security Detail report, and asks him to collect Dr. Nevens' confidential report and bleeder slips from the Official Veterinarian.²⁸ She asks Fink to obtain these reports because Powell had been ordered by Fermin not to interact with Bell.²⁹ This is confirmed by Fermin because Powell and Bell had had a verbal altercation earlier in the summer. In reality, Fink was not present at Del Mar on September 4; in fact his last day at Del Mar was August 28, after which he went on vacation and returned to work at Fairplex on September 7, 2005.³⁰ In Powell's second declaration, she states that she attempts to contact Fink to view the surveillance video together but is unsuccessful that day, and although over the course of the summer they watched nearly one hundred stall security video tapes together, they did not watch the Intercontinental tape together.³¹ Fink, however, states that he reviewed approximately two surveillance videos that summer, neither with Powell.³²

At about 9:30 a.m., according to Powell, she and Moore meet with Ingrid Fermin to discuss the Intercontinental incident. Powell says Fermin asked why Intercontinental had not been scratched and orders her not to tell anyone about the incident because she would handle it herself. She also instructs Moore to begin an investigation.³³ Fermin does not specifically recall how she learned about the Intercontinental matter, but believes she learned about it on September 4, 2005 most likely from Moore or the Board

²⁷ At this point, it should be noted that a time stamp did not, in fact, exist on the video tape that Powell allegedly viewed. This fact was widely misreported in the press and apparently incorporated in Powell's declaration.

²⁸ Declaration of Gina Powell, March 8, 2006, page 70, lines 3-17.

²⁹ Declaration of Gina Powell, March 8, 2006, page 70, lines 12-17.

³⁰ Declaration of Frank Fink, page 58, lines 9-10.

³¹ Declaration of Gina Powell, March 17, 2006, page 77, lines 22-27.

³² Declaration of Frank Fink, page 58, lines 14-16.

³³ Declaration of Gina Powell, March 8, 2006, page 70, lines 18-25; page 71, lines 1-5.

of Stewards.³⁴ Fermin speaks to no one else about the incident other than Moore and/or the Board of Stewards.³⁵

At some point that same morning the Board of Stewards was apprised of the situation with Intercontinental although each has a different collection of the way in which they were informed. Although he has no specific recollection as to how the information was transmitted, Steward George Slender believes that he received the information from Dr. Bell because this is the type of information that would generally be relayed by him.³⁶ Steward Kim Sawyer also recalls learning of the matter on the morning of September 4, but does not specifically recall how they received the information.³⁷ Steward Dennis Nevin does not recall learning of the incident that day and in fact does not recall learning of the matter until a month later, when the incident is described in the Oak Tree minutes with respect to Dr. Amy Nevens hearing.³⁸ He explains that he was responsible for morning steward minutes that week, and not having learned of the situation was not in a position to include the information for publication.³⁹ All three stewards, however, agreed that this is the type of information that should have been included in stewards' minutes. After learning of the Intercontinental matter, possibly Sawyer but most likely Slender referred the matter to the CHRB investigate staff, most likely Moore, either in person or by telephone.⁴⁰ This comports with custom and practice of the Board of Stewards and the requirements of Horse Racing Law.⁴¹ At some point that morning or afternoon, Dr. Bell learns of the late furosemide administration from the stewards or investigators.⁴² His assistant Phyllis Davis, learns of the matter from the CHRB investigators at the same time.⁴³

That same morning, Associate Steward Gina Powell says that she goes with Moore to office of CHRB Investigator Marla Lloyd to request a case number for the Intercontinental investigation and afterward learns that Moore has assigned the case to

³⁴ Declaration of Ingrid Fermin, Appendix page 57, lines 13-18.

³⁵ Declaration of Ingrid Fermin, Appendix page 57, lines 19-21.

³⁶ Declaration of George Slender, page 81, lines 11-14.

³⁷ Declaration of Kim Sawyer, page 80, lines 11-14.

³⁸ See Stewards' Minutes, page 41.

³⁹ Declaration of Dennis Nevin, page 65, lines 11-13.

⁴⁰ Declaration of George Slender, page 81, lines 15-17; Declaration of Kim Sawyer, page 80, lines 15-18).

