Case No. 13-11043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABRAHAM & VENEKLASEN JOINT VENTURE;
ABRAHAM EQUINE, INCORPORATED; JASON ABRAHAM,

Plaintiffs-Appellees,

V.

AMERICAN QUARTER HORSE ASSOCIATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 5th CIR. R. 28.2.1, Appellees offer this Certificate of Interested Persons.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Abraham & Veneklasen Joint Venture, plaintiff-appellee.

Abraham Equine, Incorporated, plaintiff-appellee. It is not owned by a parent company and is not owned in whole or in part by any public company.

Jason Abraham, plaintiff-appellee.

American Quarter Horse Association, defendant-appellant, and its Stud

Book Registration Committee and all others who own, show, race, or breed elite Quarter Horses.

Nancy J. Stone, counsel for Abraham & Veneklasen Joint Venture.

Sam L. Stein, counsel for appellant Abraham Equine, Incorporated.

Luther T. Munford, P. Ryan Beckett and Kathleen E. Ingram, Butler Snow LLP, counsel for appellee Jason Abraham.

Ronald D. Nickum, trial counsel for appellee Jason Abraham.

Brian E. Robison, Gibson, Dunn & Crutcher, LLP, trial counsel for appellee Jason Abraham.

David E. Keltner, Marianne M. Auld, Mary H. Smith, Kelly Hart & Hallman LLP, counsel for appellant.

Amici Curiae The Jockey Club, **the U.S. Trotting Association**, **the American Morgan Horse Association**, **the American Paint Horse Association**, **the Appaloosa Horse Club**, **the Arabian Horse Association**, **the Pinto Horse Association**, **The Cat Fanciers' Association, Inc.**, and **the American Kennel Club**.

s/ Luther T. Munford
Counsel for appellees

STATEMENT REGARDING ORAL ARGUMENT

There are two reasons not to hear argument in this case, but they are outweighed by a third, more compelling reason to allow argument.

Argument would not normally be needed where the sole issue is whether there was sufficient evidence to support the verdict of a properly-instructed jury.

Also, the principal issues on appeal were addressed by the district court in a well-reasoned opinion denying summary judgment, *Abraham & Veneklasen Joint Venture v. American Quarter Horse Ass'n*, 2013 U.S. Dist. Lexis 73754, 2013 WL 2297104 (N.D. Tex. May 24, 2013), SRE 2,[1] *citing Floyd v. Am. Quarter Horse Ass'n*, No. 87-589-C (251st Jud. Dist. of Texas, Dec. 15, 2000), SRE 4, ("[w]here the AQHA stops defining its breed and starts restricting breeding, it can run afoul of antitrust law."). Those opinions answer many of the questions in the appeal.

However, the evidence and the rulings go virtually unmentioned in the Brief of Appellant and the Brief of Amici Curiae. Oral argument will be needed to give the appellee horse owners a fair chance to respond to what the appellant may wish to say about them in its reply brief. For example, the briefs do not mention that the existence of an elite Quarter Horse market was undisputed at trial.

[1] Record Excerpts will be cited "RE Tab Number" and Supplemental Record Excerpts will be cited as "SRE Tab Number."

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ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (Seventh) 582-583 (2012) 37
2-10 J. Bauer, W. Page, & J. Lopatka, KINTNER'S FEDERAL ANTITRUST LAW § 10.10 (3d ed. 2013) 35
P. Coelho & J. McClure, *Barriers to Entry in the Market for Stud Services: Government and "Non-Profit" Institutions in Collusion*, 25 Economic Inquiry 659 (Oct. 1987) 44
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James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 722 n.151 (1995) 34

INTRODUCTION

This case took the jury and now brings this Court into a rarefied world: the reproduction of elite American Quarter Horses, a small fraction of the total of the horses specially bred to excel at quarter-of-a-mile races in the United States and Canada and also known for their performance abilities, including working cattle. In that world, because the horses are too valuable to be allowed to actually breed and bear their young, all breeders use advanced reproductive techniques, including in vitro fertilization. Now, however, a new reproductive technique known as Somatic Cell Nuclear Transfer ("SCNT"), a form of cloning, is considered a competitive threat even though it costs $165,000 to produce one foal. Consider the economic interests that SCNT now challenges:

- The breeding fees earned by an elite stallion, such as one managed and owned in part by SCNT opponent Butch Wise, can exceed $3,146,000 a year. ROA 3799.
- An elite broodmare capable of producing multiple embryos a year can sell for $1 million. ROA 3033, 3468-69.

AQHA controls entry into that world. Without registration, a Quarter Horse cannot race, cannot compete in Quarter Horse events, and is worthless for breeding. AQHA has delegated its registration powers to a Stud Book and Registration Committee ("SBRC") dominated by Wise and others who compete in

the market for elite Quarter Horses. They use the many advanced reproductive methods approved by AQHA, but they oppose SCNT because horses born through SCNT pose a serious economic threat to them.

The evidence shows that these members pursued their own economic interests by using control over registration to exclude competition that would not only make elite Quarter Horses cheaper but also improve the genetics of the breed, and that they did this in a manner calculated to preclude competition as long as possible.

A properly instructed jury correctly found baseless AQHA's articulated reasons for refusing to register SCNT horses and their offspring – concentration of genetic disease and parentage verification. The plaintiffs' horses that AQHA refused to register are freed from genetic disease and have undisputed parentage. P-11; ROA 2363-64. The evidence established that proper cloning can actually reduce genetic disease and that parentage can be verified through genetic testing because a clone is more than 99.99% identical to its donor. D-53; ROA 3050-51, 3694. The relationship is the same as that of identical twins. They can be described as "identical twins separated by time." ROA 2319-20, 2343, 2758.

From the outset, the executive vice-president of AQHA, in consultation with two attorneys, acknowledged that these reasons were pretextual – "red herrings" as he put it. P-81, p. 00439; ROA 2944-52, 2967-68. The SBRC's "deliberative

process" was a sham intended to establish a "defense" to an anticipated lawsuit AQHA knew would be filed when the foreordained conclusion to exclude was reached. P-81, p. 00440; 449, 441; ROA 2954-56, 2963. In fact, even the description of the process found in the Brief of Appellant at 1-3 is misleading – it comes from summary judgment material that AQHA did not offer at trial.

A distinct market for elite Quarter Horse was not only well established by Plaintiffs' evidence, but even AQHA's economic expert admitted its existence. ROA 3549. He disputed its extent, but offered no definite opinion other than that he disagreed with plaintiffs' expert. The evidence on which the jury relied showed that the elite market consists of one-half of one percent of the registered American Quarter Horses and that the exclusion of cloned horses has a substantial effect on price competition in that market. ROA 3131, 3178-79.

The jury properly found competitors in the elite Quarter Horse market concertedly used their power over AQHA registration, which its lawyer admitted was "the only game in town," to prevent competition and that their justifications could not satisfy the rule of reason. ROA 3170-72, 3942. Its verdict and the resulting judgment should be affirmed.

After the jury rendered its verdict, the district court granted the plaintiffs' request for injunctive relief and asked the parties to submit a proposed injunction. The injunction ultimately entered was based on proposed rules previously drafted

by AQHA staff, was entered after AQHA refused to offer any specific comments, and was accompanied by an invitation to AQHA to come back to the court if any specific problems arose. It should also be affirmed without modification and the case remanded to the trial court for a further award of attorneys' fees.

STATEMENT OF ISSUES

1. Was there sufficient evidence upon which a properly instructed jury could find:

    - An agreement with and among competitors in the elite Quarter Horse market to exclude the plaintiffs' horses;
    - A distinct market for elite Quarter Horses;
    - Injury to competition caused by the exclusion;
    - A lack of any sufficient business justification for the exclusion.

2. In the alternative only, if AQHA acted as a single entity, did it monopolize the elite Quarter Horse market for the benefit of its leaders by excluding the plaintiffs' horses?

3. Did the district court abuse its discretion in granting injunctive relief based on rules drafted by AQHA staff and offered into evidence at trial?

Note: Because the interstate commerce finding is not challenged on appeal, the Court need not consider the alternative findings under the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COM. CODE §15.05.

STATEMENT OF THE CASE

The parties.

Jason Abraham lives on the Mendota Ranch in the Texas panhandle. ROA

2600. He is the sole shareholder of **Abraham Equine, Inc.**, which since 1997 has provided "recipient mares" to act as surrogate mothers for elite Quarter Horses. ROA 2602-04. The recipient mares carry to term embryos transferred from elite Quarter Horse mares. ROA 2613-14. The embryos are created by one of the advanced reproductive techniques used in the industry. Abraham has a contract with Viagen, Inc., an Austin, Texas company which holds worldwide patents for the use of SCNT in non-human mammals. ROA 2877-79.

Abraham & Veneklasen Joint Venture is a business which Abraham formed with Gregg Veneklasen, DVM, who owns Timber Creek Veterinary Hospital in Canyon, Texas. Veneklasen is one of the nation's foremost experts on advanced equine reproductive techniques. ROA 2353-54. The plaintiffs own or own an interest in several Quarter Horses produced by SCNT and their offspring including the following:

- Lynx Melody Too, a clone of Lynx Melody, winner of the National Cutting Horse competition for three-year-olds (the "Futurity") and a mare whose 17 offspring include 16 substantial money earners including a daughter that won also the NCHA Futurity. P-25, SRE 5. No other mother and daughter have ever duplicated that feat. P-3, 4, 9 (File

02/05)[2]; ROA 2340-41, 2637. From P-25:

Lynx Melody Too

- Back to Feature, a clone of Feature Mr. Jess, a racing stallion that earned $500,000 on the race track. Feature Mr. Jess' offspring have won $19 million. P-7, 8, 9 (File 03/02); ROA 2343.

