



Race Track Industry Program

39th ANNUAL SYMPOSIUM ON RACING & GAMING

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BARRIERS TO DEALING WITH "THE 1%"

MODERATOR:

Rick Goodell, Assistant Counsel, New York State Racing & Wagering Board

SPEAKERS:

Vince Mares, Agency Director, New Mexico Racing Commission

Christopher McErlean, Vice President of Racing, Penn National Gaming, Inc.

Mr. Doug Reed:... if you want to stand for an hour and 15 minutes in the back, you're welcome to stand, but if you'd like to get seated, I'll go slowly. The Road Warriors are in the room. It's always nice to see the — who are the real road warriors in a conference. Any conference you go to, the last day, we see who holds up the best. Appreciate you being here. Once again, I'm going to thank our sponsors. This panel is sponsored by The Blood-Horse. Our refreshment break following this is sponsored by Equineline.com. I had a good breakfast sponsored by Equibase, and last night's reception was sponsored by the Daily Racing Form.

I think we have perhaps a very good session here for you today, for those of — the road warriors, we kept the best for last. Barriers for Dealing with the 1 Percent. Now, I hope that title didn't confuse too many of you, but I assume it didn't by the good crowd we've got in here. I think it's a very important topic and we've got three tremendous speakers here, so I'm not going to babble up here too long. What I'd like to do is introduce our moderator, Rick Goodell.

Rick Goodell has been an Assistant Counsel to the New York State Racing and Wagering Board since 1999. Frequently handling equine drug cases and rulemaking issues, and as Vice Chairman of the ARCI Model Rules Committee. He participated in the Interstate Racing and Wagering Compact Initiative as the author of the bill in New York and co-authored the national model bill with the Council of State Governments and members of the National Steering committee which he chaired in 2009 to '11. He graduated from Columbia Law University — Law School, excuse me, and also was a private attorney, Assistant District Attorney and Assistant Attorney General before joining the New York State Racing and Wagering Board. Please welcome Rick.

Mr. Rick Goodell: Good morning. Public perception of your product is important in any industry, but when every purchase that your customer makes is literally a gamble, it's

particularly important, and it becomes very important what we can do to promote a good public image. It's difficult for the people involved in the day-to-day activities and challenges of racing sometimes to see the bigger picture, but the racetracks and the racing regulators I think need to carry the burden to try to enforce rules that are sometimes seen as harsh in individual circumstances, but provide a benefit for the industry as a whole.

I think the worst blows that this industry suffers are the public perception that is created when chronic offenders, particularly those with serious offenses, continue to participate in racing either because of short sentences or long delays before they start their penalties, not to mention the damage that causes to the sport and the people in the sport. It's terrible for the public perception and the support that we have from wagerers.

I'd like to start off this morning by outlining a few of the steps and the barriers that are involved. Many of these steps are under way in various states including New York to try to reduce the problem that we face, and to discuss the legal framework in which state actors, racing commissions, operate in this field.

The steps are pretty straight forward and obvious. Serious penalties, swift and sure justice, and in addition, I think trying to take some steps to discourage the people who enable those who commit the violations.

The first step we've taken, and by "we" I mean the three governing members of the New York State Racing and Wagering Board, who establish policy and actually take these actions in New York, is to impose heavy penalties for chronic offenders.

A few years ago, we had for the first time a board member who was a harness owner, and I think the biggest barrier that racing commissions face when dealing out harsh penalties is sympathy for the people who are being punished, particularly because their skill set isn't necessarily transferable from horse racing into some other vocation, but we had someone who was a horse trainer and he had exhausted his supply of sympathy for trainers who commit drug infractions.

In a policy basis, our three current board members embrace that point of view. John Sabini, Dan Hogan and Charlie Diamond. The first instance I recall was a harness trainer who incurred an acepromazine positive. It was his sixth violation in 42 months, albeit all of them relatively minor drugs. He was given a five-year license suspension.

Similar results have been given by the Board in other cases, sometimes with fewer but some more serious violations. For example, in the area of TCO2, we've given five-year summary suspensions because the person had a history of chronic violations.