⁴¹ See California Government Code section 11425.10(a)(4).

⁴² Declaration of Dr. William Bell, page 53, lines 17-21.

⁴³ Declaration of Phyllis Davis, page 56, lines XXX.

Aschenbrenner.⁴⁴ Powell then claims to have been summoned back to Fermin's office where she accuses Fermin of a cover up,⁴⁵ despite knowing that it is the subject of an active investigation (that ultimately results in a complaint being filed). Later that afternoon, Powell claims to have composed a summary of the events surrounding the Intercontinental incident and forwards it to Eileen Capotosto, Executive Secretary to Ingrid Fermin.⁴⁶ This summary, although dated September 4, 2005, bears no resemblance to any other communications with Capotosto throughout the summer, and uses the past tense, indicating that it might have been written at some later date. Additionally, Capotosto was not working on September 3, 4, or 5, 2005 and never sees the summary until March 16, 2006 as part of the first Powell declaration.⁴⁷ Additionally, Powell sends two emails that afternoon, one to Craig Fravel soliciting money for an instructional video, and one to Ingrid Fermin which appears to apologize for the solicitation to race track management, failing to mention anything about the Intercontinental matter, or her indignation concerning it.⁴⁸

III. SEPTEMBER 5, 2005 AND LATER

A complaint was filed against Dr. Amy Nevens, case number 05DM0091, for violation of CHRB Rules 1845(e)(Authorized Bleeder Medication) and Rule 1842 (Veterinarian Report). A hearing was held at Oak Tree on October 13, 2005 which is outlined in the Stewards' minutes from that date,⁴⁹ and a ruling was issued on October 15, 2005 fining Dr. Nevens seven hundred and fifty dollars.⁵⁰ Dr. Nevens was the only person against whom a complaint was filed in this matter. Craig Fravel, Executive Vice-President for the Del Mar Thoroughbred Club, first learned of the Intercontinental matter at the February, 2006 meeting of the CHRB.⁵¹ Lastly, Joe Harper, President and General

⁴⁴ Declaration of Gina Powell, March 8, 2006, Appendix page 71, lines 6-17.

⁴⁵ Declaration of Gina Powell, March 8, 2006, Appendix page 71, lines 6-17.

⁴⁶ Declaration of Gina Powell, March 8, 2006, Appendix page 71, lines 24-26; page 72, lines 1-3; See also Exhibit A of the Powell Declaration, March 8, 2006, page 73-74.

⁴⁷ Declaration of Eileen Capotosto, page 55, lines 9-10.

⁴⁸ See Email from Powell to Fravel, page 42; see also Email from Powell to Fermin, page 43.

⁴⁹ See Stewards' Minutes, page 41.

⁵⁰ See Oak Tree Ruling #27, page 39.

⁵¹ Declaration of Craig Fravel, page 59.

Manager of DMTC first learned of the Intercontinental incident in an article in the San Diego Union Tribune published after the February, 2006 meeting of the CHRB.

LEGAL ANALYSIS

I. Introduction

II. Protests

III. Timeliness of Protests/Protest Waiver

IV. Discussion of Arguments For and Against Disqualification

I. INTRODUCTION

Despite the difficult factual terrain that precedes this section, the legal issues largely constitute a separate inquiry intersecting with the facts only intermittently. The issue is whether a horse, that was permitted to run, despite a violation of California Horse Racing Board (hereinafter CHRB) rule 1845 (Authorized Bleeder Medication) which, if known before the race, would have resulted in the horse's declaration, should be disqualified from its original finish position requiring that the purse be redistributed. Under the California Horse Racing Board Rules and Regulations, this inquiry is predicated upon the timely filing of protests by individuals who are empowered to file such protests. This matter presents interesting interpretations of the rules and appears to be a case of first impression for consideration by the Board. It should be noted at this point that a matter strikingly similar to this one was recently adjudicated by a Board of Stewards at Cal Expo and a decision rendered on October 27, 2005.⁵² That case presented essentially the same factual posture as the one at hand except for the timeliness issues with respect to the protest. In a 2-1 vote, that Board of Stewards redistributed the purse, and although that decision is in no way binding on this body, several of the arguments contained in the Statement of Decision have been incorporated herein. That case has been appealed, heard and taken under consideration by an Administrative Law Judge.

