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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC PART 8
*Justice*

Robert Summer

-v-

David D. Hogan

INDEX NO. 102150/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion decided pursuant to attached Dec

**UNFILED JUDGMENT**
This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/2/08

MARILYN SHAFER

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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ROBERT SUMNER, SANDFORD J. GOLDFARB and FRANK A. CANZONE,

Petitioners,

-against- Index No. 100150/08

DANIEL D. HOGAN, Chairman, JOHN B. SIMONI, Member, and MICHAEL J. HOBLOCK, JR., Member, constituting the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

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TROY STABLES, LLC, TAREK KAZAL and DONNA M. TEMMING,

Petitioners,

against- Index No. 100843/08

DANIEL D. HOGAN, Chairman, JOHN B. SIMONI, Member, and MICHAEL J. HOBLOCK, Member, constituting the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

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**MARILYN SHAFER, J.:**

These two proceedings challenge regulations of the New York State Racing and Wagering Board (Racing Board) governing Standardbred (Harness) racehorses which require pre-race detention of horses when a horse has been found to have excessive levels of total carbon dioxide (TC02) in its blood. The regulations are designed to detect and prevent the practice of "milkshaking," that is, administering baking soda combined with other substances to the horse before a race, for the purpose of neutralizing lactic acid build-up, slowing the onset of

fatigue, and presumably enhancing the horse's performance.

Pursuant to 9 NYCRR 4120.13, the Racing Board may obtain pre- and post-race blood samples from horses for subsequent testing for TC02. If a horse's TC02 level exceeds the level specified in the regulation, its owner or trainer may request a 72-hour guarded quarantine during which time the horse's blood will again be tested to determine whether the horse's physiologic normal TC02 level was not exceeded.[1] The penalties for violation of the rule include, among other things, for the first violation a 60-day license suspension and $1,000 fine; for the second violation, a 75-day license suspension and $2,500 fine; and disqualification of the horse from the race and forfeiting of purse moneys. 9 NYCRR 4120.13.

In addition, pursuant to section 4120.14 of the regulations, a horse that tests above permissible levels of TC02 shall be placed in pre-race detention for a period of six months from the date of violation, regardless of whether it has been transferred to another trainer. If during the detention period, the horse

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[1] According to petitioners, the cost of 72-hour guarded quarantine can be very costly - as much $9,000 at Yonkers Raceway. *See* Affirmation in Support of Sumner Petition of Joseph A. Faraldo, ¶ 46. Robert Cameron Haughton, employed by the Racing Board as Presiding Judge at Yonkers Raceway, however, asserts that the estimated cost of a quarantine test at Yonkers Raceway is only $2,500. Saratoga Gaming and Raceway (Saratoga Raceway) charges between $1,300 and $1,400 per horse for 72-hour guarded quarantine testing. Affidavit of Bruce Cogan, Director of Security at Saratoga Raceway, ¶ 10.

again tests in violation of the standard, the detention shall be extended for a period of time the judges deem appropriate. 9 NYCRR 4120.14 (a). In addition, all horses of the trainer who is found to have violated section 4120.13 twice in a 12-month period shall be placed in pre-race detention for at least six hours before the race, for a period of eight months, regardless of whether the horses are placed with a different trainer. 9 NYCRR 4120.14 (b). All decisions and rulings of the judges may be appealed to the commission for review if the licensee files a notice of appeal, and the penalties imposed by the judges or other officers shall continue in full force and effect until the appeal is determined, unless otherwise directed by the commission. 9 NYCRR 4121.5.

The challenged regulations were initially filed as "emergency measures" in 2005, 2006 and 2007 and were ultimately adopted as final rules on July 31, 2007, effective August 15, 2007.

Petitioners in Index No. 100150/08 (proceeding #1), Robert Sumner, Sandford J. Goldfarb, and Frank A. Canzone are all owners of Harness racehorses which have been trained by Matthew A. Medeiros (Medeiros). In March 2007, a racehorse trained by Medeiros named Notthatkindaangel, partially owned by petitioner Sumner, was found by the Racing Board to have excessive levels of TC02. Medeiros appealed that finding and was allegedly given a

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stay by the Racing Board.