Finally, in 2011, the Board suspended Rick Dutrow for ten years in view of his history and another two violations in New York.

The second step and the second barrier to effective enforcement that we face, and it's a work in progress in New York and a constant problem for all racing commissions, is to try to minimize the delay before a penalty has begun. This is a complicated subject, because of legalities of due process, and there's a lot of variation in how the issue is handled from state to state with different involvement of legislatures and courts.

In New York, from Supreme Court case *Barry v. Barchi* in 1979 to *Pena, Lou Pena v. New York State Racing and Wagering Board* at the end of October of this year, the Board has litigated the imposition of penalties without long delay. The difficulty in this area is

illustrated in the US Supreme Court Barry decision, a 5-4 decision, in which the majority of the Supreme Court concluded that the damage caused by any horse drugging to the public image and the fairness of racing justifies a summary interim suspension based on a certified lab positive and an investigative interview with the trainer. That was it.

The only restriction is that a prompt post-suspension hearing must be made available for the trainer, and those of us in the industry know that frequently the trainer will ask for the adjournments at that point in order to be better prepared for the hearing.

The opposing view in the court, four members of the court, was that a career is irrevocably destroyed by any substantial suspension period, and there are no money damages for lost time and racing, for a person who's later exonerated? Fifteen days was the penalty at issue in the case and accordingly a pre-suspension full hearing is the only fair approach. This balance between the harm to the sport and harm to the trainer together with the strength of the evidence or as it's referred to commonly, as the likelihood of success of the merits, it's the same consideration when courts issue a stay either after an attempted summary suspension or a full hearing has taken place.

Some of the tools available for us to use, I think, are to use summary interim suspensions often whenever possible. The problem that we face when we go to court is that the judges frequently are unfamiliar and it's hard to quantify with the damage that it causes to racing to allow people to continue to participate. It's very obvious the harm to the individual, and it's not that obvious, and quite frankly sometimes courts have not a great deal of interest in the future of horse racing, to a court. It's very easy to grant the stay, and that all too frequently happens.

In New York in the Pena case this year, Lou Pena was a harness trainer that we summarily suspended after his veterinary records disclosed over 1700 violations in the preceding 28 months in New York. We could enforce that without any lab positives because in New York all of our rules are time-based. We recently got a decision upholding basically the US Supreme Court's majority approach. The Board can impose an interim suspension in a case of horse drugging in which the trainer was negligent, and that's presumed by the trainer responsibility rules, simply by showing of probable cause.

There are lots of other efforts under way in other states with varying degrees of success, but the gist of it is to try to do the summary suspensions, number one, another good idea that some of the states are trying is to give the licensee an opportunity between the interim suspension and the full hearing to be heard, either on motions or a hearing. They do, in Indiana, they offer a hearing specifically on the summary suspension.

It hasn't always gone this way for us in New York, and this illustrates the problem. We summarily suspended a trainer once not too many years ago who during the pendency of his TCO2 appeal occurred two more TCO2 positives. There's excellent research tools available through the USTA and using those, we were able to prove that every previous time this trainer had served an equine drug suspension, he increased his purse earnings the following season. However, he went to court and was given a stay of our suspension in the face of three pending TCO2 violations.

We hope that our more recent decision in Pena will prevail, but it's a battle that has to be fought on an ongoing basis.

The other two steps I wanted to touch on are the sureness of the penalties, by which I mean reducing the way a penalty can be avoided by using a front or substitute trainer.

Delaware demands affidavits from the owners and the trainers that the front situation is not occurring, that does create the potential of transferring the issue into a criminal matter for filing false documents. That's one example, and putting some responsibility on owners who supply what the trainers need to operate, to not select trainers who are chronic or serious drug rule offenders.

We've introduced some limited measures in New York. Delaware, Indiana, Kentucky and Ontario have pursued others. Ontario, for example, for most equine drug positives, now excludes the horse from racing for 90 days.