In conducting this review, each of the owners with horses in the Palomar Handicap were invited to submit any information or arguments they believed to be relevant to my analysis and review of the Intercontinental matter.⁵³ Despite this

⁵² See Cal Expo Statement of Decision, page 44.

⁵³ See Licensee Request, page 29.

opportunity, I received only two submissions: (1) an extensive analysis and supporting evidence by the attorney representing Juddmonte Farms Inc., the owner of Intercontinental⁵⁴ and (2) the one page protest letter that touched on some of the relevant issues submitted by the attorney representing Marsha Naify and Woodside Farms LLC, the owners of second place finisher Amorama.⁵⁵ I have incorporated these arguments as well as independent interpretations of the rules in this analysis. My intention is provide the Medication Committee with the pertinent and relevant arguments and information necessary to consider this matter in a fair and transparent manner. To that end, I have separated this part of the review into pertinent issues based on the CHRB rules and facts as they apply to those rules.

II. PROTESTS

The first question is whether the two requests made by owners in the race qualified as protests under CHRB regulations. CHRB rule 1754 (Protests) states, *inter alia*, that: “A protest against any horse which has started in a race shall be made to the stewards in writing, signed by the protestor, no later than seventy-two (72) hours after the race is declared official excluding non-racing days of the meeting. . . . Protests shall state the specific reason or reasons in such detail to establish probable cause for the protest.”⁵⁶ In this case, the stewards received two requests that purported to be protests; a fax from Jim Ford, the owner of fourth place finisher Katdogawn,⁵⁷ and a letter signed by Roger Licht requesting a hearing on this matter as counsel for the owners of second place finisher Amorama.⁵⁸ While the Ford fax appears to qualify as a protest on its face, the Licht letter does not have the signature of a person empowered to file a protest,⁵⁹ although as an attorney representing such a person would probably qualify. A permissive interpretation of this rule seems appropriate insofar as both requests are clearly intended

⁵⁴ See Juddmonte Brief, page 84.

⁵⁵ See Licht letter, page 97.

⁵⁶ See Pertinent Rules and Law, page 33.

⁵⁷ See Ford fax, page 98.

⁵⁸ See Licht letter, page 97.

⁵⁹ CHRB Rule 1756 (Persons Empowered to File Objection or Protest) states “A jockey, driver, trainer or owner of a horse which is entered for or is a starter in race is empowered to file an objection or protest against any other horse in such race upon the grounds set forth in this article for objections and protests.”

to be protests, were received by the stewards, and there is no dispute with respect to the veracity or standing of the person purporting to file the protests.

Assuming *arguendo* that these requests for purse redistribution are deemed to be submitted to the appropriate persons and filed by persons empowered by the rules to file protests, it becomes necessary to determine if they state the proper grounds on which a licensee may file a protest. CHRB rule 1755 (Grounds for Protest) establishes the following criteria:

A protest to the stewards may be made on any of the following grounds:

- (a) Any ground for objection as set forth in this Article.
- (b) The official order of finish, as determined by the stewards, was incorrectly posted.
- (c) A jockey, driver, trainer or owner of a horse which started in the race was ineligible to participate in racing as provided in this Division.
- (d) The weight carried by a horse was improper, by reason of fraud or willful misconduct.
- (e) An unfair advantage was gained in violation of the rules.

None of the grounds for objection are relevant in this matter,⁶⁰ there are no claims that the official order of finish was incorrectly posted, all of the human participants in the race were eligible to participate under the rules, and there are no claims the any horse carried the incorrect weight. The only ground for protest in the Intercontinental matter that seems remotely applicable therefore is (e) an unfair advantage was gained in violation of the rules. The question then becomes whether a furosemide injection administered twenty minutes after the rule permits creates an unfair advantage in violation of the rules. Obviously the late administration of furosemide constitutes a violation of CHRB rule 1845 (Authorized Bleeder Medication)⁶¹ and there is no contention that the furosemide was administered in accordance with these rules.⁶² Whether Intercontinental gained an unfair advantage via the late administration of furosemide is therefore essentially a scientific inquiry. While the majority in the Cal Expo case seemed to rely on the idea that the horse in that matter gained some advantage to partially support their decision,

⁶⁰ See Pertinent Rules and Law, 1752. Grounds for Objection, page 33.

