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

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 5th CIR. R. 28.2.1, Appellant American Quarter Horse Association offers this Certificate of Interested Persons.

(1) Number and Style of the Case: Case No. 13-11043; *Abraham & Veneklasen Joint Venture; Abraham Equine Incorporated; Jason Abraham v. American Quarter Horse Association*.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 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 disqualifications or recusal.

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REPLY

Appellees' Response demonstrates why this Court legally cannot affirm the trial court's judgment. Appellees accuse AQHA of "wrongly tr[ying] to 'slice and dice' this case[,]" while they try to defend their antitrust judgment and the unprecedented act of forcing comprehensive rule changes on a private organization without reference to the guiding principles of law. [Br. of Appellees at 60]. By ignoring AQHA's arguments and, instead, relying on their misleading and incomplete version of the facts to carry the day, Appellees lose sight of the wise and time-honored legal principles that must guide this Court's decision. Because several elements of Appellees' claims either were not or cannot be established as a matter of law, the District Court's judgment must be reversed.

I. The Court Should Reverse and Render Because the District Court Erred in Denying AQHA's Motion for Judgment as a Matter of Law.

No evidence supported the submission of Appellees' claims to the jury, and the District Court, therefore, erred by denying AQHA's Motion for Judgment as a Matter of Law. ROA.2138-51. Although Appellees purportedly agree with AQHA's rendition of the standard of review, they incorrectly assert that the "standard . . . defers to the fact-finding ability of a properly instructed jury." [Br. of Appellees at 25]. In fact, this Court must apply the same standard that should have been used on initial consideration. *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1999). Specifically, the Court must evaluate whether legally sufficient evidence justified the *submission* of claims to a jury. [AQHA Br. at 7-8]. The propriety of instructions ultimately given to the jury is irrelevant to this determination. Because several elements of Appellees' claims rest upon legally insufficient evidence, the District Court erred by submitting those claims to the jury. The judgment, therefore, should be reversed.

A. No Evidence Supports Appellees' Section 1 Claim.

Appellees claim that AQHA violated Section 1 of the Sherman Act, which provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Yet, Appellees failed to satisfy their burden of proof with regard to several elements. *Apani Sw., Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 627 (5th Cir. 2002).

1. There is no evidence of a conspiracy.

a. The SBRC cannot conspire with itself as a matter of law.

Section 1 does not proscribe independent action by a single entity because—as a matter of legal and practical reality—a single entity cannot conspire with itself. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191-96 (2010). To determine whether alleged conspirators were acting as a single entity, the inquiry is whether the decision resulted from a concerted agreement between separate economic actors pursuing separate economic interests such that the agreement deprived the marketplace of independent centers of decision-making and a diversity of entrepreneurial interests.[1] *Id*. at 195. The evidence fails to satisfy this standard.

Appellees contend that "[t]he SBRC members are separate economic entities" because (1) five of the SBRC's thirty members have a separate economic interest in the alleged market for "elite Quarter Horses" and (2) all members have a stake in the cloning debate due to the "trickle down" effect of cloning.[2] [Br. of Appellees at 29-30 (citing Br. of Appellees at 16-18)]. However, the evidence conclusively establishes that most members of the SBRC have *no economic interest* that would be adversely affected by the registration of clones and their offspring.[3] ROA.2857-64; [*see* AQHA Br. at 11-12].

To avoid this inconvenient reality, Appellees argue that the interests of most SBRC members are irrelevant due to the "controlling role" of the "five men who

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1 Appellees improperly rely on this Court's opinion in *North Texas Specialty Physicians v. F.T.C.*, which provides that, "[w]here an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members." 528 F.3d 346, 356 (5th Cir. 2008). That statement does not mean that evidence of competitor control conclusively establishes the existence of a conspiracy—just that it defeats the single entity defense. *Id*. *American Needle* sets forth the standard for determining competitor control. 560 U.S. at 195.

2 In fact, the record establishes that only four members of the SBRC have an economic interest in the alleged submarket. [AQHA Br. at 12 (citing ROA.2857-64)]. Frank Merrill is largely out of the business and, personally, would suffer little or no economic effects if clones and their offspring are registered. ROA.2562-63, 2864-66, 3289-91, 3329, 3350.

3 Appellees' reliance on the District Court's summary judgment opinion to support a contrary conclusion—both here and throughout their Brief—is improper. "The full record developed in court supersedes the record existing at the time of the summary judgment motion." *Ortiz v. Jordan*, 131 S.Ct. 884, 889 (2011).

spoke out against the SCNT proposal." [Br. of Appellees at 28-31]. However, no evidence supports Appellees' audacious statement that "Wise, Merrill, Blodgett, Helzer and others met secretly before the March 2012 meeting and controlled the result" of the SBRC's vote to retain the Rule.[4] [*Id.* at 28]. Moreover, the evidence conclusively negates any suggestion that less vocal members of the SBRC were controlled or intimidated by their more vocal counterparts. [ROA.3402-04, 3785, 3789-92]. Quite simply, there is no evidence that separate economic actors control the SBRC either by number or by influence.