See also P-9 (DVD of SCNT horses and their offspring).

American Quarter Horse Association is the world's largest equine breed registry and membership organization. It is a private association with 280,000 members, 350 employees, $93 million in assets and maintains its international headquarters in Amarillo, Texas. Since its inception in 1940, AQHA has registered more than 6.2 million horses. ROA 1634. AQHA sanctions races at

[2] P-9 is a DVD of SCNT horses and their offspring. File 02/05 shows Lynx Melody Too. File 03/02 shows Back to Feature.

which only AQHA registered horses are allowed to compete, and it sponsors similarly exclusive horse shows. "Meaningful participation in the multimillion dollar industry is dependent upon AQHA membership and AQHA registration." *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 654 (5th Cir. 1977). *See* pp. 12, 39-40, *infra*.

Course of proceedings.

After AQHA's Stud Book and Registration Committee voted in 2012 to refuse to register cloned horses and their offspring, and AQHA expressly refused to register plaintiffs' horses, the plaintiffs brought this suit in federal district court in Amarillo, Texas. They sought not only damages but also injunctive relief and attached a list of proposed changes to AQHA rules to their complaint. ROA 22, 364.

AQHA moved to dismiss and argued that injunctive relief could not be granted against it. The district court denied the motion to dismiss. ROA 136; SRE 1. It did so based on this Court's decision in *Hatley*, 552 F.2d at 656 (registration rules not insulated from review where legal violation shown).

AQHA then moved for summary judgment. The district court denied the motion with one exception. It held there could be no attempted monopolization because the allegation was that AQHA had a monopoly, not that it was attempting to get one. *See Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS 73754 at *17-18,

SRE 2, p. 11.

The case went to trial. AQHA moved for judgment as a matter of law and renewed the motion after the jury verdict in favor of the plaintiffs. ROA 1892, 2138. The district court denied the motions. ROA 2151, 3281. AQHA did not move for a new trial and it has not complained on appeal about the jury instructions.

The district court ordered a post-judgment hearing on attorneys' fees and injunctive relief. ROA 1944. At the hearing the district court asked AQHA to comment on the proposed injunction that the plaintiffs had drafted using rules that had been written by AQHA staff in 2010 that would have allowed for the registration of clones and their offspring. D-50; ROA 3993-94, 4035-38. AQHA's "comments" were to object to the entry of any injunctive relief and propose no alternate language. ROA 2062.

The district court then entered findings of fact and conclusions of law to support injunctive relief and entered judgment, including a modified version of the injunction proposed by the plaintiffs. ROA 2119, 2129; RE 4, 5.

Subsequently, AQHA obtained a stay pending appeal.

The elite Quarter Horse

Market participants distinguish a small percentage of Quarter Horses as "elite" because they have characteristics which make them highly desirable in

specific disciplines as competitors or for breeding. But for AQHA's exclusion from its registry, the plaintiffs' Quarter Horses at issue in this case would be recognized as elite. ROA 2617.

Plaintiffs' economic expert Chris Pflaum estimated that elite Quarter Horses consist of the top one-half of one percent of Quarter Horses registered each year. ROA 3130-31. Pflaum listed specific characteristics of elite Quarter Horses, P-92(3).

Desirable bloodlines. Of the top 10 yearling foals bred for cutting sold in 2011, nine had the sire Highbrow Cat while three had the dam Autumn Boon. P-92(7). The probability of getting elite foals is increased by breeding elite sires to elite dams. ROA 3035-36. The probability increases even more when breeding mares out of certain paternal lines that are known to cross best with a certain stallion or sire line to produce the most money in the show pen or on the race track, known as a "magic cross." ROA 3133-35, 3139. Another example mentioned by Pflaum was the racing bred stallion, Mr. Jess Perry, sire of Feature Mr. Jess from which plaintiffs' horse Back to Feature was cloned. P-92(4); ROA 3134, 3200. Descendants of Mr. Jess Perry included 13 yearlings that sold at auction for a total of $2,003,000 in 2011. P-92(19).

Conformation and disposition or trainability is another elite characteristic. ROA 3135.

Advanced reproductive techniques are used to produce elite Quarter Horses. For example, to allow the harvest of multiple embryos from an elite mare in one year and spare the mare from the risks of pregnancy, her embryos will be removed, and implanted in a recipient mare. ROA 3136-37.

Stallions that breed more than 100 mares a year are likely to sire elite Quarter Horses. P-92(3); ROA 3137. According to AQHA there were 45 such stallions in 2011. P-89(32).

Wins and earnings in competitions are another characteristic. P-92(3). Breeding fees are charged based on the performance of their offspring. For example, there are 19 horses whose offspring have earned more than $2 million and some SBRC members stand stallions whose offspring have earned up to $40 million. P-92(6); ROA 3816; *See* pp. 16-18, *infra*.

High prices also typify elite Quarter Horses. For example, the top 10 yearling cutting foals sold at auction in 2011 sold at prices ranging from $75,000 to $280,000. P-92(7). In 2010, an elite racing broodmare sold for $875,000. ROA 3468.

Pflaum verified with a regression analysis that prices of elite Quarter Horses reflect the characteristics he described. ROA 3156-63. His testimony confirmed what this Court said in *Hatley*: “Races and shows offer lucrative prize money. Selective breeding has become an art and a science. Champion stallions command

high stud fees and successful mares are prized by stables." *Hatley*, 552 F.2d at 649.

The elite Quarter Horse market

Pflaum identified a distinct market for elite Quarter Horses, which he defined based on the factors antitrust law recognizes: Recognition within the industry; the horses' particular uses as competitors and breeders; owners who operate sophisticated breeding establishments, such as Wise, Merrill, Helzer and others on the SBRC; specialized buyers including syndicates; and prices that increase rapidly for the best horses – a certain sign of price inelasticity and monopoly power. ROA 3151-55. *See* pp. 34-36, *infra*.

Defense expert Keith Ugone agreed that an elite Quarter Horse market exists and that price depends on such things as pedigree, temperament and appearance. ROA 3546-49. His criticism was that Pflaum had defined the market too narrowly, but he offered no boundary of his own. ROA 3549-50.

Numerous fact witnesses confirmed the existence of a market for elite Quarter Horses. ROA 2327, 2333-34, 2339-41, 2613-14, 2702-05, 2765-66, 3072, 3077, 3095-98, 3111, 3114, 3283, 3387-88. Plaintiffs' witness David Brown testified that he would not buy a Quarter Horse that was not elite and that he would rather own two $100,000 mares than twenty $10,000 mares. ROA 3114.

Registration is essential

A Quarter Horse without AQHA registration papers is virtually worthless for breeding and cannot compete in any AQHA sanctioned event, including very lucrative races. ROA 2419, 2643, 2713, 2737-38, 2772-73, 2831-32. While an unregistered Quarter Horse may compete in cutting horse events, owners have no incentive to invest in raising and training an unregistered Quarter Horse to compete in cutting events because even a successful horse will not generate breeding income. ROA 2419-20. While AQHA sanctioned races and NCHA events pay large purses, it is breeding elite mares and stallions that make the most money. ROA 2598, 2624-25, 3133, 3141, 3154-55.

The evidence established that AQHA holds the keys to the Quarter Horse kingdom through registration. ROA 2682, 2713. There is no other registry. ROA 2420-21, 3265-68. AQHA has absolute power to determine which horses get registered and registration papers are essential. ROA 2419-21, 2681-84, 3170-71. AQHA's counsel admitted in his closing argument that AQHA is "the only game in town." ROA 3942.

Advanced reproductive techniques

The use of advanced reproductive techniques has been a hallmark of elite Quarter Horse breeding for more than 40 years. Such techniques are now used by virtually all elite breeders, including those on the SBRC. Natural breeding, or

"live cover," is not and has not been used as a breeding technique for elite Quarter Horses in decades. P-18, 139; ROA 329-30, 2632, 3137, 3825.

Artificial insemination. In the 1960s AQHA began to allow the registration of foals produced through the artificial insemination of mares, and as technology advanced further, AQHA allowed the registration of foals resulting from the use of cool-shipped semen in 1997, frozen semen in 2001, and frozen semen after the death of a stallion in 2003. P-139.

Embryo Transfer. AQHA first registered foals resulting from the transfer of an embryo from a donor to a recipient mare in 1980, but it refused to allow the registration of more than one foal per year out of a single donor dam that produced multiple embryos during a single breeding season. In 2000, that restriction was held to violate the Texas state antitrust laws because it was "not a legitimate rule adopted for the purpose of protecting the reproductive health of the animal in question, but was instead an anticompetitive restraint adopted for purposes of limiting the supply of registered quarter horses." *Floyd v. Am. Quarter Horse Ass'n*, SRE 4 p. 3. *See also* P-130A, SRE 10 (discussing suit). As a result, AQHA changed the rule. In 2007, AQHA began allowing registration of foals resulting from the use of frozen embryos after the death of the mare. P-139.

ICSI. Intracytoplasmic Sperm Injection ("ICSI") combines two cells in an in-vitro procedure. Using a micromanipulator, a single sperm cell is injected into a

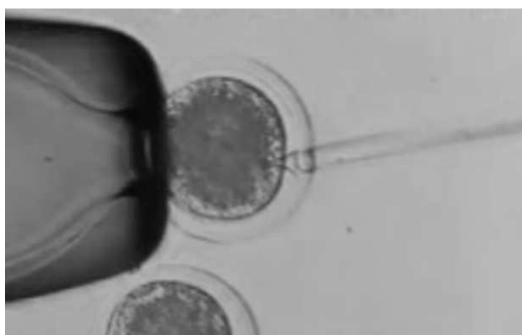
mature unfertilized egg cell called an oocyte. ROA 2327-28, 2348-49. The fertilized egg cell is then transferred into a recipient mare. AQHA has registered foals resulting from the ICSI procedure since 2004, even though it fits within the definition of cloning prohibited by Rule 227(a). P-139; ROA 2827-28, 3049-50. A demonstration of the procedure is shown on the DVD which is P-10, File 05, SRE 6.