⁶¹ Rule 1845 (Authorized Bleeder Medication) states in pertinent part that the horse must be treated “on the grounds of a racetrack where the horse will race no less than four hours prior to post time. . .” For the entire text of the rule see Pertinent Rules and Law, page 36.

⁶² See Oak Tree Ruling #27, dated 15 October, 2005, page 39; see also Declaration of Dr. Amy Nevens, page 63-64; see also Elite Security Detail Report, page 40.

they admit that “no documented evidence pointed to bleeder medication enhancing performance.”⁶³ In fact, the testimony in that case by both CHRB Veterinarian Dr. Robert Goodbary and private veterinarian Dr. Gary Budahn both indicated that a late administration of furosemide (in that case at three hours and twenty three minutes before the race) would not provide a horse with any competitive advantage.⁶⁴ Furthermore, included as part of Juddmonte’s brief in this matter is the declaration of Dr. Steven A. Barker, Ph.D. from the Louisiana State University School of Veterinary Medicine, clearly an expert in the field of equine pharmacology, who states in no uncertain terms that given the facts in this case, Intercontinental received no unfair advantage by the misadministration of furosemide.⁶⁵ This view is shared by Dr. William Bell, who acted as the Official Veterinarian at Del Mar last summer. Moreover, in my interview with Dr. Scott Stanley, Director of the University of California, Davis, Kenneth L. Maddy Equine Analytical Chemistry Laboratory, he confirmed that it would be scientifically impossible to claim that Intercontinental gained an unfair advantage given the facts of the case at hand.⁶⁶ He also provided information about Intercontinental’s urine sample that indicated that dilution within normal limits.⁶⁷ Given this scientific information, it would be difficult to conclude that the ground for a protest by which a horse gains an unfair advantage by violation of the rules is satisfied. However, in accordance with the rules, a trier of fact need only find enough evidence “to establish probable cause for the protest,”⁶⁸ so it is possible to determine that the two requests submitted in this case are protests on their face.

III. TIMELINESS OF PROTEST

Whether or not the two requests received by the stewards and Board are considered protests is in many ways much less difficult than demonstrating that these

⁶³ See Cal Expo Statement of Decision: Conclusion, October 27, 2005, page 49.

⁶⁴ See Cal Expo Statement of Decision, Baker dissenting, page 51.

⁶⁵ See Juddmonte Brief, page 84.

⁶⁶ In various discussions while preparing this report, including with Dr. Stanley, it appears that “lasix time” used to be three hours before the race as opposed to four hours. It was changed because of the concern that later furosemide administration could mask other drugs through dilution of urine rather than a concern that a competitive advantage could be gained by later administration; this concern, however, has been largely obviated by the introduction of instrumental testing.

⁶⁷ See Dr. Scott Stanley report, page 100.

⁶⁸ See Pertinent Rules and Law, CHRB Rule 1754 (Protests), page 33.