Even if legally sufficient evidence supported a conclusion that SBRC members are separate economic actors (it does not), Appellees wholly ignore the second half of the equation. According to the *American Needle* standard, there must be evidence of a concerted agreement between separate economic actors *pursuing* separate economic interests to overcome the single entity defense. 560 U.S. at 195, 200. Appellees offer no evidence that SBRC members were pursuing separate economic interests when they voted to retain the Rule. [*See* Br. of Appellees at 25-31].

[4] Presumably referring to the same "secret meeting" in their Statement of Facts, Appellees contend that "Wise, Merrill, Blodgett, Helzer, Tebow and others met secretly in January 2012 and arranged to kill the proposal . . . behind the back of the president." [Br. of Appellees at 20]. Their evidence, however, is an email *from* AQHA's president *inviting* 10 SBRC members to the EC's January meeting. [PX 142]. Not only would this meeting be neither "secret" nor "behind the back of the president," there is no evidence that any "secret meeting" actually occurred.

The evidence conclusively establishes that most members of the SBRC have no separate economic interest to advance by recommending retention of the Rule, and there is no evidence that any member pursued a separate economic interest by so voting. Accordingly, AQHA is a single entity that lacks capacity to conspire, and this Court should reverse and render judgment in AQHA's favor.

b. There is no evidence of a conspiracy in the SBRC.

Even if the SBRC were capable of conspiring, there is no evidence of a contract, combination, or conspiracy to restrain trade. Appellees had to show that the SBRC's recommendation to deny each rule-change proposal was the result of an agreement and not the result of separate decisions made by each Committee member on her or his own. *Am. Needle*, 560 U.S. at 190, 195-96; ROA.1921. Appellees presented no evidence that this type of concerted agreement occurred.

First, Appellees mention Frank Merrill's testimony in which he agreed that, "at all times since 2008, the members of the [SBRC] have agreed to exclude horses produced through somatic nuclear transfer and their offspring from the registry of the [AQHA]." [Br. of Appellees at 28]. This is no evidence of a concerted agreement because other testimony conclusively establishes that SBRC members only "agreed" by *voting* at AQHA's annual meetings to recommend that the board take no action or deny the rule-change proposals.[5] [*See* AQHA Br. at 13-14 (citing ROA.3407)]. Appellees do not acknowledge, deny, or dispute this contextual evidence. [*See* Br. of Appellees at 28].

Second, Appellees assert that "AQHA had agreed to give the SBRC veto power, AQHA leaders had stacked the SBRC membership, and . . . absent a positive recommendation from the SBRC, no action would be taken." [Br. of Appellees at 28 (citing Br. of Appellees at 16)]. Not only are these statements irrelevant to whether a concerted agreement existed, they are grossly misleading. To support their characterization of AQHA's rule proposal process, Appellees refer to the following email:

> If the stud book and registration committee makes any affirmative recommendation on your change proposal, i.e., recommends its adoption, suggests it be modified, refers it to a subcommittee for further study, etc, the committee's report will make reference to that proposed action. If not, your proposal will not make it into the committee recommendations reported to the general assembly. If that was the case, you could raise your proposal from the floor, but again, the time available to you to push your proposal would be limited.

[PX 31]. Importantly, this email states only that a "no action" recommendation will not be *reported* to the general assembly—not that it will cease to be a live topic for discussion. [*Id.*]. Indeed, it will not. All rule proposals go through the entire process and are submitted to the board, regardless of the SBRC's

[5] As the District Court recognized, "[t]he fact that each of the [SBRC] members voted in the same manner is not, by itself, sufficient to prove the existence of an alleged agreement" in violation of Section 1. ROA.1921; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

recommendation. ROA.2994. It would be time-prohibitive "if every committee chairman came before the membership and then the board and read off the specific action on each individual item that . . . fifteen or more standing committees were voting on[,]" and so each committee reports only a list of "action" items, without substantive descriptions. ROA.2547-48, 2539-40. The onus is on members of the general assembly and board to familiarize themselves with the proposals before each committee—which are posted online prior to the convention—and raise whatever issues concern them.[6] ROA.2549-52.

Third, Appellees string-cite several sections of the reporter's record, claiming that the testimony reinforces its "evidence"—i.e., unsupported statement—that "[t]his is . . . 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 investment the members had made in elite Quarter Horses." [Br. of Appellees at 28]. However, Appellees fail to describe the cited testimony or explain how any evidence establishes the existence of a concerted agreement. [*Id.* at 28-29]. Thus, this point has been waived. *See Carl E. Woodward, L.L.C. v. Acceptance Indem. Ins. Co.*, 743 F.3d 91, 96 (5th Cir. 2014).