SCNT. Somatic Cell Nuclear Transfer also combines two cells in an in-vitro procedure. Using the same micromanipulator, a nucleus from a somatic cell of a donor horse is injected into a mature oocyte, from which the nucleus has been removed. The egg is stimulated to replicate fertilization, cultured and the resulting embryo is then transferred into a recipient mare. P-12; ROA 2345-52. The result is a clone of the cell donor horse, or an "identical twin separated in time." ROA 2321, 2343. The clone is greater than 99.99% genetically identical to the donor horse. ROA 3051, 3694.

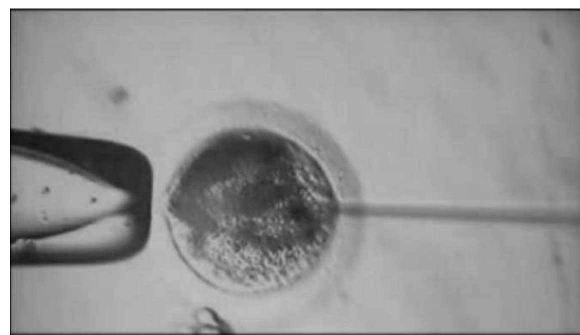
SCNT has been used extensively throughout the livestock world, especially by the beef and dairy cattle breed organizations, for more than 10 years. P-92(39); ROA 2316. SCNT is also used to produce bucking bulls, polo ponies, horses for equestrian events, and rodeo horses. P-92(39); ROA 2338, 2974-75, 3202-07. A SCNT cow recently won the world Dairy Expo. A SCNT horse sold for the highest price ever paid for a polo pony. In 2008, the U.S. Food and Drug

Administration approved use of SCNT to improve breeds of food animals. ROA 2319. And, after this suit was filed, the Federation Equestrian International ("FEI") changed its rules to allow SCNT horses to compete in equestrian events in the Olympics. P-92(39); ROA 2337, 2975, 3206-07. Viagen, Inc., whose President, Blake Russell testified, owns the patent on this technology. D-201; ROA 2296, 2316, 2877, 2879.

ICSI and SCNT use the same tools and laboratory equipment. They use the same micromanipulator, incubators, oocytes, and lab process including the culturing and maturation of oocytes. ROA 2328, 2349-50. An observer in the lab cannot tell the difference between the two procedures. ROA 2349, 2627-28. SCNT is also shown on the DVD which is P-10, File 06, SRE 7. The principal difference is that with SCNT a cell nucleus is substituted while with ICSI a single sperm cell is injected. *Compare* SRE 7 to SRE 6:



SCNT



ICSI

AQHA Stud Book and Registration Committee

AQHA has delegated all decisions concerning registration to its Stud Book and Registration Committee. If the SBRC does not recommend a change, then the proposal to change does not go any further. P-31; ROA 2536-37, 2599, 3045-46. In 2004, AQHA adopted Rule 227(a), which states in pertinent part that "[h]orses produced by any cloning process [such as SCNT] are not eligible for registration." P-78. Any change to the 2004 anti-cloning rule must necessarily come from the SBRC.

The SBRC is comprised of AQHA members who have an interest in the elite Quarter Horse market as owners, as competitors, and as breeders. But there were five men who spoke against the SCNT proposal. P-147; ROA 2378-84, 2387-91, 2406, 2839, 3822-23.

- **Butch Wise** runs Lazy E, one of the top breeding farms for racing Quarter Horses. It stands at stud some of the leading racing stallions in the country. ROA 3822. One such syndicated stallion, Corona Cartel, has sired offspring that have earned over $40 million on the race track. ROA 3816. Corona Cartel bred 88 mares in 2011 at a stud fee of $35,750 per breeding. ROA 3799. Wise has sold yearlings at public auction for as much as $550,000. ROA 3805-06.
- **Frank Merrill** built Windward Stud in 1972, one of the largest breeding

establishments in the horse breeding industry. ROA 3285-87. He has earned over $670,000 in prize money, but his real money comes from breeding. ROA 2598, 3358-59. He has owned, managed or syndicated more than 100 stallions. ROA 3346. He has bred over 25,000 mares and owned two Hall of Fame horses. ROA 2577, 3287. Merrill has repeatedly stated that AQHA will allow clones to be registered "over my dead body," and that "no court – no judge will tell our association how to register a horse." ROA 2588, 2594, 3370-71.

- **John Andreini**, an influential syndicate member, breeder, and AQHA director, has told the SBRC "I will not allow this technology to move forward. I will not have sixty First Down Dashes in every county in this country," a reference to the stallion, First Down Dash, that is arguably the greatest racing sire of all time. Andreini said he had invested millions in the industry and if "this is approved I will take every dime of it out." In other words, he did not want the competition from clones and their offspring. ROA 2387-89. His business partner, **Jeff Tebow**, sits on the SBRC and runs Heritage Place auctions. ROA 3420-21.
- **Jim Helzer**, another prominent horse breeder, owns JEH Stallion Stations. When he was president of AQHA in 2009, he said he was not going to participate in cloning in any "way, shape, or form." P-130A. He owned an

interest in Feature Mr. Jess whose clone Back to Feature is now owned in part by the plaintiffs. P-130A.

- **Glenn Blodgett**, DVM, manages the vast equine operation of the 6666 Ranch operated by Burnette Ranches. Blodgett, who stands at stud 20 stallions a year, including Mr. Jess Perry, whose offspring, including Feature Mr. Jess, have also won $40 million. ROA 3816. Blodgett opposed the change in the embryo transfer rule in 2000 because it would "increase the supply of these good mares and breeding opportunities and maybe reduce the price a little bit." ROA 3173.

In addition to being members of the SBRC, since 2007 Merrill and Helzer have served as president of AQHA and Blodgett and Trotter have been on its executive committee. P-28, 29**.** Blodgett, Wise and Helzer stand at stud more elite Quarter Horse stallions than anyone else in the country. ROA 3822.

No one spoke in the Stud Book meetings against cloning who was not a breeder of elite horses. ROA 2390, 2406, 2556-57, 3823-24. They dominated the meetings. ROA 2380, 2390-91. Butch Wise testified that all of the 2012 committee members were breeders, with one exception. ROA 3012. Jason Abraham estimated that 70% were breeders of elite Quarter Horses. ROA 2697.

The committee as a whole consisted of competitors in the owning, showing, and breeding of elite Quarter Horses. ROA 2390, 2556-57. A diagram identified

16 prominent present or former SBRC members tied to Heritage Place, an Oklahoma auction company, as sellers or purchasers of elite Quarter Horses. P-147; ROA 3452-66; SRE 11. One of them, Jeff Tebow, confirmed that they were leaders that were a "significant part" of the industry. ROA 3464. Wise said all 16 had "skin in the game." ROA 3822.

The sham procedures

After the cloning issue arose in 2008, Don Treadway, AQHA's executive vice-president, made notes on a plan to defeat the registration of clones and their offspring. Treadway's notes acknowledge that the economics of cloning could be "devastating" to established breeders. P-81 p.00444, SRE 8; ROA 2958. The evidence showed that AQHA leaders knew their proffered reasons for refusing to register clones and their offspring were "red herrings." Treadway noted that the purported justifications to support exclusion of clones and their offspring from AQHA's registry, such as gene concentration and "parentage verification" were "red herrings" and could not be used to support exclusion. ROA 2944-51, 2967-68. Treadway suggested as a "defense" . . . that the AQHA "table it for 2-3 years" based on a purported rationale of "don't know all the ramifications." P-81 p. 00440, SRE 8; ROA 2954-56.

And that is in fact what the SBRC subsequently did. It voted to table the proposal and then appointed a committee of cloning opponents to examine the

"questions." ROA 2955-56, 2963, 3362-63, 3827-28. With telling use of quotation marks to indicate sarcasm Treadway's notes document a way to find options "for those who 'say' maybe not enough info" and to ask the committee "to get us their 'questions'." P-81 p. 00447, 449, SRE 8. A survey of 1,000 of the 280,000 members was conducted to bolster the "defense." P-81 p. 446, SRE 8; ROA 2964, 3825, 3852.

After the SBRC voted the proposal down in 2010, Veneklasen submitted a rule change compromise in the fall of 2011 which the then-president of AQHA appeared to favor. P-27; ROA 2809-16. But before the SBRC could vote at its 2012 annual meeting, Wise, Merrill, Blodgett, Helzer, Tebow and others met secretly in January 2012 and arranged to kill the proposal. P-142; ROA 2822-23. The evidence showed that they went behind the back of the president and agreed to derail the proposal. P-13, 14, 27, 142; ROA 2664-68, 2809-25, 2970-74. When the SBRC met in March, it then "officially" voted the proposal down in a closed meeting with little discussion. ROA 2670-71, 2823-25. The SBRC hid the agenda item in its report to the board of directors so it would not reveal what the vote was about. P-67; ROA 2539-42.

This suit followed later in 2012. In 2013, AQHA board of directors for the first time considered the issue and, with lawyers present, voted to defend the litigation. It was undisputed that one of the AQHA lawyers observing the vote was

heard to say, "they don't even know what they are voting on." ROA 2678-79.

Damages

Plaintiffs offered proof of substantial damages they had suffered by not being able to register their horses and sell the offspring. Jason Abraham, however, twice told the jury that the case was not about money and what he really wanted was a verdict that would require AQHA to register the horses. ROA 2686, 3867. AQHA made sure the jury understood that Abraham was wealthy enough to afford an elite horse. ROA 2704, 3248-49.