purported protests were filed in a timely manner. In order for a protest to be timely, the protest must be made “no later than seventy-two (72) hours after the race is declared official.”⁶⁹ Clearly, it cannot be genuinely argued that either of the two protests were filed in a timely manner, in fact both were filed months after the race on which the protests are based was declared official. The rule makes no exception with respect to whether the information that forms the protest was known or knowable within the first seventy-two hours after the running of the race. I suspect that the policy behind this rule intends to promote the principles of finality, seeks to distribute purse money in a timely manner, and is based upon the truth that the passage of time also makes it more difficult to reconstruct and verify the facts on which protests may be lodged. The rules do, however, waive the time limitation in certain cases: “Notwithstanding any other provision in this article, the time limitation on the filing of protests shall not apply in any case in which fraud or willful misconduct is alleged provided that the stewards are satisfied that the allegations are bonafide and susceptible of verification.”⁷⁰ Fraud and willful misconduct are specific legal terms that require a demonstration that the party committing those acts had an intent to deceive that amounted to something more than negligence.⁷¹ Interestingly, the rule does not state whose fraud or willful misconduct gives rise to the time limit exception to the seventy two hour protest rule. Normally, this would apply to the party benefiting from the alleged fraud or misconduct—in this case, Juddmonte Farms, Inc.. However, there is no evidence that would sustain an allegation of fraud or willful misconduct against Juddmonte Farms, Inc.. In the interests of fairness, however, this rule could be read to apply to fraud or misconduct on the part of the private veterinarian, the CHRB and its employees, the Del Mar Thoroughbred Club and its employees, or any other related party. In my factual analysis, there is no evidence to sustain allegations of fraud or willful misconduct by any party that are “bonafide and susceptible to verification”⁷² required by the rule. At best, one could claim negligence on the part of Del Mar Thoroughbred Club through its employee Sam Templeton, or on the

⁶⁹ CHRB Rule 1754 (Protests).

⁷⁰ CHRB Rule 1757 (No Limitation on Time to File When Fraud Alleged).

⁷¹ Black’s Law Dictionary defines fraud as “an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.” (Black’s Law Dictionary, Sixth Edition. 1990). See Juddmonte Brief for elements of both fraud and willful misconduct, page 84.

⁷² CHRB Rule 1757 (No Limitation on Time to File When Fraud Alleged).

part of the CHRB through its investigative staff or Associate Steward Gina Powell, all of whom knew or could have known that Intercontinental had received an untimely furosemide administration in violation of the rules. However, negligence is not enough to qualify for the waiver provision of the seventy-two protest rule.

On balance, therefore, it would be difficult sustain a claim under the CHRB Rules and Regulations that these requests for hearings and purse redistribution could reasonably qualify as protests made in a timely manner, or qualify for the exception to the seventy-two hour rule. In terms of equity, however, and given the significant nature of this matter, it seems unfair for the connections of the horses that complied with the rules and had no reasonable way in which to uncover the information that would lead to a protest, to now be denied the opportunity to be heard regarding this, in many ways novel, situation. Given the unique nature of this case, it could be argued that the Board should determine a policy regarding this matter, both in the instant case and for the purposes of establishing a precedent for future cases.⁷³ This can be accomplished in accordance with the CHRB Rules and Regulations and Horse Racing Law in California. First, CHRB Rule 1407 (Extension for Compliance) states: “If a licensee fails to perform an act, or obtain required action from the Board, within the time prescribed therefore by these rules, the Board, at some subsequent time, may allow the performance of such act or may take the necessary action with the same effect as if the same were performed within the prescribed time.” This rule allows the Board to waive the timeliness requirement regarding protests and examine the protest on its face. Also, the Board may use a more general rule such as CHRB rule 1530 (Cases Not Covered by Rules and Regulations)⁷⁴ as a vehicle to examine whether a disqualification and purse redistribution is warranted in this matter. Lastly, the Board of Stewards at Cal Expo analyzed similar facts under CHRB rule 1592 (Ineligible Horse to Be Disqualified). Any of these approaches allow a more substantive analysis of the equities involved in the proposed disqualification and purse redistribution in a case where a horse received an untimely administration of furosemide and was permitted to run.

⁷³ Additionally, the Board will have to act on the recommendation of the Administrative Law Judge after he or she renders his or her opinion.

⁷⁴ “Should any case occur which may not be covered by the Rules and Regulations of the Board or by other accepted rules of racing, it shall be determined by the stewards in conformity with justice and in the interest of racing.” See Pertinent Rules and Law, page 32.

IV. DISCUSSION OF ARGUMENTS FOR AND AGAINST DISQUALIFICATION

Since the California Horse Racing Board has the ability to waive any requirements with respect to a protest and may examine matters such of those regarding Intercontinental independently, it is important to examine substantive arguments other than those already advanced. While deciding whether a horse gained an unfair advantage is essentially a scientific analysis, other arguments revolve around established custom and practice in the racing industry as well as interpretations of CHRB Rules and Regulations regarding disqualification and purse redistribution.