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[6] As AQHA members, Appellees and their supporters could have raised their proposals from the floor during the membership meetings, but they never did. ROA.2483-84; [PX 31].

It is no wonder that Appellees avoid discussing the cited testimony, which concerns (1) comments made by "vocal" members during the SBRC's annual meeting, (2) Abraham's subjective belief regarding SBRC members' motivations, (3) Veneklasen's list of SBRC members who allegedly have "influence" within the alleged market, (4) Veneklasen's characterization of the SBRC as a "good ol' boys' club," and (5) the interconnectedness of SBRC members through AQHA and the Quarter Horse business. [Br. of Appellees at 28]. AQHA already has explained why this testimony constitutes no evidence that the SBRC's votes between 2008 and 2013 resulted from a concerted agreement to exclude clones and their offspring, and Appellees have no response.[7] [AQHA Br. at 11-12, 15-19]. Because Appellees presented no evidence of a contract, conspiracy, or combination—and the evidence conclusively establishes that the SBRC's votes were the result of independent decision-making and parallel agreement—this Court should reverse and render judgment in AQHA's favor.

2. There is no evidence of a relevant product market.

Market considerations provide the "objective benchmarks" for ascertaining the existence of a Section 1 violation. *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983). For that reason, the market must be

[7] The cited testimony also addresses several matters that have no conceivable relevance to the existence of a concerted agreement—specifically, the significance of Blodgett's and Helzer's breeding operations, Wise's failure to attend the 2008 convention, Merrill's impression of the October 2008 cloning forum, and how SBRC members are appointed. [Br. of Appellees at 28].

defined precisely and in accordance with commercial realities. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992). The alleged submarket for "elite Quarter Horses" satisfies neither requirement because there is no legal test according to which an "elite" Quarter Horse can be defined, and the market fails to encompass all reasonably interchangeable products.

Several times throughout their Response, Appellees insinuate that AQHA had some burden to offer an alternative market definition and that, by failing to do so, AQHA implicitly acquiesced to their definition. [Br. of Appellees at 11, 32, 38]. However, the burden to define the relevant product market rests solely with the plaintiff. *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1244 (5th Cir. 1985). Because Appellees alone bore the burden to define the relevant product market, and there is no evidence of a separate market for "elite Quarter Horses," this Court should reverse and render judgment.

a. The alleged submarket fails to encompass all reasonably interchangeable products.

The outer boundaries of a product market are determined by the reasonable interchangeability of use and the degree of cross-elasticity of demand between the product itself and substitutes for it.[8] *Apani Sw.*, 300 F.3d at 626. Appellees flatly

[8] Despite acknowledging that "[a] relevant market includes 'all products reasonably interchangeable by consumers for the same purposes[,]'" Appellees fail to apply that standard to the evidence. [Br. of Appellees at 31]. Instead, they describe the evidence in reference to jury instructions. [*Id.* at 31-38]. As previously explained, jury instructions are irrelevant because the

ignore these standards and, instead, rely solely upon the "practical indicia" of a submarket set forth in *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962).[9] [Br. of Appellees at 33-36]. Although these practical indicia have some relevance, they "come into play only *after* the 'outer boundaries of a product market are determined' by evaluating 'the reasonable interchangeability of use or the cross-elasticity of demand between the product and substitutes for it.'" *Ky. Speedway, LLC*, 588 F.3d at 918 (emphasis added); *Worldwide Basketball & Sports Tour, Inc. v. NCAA*, 388 F.3d 955, 961-62 (6th Cir. 2004), *cert. denied*, 388 F.3d 955 (2005). Because Appellees apply an incorrect legal standard to support their product market, their analysis should be afforded no weight.

To properly analyze reasonable interchangeability and cross-elasticity of demand, "[t]he emphasis always [must be] on the actual dynamics of the market rather than rote application of any formula." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *Eastman Kodak Co.*, 504 U.S. at 482. These standards "offer no precise formula for judgment and . . . necessitate, rather than avoid, careful consideration based upon the entire record." *U.S. v. Cont'l Can*

question before this Court is whether legally sufficient evidence justified the District Court's *submission* of claims to a jury. *See supra* at 1-2.

[9] Appellees mention the "small but significant, non-transitory increase in price" test. [Br. of Appellees at 32]. However, the Fifth Circuit never has adopted this test as a method for estimating substitutability, and Appellees cite no evidence that would satisfy its requirements. [*Id*. at 32-36]; *see IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1345-46 (Fed. Cir. 2012); *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 918 (6th Cir. 2009).