In New York what we've tried to do is to discourage owners from purposely continuing to hire a trainer with a history. Basically we've defined that as a certain 180 days lifetime penalties, or two 15-day penalties in the last couple of years, that kind of thing. We're proposing a new rule that would sanction the owner, prevent them from using their horse, and for repetitive offenses, actually lose their license for using that type of a trainer, if that trainer then incurs a drug positive.

All of these actions are conducted in an environment of due process. Racing commissions want to be fair to trainers, all trainers, and do not want to accuse the innocent. There are lots of examples where racing commissions don't proceed, and many more where penalties are not served until the full hearing process is concluded, but for the most egregious cases I think that there's a growing belief among racing regulators and others that we really need to remove people from the sport.

Sometimes, difficulties create opportunities and I'm going to introduce our next speaker who is going to address some of the issues and opportunities that arise under those circumstances, Vince Mares.

Hold on Vince, I'm going to grab my — Vince began to work for the New Mexico Racing Commission in 2009 as an investigator, and the following year was made the Head of Investigators for the New Mexico Racing Commission, and recently has been appointed the Executive Director of the New Mexico Racing Commission. Appointed by Governor Susana Martinez in February of this year, he oversees day-to-day operations at the agency. His background includes 30 years in law enforcement, 28 of those as a police officer, and 14 as Chief of Police in his home town. He retired in 2008 from the police department and fortunately for New Mexico, joined the Racing Commission to conduct their investigations.

He's a graduate of different FBI programs, and holds various honors and certificates in his field of law enforcement. Basically, a guy that if you were intent on breaking rules you wouldn't want to mess with.

[Laughter]

Vince?

Mr. Vince Mares: Good morning, and thank you, Mr. Goodell. As Mr. Goodell said, I did retire in law enforcement in 2008, and little did I know that I would be parachuting into such a storm for the state of New Mexico. New Mexico has been, for a better word, under the microscope because of issues that have come such as the New York Times and the doping of the hoses. Inconsistency of our rules and regulations, so in February the Governor said, I want you to go ahead and take this by the horns and try to get a reform in the racing industry itself, and try to bring some integrity back into the state of New Mexico.

How we're dealing with the one percent in the state of New Mexico is what I'd kind of like to spend at least ten minutes of our time in discussing, and how we had to actually reform our rules and regulations, and our approach on how we're addressing these repeat offenders that continue to put not only the jockeys but the horses in harm's way where these horses are actually dying on the track through catastrophic injuries because of the doping, and basically giving our industry a very, very bad name.

What I'd like to do is, how New Mexico is dealing with three parts of the challenges that we face, since my tenure and the changes that we're making and the goals that we have, actually have to deal with, with the Commission. Some of the challenges that we saw in dealing with the one percent is, obviously the detection of actually identifying those horses that are actually being drugged, and those agents — I'm sorry, trainers and owners that are actually doing it.

With New Mexico, we have a total of 299 racing days every year with an average of about 11 races a day, with a budget of about \$400,000 so it doesn't take a rocket scientist to know that there is just inadequate funding to actually identify those individuals that are actually doping the horses.

We'll on an average test every horse that wins a race, that's our standard protocol. We would like to do at least a random in that race, but as you know, as we've seen in the state of New Mexico, there are individuals that are actually doing match races on the tracks themselves. These match races consist of two individuals that are actually racing their horses on the tracks. They don't care if they come in first or second, it's that first — it's that two horses that they're actually racing.

Sometimes, we don't identify those horses. Sometimes our investigator, and me coming as an investigator, you could more or less see who's actually doing the match races at the tracks and we would get with our stewards and say, we need to get these two horses tested for whatever reasons, and on a good average percent of the time we would find out that those horses would come back with a positive.

So, going back, funding is an issue for the state of New Mexico, and that was a serious challenge. Secondly, the timelines that we're dealing with. I could use a case as an example. Our last demorphin cases, this made nationwide news, not only for New Mexico but for Oklahoma and those other jurisdictions that had the demorphin cases. We are basically finding out that our lab and the labs that the horsemen were using were taking up to sometimes six to eight weeks, even three months, to get the confirmation back on their splits.