The majority in the Cal Expo case a couple of months ago, relied on CHRB Rule 1592 (Ineligible Horse To Be Disqualified) which states that “[a]ny horse ineligible to be entered for a race, or ineligible to start in any race, who competes in such a race may be disqualified and the stewards may discipline anyone responsible thereof.”⁷⁵ The majority opinion and the strongest argument for disqualifying Intercontinental and redistributing the purse is that Intercontinental was administered furosemide in an untimely manner in violation of CHRB Rule 1845(e) (Authorized Bleeder Medication) and that this undisputed violation if discovered before the race would result in a scratch by the Board of Stewards. As such, had the rule violation been apparent before the race, she would have been ineligible to participate. In my discussions with many of the Stewards in California, Ingrid Fermin, and Dr. William Bell, it became clear that although the stewards have the discretion with respect to whether to scratch a horse because of the misadministration of furosemide, in all cases in recent memory the horse have been scratched.⁷⁶ All of my research and investigation indicates that horses are routinely scratched when furosemide is misadministered. This can be in situations when furosemide is administered past the allowable time, when furosemide is not administered at all to a horse that is on the Authorized Bleeder Medication list or on occasions when a horse that is not on the Bleeder list receives furosemide in error. Therefore, had the stewards known about the late administration of furosemide to Intercontinental, all officials with whom I communicated agree that she would have been scratched.

⁷⁵ See Pertinent Rules and Law, page 32.

⁷⁶ See Declarations of George Slender, Kim Sawyer, Dennis Nevin, Ingrid Fermin and Dr. William Bell, pages 81, 80, 65, 57 and 53 respectively. However, it should be noted that there is no rule that requires that the stewards scratch horses in these situations, in fact, there is no rule that even contemplates this idea.

Similarly, if the stewards discover before a race that a horse has been accidentally treated with two approved non-steroidal anti-inflammatory medications in contravention of the rules or accidentally treated with an unapproved medication in contravention of the rules, the horse is routinely scratched. Hence, since there is no dispute that Intercontinental would have been scratched before the race had the Stewards been aware of the rule violation, why should the result be different if she were inadvertently allowed to participate? Why should she and her connections be permitted to benefit from the fact that the rule violation was not discovered until after the race? This appears to create an atmosphere in which licensees are permitted or even encouraged to violate the rules without penalty as long as discovery can be delayed until after the running of the race.

On the other hand, as Juddmonte Farms Inc. and the dissent in the Cal Expo case argue, disqualification and purse redistribution for the late administration of an approved medication is not supported by the rules or custom and practice. To wit, it is an unreasonably severe penalty for the misadministration of an approved medication. CHRB rule 1859.5 (Disqualification Upon Positive Test Finding) requires that a horse upon the positive finding of a Class 1, 2, or 3 drug substance in a post-race blood or urine sample, be disqualified and the purse redistributed.⁷⁷ Although the rule does not preclude the disqualification of a horse upon the positive finding of a Class 4, 5, 6, or 7 drug substance or the finding of an approved medication in excess of the permitted levels, neither stewards nor the Board disqualify horses based on these types of findings. This is most likely because these findings do not generally carry the presumption that athletic performance is enhanced by these substances and thus horses that test positive do not enjoy an unfair advantage. This is not to suggest, however, that the persons responsible for these types of violations are not or should not be penalized for their actions that led to a positive test. In the instant case, although we are not dealing with a positive test or an overage of a permitted medication, the analysis should essentially be the same. Furosemide is not classified under the CHRB Rules and Regulations because it is considered an approved medication, similar to phenylbutazone or flunixin. A finding that a horse competed with an level of phenylbutazone in excess of the permitted level, is prima facie evidence that that horse was treated in violation of the rules, either with a

⁷⁷ For a text of the rule see Pertinent Rules and Law, page 36.