The jury responded with a verdict that found that the plaintiffs had suffered an antitrust injury, but awarded them no money damages. ROA 1935, SRE 3.

SUMMARY OF THE ARGUMENT

The sole question before the Court on liability is whether the evidence supported the properly-instructed jury's finding that the defendant and its SBRC members agreed to exclude the plaintiffs from the elite Quarter Horse market and lacked a business justification sufficient to justify the resulting harm to competition. The evidence was more than sufficient.

First, the evidence showed an agreement among the members of the SBRC and between the SBRC and AQHA to refuse to register SCNT horses. The members compete in the racing, showing, and reproduction of horses and where an

organization is controlled by competitors it is considered to be a conspiracy of its members. *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008).

Nor is there any merit to AQHA's claim that its members, and especially those who controlled this decision, did not have any independent economic interest different from that of AQHA. To the contrary, AQHA's interest is in having more members and more registered horses, while the SBRC members' individual economic interest was in preventing competition with the elite Quarter Horses they own, compete, and breed. *See Am. Needle, Inc. v. Nat'l Football League,* 560 U.S. 183 (2010) (sports league members have individual economic interests); *Am. Soc'y of Mech. Eng'rs*, *Inc. v. Hydrolevel Corp.* 456 U.S. 556 (1982) (association liable for delegating standards of decision-making to committee of plaintiff's competitors).

Second, the evidence supported the existence of an elite Quarter Horse market. Both sides' experts and other witnesses admitted that it exists. Multiple factors determine whether a market exists. A bright line is not required. Plaintiffs' expert explained that the industry recognizes a separate market, with distinctive reproduction methods, sellers, buyers (who are frequently syndicates), and prices. The demand for elite Quarter Horses becomes highly inelastic as the top few percent is reached. This case is thus much like *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 250 (1959), which recognized a separate

market for "championship boxing contests" that had been monopolized by the defendants.

Third, the exclusion of SCNT horses and their offspring harms competition within that market. The plaintiffs' horses would compete directly with horses owned by SBRC committee members if registration were allowed, but without registration, they have little value. *See Hatley*, 552 F.2d at 655. State statutes that require AQHA registration for racing are only a part of the picture. AQHA attempts to raise a statutory immunity issue for the first time on appeal but it is both a day late and a dollar short. Nothing in those statutes provides for supervision of the purely private AQHA registration process in the manner required for immunity. Also, none of them prohibits the registration of SCNT horses. The statutes are instead a source and preserver of the market power AQHA has abused. In any event, the statutes only apply to racing and not other disciplines.

Moreover, the evidence shows that allowing SCNT horses to be registered would increase competition in the elite Quarter Horse market as it has done in the markets for other animals in which SCNT is allowed. That would reduce price and would benefit those who have not previously been able to afford elite horses.

Finally, there is no merit to AQHA's alleged business justifications. They are in fact "red herrings." Allowing SCNT horses to be registered can improve the

genetics of the breed and need not harm it. And while there can be some difficulties with the verification of parentage of some SCNT horses, AQHA in the past has not allowed those difficulties to prevent registration of similarly situated horses, i.e., identical twins and their offspring. The donor and the SCNT horse are identical twins separated by time. The jury was entitled to believe that the difficulties were pretexts trotted out for purely anticompetitive reasons.

If the Court finds §1 liability, it need not reach §2. But even if the Court found that AQHA acted as a single entity, that entity has monopolized the market for elite Quarter Horses and maintains that monopoly for the benefit of its leadership. So the proper result would again be affirmance, but under §2.

The injunctive relief sought, i.e., a change in AQHA registration rules, has been at issue since the filing of the complaint. Plaintiffs offered into evidence AQHA staff proposals to change 12 different rules to accommodate SCNT horses and their offspring. AQHA did not dispute that the changes were practical and feasible. After the verdict, the district court gave AQHA every chance to suggest specific modifications but AQHA offered none then and offers none on appeal. The district exercised some discretion when it required the proposed changes, with some alterations, while it invited AQHA to come back to court with any future changes that did not discriminate against SCNT horses.

ARGUMENT

1. The jury correctly found that competitors combined to exclude the plaintiffs from a distinct elite Quarter Horse market and so injured competition without any sufficient justification, in violation of Section 1 of the Sherman Act.

The standard of review is the standard which defers to the fact-finding ability of a properly-instructed jury, and AQHA Brief at 8 states it correctly.

In antitrust cases like this one, the decisive questions are all questions of fact appropriate for both jury resolution and affirmance unless there is no evidence to support them. Those questions include the existence of a combination in restraint of trade, *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410-11 (5th Cir. 2007), the definition of a market, *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342, 1348-49 (5th Cir. 1980), and the credibility of business justifications for anticompetitive conduct, *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988).

1.1 Owners and breeders of elite Quarter Horses agreed to exclude the plaintiffs' horses from competitions and breeding.

The district court held that because AQHA delegated authority to the SBRC whose members were competitors in the horse selling, competing and breeding business it was subject to §1. The district court cited *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008), for the proposition that "Where an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members." *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS

73754 at *8, SRE 2 p. 5. *See also Am. Needle*, 560 U.S. at 191 (entity "controlled by a group of competitors" was a "vehicle for ongoing concerted activity").

AQHA and the amici wrongly argue that this control rule should not apply because it is entitled to the "single entity" defense. The statement in *Hatley* wrongly said it was unnecessary to consider what the U.S. Supreme Court has now made the controlling test, i.e., "the possibility that a conspiracy can exist if the officers have an independent stake in the illegal acts." *Hatley*, 552 F.2d at 654 n.7.

Under *American Needle*:

> [t]he relevant inquiry . . . is whether there is a contract, combination . . . , or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of 'diversity of entrepreneurial interests and thus of actual or potential competition."

560 U.S. at 195 (citations and internal quotation marks omitted).

Thus "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." *Id*. at 200.

In denying summary judgment here, the district court followed the *American Needle* standard. It reserved for the jury to consider evidence that members had interests in their own horses, such as racing or showing, which would make them "potential independent centers of decisionmaking" capable of conspiring in

violation of §1. *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS 73754 at *11, SRE 2 p. 7 (*quoting Am. Needle*, at 197).

Jury instructions. The theory on which the jury instructions proceeded was that SBRC members, acting to advance their own economic interests, controlled the SBRC and that because the AQHA directors deferred to them there was a conspiracy "to exclude [p]laintiffs from the elite Quarter Horse market by agreeing to prevent registration of clones." ROA 3897.

The court told the jury:

> [A]greements made within a firm can constitute concerted action covered by Section 1 when the parties to the agreement act on economic interests separate from that of the firm itself ….You may consider the [SBRC] committee members' votes along with other evidence in deciding whether the committee members' conduct was the result of an agreement and not the result of separate decisions made by each committee member on his or her own.

ROA 3904-05, RE 3.

After the jury returned its verdict for the plaintiffs, the district court granted injunctive relief. In doing so, it independently found that AQHA acted as a "trade association," that AQHA and its members "did not operate as a single business entity," and that the decision to exclude clones "was the result of concerted action." ROA 2119, RE5. There was more than sufficient credible evidence to support these findings.

Evidence: Agreements with and within the SBRC. Frank Merrill testified that since 2008 the members of the SBRC agreed to exclude horses produced through Somatic Cell Nuclear Transfer and their offspring from AQHA's registry. ROA 2599-600, 3374, 3407. The evidence also showed that AQHA had agreed to give the SBRC veto power, AQHA leaders had stacked the SBRC membership, and that, absent a positive recommendation from SBRC, no action would be taken. *See* pp. 15-16, *supra.* And even more telling, Wise, Merrill, Blodgett, Helzer and others met secretly before the March 2012 meeting and controlled the result.

This is thus a case where there were agreements among those who controlled the SBRC, within the SBRC, and between the SBRC and AQHA, to exclude clones in order to prevent competition and to protect the investments the members had made in elite Quarter Horses. *See Am. Soc'y of Mech. Eng'rs, Inc.*, 456 U.S. 556 (association held liable for entrusting committee of competitors with drafting of standard that excluded the plaintiff). This evidence was reinforced by testimony elicited from AQHA's witnesses including Jeff Tebow and Butch Wise, as well as from plaintiffs' witnesses Jason Abraham, Gregg Veneklasen, DVM and Blake Russell. P-147; ROA 2387-91, 2406, 2681, 2837-39, 2854-55, 3014, 3311-12, 3366-70, 3452-66, 3472-73, 3477, 3811-20, 3822. There was more than enough evidence to create a question of fact for the jury. *Tunica Web Adver.*, 496 F.3d at 410-12 (evidence of "gentleman's agreement" enough to create jury issue). This is

not a case where no agreement could be shown, *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 182 (D. Mass. 2013) (proof of meeting but not agreement).

Evidence: Control by those with "separate economic interests." As an organization, AQHA's interest is in registering more Quarter Horses to boost participation and fees, yet its number of horse registrations is declining. P-89 pp. 5, 6. It would stand to benefit by registering more horses, including clones and their offspring, and allowing them into AQHA competitions. *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS 73754 at *9-10, SRE 2 p. 6. *See Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 286 (4th Cir. 2012) ("[D]efendants' alleged efforts to exclude innovative competitors conflicted with the economic interest of the [multiple listing service] to admit additional dues paying members and to expand its database of property listings.") (Wilkinson, J.).

On the other hand, as owners, racers, showers and breeders "most Committee members from 2008-2012 had an incentive to decrease competition by excluding elite clones." *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS 73754 at *10, SRE 2 p. 6. The SBRC members are separate economic entities and competitors who acted out of "the fear [that a SCNT horse] might outperform the horses owned" by the SBRC members. *Hatley*, 552 F.2d at 653.