That's unacceptable. That's unacceptable not only for the New Mexico standards, but I'm sure within your jurisdictions you do not want the perception that we have or wow, your commission is doing nothing.

Rest assured, I was getting daily phone calls, not only from media but the industry members itself, saying why are you not doing anything about these demorphin cases, what is going on? The timing on this is a big challenge for the state and we're hoping as I get on into my presentation, hopefully we've addressed it now.

Lastly some of the challenges that we had in our detection was the identification. New Mexico, because of the limited funding, we should have been doing some of the tow bar testing, but again, without sounding repetitive, our funding were limited. Our testing consisted of what we thought would be, should be tested on the races themselves, and

sometimes some of those drugs were getting bypassed in the screen itself. That was a very serious challenge for us.

The other challenging issues that we have was in our enforcement section itself. New Mexico just like everybody else has the economic hardship as any other state. Unfortunately, New Mexico does not have the adequate amount of investigators that it needs to actually properly be proactive out in the racetracks themselves. We were at an average of two investigators to four investigators to one investigator, it'd all depend on if those investigators found better-paying jobs.

You cannot adequately enforce the rules and regulation of any jurisdiction with inadequate enforcement. Coming from my background in law enforcement, the detectives were paramount in any agency. This is the way I want to approach it in the New Mexico Racing Commission. Investigations should be paramount along with all the other issues as far as funding and everything, but your investigators, your guys on the ground, are the ones that are the eyes and ears for your institution to identify this one percent.

If you do not have adequate personnel to actually address and be proactive in there, you're kind of spinning your wheels and they're being reactive. They're getting the cases that are actually getting sent to the Commission they have positives or any type of infractions that they find on the back side itself. They're just being reactive on it. Like I said, we only had one or two, sometimes three. On a good month we had four investigators.

The other issue was our consistency in our investigations, the consistency itself. New York Times basically giggered the State of New Mexico for their inconsistency in their rules and regulations, and the enforcement of those rules and regulations. It is what it is, and it was what it was. We were, we were inconsistent in what we were doing. Where this individual was getting the maximum penalty on our rules and regulations, this individual was getting less, sometimes significantly less because of what they call mitigating circumstances.

I do not like that word, mitigating circumstances. I know they're out there, but some of the mitigating circumstance were, should have not been imposed. Our consistency was a real challenge for us to actually address what happened.

Thank you. I got a little panic there for a little bit.

[Laughter]

Lastly, our resources. The New Mexico, for whatever reason, the State of New Mexico again, before my time and I don't want to sound condescending, but for some reason we weren't involved in ARCI. We weren't involved in getting involved at the RMTTC for whatever reasons. I do not know. Since the inception of this new commission, and I'm hoping since my appointment, too, we have now currently been involved with the ARCI.

We utilize those sources, but the biggest challenge that we had in the past, we were basically a rogue state for lack of a better term. We didn't go out there and reach those individuals such as yourselves to find out how we could address the problem. Instead of, we wanted to re-invent the wheel every time when the wheel was actually out there already. Significant challenges.

Lastly on our challenges was our prosecution. Unfortunately in the State of New Mexico, the courts themselves do not recognize our stewards' hearings as part of the adjudication process. In law enforcement, there's what's called a probable cause hearing. That hearing

is to make sure that the officer had enough probable cause to take administrative or criminal actions on the individual. Unfortunately, in the state of New Mexico, that's still the case. The courts themselves, i.e. district court, don't really recognize the stewards' hearing as part of the due process or any type of the adjudication process.

So, in turn, the licensees would file stays and past administration would give out stays, no problem. We had a multitude and a high number of stays, and to this date we are still trying to take progressive action to get those stays adjudicated.

Lastly, the biggest challenge I'm sure for not only our jurisdiction but for those jurisdictions throughout the country is our stays in the temporary restraining orders. If in fact a stay is given or a stay is denied, the licensee has the authority or the opportunity to actually appeal my decision or the decision of our commission. They will get their lawyer to actually go to district court, and file a temporary restraining order.