very high dosage or at time closer than permitted by the rules, but never results in the disqualification of a horse and a redistribution of the purse.⁷⁸ Assuming *arguendo*, that furosemide was classified (although it is critical to realize that it is not because it is approved) it would unquestionably be considered a Class 4, as a loop (high ceiling) diuretic.⁷⁹ I have found no evidence where a positive finding of a Class 4 drug substance resulted in disqualification or purse redistribution. This argument becomes even stronger when viewed from the standpoint that Intercontinental's urine tested within normal limits and showed no pharmacologic evidence that it had been given late or in a quantity in excess of that which is permitted. Finally, taken to an absurd conclusion, one could argue that the positive finding of furosemide in a post-race urine sample on a horse not approved for furosemide (i.e. not on the Authorized Bleeder list), as a Class 4 positive would not result in a disqualification; but administering furosemide to horse approved for its use (i.e. on the Authorized Bleeder list), twenty minutes late, should result in a purse redistribution. This, of course, would not be logical or comport with the purpose or meaning of the rules.

One other argument that deserves mentioning in this particular case is that of estoppel. Black's Law Dictionary defines estoppel as "a bar or impediment which precludes allegation or denial of a certain fact or state of facts, in consequence of previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law."⁸⁰ In the Intercontinental matter, Juddmonte Farms, Inc. could argue that the doctrine of estoppel applies because the CHRB knew through its representative Gina Powell of the violation of the furosemide rules before the race took place and failed to act, and is therefore precluded from any action against Juddmonte's horse at this point because of that knowledge. The countervailing

⁷⁸ This also seems to rebut the argument that if the Stewards would scratch a horse for a medication violation if known before the race they would necessarily disqualify a horse after the race for the same violation. For example, the stewards routinely scratch horses for accidental double NSAID administration if discovered before the race, but would never disqualify a horse for a double NSAID if the administration was discovered after the race. This is true even if both NSAIDs were revealed in a post-race test—which is dissimilar to this case in that there is no "positive test" finding in that Intercontinental's urine tested within normal parameters. The practice of scratching horses before the race for these approved medication violations, seems predicated upon protecting the wagering public—a consideration that becomes moot after the race is run and declared official.

⁷⁹ See CHRB rule 1843.2 (Classification of Drug Substances), page 35.

⁸⁰ Black's Law Dictionary (Sixth Edition, 1990).

arguments might be that Gina Powell although a representative of the CHRB was not in a position to act on the information, short of informing the Board of Stewards, which based on both of her declarations, she failed to do.⁸¹ Furthermore, the aggrieved party in this case is not the CHRB now contemplating some punishment, but the owners of the other participants in the race who did not have the knowledge of the rule violation and therefore were not in position to effectuate an objection.

⁸¹ See Gina Powell Declaration I and II, pages 66 and 75.

CONCLUSIONS

I was assigned simply to find and report the truth. I have tried to do just that as I retraced the path of events leading up to the running of the Palomar Handicap on September 3, 2005, and to the allegations of impropriety resulting therein. I view the initiation of this investigation and the cooperation afforded me as a mark of an agency and an industry determined to understand what happened and to fix whatever needs to be repaired. That view is underscored by the fact that I was given unfettered access to people, notes, documents, and other materials to ensure that this review was as thorough as possible.

In the Introduction to this report, I outlined what I believed to be my assignment and my responsibility. First and foremost, the entire process has been overshadowed by allegations that it was known by CHRB Executive Secretary Ingrid Fermin, CHRB Official Veterinarian William Bell, Del Mar Thoroughbred Club Executives, and the CHRB Investigators that Intercontinental had been untimely administered furosemide and that a plan was concocted to permit Intercontinental to race despite the of medication violation. This allegation of a cover up came from CHRB Associate Steward Gina Powell. My review has failed to uncover a single shred of evidence supporting the allegations by Gina Powell. It is clear that Ingrid Fermin, Frank Moore, William Bell and Stewards George Slender and Kim Sawyer first became aware of the violation on September 4, 2005, the day after the race. Certainly, their behavior on that day which resulted in an immediate investigation can not be considered a cover up. Ironically, if Gina Powell is to be believed, it appears that she is the only CHRB Official who had uncontroverted knowledge before the running of the Palomar Handicap of the misadministration of medication to Intercontinental. She failed to contact the Board of Stewards, and by her own admission, she did not contact a single other CHRB official. The pertinent portions of her declarations regarding a cover up by her own admissions are assumptions and unsubstantiated allegations. Yet these assumptions, have caused great harm to the California Horse Racing Industry and have besmirched the reputation of many innocent individuals.