There was ample evidence that the members of the SBRC are individual

competitors with an economic incentive to exclude competition from the plaintiffs' horses. With respect to breeding, every member who spoke in opposition to SCNT at the meetings was a breeder of elite Quarter Horses. *See* pp. 16-18, *supra*. AQHA argues that these men, who expressed a "vociferous desire to exclude clones to avoid competing against them," *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS 73754 at *11, SRE 2 p. 7, were only a few of the committee members, AQHA Brief at 13-15, but it ignores their "controlling" role. *See Am. Needle*, 560 U.S. at 191; *North Texas*, 528 F.3d at 357.

In addition, the evidence showed that while cloning would increase the supply of elite horses and so drive their prices down, there would be a "trickle down" effect throughout the industry that would improve the genetics and decrease the prices of Quarter Horses at all levels. ROA 2363, 2682-84; *see also* ROA 2772, 3169-71, 3262-63. It thus threatens the investments of all of the members and not just those at the top of the heap like John Andreini, who said that if SCNT horses were registered he would take his money out of the Quarter Horse racing industry.

Because the evidence showed that members whose independent economic interests were threatened controlled AQHA's refusal to register SCNT horses and the jury found that they acted based on "economic interests separate from that of the firm itself," the contract, combination or conspiracy element of §1 was

satisfied. *See Hialeah, Inc. v. Fla. Horsemen's Benevolent & Protective Ass'n, Inc.*, 899 F. Supp. 616, 622 (S.D. Fla. 1995) ("the actions of a number of horsemen, taken by one association representing them, can be a concerted action"), *Medlin v. Professional Rodeo Cowboys Ass'n*, 191 U.S. Dist. LEXIS 2084 (D. Colo. 1991) (conspiracy to exclude cowboy who competed elsewhere).

Contrary to the wishes of the amici, there is no "breed owners exception" to the antitrust laws just as there is no exception for football, *Am. Needle, Inc.*, *supra*, or professionals, *Am. Soc'y of Mech. Eng'rs Inc.*, *supra*. In the case on which AQHA relies, no issue was raised as to the interest of the individual members. *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (breed registry and local affiliate had identical interests). *See also* VII P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 1478 n.25 (3rd ed. 2010) (questioning validity of *Jack Russell* in light of *American Needle*). Here the SBRC was controlled by members in pursuit of their own economic advantage, not the best interests of AQHA.

1.2 Elite Quarter Horses constitute a separate market.

A relevant market includes "all products reasonably interchangeable by consumers for the same purposes." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Both Chris Pflaum and Keith Ugone, experts for the respective parties, agreed that there is an elite Quarter Horse market. ROA

3126, 3549. Pflaum described it as one-half of one percent of Quarter Horses registered in given year. ROA 3131, 3831. Ugone said that was too small but offered no figure of his own. ROA 3499. The district court found in support of injunctive relief that the relevant market "is the market for elite Quarter Horses." ROA 2119. Because AQHA raises the issue on appeal, it merits discussion.

Jury instruction. The district court's instruction correctly stated the standard for a relevant product market which depends on several factors to be weighed by the jury and does not require a bright line:

> The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view: that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other…. Now, to determine whether products are reasonable substitutes for each other, you should consider whether … a small but significant permanent increase in the price of one product could result in a substantial number of consumers switching from one product to another…. If you find such switching would occur, then you may conclude that the products are in the same market.

ROA 3900-01, RE 3. The instruction said switching in response to a 5% increase would show products in the same market. This "small but significant, non-transitory increase in price" test, formulated for merger analysis by the Antitrust Division of the Department of Justice and the Federal Trade Commission, has been widely used by courts to estimate substitutability. *See, e.g., FTC v. Whole Foods Mkt., Inc.*, 548 F. 3d 1028, 1038 (D.C. Cir. 2008) (*citing* Department of Justice and

Federal Trade Commission, Horizontal Merger Guidelines § 1.11, 57 Fed.Reg. at 41,560-61). More directly, the district court instructed the jury, in deciding whether products were reasonable substitutes for each other, to consider the factors the courts have identified as relevant to this inquiry. ROA 3901-02, RE 3. *See Brown Shoe Co. v. United States,* 370 U.S. 294 (1962).

Evidence: A separate elite market. The evidence relevant to those factors included the following:

Industry recognition. Industry publications refer to elite horses and give their statistics. ROA 3141-42, 3150, 3794, 3797. In a 2009 article on clones, the *Quarter Horse News* said that the donors were joining a group of "elite" horses that were being cloned, and it named them. P-130A, SRE 10. Witnesses for both plaintiffs and defendants testified that an elite market exists. ROA 3072, 3657. The website of SBRC member Blodgett boasts of the elite nature of the broodmares he raises. ROA 3796-97.

Characteristics and uses. Horses in the elite market, as discussed above, have elite bloodlines; meet the breed standard; have a good appearance and disposition; are the result of advanced reproductive techniques; are entered in competitions and shows; earn stud fees based on the performance of their offspring; are sold for high prices; and are used for breeding more often than other horses. P-92(3); ROA 3151.

Separate production facilities. A small number of breeders dominate the production of elite Quarter Horses by discipline, such as racing and cutting horses. ROA 2856-57. Top 20 price lists for two yearling sales at Heritage Place, an auction house to which at least 16 SBRC members have financial connections, showed that in one sale half of the top selling horses came from or went to SBRC members (Wise, Merrill, Eller, Blodgett and Trotter), while another 16 of 20 came from or went to SBRC members (Wise, Merrill, Cook, Helzer, Graham), P-145, 146, 147; SRE 11. The Heritage Place website says it is "where champions are sold." ROA 3034.

Separate buyers. Elite stallions are frequently owned by syndicates. For example, Butch Wise owns interests in and manages several 40 member syndicates in which the highest price paid for a membership share was $500,000. ROA 3800.

Separate prices. The relationship between the percentage of Quarter Horses sold and price is not a straight line. In fact, 93% of racing yearlings sold in Pflaum's analysis sold for less than $35,000. The price for the top 7% goes up to $435,000. P-92(22).

A separate market can exist where "price differences represent material distinctions in utility for the consumer." James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697, 722 n.151 (1995); The proper focus is on "core" and not "marginal"

customers: "[A] a core group of particularly dedicated, distinct customers, paying distinct prices, may constitute a recognizable submarket ….", *Whole Foods Mkt., Inc.*, 548 F.3d at 1039 (holding FTC showed it could establish "premium natural and organic supermarkets" as a distinct submarket). *See* 2-10 J. Bauer, W. Page, & J. Lopatka, KINTNER'S FEDERAL ANTITRUST LAW § 10.10 (3d ed. 2013) (collecting cases).

Demand not sensitive to price. At the top demand is not sensitive to price. While 93% of Quarter Horses not used for racing ("Non-Speed") could be bought for $35,000 or less, the elite 7% cost eight times that price, up to $280,000. Pflaum illustrated this with a chart for yearling sales, P-92(9), SRE 9:

As he explained, to the right, demand for inexpensive horses is greatly dependent on price, but to the left, at the elite end of the market, it is not. ROA 3154-3155.

One breeder testified that a five percent increase in the price of an elite horse would not deter him from making a purchase. ROA 3097. He would rather buy two $100,000 horses than twenty $10,000 horses. ROA 3114. SBRC member Butch Wise agreed. ROA 3762.

It is with unrecognized irony that AQHA attacks the proof of inelasticity by saying that "high cross-elasticity of demand" is established "conclusively" by testimony that cloning would reduce the price of elite horses so that "average guys" could afford an elite horse. AQHA Brief at 27. This does not show that demand for elite Quarter Horses in the *current* market is elastic. Rather, it is proof that the relief plaintiffs seek will make the market more elastic in the *future.* That is exactly what the antitrust laws are designed to accomplish.

The U.S. Supreme Court upheld a similar market, one for "championship boxing contests," in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 250 (1959). The defendants argued that all boxing contests were alike, but the Court upheld the district court's finding that "championship" contests were different. It relied on proof that championship bouts brought in four times more revenue, enjoyed 17% better Nielsen ratings, and, unlike other fights, were the subject of special radio and television attention as well as full-length movies. The Court said the Sherman Act recognized "distinctions in degree as well as

distinctions in kind," and so the "'cream' of the boxing business" could be classified as a separate market for antitrust purposes. *Id.* at 250-252.

In this case, as in the *International Boxing Club*, the evidence of distinct prices, together with proof of specialized and different uses, facilities, and buyers, as well as industry recognition, is enough to establish an elite Quarter Horse market. The cases on which AQHA relies address failed attempts to establish a separate market based on price alone, and so they have no bearing here. They are classic "no evidence" cases. *See* ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (Seventh) 582-583 (2012) (multiple factors in *International Boxing Club* distinguish it from ice cream case where small price and quality differences were not accompanied by specialized uses, facilities, or buyers).[3]

Evidence: The market is small. The evidence also supported Pflaum's opinion that the number of horses in the elite market is relatively small.

AQHA misinterprets his testimony when it asserts he placed it at 5%. One aspect Pflaum examined was the market for yearlings. The elite yearling group was 5% of the 6,000 yearlings sold at prestigious sales out of 90,000 registered a

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[3] *See HDC Med. Inc. v. Minntech Corp.*, 474 F.3d 543 (8th Cir. 2007) (no evidence other than price to separate single use from multiple use dialysis machines); *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp 1262, 1268 (N.D. Cal. 1988) (spectrum of small price and quality differences not enough to show separate market because customers would switch), *aff'd Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams*, 895 F.2d 1417 (9th Cir. 1990); *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 134 (N.D. Cal. 1966) (all brands and types of beer compete with each other in price, advertising, and attention from wholesalers).

year. So his figure for elite yearlings was 250-300, or less than one-half of one percent of the total. ROA 3131; P-92(2) (.05 x 6,000 = 300).