On December 7, 2007, another racehorse trained by Medeiros, named Sweet Celebration, was also found to have a level of TC02 above that permitted. Sweet Celebration was not owned by any of the petitioners. Medeiros appealed that violation as well. On December 14, 2007, Medeiros requested guarded quarantine to re-test Sweet Celebration, a stay of his violation, and a stay of the pre-race detention rules as applied to all of the horses trained by him, including the horses of petitioners Sumner, Goldfarb, and Canzone. According to petitioners, Medeiros obtained a stay of his violation pending appeal, but apparently no stay was granted with respect to the six-month pre-race detention of the other horses being trained by Medeiros. On December 17, 2007, Medeiros refused to submit Sweet Celebration to the guarded quarantine which he had previously requested, when he learned that the Racing Board had refused his request to provide for split samples to be taken during the 72-hour period.

As of the filing of the petition, there had been no hearing on the appeal of either of the TC02 charges against Medeiros.

On January 8, 2008, this court granted a temporary restraining order restraining the Racing Board from requiring pre-race detention of the horses owned by petitioners, on the condition that the horses subject to the order be transferred to a different trainer and not be sold, and if there is an adverse

determination of the proceeding, those horses will then be subject to the contemplated eight-month detention.

Petitioners in Index No. 100843/08 (proceeding #2), Troy Stables, LLC, Tarek Kazal, the managing member of Troy Stables, and Donna Temming own horses trained by Ross Claridge. In November 2007, Claridge received a 60-day suspension and a $1,000 fine in connection with a finding that, in October 2007, a horse trained by him named Amizida, had exceeded the permissible TC02 level. Troy Stables and Kazal, who allegedly own Amizida, contend that Kazal was in Australia at the time of the race, and that they were never given notice that their horse was determined to have raced with excessive levels of TC02, or that they had a right, pursuant to 9 NYCRR 4120.13, to have their horse placed in 72-hour guarded quarantine to establish that the level of TC02 was physiologically normal for their horse. Claridge appealed the finding and the Racing Board stayed his suspension.

In November 2007, Claridge allegedly received a second excessive TC02 result for a horse named Dave Aint Here. Claridge received a stay of the penalties for that violation pending appeal, as well. None of the petitioners own Dave Aint Here, and there has been no final determination of either appeal.

On January 18, 2008, this court granted a temporary restraining order prohibiting the Racing Board from requiring pre-race detention of the horses owned by petitioners in

proceeding #2, on condition that the horses subject to the order be placed in the care of another trainer and not be sold, except to a fully informed buyer, and if there is an adverse determination of the proceeding, the horses will be subject to the contemplated eight-month pre-race detention.

The petitioners in both proceedings allege that they were never given notice by the Racing Board that the trainer of their horses had violated the TC02 standards. In response to an inquiry from the Standardbred Owners Association, the Racing Board has indicated its position that it is not the Racing Board's duty to notify all owners who have horses with a certain trainer that the trainer has had a positive TC02 horse in his or her barn; rather it is the trainer's responsibility to communicate that information to owners of the horses he or she trains. Letter from Daniel Hogan, Chairman Racing Board to Standardbred Owners Association, Inc., dated May 9, 2007.

Petitioners contend that the pre-race detention is very costly,[2] and that some racetracks actually refuse to make pre-race detention available at all, thereby preventing their horses

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[2] The parties dispute how great a burden is imposed by the cost of pre-race detention. According to Bruce Cogan, beginning in 2007, Saratoga Raceway provided for pre-race detention without charge, unless there was insufficient space in their current ship-in barn, and then they might charge from $96 to $2 per horse. Affidavit of Bruce Cogan, ¶ 6. However, as long as there is some significant cost, a property interest is involved.