Any type of sanctions, any type of disciplinary action that was taken on them, the judges basically say they are still afforded their opportunity to make a living so those sanctions, the disciplinary, is basically put on hold until a hearing could be done.

As of today, I know that one case when I was an investigator has still not gone before the district court, and we're going on three years. This individual luckily got arrested by the FBI on drug laundering and involvement with drug cartels, so poetic justice, whatever you want to call it. He's not being allowed to race on our tracks.

So, what have we done in the state of New Mexico? Is it right, should it be done in your jurisdiction? I don't know. It's something I think is going to work for our jurisdiction. We have to take a progressive ethical approach to addressing this one percent, so what have we done? I went ahead and had basically gone before the New Mexico Legislative Finance body and said listen, we made the New York Times, we as a state are being identified as some of the worst tracks in the country for safety record.

I, myself, my personal opinion, I think some of that safety record is attributed to the doping of the horses themselves. That one percent, or a higher percent, that's actually doping those horses, causing those horses to break down. Why would you use blocking agents on a two-year-old? It makes no sense.

Those blocking agents are merely for the purse. They don't care about the jockeys, they don't care about the horses themselves, they want to win that purse money. Fortunately, my fellow speaker here, Penn National, Zia Park, they got some of the best purses in the country. Why would you not want to go ahead, and this is the mentality of those individuals that are actually doping the horses — block them up, dope them up, I want that big purse money. It's not attributed anything to do with Penn National or Zia Park, I'm not trying to say that. It's just that those are some good purses, and they want to win that money, so they'll do whatever they can to it.

I went before the New Mexico Legislative Finance Committee and said, do we want that type of reputation in the State of New Mexico? Absolutely not. I do not have one member on that 25-member panel say, "No, we don't." Basically, they said, how can this happen, how, why was it allowed to happen? Why did the New Mexico Racing Commission not do anything about addressing this issue, and now we have it in our front, New York Times, one of the biggest national papers in the country.

This commission, in fact, started addressing those prior to the New York Times hitting the actual publication of that. With \$400,000 in previous years to actually do drug testing, that has now been doubled to where we're actually looking to \$900,000 to over \$1 million for our drug testing.

We want to go ahead and do out-of-competition testing. Out-of-competition testing. New Mexico, again for funding reasons, did not have the monetary to actually do the out-of-competition testing. We were given, we were allocated money to actually start doing out-of-competition testing before our July budget kicks in, so now we are doing 30 days out, 60 days out, even whatever we choose to do on only the big races, because again for funding, but we're starting to do out-of-competition testing.

We have since implemented a necropsy program. The necropsy program as you well know is just an autopsy for the horse itself that falls catastrophically and dies, or dies on the track under suspicious circumstances. With the current budget that we have right now, we are allowed to do those horses that are dying right after the wire. As of today we've had 12 horses that were actually necropsied. One has come back with drugs, the rest have all been attributed to past injuries, but nothing to do with the actual drugging of the horses itself.

On enforcement, again, I went before the legislative bodies and the powers that be and said I can't do it with two, I can't do it with three, I can't do it with four, ideally coming back from my background the more numbers that you have on the ground, the better you are to identify and be progressive in your enforcement as far as identifying these individuals that are actually doping.

So, they've allowed me to increase my staff. I've gotten doubling my staff now, in July I'll actually have probably six to seven, hopefully eight investigators, for our five tracks throughout the state of New Mexico, which to me is going to be a significant change to actually be progressive in identifying these others.

We are now again like I said, members of the ARCI, we're utilizing ARCI. We've changed our rules and regulations as far as our penalties to show ARCI standards and actually go after those individuals. With our demorphin cases that we've had in the past six months, we've already gone through the preliminary adjudication process and on the average we have handed down 25 years of suspension on one individual that had five demorphin cases.

We had five individuals with demorphin cases and a couple that actually — or one that had ractopamine, which is the pig steroid. Again, we handed down severe penalties, like the state of New Mexico has never seen before. Twenty five years, 20 years, was the least. The ractopamine I believe was 15 year suspension.