For example, only 131 cutting yearlings sold for more than $29,000 in 2010. P-92(7-8). Only 257 racing yearlings sold for more than $35,000. P-92(22). In 2011, only 21 stallions had stud fees of more than $5,000. P-92(11). Only 45 stallions bred more than 100 mares in 2011. P-89(10). But in 2011, 42% of the recognized racing performers came from stallions in that category. P-89(35).

All of this was more than enough to support Pflaum's opinion that there is a separate market for elite Quarter Horses and that the number of horses in that market is small, perhaps one-half of one percent. ROA 3131, 3830. AQHA countered with proof of "Cinderella" stories about outlier horses that sold at low prices as yearlings that later became competition winners such as Wicked Courage. AQHA Brief at 26. But Pflaum did not testify that entry into the market was impossible. AQHA made no attempt to quantify this anecdotal evidence so Pflaum's analysis went essentially unrebutted.

1.3 The exclusion of SCNT horses and their offspring from the market injures competition in that market.

Jury instructions. The jury instructions simply asked the jury whether registration was "necessary for Plaintiffs to compete effectively in the market" and whether the exclusion of the plaintiffs' horses "unreasonably impairs competition in the relevant market." ROA 3904, RE 3. In support of injunctive relief the

district court found that AQHA "has unique access to a business element essential to effective competition" i.e., registration, and that the denial of registration "unreasonably impairs competition in the relevant market." ROA 2119; RE 5. *See Nw. Wholesale Stationers, Inc. v. Pac Stationery & Printing Co.*, 472 U.S. 284 (1985).

Evidence. There was ample evidence to support the jury's findings and the district court's conclusion that registration is necessary and that its denial unreasonably impairs competition.

1.3.1 Without registration, the plaintiffs' horses are excluded

Without AQHA registration, plaintiffs' cloned horses, although they are identical to champions, are virtually worthless. ROA 2648, 2713. Their breedings are being given away. ROA 2654-55. They cannot race in lucrative Quarter Horse races, not even in events free of state racing commission control. ROA 2740-41. As the district court said, it "can fetch little as a breeding animal and is excluded from competitions requiring registration." *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS at *15, SRE 2 p. 10. *See Hatley*, 552 F.2d at 654-55 ("Meaningful participation in the multimillion dollar industry is dependent upon AQHA membership and AQHA registration"; denial of registration has "grave economic consequences" e.g., value of $10,000 rather than $100,000).

Even when unregistered horses can enter competitions, as is true in cutting

contests, they are still worthless for breeding because their offspring cannot be registered. ROA 2419-20, 2522-23, 2623-26. Buyers want proof of what they are buying, and registration provides that. ROA 3173. There is no alternate registry and AQHA put its last would-be-competitor out of business years ago. ROA 2420-21, 2738-39, 3268.

As AQHA's counsel told the jury, "whether clones get allowed or not, we're the only game in town; it's not going to affect us one way or the other." ROA 3942. He was referring, of course, to the AQHA, not its members who currently breed elite horses.

There is no merit to AQHA's attempt to dismiss the lack of AQHA registration as mere "stigma." AQHA Brief at 36-39, *citing Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988). There, an association set a standard on the recommendation of a committee of buyers who did not compete with the plaintiff seller. Voluntary compliance with the standard did not prevent the plaintiff from selling his equipment. That is why mere "stigma" was shown. Here, there is stigma, but the restraint is far more than that. This is not a question of entering the race without an AQHA "seal of approval." As *Hatley* pointed out, it is a question of not being able to enter the race at all.

Liability, not immunity. On appeal, AQHA for the first time seeks to refuse from antitrust liability in the state action doctrine. But the state statutes that

define "Quarter Horse" for racing purposes as a horse registered by AQHA are a source of its monopoly and do not excuse its abuse of that power. *See e.g.,* TEX. REV. CIV. STAT. art. 179e, §1.03(9); *Am. Soc'y of Mech. Eng'rs Inc.*, 456 U.S. at 559 (plaintiff injured because defendant's standards adopted in federal regulations and "laws of most States"); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3rd Cir. 2007) (regulatory adoption of standards a barrier to entry).

To begin, such an argument cannot be made for the first time on appeal. *Cent. Telecomms., Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 725 (8th Cir. 1986); *see also Barrett v. Thomas*, 649 F. 2d 1193, 1201 (5th Cir. 1981) (rejecting attempt to assert affirmative defense of qualified immunity for first time on appeal).

But even if it could, the state action doctrine is not favored. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 367 (4th Cir. 2013). The statutes speak only to racing, and not to other disciplines, such as cutting, reining, or halter competitions, nor do they have any application to breeding. They cannot possibly justify AQHA's market power over those activities. In other words, the AQHA restrictions have force in the marketplace independent of any government adoption. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988) (no immunity for conspiracy to set standards because their effect went beyond adoption by states).

Even as to racing, the statutes do not compel AQHA to refuse to allow the

registration of horses produced using SCNT. Moreover, states agencies do not actively supervise the exclusionary standards of the AQHA, as the state action doctrine requires for private entities to enjoy immunity. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (rate fixing by title companies was not immune, because rates filed with state agencies were not subject to meaningful administrative review). *Cf. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1039 (3rd Cir. 1997) (exclusionary process not explicity approved by state is not immune). *See also* P. Areeda at ¶224.15 (criticizing *Mass Sch. of Law* for failure to emphasize sufficiently the need for approval) & *id.*, ¶572d (company with statutory monopoly could not refuse to connect with equipment made by rivals).

In fact, only one of the statutes mentions cloning and even it assumes AQHA may register SCNT horses even though it forbids their use in races in Oklahoma. *See* OKLA. STAT. ANN. Tit. 2A §200.1.

So even if the issue had been raised in the trial court, it would not be sufficient to immunize the AQHA conduct in issue here.

1.3.2 The exclusion injures competition

The evidence supports the jury's finding of injury to competition.

Plaintiffs' economist testified, and fact witnesses verified, that there is a shortage of elite Quarter Horses because of AQHA's refusal to register clones of

American Quarter Horses and their offspring. ROA 2771-72, 3097, 3179. David Brown, Blake Russell, Gregg Veneklasen and Jason Abraham testified about the effect of the exclusion from the market. ROA 2523, 2616-17, 2682-84, 2829-30, 3093-94.

The exclusion begins with the plaintiffs' horses. Plaintiffs have SCNT horses and their offspring, that if registered, would compete at the very top of the market. ROA 2616-17. Lynx Melody Too is the clone of a mare that produced 17 foals, 16 of which were money winners. If Back to Feature were registered, he would compete with Mr. Jess Perry, the sire of Feature Mr. Jess from which Back to Feature was cloned. SBRC member Glenn Blodgett stands Mr. Jess Perry. AQHA's refusal to register Back to Feature directly protects Blodgett's horse from that competition. Thus, plaintiffs have suffered an antitrust injury which gives them standing to bring this lawsuit. *See also* ROA 2522-23 (no incentive to train for competition). But the case is about far more than that.

SCNT reproduction promises to produce far more elite Quarter Horses than those owned by the plaintiffs. In anticipation of the rule change, breeders have gene-banked 300 more elite Quarter Horses. ROA 2358. In fact, one SBRC member admitted that she had done so. ROA 3028. Viagen has cloned more than 25 registered Quarter Horses. ROA 2338. There is every reason to believe this number will grow. SCNT has proven to be popular and effective in improving the

genetics of other animal breeds, including both beef and dairy cattle. *See* p. 14, *supra*.

Further, as SCNT expands the supply of elite horses, the price will fall and others will be able to afford them and compete with the "big boys." ROA 2681-84, 2772, 3169-71, 3262-63. Chris Pflaum explained how increased supply would decrease price. ROA 3178, 3831-32. His analysis was based in part on a study of the thoroughbred market. P. Coelho & J. McClure, *Barriers to Entry in the Market for Stud Services: Government and "Non-Profit" Institutions in Collusion*, 25 Economic Inquiry 659 (Oct. 1987).

Certainly this is what the leaders of AQHA and the SBRC have feared:

- Treadway: "Economic consequences … It would be devastating?" P-81, p. 00444; ROA 2958.
- Andreini: "I will not have 60 First Down Dashes in every county." ROA 2387-90, 2796.
- Merrill: "Where are the breeders?" to oppose cloning. P-81A; ROA 2593-94.
- AQHA: Past drop in foal crop performers "should see increases in prices" and relief expressed that embryo transfers are not "flooding the market." P-89(27, 41).

Finally, SCNT will substantially increase the supply of elite mares for

breeding purposes. The shortage is not limited to mares, but the shortage of mares is important. ROA 3177-78, 3831-32. Proven elite mares are in short supply, for several reasons. To begin with, a mare only produces a few eggs each year. It takes several years for her foals to grow to maturity and to establish themselves as competitors. By the time that history is established, the mare, if still healthy, may be at the end of her useful life. ROA 3097-98, 3139, 3159. AQHA expert Ugone attempted to rebut this by providing a list of unbred elite mares, but the evidence showed that the mares on this list were either infertile, injured, or dead. ROA 3191-94. Sales records showed the top nine prices at one Heritage Place sale were paid for broodmares. ROA 3032.

If the mare can be cloned then, in effect, that useful life can be extended and more embryos can be produced. It is the sale of yearlings from a proven horse that makes the most sense, as a relatively high price can be obtained before incurring the risks and expense of training and proving the animal in competition. ROA 4029-31.