from entering the race at all.[3] In either case, according to petitioners, they are deprived of property without due process of law. Petitioners contend that, under *Goldberg v Kelly* (397 US 254, 269 [1970]) and its progeny, the regulatory scheme violates their rights to due process in that, inter alia: they are not given notice by the Racing Board of TC02 violations; because they are not given notice of the first violation, they are not able to transfer their horses to a different trainer before a second violation might occur; innocent owners are not party to, and are not able to appeal, the underlying violations; they are not afforded a stay of the pre-race detention despite the fact that the trainer may obtain a stay, and if one or both of his or her violations are voided on appeal, the pre-race detention of their horses would have been unjustified; and they are not reimbursed for the costs of pre-race detention even if a detention-triggering violation is reversed. Petitioners specifically refer to the case of another trainer, John Leggio, who was twice cited for violating TC02 regulations, one of which was later reversed on appeal. Because the owner of one of the horses in his care was unable to obtain a stay of the pre-race quarantine rules

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[3] Responding to a letter from Faraldo regarding the alleged decision of Monticello Raceway to not offer pre-race detention, the Racing Board stated that despite the requirement in Section 4120.14 that "the racetrack operator sponsoring the race shall make such pre-race detention available," it recognized the business judgment of the racetrack not to do so. *See* Letter from Robert A. Feuerstein to Joseph A. Faraldo, dated May 31, 2006.

pending Leggio's appeal, she was forced to pay the costly fees of pre-race detention.

Petitioners further contend that the TC02 regulations, as permanently adopted, lack critical safeguards including specification of the scientific method which may be used in analyzing blood samples for TC02, and availability of split samples, as required in the testing scheme for other chemicals.

Although respondents have submitted neither a formal motion to dismiss the petition, nor a formal answer, in the "Answer and Affirmation in Opposition" of Susan Anspach and the affidavits submitted in support thereof, based on both procedural and substantive arguments, respondents request that the petitions be dismissed, or transferred to Schenectady County. The court will therefore treat respondents' response as an answer.

As a threshold matter, respondents argue that this proceeding is untimely because it was not initiated within four months of the promulgation of the final rules which were adopted on July 31, 2007, effective August 15, 2007. To determine the applicable statute of limitations, the court must look at the substance of the challenge of the action or proceeding. *Matter of Vecce v Town of Babylon,* 32 AD3d 1038, 1039 (2d Dept 2006), citing *Matter of Save the Pine Bush v City of Albany,* 70 NY2d 193, 202 (1987). Although petitioners styled their complaint as a proceeding, part of which challenges procedural aspects of

the promulgation of certain regulations governing harness racing, they also seek a declaration that the regulations are both arbitrary and capricious and violative of due process. The essence of petitioners' challenge is that horses that they own are subject to eight months of pre-race quarantine when their trainer is found to have had a second TC02 violation within a 12-month period, although their horses were not in violation of the TC02 regulations; they never received notification from the Racing Board of the trainer's first violation, and, therefore, were not in a position to remove their horses from his care prior to the second violation; they are not able to obtain a stay of enforcement of the pre-race detention, despite the fact that the trainer can, and often does, obtain such a stay pending appeal of his or her violation; and finally, if either of the trainer's violations is overturned, the pre-race detention of their horse or horses may have been unfounded. This constitutes a challenge, not to a specific administrative decision, but rather a broadbased challenge to the constitutionality of a rule of general applicability, and, thus, the Article 78 four-month statute of limitations should not apply, and the proceeding is timely. *See Slutzky v Cuomo*, 128 Misc 2d 365 (Sup Ct, Albany County 1985), citing *New York Pub. Interest Research Group v Levitt*, 62 AD2d 1074 (3d Dept 1978); 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 3001.10a.

To the extent that petitioners contend that the final regulations are procedurally defective, however, those arguments should properly have been raised within four months of the promulgation of the final regulations, and are untimely.

Respondents also argue that petitioners have failed to exhaust their administrative remedies, and, therefore, the proceedings should be dismissed, quoting 9 NYCRR 4121.5 (a), as follows: "All decision and rulings of the [Board] may be appealed to the [Board] if the licensee files a notice of appeal...." Respondents contend that petitioners, who are licensed by the Racing Board, have their own separate right to appeal the Board requirement that mandates pre-race detention of their horses, whether the horse tested positive or not, and that having failed to do so, their petitions should be denied on the basis of exhaustion.