Co., 378 U.S. 441, 449 (1964). As a matter of commercial reality—and as the evidence conclusively establishes—Quarter Horses outside the alleged "elite Quarter Horse" market are reasonably interchangeable substitutes for those within it because they all can be used for the same purposes. [AQHA Br. at 19-34].

Appellees fail to demonstrate a meaningful distinction between "elite" and "non-elite" Quarter Horses. For example, Appellees claim that there is industry recognition of "elite Quarter Horses" because "[i]ndustry publications refer to elite horses and give their statistics," "the *Quarter Horse News* said that the donors were joining a group of 'elite' horses that were being cloned[,]" and "[t]he website of SBRC member Blodgett boasts of the elite nature of the broodmares he raises." [Br. of Appellees at 33]. However, Appellees do not contend that any of these sources intended the word "elite" to describe Quarter Horses that satisfy Pflaum's definition of an "elite Quarter Horse." [*See* PX 92 at 8]. As Pflaum conceded, "elite" is just an imprecise adjective meaning "high quality," "best of the best," "top drawer," or "aspirational." ROA.3224-25.

Next, Appellees claim that "separate production facilities" distinguish "elite" and "non-elite" Quarter Horses, but the evidence does not support that conclusion. The only relevant cited testimony is a statement by Veneklasen that "the top racehorses and cutting horses are bred by a relatively small group of large ranches that dominate breeding in those particular types of competition."[10] ROA.2857. This testimony is legally insufficient for two reasons. First, Appellees vigorously deny that racing and cutting are the only two disciplines encompassed by the "elite Quarter Horse" market. [Br. of Appellees at 60]. Second, there is no evidence that these ranches breed *only* "elite" racing and cutting horses; the evidence conclusively establishes that the major breeders of high-priced yearlings also produce low-priced yearlings. ROA.3283, 3512-13 (discussing DX 239 at 11).

Appellees also argue—without citation to the record—that "separate buyers" distinguish "elite" and "non-elite" Quarter Horses because "[e]lite stallions are frequently owned by syndicates." [Br. of Appellees at 34]. However, there is no evidence that *only* syndicates purchase "elite" horses or that syndicates purchase *only* "elite" horses. The evidence conclusively establishes that at least two "elite" Quarter Horses are not owned by syndicates, ROA.3801-02, 3804, and the fluidity of the alleged submarket means that syndicates never can be certain in the "elite" nature of their purchases. [AQHA Br. at 30-31]. Moreover, a syndicate is just a group of people who buy a horse together to share in the risks and benefits of investing. ROA.2575. There is no evidence regarding what type of Quarter Horse a syndicate member might purchase in his or her individual capacity.

[10] Advertisements claiming that Heritage Place auctions are "where champions are sold" do not prove that "separate production facilities" exist. [Br. of Appellees at 34]. Heritage Place does not "produce" anything.

Finally, Appellees rely on the difference in prices between "elite" and "non-elite" Quarter Horses, claiming that "[a] separate market can exist where 'price differences represent material distinctions for the consumer.'" [Br. of Appellees at 34]. Yet, Appellees do not even attempt to explain what "material distinctions in utility" exist between "elite" and "non-elite" horses. [*Id*. at 34-35]. Indeed, the only statement in Appellees' entire brief concerning the utility of "elite" Quarter Horses—the ultimate measure of reasonable interchangeability and cross-elasticity of demand—is that "[h]orses in the elite market . . . are used for breeding *more often* than other horses."[11] [*Id*. at 33 (emphasis added)]; *see Apani Sw.*, 300 F.3d at 626.

Whether or not that is true, the evidence conclusively establishes that consumers who want to succeed in competition—and, by extension, breeding—have options both in and out of Appellees' alleged "elite Quarter Horse" submarket. [*See* AQHA Br. at 24-26]. Appellees cannot legitimately dispute this point, as they concede that "non-elite" Quarter Horses can and do gain "entry into the [alleged 'elite'] market." [Br. of Appellees at 38]. Although Appellees dismiss such instances as "Cinderella stories" and criticize AQHA for making "no attempt

[11] Appellees criticize AQHA's point that high cross-elasticity of demand exists between "elite" and "non-elite" Quarter Horses if, as Appellees contend, "average guy" breeders will begin participating in the alleged submarket once prices are lower. [Br. of Appellees at 36 (citing AQHA Br. at 27)]. According to Appellees, this shows only that cloning will make the market more elastic in the future. [*Id*.]. Appellees miss AQHA's point. Either demand for "elite" Quarter Horses over "non-elite" Quarter Horses depends on price or it does not. Appellees cannot have it both ways. [*Compare* Br. of Appellees at 35 *with* Br. of Appellees at 44].

to quantify this anecdotal evidence," AQHA furnished evidence that most of the top-earning horses in 2011 and 2012 were purchased at yearling auctions for a modest price and would not have been considered "elite." [*Id.*; DX 239 at 7-8]. Moreover, the burden to prove the relevant market rest solely with the plaintiff. *See supra* at 9.