The other individual who knew about the untimely administration of furosemide

to Intercontinental, Sam Templeton, although attempting to contact the appropriate parties either failed in that endeavor or at best alerted a CHRB investigator very late in the game. Neither Powell nor Templeton appear to have intended to prevent this information from reaching the proper parties, but neither contacted the proper parties just the same. The problem seems to stem from the fact that the CHRB while well intentioned has failed to implement a comprehensive surveillance program that could prevent this type of problem. Neither the CHRB nor Del Mar Management appears to know whether this surveillance program is required as a condition of licensing or done as a measure of good will. At Hollywood and Santa Anita this graded stakes surveillance program is run entirely by Stable Area security while at Del Mar the CHRB investigative staff is more involved. One investigator explained to me that Santa Anita actually owns the cameras that the private security firms use, and the investigative staff borrows them for Del Mar. He also explained that there is no program in place for cataloging and storing the video tapes and oftentimes they are reused after a certain amount of time. Ironically, it appears that Gina Powell had been very active in attempting to create a more structured approach to surveillance. Unfortunately, that structured approach should also include the Associate Steward taking a supervisory role and informing the appropriate personnel (i.e. Board of Stewards) in the event of a CHRB violation. It is therefore suggested that the entire pre-race surveillance protocols be revisited and reformed to prevent a reoccurrence of the mistakes in this matter.

Some have implied that by assigning the investigation of this incident to the CHRB investigators without an announcement to the owners of other horses in the race constituted another type of cover up. I found the explanation for the lack of stewards' minutes plausible. It should be noted that a full review of the pertinent facts appear in the Stewards' Minutes related to the Oak Tree hearing of Dr. Amy Nevens. It appears that this investigation which resulted in a sanctioning of the administering veterinarian was conducted in a manner consistent with customary CHRB practice. There was at that point, September 4, 2005, no steward's decision to protest or appeal. There is the possibility that one could have protested the eligibility of Intercontinental to participate in the race had they been apprised of the medication violation. Should there be some policy in place by which potentially aggrieved owners are informed that they may have a cause

for a protest? Should the Stewards in these types of cases call their own hearing and allow all parties to be heard? Many stewards with whom I communicated were surprised that more complaints were not filed in this matter—against the trainer or his employees, and others. This committee should consider whether the trainer of a horse receiving a race day administration of approved medication should be held responsible for assuring that such medication is given in accordance with CHRB regulations. I am convinced that if any mistakes were made, or more properly, if this incident could have been better handled, a full hearing of the aggrieved parties would likely provide a forum for a lively discussion for the improvement in the regulatory scheme.

The practice of veterinarians filling out the Bleeder slips before the day begins and going so far as to guess who might be the “attendant present” and filling out that part as well, seems contrary to the idea behind bleeder slips in the first place. Had the bleeder slip been filled out honestly and accurately, it appears that this mistake would have been discovered in the receiving barn. This is certainly inconvenient especially if a particular veterinarian is treating many horses, but inconvenience is a small price to pay in order to protect the horsemen and wagering public.

There is still an open question in terms of how the Board should act given that Intercontinental ran despite a clear rule violation. Although it would be difficult for the owners in the Palomar Handicap to claim that their protests are timely, this is an important issue. One in which a hearing should be held to determine whether she and future horses should be disqualified. I have provided several ways in which the Board could hear this matter despite the untimeliness of the protests. Additionally, the Board will be required to act shortly regarding the appeal of the Cal-Expo decision, so this issue must and should be resolved. I have provided what I believe to be the strongest arguments for and against purse redistribution, but perhaps the participants should be allowed to make their own.

Lastly, I have endeavored to provide the Medication Committee with a truthful and thorough account of what happened and options for what can now be done. Undoubtedly, memories have faded and people have colored their accounts to cast themselves in the best possible light, but hopefully a complete and unbiased review will aid the Medication Committee in further discussion regarding this matter. It is hoped that

this review will, in the end, strengthen the trust in and improve the regulation of California's racing industry.