Although section 4121.5 (a) does appear to provide any licensee, and not merely the trainer charged with a violation, the right to file a notice of appeal, that section further states that the appeal must be filed "within 10 days after notice of such decision or ruling." 9 NYCRR 4121.5 (a). Given that notice of a trainer's violation is not provided to owners, it is hard to see how they would be in a position to file a timely appeal, even if permitted to. Therefore, they cannot be required to exhaust administrative remedies that, as a practical matter, are not

available to them. Nor will exhaustion be required where an agency's action is challenged as unconstitutional. *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978).

To the extent that petitioners challenge the testing methods and procedures, however, evaluation of those methods are more appropriately raised before the Racing Commission, which is uniquely qualified to evaluate the relevant factual and technical issues; therefore the doctrine of primary jurisdiction applies. *See Matter of Verdon v Dutchess County Bd. of Coop. Educ. Servs.*, 47 AD3d 941, 942-943 (2d Dept 2008); *Davis v Waterside Hous. Co., Inc.*, 274 AD2d 318 (1st Dept 2000).

Finally, respondents contend that venue properly lies in Schenectady County, pursuant to CPLR 506 (b), which provides that proceedings against bodies or officers:

> shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located...."

CPLR 506 (b). Respondents contend that the "material events took place" in Schenectady County, because that is where the principal office of the Racing Board is located and where the challenged regulations were drafted.

Pursuant to section 506 (b), venue is also permissible in

the county where the matters sought to be restrained originated. Here, the pre-race detentions that petitioners seek to enjoin resulted from four findings of excessive TC02 levels that occurred at Yonkers Raceway. The fact that petitioners seek to invalidate regulations that may have been drafted in Schenectady County should not prevent the litigation of this proceeding in New York County. *See Matter of Gil v New York State Racing and Wagering Bd.*, 50 AD3d 494 (1st Dept 2008) (a combined Article 78 and declaratory judgment action which sought to invalidate the Racing Board's emergency rule permitting post-race testing of horses for the drug Fluphenazine and was venued in New York County). Respondents' request to change venue to Schenectady County is denied.

On the merits, respondents argue that pre-race detention is a reasonable method to prevent milkshaking of horses, and that the regulations are not arbitrary and capricious. According to respondents, when a horse in a particular stable exceeds the TC02 threshold on race day, there is a strong inference that an alkalizing agent was administered to that horse, that the person who administered the agent knew it was illegal, that the dosage was beyond that given for therapeutic purposes and was intended to influence the horse's performance in the race and that the trainer and/or owner either authorized the conduct or failed to guard the horse. Respondents contend that under principles of

agency, the owner of a horse is responsible for the misconduct of his or her trainer, and that in regulatory matters, the owner may constitutionally be punished for the misconduct of an agent.

Throughout their papers, petitioners appear to make no distinction between the three petitioners who owned a horse found to have elevated levels of TCO2 and those who did not. Petitioners characterize them all as "innocent owners," presumably, because even those three petitioners allege that they were not aware that their horses may have been tampered with. However, under the principle of respondeat superior, treating the two different classes of owners in the same manner raises serious questions.

An employer can be held responsible for both intentional and negligent acts of his or her employee, where the acts are committed within the scope of employment or the conduct is "generally foreseeable and a natural incident of the employment." *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 (1999); *see also Holmes v Gary Goldberg & Co.*, 40 AD3d 1033, 1034 (2d Dept 2007)(an employee's tortious acts may be imputed to the employer "when they were committed 'in furtherance of the employer's business and within the scope of employment'" [citation omitted]); *Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 113-114 (1st Dept 2002). Though it could certainly be said that a trainer that engages in, or permits,

milkshaking of a horse is acting in furtherance of the business of the owner of that horse, it is quite a reach to say that the trainer is acting in the furtherance of the business of other owners of horses that do not have elevated levels of TC02. To the extent that section 4120.14 mandates the pre-race detention of the latter horses, without any notice, opportunity to remove those horses from the offending trainer or appeal the charges against him or her, or opportunity of a stay, the regulations cannot be justified on the basis of respondeat superior. ******(add from end)

Due process is clearly a flexible concept and the procedural protections required vary, depending on the nature of the interests. "The essence of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. This principle requires that there be some kind of ... hearing prior to the termination of a legally cognizable property interest." *Galvin v New York Racing Assn.*, 70 F Supp 2d 163, 174 (ED NY)(internal quotation marks and citations omitted), *affd* 166 F3d 1200 (2d Cir 1998).