The fact that no material (or immaterial) distinctions in utility exist between "elite" and "non-elite" Quarter Horses confirms AQHA's conclusion that the only true distinction between "elite" and "non-elite" Quarter Horses is the price they command.[12] [AQHA Br. at 27-30]. Because the evidence conclusively establishes that "elite" and "non-elite" Quarter Horses are reasonably interchangeable in terms of use, no evidence supports Appellees' market definition, and "elite Quarter Horses" is an improper product market as a matter of law. [*See id.*].

b. The alleged submarket's boundaries cannot be defined.

Assuming *arguendo* that the "elite Quarter Horse" market encompasses all reasonably interchangeable substitutes and, therefore, rests on more than alleged price and quality distinctions (it does not), Appellees did not satisfy their burden to define boundaries. *Apani Sw.*, 300 F.3d at 627. Establishing boundaries is crucial because, without them, there is no context within which to determine whether the

[12] Price and alleged quality distinctions alone cannot support a market. [AQHA Br. at 27-30].

defendant had the ability to lessen or destroy competition. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

It is impossible to define an "elite" Quarter Horse, and Appellees do not attempt to rebut the accuracy of that statement. [*See* AQHA Br. at 30-31]. Instead, Appellees take issue with AQHA's alternative argument that, assuming it is possible to define an "elite" Quarter Horse, Appellees still failed to do so. [*Id.* at 31-34]. Specifically, Appellees claim that AQHA misinterprets Pflaum's opinion that the top 5% of horses sold are "elite" because that testimony referred only to yearlings, which is just "[o]ne aspect" of the market. [Br. of Appellees at 37].

AQHA did not "misinterpret" this testimony. As AQHA made clear in its principal brief, "[t]here . . . is no economic or statistical evidence to establish how 'elite' mares and stallions factor into the 'elite Quarter Horse' submarket" because Pflaum's economic and statistical market analysis focused exclusively on "elite" yearlings sold at auction.[13] [*See* AQHA Br. at 34; PX 92]. It was Appellees' burden to define the market, and they offered legally insufficient evidence to support a market that encompasses horses other than yearlings.[14]

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[13] Appellees cannot reasonably fault AQHA for discussing the case as if it "is only about yearlings" when they offered no evidence to assist AQHA or this Court in determining if and how "elite" mares or stallions are bought and sold within the market. [Br. of Appellees at 60].

[14] Conclusory testimony that the alleged submarket is "small, perhaps one-half of a percent" is legally insufficient to establish boundaries. [Br. of Appellees at 37-38 (citing ROA.3131, 3831)]; *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1540 (8th Cir. 1989) (overturning

Even if the relevant market encompasses only "elite" yearlings, however, Appellees still presented legally insufficient evidence of its boundaries. Pflaum's testimony made clear that it is not always possible to identify what yearlings are "elite" and what yearlings are not due to the "gray area" in which there is "substitutability between the top five percent and th[e] bottom group[.]" ROA.3838-39. Because there is no evidence from which a person reasonably and objectively could determine what horses are "elite," what horses are "not elite," and what horses fall within the "gray area," no evidence supports a product market for "elite Quarter Horses."

The inability to define an "elite" Quarter Horse with any certainty distinguishes the only case upon which Appellees rely. [*See* Br. of Appellees at 36-37 (citing *Int'l Boxing Club of New York, Inc. v. U.S.*, 358 U.S. 242, 250 (1959))]. In that case, the court recognized a submarket for "championship boxing contests" within the larger market for "professional boxing events," finding that championship contests "brought in four times more revenue, enjoyed 17% better Nielson ratings, and, unlike other fights, were the subject of special radio and television attention as well as full-length movies." [*Id.*]. Unlike "elite Quarter Horses," a "championship boxing contest" is easily recognized. There are eight recognized weight classes, each has one recognized world champion at any time,

jury verdict where plaintiff failed to offer "market data or similar hard evidence in identifying the relevant market").

and a boxer becomes the champion in his weight class either by (1) defeating the existing champion in a recognized title contest or, (2) if the champion has retired or his title is declared vacant, by engaging with one or more recognized top contenders in a contest or series of contests recognized as title. *U.S. v. Int'l Boxing Club of N.Y., Inc.*, 150 F. Supp. 397, 403 (S.D.N.Y. 1957). Because consumers know to expect a championship boxing contest before it begins, it makes sense that those contests generate more attention, revenue, and coverage. The same cannot be said for "elite" yearlings, which are defined solely by their untested potential.