The ractopamine at this time has not appealed, however all the demorphin cases have been appealed. I have denied their stays. That is one change that I've done as the Director of the New Mexico State Racing Commission. Category As and Bs I'm not going to give you a stay. Cs, therapeutic, I can see maybe get a stay, allow you to continue to do it. Therapeutic still can be abused, but ractopamine, demorphin, there's no reason why those drugs should be in a horse.

If I get a trainer or an owner that has a category A and B, you're not going to get a stay from me, so what they are doing now, they are doing the temporary restraining orders.

We are working hand in hand with our attorney general. Our attorney general is the prosecutor for the State of New Mexico Racing Commission. She has been going before the

courts themselves and fighting on these TROs. We are now going to be addressing one individual that has a temporary restraining order for five demorphin cases. Five demorphin cases, only in the state of New Mexico, and I know there are some of you out there that know who this individual is, and he has demorphin cases in your jurisdiction.

Why should we allow this individual to continue racing and giving our industry a black eye? There's no reason for it. He's doing it solely for the purses themselves.

The resources and referrals, how we've changed that, we are now again like I said utilizing the resources of our industry, plus we are starting to utilize federal authorities. We're using the FBI, we're using the IRS, we're using the DEA, we're using state and local law enforcement. I was just talking to the panel here yesterday. I came in late last night because our governor, I had to meet with the bodies in Santa Fe yesterday. Our governor wants us to address the illegal bush tracks that are going on there in the state of New Mexico.

I don't know if that's prevalent in your jurisdiction, but in New Mexico we have literally the same amount of bush tracks that are running within our regular tracks. We have five regulated racing tracks. We have five bush tracks that are running. There was an investigative report about two weeks ago from the Albuquerque television station where one of the investigative reporters went undercover for six months. When I was first notified by this individual reporter, he told me, I want to do this, who is responsible for enforcing the rules and regulations of the bush tracks?

Unfortunately, it's not the State of New Mexico. Our jurisdiction, as far as the racing commission is involved, is within the confines of the racino and the track itself. Once we go off the track we basically have no authority so it comes down to the local state police, local jurisdictions. I met with the state police like I said yesterday and we are going to address the problem.

The reason why we want to address it aggressively and as quick as possible with legislative changes and changes in the laws which will give the New Mexico Racing Commission jurisdiction to actually address this, is because of the fact of the undercover story itself. You guys can go to KRQE.com and look up the television station on the internet. Again, it's KRQE.com.

You will see these bush tracks, you will see these individuals doping the horses, you will see the needle going in the neck, you will see them throwing down pills down the horse's mouth. You will see a nine-year-old jockey. You will see one of our licensee jockeys bragging about making \$500,000 in two days. You will see the report that is actually done with these illegal tracks.

There are more people at the illegal tracks because it's unregulated, and making bigger money than they are coming to our tracks such as Zia, and they are breaking down because of the doping. Because the tracks they are running in the bushes are solid dirt. There's no type of ground work. I mean, we're just a quarter mile stretch, and they're running. Then they go to Zia Park and they run and they break down, and oh my gosh, it's the park's problem. Oh my gosh, the Commission's not doing anything about these regulations.

Now, we have to start attacking these individuals and apprehending these individuals that are actually going out and doing the bush tracks.

Lastly on our prosecution, again, our attorney general has basically gone to the stewards hearing because our courts do not recognize it as basically adjudication process, and our prosecutor is prosecuting all the category A cases, and sometimes some of the B cases. This way, we know they're going to get appealed. All the elements of the case itself are being presented by our attorney general. This way the courts can identify, well, something's going on.

We are now looking to actually have these cases bypass the stewards and actually go right to the hearing officer themselves. The reason why we want to do that is because of the appeal process. We want to cut down our appeal process to where it goes from a category A, goes straight to the hearing officer, hearing officer hears it and goes right to the Commission, the Commission makes a decision on the fact itself.