1.4 The proffered business justifications for exclusion are not sufficient to justify its anticompetitive effect.

The evidence showed that SNCT reproduction of Quarter Horses promises to improve the breed. Witnesses who included one of AQHA's Directors, Don Topliff, PhD testified about the benefits of cloning to the Quarter Horse breed and the resulting harm from refusing to allow registration. P-140; ROA 2359-63,

2554-55, 2615-16, 2648, 2654-55, 2658, 2681-84, 3095, 3098. Among other benefits, cloning can add to genetic diversity because it makes available genes of elite animals that would otherwise have been lost through neutering, infertility, injury, or early death. *Id.*

In contrast, AQHA's proffered justifications for its refusal to register clones and their offspring fell apart at trial. As Don Treadway's handwritten notes revealed, AQHA knew from the beginning they were "red herrings" and "dead ends" and could not support exclusion. P-81, SRE 8; ROA 2944-52, 2968. Multiple witnesses agreed. ROA 2407-19, 2422-24, 2775-801, 2829-30, 2896-98, 2923-24, 3640-44, 3708, 3715-16.

Jury instructions. The jury found that AQHA's reasons for the clone ban, to the extent they were objective, were not necessary to serve any legitimate end. The jury was instructed that the rule excluding them must be "reasonably tailored to achieve Defendant's legitimate goals and be based on objective standards." ROA 3906, RE 3. The jury rejected this defense.

Evidence. The "objective" business justifications proffered by AQHA in its brief are to protect against genetic disease and to ensure parentage verification. The jury had ample reasons to believe that the refusal to register clones was not necessary to serve either of these ends. AQHA also, as an afterthought, invokes "morality," but the jury did not have to find that was either objective or credible.

Cloning can improve genetics and minimize disease. The genetics "red herring" defies common sense and scientific fact: all of the veterinary witnesses testified that cloning can be used to *improve* genetics and increase genetic diversity. ROA 2783-90, 3640. It allows the reproduction of superior and disease-free animals that may not be able to reproduce because of castration, early death, or old age. ROA 3021, 3029.

AQHA's expert, Sharon Spier admitted that allowing clones into the Quarter Horse registry could be beneficial because if, as plaintiffs proved, they tested free of all known genetic defects, then registering them would actually broaden the gene pool and allow breeders to breed away from genetic diseases. ROA 2363, 3640-44, *accord*, ROA 3678, 3708. Protection against genetic disease cannot be a reason to refuse to register them.

In any event, AQHA has no general policy against the registration or even breeding of horses with genetic diseases, with one exception. ROA 2526. It believes that breeders should be informed and act responsibly. ROA 3381. There is no reason why owners of cloned horses should not be given the same latitude.

Parentage can be verified. Given that a clone is greater than 99.99% identical to the registered Quarter Horse donor, it is not clear what interest AQHA has in verification other than to determine that identity. AQHA's mission is to maintain breed pedigree and integrity. D-206A.

An SCNT clone is an identical twin separated in time from the original cell donor horse. AQHA allows the registration of identical twins and their offspring even though the parentage verification problems that may arise are the same as with clones and their offspring. ROA 3062-63, 3718. AQHA witness George Seidel, PhD confirmed that AQHA allows identical twins to be registered, that identical twins are currently registered with AQHA and that the issues of parentage verification, if any, are the same for identical twins as they are for clones produced through SCNT. ROA 3715-19.

In most circumstances it is possible, absent a duplication of maternal lines, to use mitochondrial DNA to distinguish a foal that is the offspring of an SCNT cell donor from a foal that is the offspring of the resulting SCNT clone. ROA 3698-3700. But in some circumstances, if both are stallions, then the offspring of one cannot be distinguished from the offspring of the other on the basis of DNA alone. ROA 3701-04. This is also true for the offspring of stallions that are identical twins. ROA 3063.

The offspring of identical twins are parentage verified by AQHA in the same way that all registered Quarter Horses were parentage verified prior to the advent of DNA testing. AQHA relies on a Registration Application and on a breeder's certificate. P-20; ROA 3718. *See Hatley*, 552 F.2d at 649 (registration based on "breeder's certificate"). Before this suit was filed AQHA relied on paper records

alone to verify parentage and register 166 offspring of a pair of identical twin stallions with AQHA registration papers. P-23, 24; ROA 3058-63. There is no reason this same method could not also be used for SCNT horses and their offspring. In fact, AQHA could hardly object to this given that 50% of the horses it registered from 1999-2011 are parentage verified based solely on paper records. P-21; ROA 2366-68, 2525.

In addition, plaintiffs demonstrated that parentage could be further verified by having the veterinarian place a smear of the twin stallion's semen on a card filed with AQHA. DNA from the semen can be used to track parentage of the offspring. D-45; ROA 2478, 3702-05. That is the method breeders of other animals have used to verify the parentage offspring of clones. P-160; D-45.

None of this is new. AQHA knew all of this as early as 2008 when the FDA approved use of SCNT animals for food and it was reiterated in 2010 when Blake Russell of Viagen wrote AQHA and explained the process. D-45, -53. The problem was, as SBRC leader Butch Wise said, he didn't know and didn't want to know about cloning. ROA 2472. As Frank Merrill said, he "didn't care about the science." ROA 2384. That was because the only "science" relevant to their decision was the "dismal science" of economics. The jury properly saw through these sham excuses which provided no legitimate reason for refusing to register the plaintiffs' horses whose parentage is not in any doubt.

Moral objection not credible. The jury had several reasons not to credit the moral objection a few witnesses mentioned in passing. The jury instruction required that the business justifications be "objective." *See United States v. Realty Multi-Listing Inc.*, 629 F.2d 1351, 1385 (5th Cir. 1980) (vague rule allowing exclusion for "reputation" not sufficiently objective). The jury could have logically concluded that generalized reference to "morality" was not an objective justification. And the jury may also have found that the witnesses' unexplained references to morality were just not credible. AQHA allows reproductive techniques so advanced that the difference between ICSI and SCNT is hard to detect, even under a microscope. *Compare* SRE 6 (ICSI) *with* SRE 7 (SCNT). And it may not have thought Frank Merrill was sincere when he listed "the moral aspect" among his reasons for opposing a technique that threatens his ability to earn stud fees. ROA 3328.

Although it reached a different result, the *Hatley* decision supports affirmance here. *Hatley* said the rule of reason analysis should depend on the motive of the leaders of AQHA and the interest they sought to protect. There the issue was the definition of a Quarter Horse that excluded horses with excessive white markings. The limit on white markings passed the rule of reason, the Court said, because denial was "not predicated upon the fear that [the plaintiff's horse] might outperform the horses owned by the members of the Executive Committee"

but rather on "the general interest in the improvement of the Quarter Horse breed." 552 F.2d at 653.

Here the evidence is just the reverse: AQHA's leaders do fear competition from clones and their offspring, including the plaintiffs' horses, and the evidence showed that the vote against cloning will harm, not help, the Quarter Horse breed.

It is telling that neither *Hatley* nor the breed association case cited by the amici, *Jessup v. American Kennel Club*, 61 F. Supp. 2d 5 (S.D.N.Y. 1999), *aff'd* 210 F.3d 111 (2nd Cir. 2000), offer these reasons or anything like them to support a refusal to register an animal. Rather, they are cases which allow breed associations to carry out the necessary task of defining the breed, a question not in issue here.

In this case, as the district court put it, the "breed is already physically and genealogically defined" and what AQHA seeks is "to exclude animals that fit these parameters so perfectly that they are indistinguishable from some of the breed's champions." *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS at *19, SRE 2 p. 12. *See* SRE 5 (photograph of Lynx Melody Too), 10 (article on SCNT horses). The jury properly found that the proffered reasons for that exclusion were not justified.

For these reasons, there was sufficient evidence upon which a reasonable jury could and did find a violation of §1 of the Sherman Act, and this Court should affirm its verdict and the judgment entered on it.

2. Even if the defendant were a single entity, its actions excluded the plaintiffs from the elite Quarter Horse market and monopolized that market in violation of Section 2 of the Sherman Act.

If the court affirms the judgment under §1, then it need not reach the §2 issue, as either will support the relief granted by the district court. But if the court reaches the §2 claim, it should affirm on that ground.

As discussed above, the elite Quarter Horse market is a valid antitrust market which AQHA has monopolized. AQHA controls entry into this market and therefore has the power to "exclude competition." *E.I. du Pont de Nemours & Co.*, 351 U.S. at 391. The evidence from AQHA's documents shows it knows its registration decisions affect horse prices. *See* P-89 p. 41 (discussion as to whether horses resulting from embryo transfers have "flooded the market"). The jury found that its proffered justifications for banning SCNT horses had no merit.

The monopolization claim does not require proof of conspiracy, so even if the actions of the owners and breeders through SBRC and implemented by AQHA were considered the actions of a single entity, they would constitute monopolization in violation of §2 of the Sherman Act.

At the very end of AQHA's brief it denotes a sentence to its principal defense to monopolization in the trial court, i.e., its claim that the exclusion of plaintiffs' horses does not maintain and in fact reduces its monopoly power because it reduces the number of horses that AQHA controls. AQHA Brief at 50.

Jury instruction. The jury was told that willful maintenance was shown if AQHA was "excluding competition or frustrating efforts of other companies to compete for customers within the relevant market" with "no registration business reason." ROA 3909, RE 3.