A market for "elite" Quarter Horses has neither relevance in the real world nor parameters that can be tested. Therefore, no evidence supports Appellees' market definition, and "elite Quarter Horses" is an improper product market as a matter of law.

3. There is no evidence of an unreasonable restraint of trade.

There is no evidence that the alleged agreement within AQHA effected an unreasonable restraint of trade. *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985). Under the rule of reason, courts examine the effect of the alleged restraint of competition, considering all the circumstances. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Courts then balance the anticompetitive effects of the restrictive practice against any benefits or justifications within the relevant market. *Benson v.*

St. Joseph Reg'l Health Ctr., 575 F.3d 542, 549 (5th Cir. 2009) (citing *Doctor's Hosp., Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997)). Because no evidence establishes that AQHA caused injury to competition by retaining the Rule, this Court need not reach the second part of the rule of reason analysis.

Appellees failed to satisfy their burden to prove an actual adverse effect on competition for at least three reasons. First, there is no evidence that the SBRC's vote to recommend retention of the Rule injured competition in the "elite Quarter Horse" market because no evidence supports the existence of that market. *See supra* at 8-17; *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 320 (5th Cir. 1985).

Second, "[a] plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products." *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988). To prove an unreasonable restraint of trade caused by the denial of an endorsement, there must be evidence that consumers within the alleged "elite Quarter Horse" market are *coerced or otherwise constrained* to buy only horses registered by AQHA. [*See* AQHA Br. at 36-41]. AQHA's decision not to register cloned horses and their offspring constitutes the entire basis of Appellees' claims, ROA.1920, but there is no evidence—and Appellees do not contend—that Quarter Horse consumers have been coerced or constrained to buy only horses registered by

AQHA. Instead, Appellees argue that AQHA registration determines whether a Quarter Horse has value and that a non-registered Quarter Horse is "worthless," even if "[t]hat horse earns a million dollars," because "there's a stigma[.]"[15] ROA.2419-20, 2529-30, 2713-15, 2737-38, 2773, 3094; [*see* Br. of Appellees at 39-40]. Because, however, there is no evidence that AQHA coerces or otherwise constrains Quarter Horse consumers to buy only horses registered by AQHA, any valuation determinations based on AQHA registration status must be attributed to the voluntary reliance of individual Quarter Horse consumers.[16] *Consol. Metal Prods.*, 846 F.2d at 296.

Third, it is axiomatic that antitrust laws exist to protect competition—not competitors. [*See* AQHA Br. at 41-44]. "Ultimately, the consumer is the beneficiary." *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994). In their Response, as in trial, Appellees offer general theories about supply and demand but focus primarily on how the Rule affects them and

[15] Appellees claim their injury is more than mere "stigma," but their own witness, David Brown, used that word. [Br. of Appellees at 40]; ROA.3094. Moreover, Appellees cannot distinguish *Consolidated Metal Products, Inc.* on the basis that, in that case, "[v]oluntary compliance with the standard did not prevent the plaintiff from selling his equipment" because the same is true here. [Br. of Appellees at 40]. The Rule does not *prevent* Appellees or other owners from selling cloned horses and their offspring; at most, the evidence shows that consumers assign a lower value to those horses. ROA.2737-38.

[16] Appellees claim "[t]here is no alternate registry" because "AQHA put its last would-be-competitor out of business years ago." [Br. of Appellees at 40]. As Appellees are well aware, the competing registry—which registered horses produced by multiple embryo transfer—went out of business after AQHA was required to do the same. ROA.2420-21, 2936-38. The fact that horse owners voluntarily left the competing registry to join AQHA once both registries allowed registration of those horses proves only consumer preference.

other would-be competitors.[17] [Br. of Appellees at 42-45]. For example, Appellees claim that "[i]t 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*." [*Id.* at 45 (emphasis added)]. Because "the legislative history [of the Sherman Act] illuminates congressional concern with the protection of competition, not competitors," evidence of injury suffered by Appellees and other would-be competitors is insufficient as a matter of law to prove anticompetitive effect in the market. *Brown Shoe Co.*, 370 U.S. at 320.

To clarify one matter raised by Appellees, AQHA noted in its principal brief that eligibility to compete in Quarter Horse races is determined as a matter of state law rather than by AQHA. [AQHA Br. at 40 & n.17]. AQHA discussed these laws for the sole purpose of proving a lack of causation—not immunity from liability.[18] [Br. of Appellees at 40-42]. Because there is no evidence that AQHA either coerces or constrains Quarter Horse consumers to buy only AQHA-registered horses or determines what horses are eligible to compete in Quarter

[17] A shortage is impossible to evaluate without precise market boundaries, and there is no evidence that a shortage resulted from the Rule. [*See* AQHA Br. at 36, 43].