As I stated previously, there's no more stays. If they want to go ahead and have their attorney file a temporary restraining order, fine, that's it, but we are now rescinding as of last week, we are rescinding all the New Mexico Racing Commission's stays that were allowed to actually go to district court. Our rules allow the stays as long as they go through the hearing and adjudication process.

It does not afford them a stay if in fact they go to district court, so anyone that had a stay that was New Mexico Racing Commission-imposed, and is in district court, I yanked them. That's our authority. We're not going to do it, we're not going to allow them to continue to race. Again, if they want to have an attorney file a TRO, fine, but we're not going to allow it.

My Commission has given me strict directions of where to go, we're not going to accept any cheaters in the state of New Mexico. We have to actually make and try to improve the image that the state of New Mexico unfortunately got with these articles.

Track management, kudos to Penn National and Sunland Park, Downs of Albuquerque, Ruidoso Downs, and like I said, Zia Park, Downs of Albuquerque, Ruidoso Downs, and they have basically said, we don't want you in here. There's going to be some questions as far as the exclusion of those trainers, but in New Mexico to the best of my knowledge, Steve, has it been challenged? I don't believe it has.

They're saying, we're going to work with the commission, we don't want you in here, we don't want this type of behavior in our industry. I have met and talked to Trey Buck at the All-American. We met at the All-American prior to it running.

AQHA wants to actually get involved with this. I have not seen any actions or sanctions from the American Quarter Horse, and I apologize for that, but I know that they want to get involved with these issues, as far as taking away the benefits of those quarter horse races that actually have pending category As and Bs on them.

I tried to get that before I came here. Again, I apologize, but I have not seen any action, but they are definitely on board with us and they also do not want to tolerate this one percent.

Some of the goals that we want to do in the State of New Mexico, obviously we want to increase our funding. Every year, as long as I'm going to be with the Director of the Racing Commission, I'm going to go screaming and hollering to that legislative body and try to get increased funding. I'm going to keep doing it. I'm going to utilize my media. Rest assured,

for those of you that do not want to utilize your media, they can be a tremendous resource to you.

The TROs, I got with this investigative reporter and said you know, the story that you did on the demorphin cases, how terrible it was and how it showed how these trainers are doing terrible stuff in the state of New Mexico, guess what, they're still running. He says, "What?" They're still running. They were given temporary restraining orders. I educated him, showed him the process, guess what? They're going to do an investigative report on why these trainers are allowed to continue running in our state.

Good or bad, I want to utilize the media, I want to keep them on a positive side for our industry. The media has already been negative in our industry. Start utilizing your media and letting them know what you are doing as far as proactive enforcement, progressive enforcement, what you're doing to actually bring integrity back into our industry.

We're going to start doing out-of-competition testing, the increased funding, we're going to try to do as much as we can as often as we can. My goal is every horse that breaks down on our tracks, I want to get them out for a necropsy. I want funding for that. If it shows that these horses are breaking down, these jockeys are getting hurt, unfortunately with the state of New Mexico we had one just recently get seriously paralyzed and then we had one a couple years that was a fatality. These jockeys don't need it.

That's our goal. We're going to get more staff, we're going to get statewide jurisdiction to actually address these. Our officers and our agents are going to be state-certified law enforcement officers, and our prosecution, we are now going through legislative changes to actually get our monetary cap from \$10,000 removed.

We want to start utilizing what the ARCI is using, we want to start utilizing these individuals that are continuing to be repeat offenders. We want penalties that are going to hit them where it hurts, right in the pocket. \$500,000 or more if we have to. They do not need to be in our industry.

We as an industry have to be aggressive ethically in getting these individuals off our tracks. We don't want them. They're giving us a bad name, and I hate to see these individuals continue to give us a bad name and then we just lose horse racing all together.

Mr. Rick Goodell: Thank you, Vince.

Mr. Vince Mares: Thank you.

Mr. Rick Goodell: Our next speaker is Chris McErlean, who is the Vice President of Racing at Penn National Gaming, Inc., which probably everybody knows and that's probably all the introduction that Chris really needs, but it's worth pointing out that Penn National, of course, owns and operates a large number of racetracks. It's the largest operator in North America of pari-mutuel racing facilities; it does over \$1 billion, or close to \$1 billion, in annual pari-mutuel handle, and over 1,000 live racing dates.