Evidence. AQHA's argument goes astray because the "relevant market" in this case is the market for elite Quarter Horses, and not the market for Quarter Horse trade association services. AQHA controls them both but it is the market for elite Quarter Horses that matters here. AQHA's argument looks to the wrong market and is contrary to the jury instruction. The district court said a jury could find "that because the AQHA defines the market, it *maintains* power by refusing to redraw market boundaries." *Abraham & Veneklasen*, 2013 U.S. Dist. LEXIS at *15. It added:

> Although the AQHA might lose monopoly power if clones were pushed by AQHA rejection into some other registry where economic viability could be established, Plaintiffs proffer evidence that "[n]o other quarter horse association of comparable stature exists [*citing Hatley* at 654] and that "meaningful participation in this multimillion dollar industry is dependent upon AQHA membership and AQHA registration."

Id. at *15-16, SRE 2 p. 10.

In this regard, it is relevant that the antitrust laws do not require that a defendant be a participant in the market it unlawfully controls. *See Tunica Web Adver.*, *supra*, 496 F.3d at 413, 415 n.17 (fact issue as to whether casino operators

controlled market for web services in which they did not participate); *Full Draw Prods. v. Easton Sports Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (archery manufacturers monopolized market for production of archery trade shows). *See generally*, ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (Seventh) 291 (2012) (subversion of standard setting organization by a "limited subset" of members can give rise to §2 liability).

For these reasons, the judgment should also be affirmed on §2 grounds.

3. The district court did not abuse its discretion in granting injunctive relief based on rules drafted by AQHA staff and offered into evidence at trial.

The standard of review guiding this Court's review of the grant of injunctive relief is abuse of discretion. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F. 3d 200, 206 (5th Cir. 2010). "Where an injunction is not based upon an error of law, this Court reviews the injunction for an abuse of discretion." *Lion Health Servs., Inc. v. Sebelius*, 635 F. 3d 693, 702 (5th Cir. 2011). Here, the decision to grant an injunction in this matter was grounded in a jury verdict and must be reviewed for an abuse of discretion.

In 2010 and 2012, AQHA staff went through its registration rules and drafted changes that would be provide for the registration of clones and their offspring. P-77; D-50; ROA 2897, 2901-08. The staff found that an amendment to Rule 227(a) which prohibits cloning was not enough. Rather, changes had to be

made to 12 different AQHA registration rules, including rules defining ownership, genetic identification, embryo transfer, and registration. Each of these was necessary to make the others effective and to keep AQHA from doing indirectly what it could not do directly. This is, after all, a case in which a former AQHA president openly bragged that no judge was going to tell AQHA what to do. *See* p. 17, *supra.*

Plaintiffs' request for new rules began with their complaint, which attached a copy of AQHA staff changes to the rules. ROA 22. Their entitlement to rules changes was placed in issue long before trial. At trial, plaintiffs relied on the staff rules proposals to demonstrate how AQHA could register clones. AQHA did not offer any evidence to dispute that these changes could and should be made and admitted that it was feasible to do so. ROA 2907-08.

After the verdict, the district court held a hearing on injunctive relief. Plaintiffs took almost all of their proposed language from the 2010 staff proposal and made modifications required by AQHA's interim renumbering of its rules, e.g., 227(a) is now 106.1. D-50, SRE 12.

The district court held a hearing at which both sides argued their positions and presented evidence. ROA 3958. AHQA argued for limits on the injunction that would have discriminated against clones and undermined the ability to use

SCNT with cutting horses. ROA 4002-03. It offered no rules change other than to say it would repeal Rule 227(a). ROA 4036.

The district court then asked AQHA to comment in writing on plaintiffs' proposal. ROA 4036-37. AQHA interposed general objections and repeated arguments the jury had rejected about parent verification and disease. It still made no specific suggestions for changes to the proposed rules. ROA 2062. The district court held a telephone conference to discuss its questions.

Ultimately, the court modified the plaintiffs' proposal and adopted it. It simplified the genetic testing rule plaintiffs had proposed, 108.4. In response to an AQHA request, the trial court narrowed the number of persons to whom the injunction applied. It also added this caveat:

> After AQHA makes the ordered changes in regulations, the AQHA may in the regular course of its periodic review of rules and regulations in its regular course of business, review and amend the rules so long as the amendment remains consistent with the requirement that clones and clones' offspring be registered without discrimination (except that such animals may be identified as clones or clones' offspring).

ROA 2128, RE 5. *Compare* ROA 2049 (plaintiffs' proposal). After entry of the injunction, AQHA again refused to register the plaintiffs' horses and sought a stay of the injunction pending appeal, which the district court granted.

3.1. The injunction entered by the district court was narrowly-tailored to give effect to the remedy mandated by the jury's verdict.

AQHA wrongly complains that injunctive relief ordered by the district court is erroneous because it "goes further than necessary to remedy the alleged antitrust violation." AQHA Brief at p. 52.

The only specific suggestion offered by AQHA on appeal is that the plaintiffs are entitled to an injunction prohibiting enforcement of Rule 227(a) and nothing more. AQHA thus stonewalls this Court and refuses to say with any specificity what is wrong with the injunction as granted, i.e., why the injunctive relief is more burdensome than necessary. When the undisputed proof showed the need for changes to at least 12 different rules, it was within the district court's discretion to enter an injunction which changed multiple rules and not just one.

The Clayton Act, 15 U.S.C. § 26, specifically authorizes injunctive relief to enforce the antitrust laws. In *International Boxing Club*, 358 U.S. 242, the defendants joined to their unsuccessful attack on the "championship boxing contests" market a complaint about the extensive relief granted by the district court, which included not only an injunction but also the dissolution of the defendant corporations, imposition of fair rental terms, and a ban on exclusive contracts with all professional boxers. The defendants complained that this went beyond the "championship" market they were found to have controlled, but the

Supreme Court nevertheless affirmed because "human nature being what it is there is sound reason to say that exclusive contracts with boxers in nontitle contests would surely affect those same boxers when and if they arrive at the title." *Id.* at 262. Similarly, in this case there was "sound reason" to adopt rules based on those tested at trial and found to be needed.

None of the cases cited by either AQHA or the amici in opposition to the injunction is to the contrary. In fact, none of them is an antitrust case. Only one reverses a federal injunction against a private party and it did so because the injunction reached issues not mentioned in the complaint. *See Doe v. Veneman*, 380 F.3d 807, 819 (5th Cir. 2004). In this case, the rules to be changed were part and parcel of the complaint. Nor is this a question where the interpretation of an association's rule is in question and so deference might be owed to its views. *See e.g., Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 845 F.2d 397, 403 (2nd Cir. 1988).

3.2. The non-intervention doctrine does not apply when there has been a finding that AQHA's rules violated the law.

AQHA admits, as it must, that the non-intervention doctrine goes out the window when an association's rules are found to violate the law. *Hatley*, 552 F.2d at 656.

In *Hatley*, this Court rejected AQHA's invocation of the non-intervention doctrine, saying it did not apply where governing bodies violated the law or their

registration rules were not "reasonable in substance and administration." *Id.* It remanded for consideration as to whether a horse should be registered, and it deplored certain "editorial comments" that AQHA had added to the horse's papers indicating that the registration would be irregular. *Id*. at 658. The district court in this case relied on *Hatley* when it rejected AQHA's pretrial resort to the non-intervention doctrine. ROA 136-137; SRE 1.

The Texas cases on which AQHA principally rely stand for nothing more remarkable than, absent a violation of the law, a court has no business regulating the affairs of a defendant. *See Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 354 (Tex. App. – Amarillo, 1990), no writ; *Juarez v. Tex. Ass'n of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 280 (Tex. App. – El Paso 2005), no pet. They carry no force here where a violation of the law has been found.[4]

The obstinacy of AQHA in this case, and its refusal to comply with the judgment in good faith, fully supported the district court's resort to detailed injunctive relief. The plaintiffs' proposal was not 100% identical to the 2010 AQHA staff proposal, but AQHA did not ask the district court to use the staff proposal instead. Rather, AQHA stood mute. The evidence proved that by various

[4] Three cases cited by AQHA and amici actually support intervention. In *Schulz v. U.S. Boxing Ass'n,* 105 F.3d 127, 135-136 (3d Cir. 1997), the court granted an injunction to reverse the decision in a boxing match. *See also M'Baye v. World Boxing Ass'n*, 429 F. Supp. 2d 660, 670 (S.D.N.Y. 2006) (entering injunction against boxing association). In *Braude v. Auto. Club of S. Cal.*, 144 Cal. Rptr. 169, 171 (Cal. Ct. App. 1978), the court affirmed a decision re-writing the bylaws of the defendant auto club.

sham maneuvers, AQHA has postponed the registration of cloned horses for six years while Viagen's patent rights are running out. ROA 2879. In *Hatley*, this Court held that the "adamantine" position of the litigants justified taking a registration decision away from AQHA and giving it to the district court. *Hatley*, 552 F.2d at 657. AQHA today is no less "adamantine" or stiff-necked than it was in 1977. In fact, it is more so. The district court was within its discretion to treat it accordingly.

CONCLUSION

Throughout this litigation, AQHA has wrongly tried to "slice and dice" this case. It is anticipated that it will claim in reply that the case is only about yearlings, or only about mares, or only about the offspring of stallions, or only about breeding as opposed to owning or showing, or only about racing or cutting and not about reining, halter or other disciplines. The truth is that this case is about all of these things, and the benefits competition through SCNT will bring to the Quarter Horse breed as a whole by making elite genetics more readily available. That is the fundamental reason why the district court's judgment is correct and should be affirmed.

Because the evidence supports the judgment of a properly instructed jury that AQHA's refusal to register SCNT horses and their offspring unreasonably and unlawfully restrained competition in a relevant market, and the district court did

not abuse its discretion in entering injunctive relief as to which AQHA offers no specific criticism, this Court should affirm the judgment below and remand for an award of appropriate post-judgment attorneys' fees.

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CERTIFICATE OF SERVICE

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CERITIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 13,949 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type and style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen (14) point "Times New Roman" style font.

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