[18] Appellees dismiss this point because the statutes speak only to racing, not to breeding or competition in other disciplines. [Br. of Appellees at 41]. Because, however, nothing prevents Appellees and other owners from breeding cloned horses and their offspring, *see supra* at 19 n.15, and unregistered horses already can compete in cutting competitions—the only discipline, other than racing, addressed by Pflaum's evidence—the statutes fairly address the question of causation. [Br. of Appellees at 39-40; PX 92, 112-120, 126]; ROA.3157.

Horse races, there is no evidence that AQHA's registration decisions *cause* adverse effects on competition.

Appellees failed to satisfy their burden to prove an actual adverse effect on competition. *See supra* at 17-20; [AQHA Br. at 34-45]. Nevertheless, Appellees devote more than six pages of their thirty-five page argument to attacking AQHA's justifications for the Rule. [Br. of Appellees at 45-51]. If the Court finds that Appellees failed to satisfy their initial burden to prove an adverse effect on competition, it need not consider these matters at all. *Benson*, 575 F.3d at 549.

To the extent this Court does consider balancing factors, however, AQHA would draw its attention to two matters. First, Appellees ask this Court to apply an incorrect standard in evaluating AQHA's justifications for the Rule. Appellees contend that AQHA's business justifications must be "objective" when, actually, the Rule must be (a) reasonably tailored to achieve AQHA's legitimate goals and (b) be based on objective standards. [Br. of Appellees at 46 (citing ROA.3906), 50]; *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 653-54 (5th Cir. 1977). The evidence supports an affirmative finding on both elements. The Rule excluding horses produced by SCNT is reasonably tailored to achieve AQHA's legitimate goals, [*see* AQHA Br. at 44], and is based on a purely objective standard. In *Hatley*, an opinion upon which Appellees heavily rely, this Court upheld an exclusion based on a far more subjective standard—the determination that a horse has excessive "white markings." 552 F.2d at 649-50.

Second, Appellees attempt to mislead this Court by asserting, "Treadway's notes acknowledge that the economics of cloning could be 'devastating' to established breeders." [Br. of Appellees at 19, 44]. In fact, Treadway's notes say, "Economic consequences 1) What would it do? 2) It would be devastating?? How[?]" [PX 81 at 6]. By presenting Treadway's statement without the predicate question, two question marks, or subsequent "How," Appellees changed its meaning entirely. [Br. of Appellees at 19, 44].

For all of the reasons set forth above and in AQHA's principal brief, no evidence supports Appellees' claim under Section 1 of the Sherman Act, and this Court should reverse and render judgment in AQHA's favor.

B. No Evidence Supports Appellees' Section 2 Claim.

Appellees also claim that AQHA violated Section 2 of the Sherman Act, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. Yet, Appellees devote less than three pages of their Response to defending this claim and fail to discuss a single piece of evidence. Instead, Appellees spout general, but inapplicable, principles of law, effectively conceding their failure to establish this claim.

As with their Section 1 claim, Appellees had the burden to establish a properly defined market within which AQHA's alleged market power could be measured under Section 2. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). Appellees did not satisfy this burden. *See supra* at 8-17; [AQHA Br. at 19-34, 46].

Appellees also failed to prove that AQHA possesses monopoly power in that (or any) market. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999); [*see* AQHA Br. at 47-49]. Appellees assert that "the antitrust laws do not require that a defendant be a participant in the market it unlawfully controls." [Br. of Appellees at 53-54]. However, their cited authorities do not support this position. *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403 (5th Cir. 2007) (does not involve Section 2 claim); *Full Draw Prods. v. Easton Sports Inc.*, 182 F.3d 745 (10th Cir. 1999) (court, reviewing grant of motion to dismiss, had to *accept as true* plaintiff's allegation that defendants exercised control over the market by participating in a group boycott with plaintiff's only competitor). Moreover, Appellees offer no evidence that AQHA actually *does* possess monopoly power. [Br. of Appellees at 53-54].

Even if Appellees could establish AQHA's possession of monopoly power, that—without more—is not unlawful. *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004). Appellees also must prove that

AQHA abused its monopoly power. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 374 (7th Cir. 1986). Appellees failed to satisfy this burden. [AQHA Br. at 49-51]. Although Appellees cite the District Court's opinion denying AQHA's pretrial motion for summary judgment, which states that a jury "could find that because AQHA defines the market, it *maintains* power by refusing proposals to redraw market boundaries," [SRE 2 at 9-10], they do not point to evidence that would have supported such a finding. [Br. of Appellees at 53].

Because there is no evidence that AQHA possesses or abuses monopoly power in the alleged market for "elite Quarter Horses," no evidence supports Appellees' Section 2 claim, and this Court should reverse and render judgment in AQHA's favor.