Here, however, there is no regulatory requirement that owners of other horses be notified by the Racing Commission when a trainer has been found to violate the TC02 regulations for the first time, which, presumably would enable owners of other horses

to remove those horses from that trainer before a second violation might occur. The Racing Commission argues both that it is the duty of the trainer to notify the owners and that the Racing Board now maintains a website on which TC02 violations are posted; however, neither method of notifying owners is mandated by the regulations. Since the Racing Board's current practice of maintaining a website listing TC02 violations appears to be voluntary, it could be discontinued at any point, and therefore, is inadequate to satisfy the due process requirement of notice. Furthermore, since the time to appeal a decision of the Racing Board is triggered by notice of the decision, due process is not satisfied by a system which places the burden of learning of the violation on the owner. Moreover, even if these "innocent owners" did learn of a violation and were permitted to participate in an appeal of the charges against the trainer, there is no guarantee that the appeal would be concluded before the eight-month pre-race detention period has been completed. Although the trainer who has been charged with violating the TC02 rules can, and apparently often does, obtain a stay of the enforcement of the penalties, pending his or her appeal,[4] under the language of section 4121.5 governing appeals, it is not clear

[4] "All penalties imposed by the judges or other officers of the commission *upon any person charged* shall continue in full force and effect until the determination of the commission is rendered, *unless otherwise directed in writing by the commission.*" 9 NYCRR 4121.5 (d)(emphasis supplied).

that such a stay is available to the owners of horses that have not been found to have excess TC02. The court notes that counsel for petitioners sought such a stay on behalf of the horses owned by petitioners in proceeding #1 and his request was denied. *See* Supplemental Affirmation in Support of Joseph A. Faraldo, dated January 7, 2008.

For the reasons set forth above, the court concludes that sections 4120.14 and 4121.5 of 9 NYCRR violate the due process rights of the owners of horses that were not found to have elevated levels of TC02 but nonetheless were subject to pre-race detention because their trainer had two violations within a 12-month period. Accordingly, it is hereby

ADJUDGED and DECLARED that the petitions in Index Numbers 100150/08 and 100843/08 are granted as follows:

the court finds that 9 NYCRR 4120.14 and 4121.5 violate due process, insofar as they require, without notice, hearing, right of appeal, or right to obtain a stay, the pre-race detention of horses that have not been found to exceed TC02 levels set forth in 9 NYCRR 4120.13 and whose owners do not own another horse that exceeded TC02 levels; and it is further

ADJUDGED that the petitions are otherwise denied; and it is further

ORDERED that the temporary restraining orders entered in Index Numbers 100150/08 and 100853/08 are vacated, consistent

with this opinion.

This constitutes the decision and judgment of the court.

Dated: 7/2/08

ENTER:

J.S.C.

(add to p. 9 - (appeal or to-) see draft

add to p. 14 *****
Respondent contends that petitioners can appeal the rulings against their trainers, citing the appeal of an unrelated owner, Robert Gruber, to the ruling of a judge placing his horses in TC02 pre-race detention when his trainer was charged with a second violation. See Affirmation of Rick Goodell, ¶ 40. However, as Goodell also notes, Gruber actually received notification from the Racing Board of his trainer's violations. Here, petitioners allege they received no such notification and respondents do not contest that allegation. Nor is there any clear regulatory requirement for such notification. To the contrary, petitioners include in their papers a letter from the Racing Board indicating that it does not believe it is the responsibility of the Racing Board to notify owners of trainers' violations.