C. No Evidence Supports Appellees' Texas Free Enterprise and Antitrust Act Claim.

Because no evidence supports Appellees' Sherman Act claims, no evidence supports their Texas Free Enterprise and Antitrust Act claim, and this Court should reverse and render judgment. [AQHA Br. at 51]; *see supra* at 1-24.

II. Alternatively, the Court Should Reverse and Remand Because the Injunction Goes Further Than Necessary and Violates the Non-Intervention Doctrine.

The District Court's error in granting injunctive relief that requires AQHA to adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring is egregious and perfectly illustrates the misguided decisions that define this litigation. ROA.2129-36.

A. The Injunction Goes Further Than Necessary to Remedy the Alleged Antitrust Violation.

Injunctive relief is an "extraordinary remedy" and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011). The District Court abused its discretion by failing to limit the scope of its injunction appropriately.[19] ROA.2129-36; *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 334-35 (5th Cir. 2008).

In their Response, Appellees assert three estoppel-type arguments: (1) AQHA's staff originally drafted and proposed the mandated amendments, (2) AQHA waived its complaint by inadequate objection, and (3) AQHA has failed to comply with the injunctive relief since its entry. [Br. of Appellees at 54-56]. Not one of these claims has merit. First, the mandated amendments were drafted, primarily, by an attorney named Holley who represented the proponent of a rule-change proposal in 2007. [PX 36]. At no time has AQHA *ever* endorsed or

[19] AQHA has never taken the position that injunctive relief cannot be ordered to enforce antitrust laws—only that the injunctive relief in this case goes further than necessary to remedy the alleged antitrust violation. ROA.3980. Accordingly, Appellees' reliance on *Int'l Boxing Club of New York, Inc. v. U.S* is misplaced. [Br. of Appellees at 57-58 (citing 358 U.S. 242)].

accepted this or any other amendment proposal.[20] ROA.3984. Second, despite Appellees' claim to the contrary, AQHA specifically objected on multiple occasions to the injunctive relief. *See, e.g.*, ROA.3980-81, 3985-86, 3988-90, 4005-07, 4014-15, 4035-36, 2062-71. Third, AQHA has not complied with the injunctive relief because it obtained a stay from the District Court pending this appeal. [Dkt. No. 180]. Any claim that AQHA has "refused to register plaintiffs' horses" or "refus[ed] to comply with the judgment in good faith" is frivolous and misleading. [Br. of Appellees at 56, 59].

Appellees also argue that the District Court did not overstep its authority because it included a "savings clause" that allows AQHA to periodically review and amend the specifically-ordered language. [Br. of Appellees at 56 (citing ROA.2128]. This argument misses AQHA's point entirely. Even if injunctive relief were appropriate here (it is not), the Court should have entered a narrow injunction directing AQHA to address the alleged antitrust injury from the outset. By failing to narrowly tailor the injunction to be no more burdensome than necessary, the District Court abused its discretion and compounded the grave error resulting from its impermissible submission of the case to the jury.

[20] Appellees know this to be true and yet persist in making this argument. ROA.2691-92, 3965-66; [PX 15 at 2; Br. of Appellees at 59; Dkt. No. 177, at 6; Dkt. No. 138, at p. 5].

B. The Injunction Violates the Doctrine of Non-Intervention.

Courts recognize a private association's right to adopt, administer, and interpret its own rules without judicial intervention. *Hatley*, 552 F.2d at 656; *Schulz v. U.S. Boxing Ass'n*, 105 F.3d 127, 132 (3rd Cir. 1997). When it is determined that a rule or bylaw violates the law, a court may prohibit enforcement of that rule, *Hatley*, 552 F.2d at 656, but it may not "rewrite other provisions of the bylaws which are not in themselves unreasonable." *Griffin v. Tall Timbers Dev., Inc.*, 681 So. 2d 546, 554 (Miss. 1996). Appellees ignore the second part of that principle and assert "that the non-intervention doctrine goes out the window when an association's rules are found to violate the law." [Br. of Appellees at 58]. That simply is not true where, as here, only one of several modified rules is found to violate the law. ROA.2129-36. By mandating that AQHA adopt and incorporate specific language into its rules, rather than simply prohibiting enforcement of the Rule, the District Court impermissibly interfered with AQHA's internal affairs and compounded its preexisting error. The District Court's judgment cannot stand.

CONCLUSION AND PRAYER

For all of the reasons set forth above and in AQHA's principal brief, AQHA respectfully requests that the Court reverse and render judgment in its favor. In the alternative, AQHA requests that the Court reverse and remand the District Court's judgment for appropriate limitation of the injunctive relief.

Respectfully submitted,

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I hereby certify that true and correct copies of Appellant's brief has been sent via certified mail, return receipt requested and via the Court's electronic Notice of Docket Activity on this the 24th day of March, 2014 to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 7,000 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 2003" in fourteen (14) point "Times New Roman" style font.

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