Chris, in addition to his involvement at Penn National as an executive, is involved with their government and regulatory relations and developmental projects. Before joining Penn National, he had a tenure at the New Jersey Sports and Exposition Authority, including Director of Marketing and Simulcasting, Vice President of Operations, General Manager at Meadowlands, Vice President of Racing Operations for Meadowlands and Monmouth.

Chris is a lifelong racing fan who wrote a column, a handicapping column, when he was 14 years old in a local paper, and is the President, and has been the President, of both the TRA and the HRA. Chris, would you like to discuss some of the issues? I mentioned the context of due process which applies only to government, as I understand it.

Mr. Chris McErlean:

[Chuckles]

Does it? First, full disclosure, I am not a lawyer, although I impersonate one every day. Secondly, the title, Doug Reed came up with the title. It is not a Obama campaign speech, but just some background on what is the one percent.

The Jockey Club recently had done some research, they went back over a seven-year period of issued violations of 13,000 licensed trainers. They took out trainers that have had less than three rulings during that time period. The remaining rulings of those 3,500 rulings, 1.5 percent of those individuals accounted for 33 percent of the rulings, which again goes back to the small minority of individuals who seem to be consistently breaking the rules or being caught.

Now again, I don't have the exact numbers but I would hazard a guess that even within that small number of trainers there's even a smaller percentage of those that were for major penalties as opposed to again, what I would call maybe minor medications, overages, bute overages, lasix overages, things like that. Again, we could get on a whole different discussion about uniformity of rules, testing, what's permissible, things like that, but the bottom line really is both the public, horsemen, media, they want and demand action on these cases. They want it from the regulators first and foremost and if it's not going to be them they want it from the racetracks.

Simple answer to that is, it's not really so simple. We just can't go out and say it's in the best interest of our business, you're not racing here. I think that's the assumption everybody goes in with when they say why don't the racetracks do anything about this. It can vary by jurisdiction. I'll point out a couple of the states that we're in where these issues have come up, and different approaches in what's happened—and on a micro level, it depends on who your judge is.

As Rick pointed out, Penn National Gaming, we have a wide breadth in the racing business. Obviously, we're a big gaming company as well, now. Roots are in racing, started with one racetrack, we're now part of 11 racetracks across North America in eight different jurisdictions. We have thoroughbred, quarter horse, harness and greyhound racing, 1,000 live dates, and a large amount of annual wagers.

One thing that we did about two years ago, being a large organization with a corporate structure, we have a code of conduct for our employees. In simplest terms, like an employee guide book for any other company. Sport leagues have these codes of conduct as well. We wanted to take a somewhat similar approach. We understand the horsemen, the jockeys, they're not our employees. They are fiercely independent contractors, and have stated that, but we just wanted to use that context as a way to kind of create some either ground rules or at least lay out from our perspective what our expectations were for our various racing properties.

In 2012, we issued — actually it should be 2011 we issued our first Horsemen's Guides at our properties. There's two sections to it. The first section is a consistent code of conduct

across all our properties, dealing with things like dishonest, offensive or illegal conduct, medication violations, racing issues, animal welfare, so that for every racetrack, that's stated in the code of conduct. Each track has its own individual local rules and regulations specific to that racetrack. Again, it might be down to the point of no smoking in the dorm rooms. It's published, it's given to every trainer, horseman, everybody, every licensee who conducts business at our track. It's on our website. It's open to the public. I can get anybody a copy or you can go to any of our track websites and get one.

The basis for decision-making on some of our issues, if there are violations, that's sort of the benchmark that we start with to take particular actions based on violations in the horsemen's guide.

Recently, what's Penn National Gaming done at our various jurisdictions when it comes to licensees? As Vince mentioned, and I give Vince a lot of credit and the New Mexico Racing Commission credit on the actions they've taken and the changes. We've given them a lot of suggestions, and encouragement, and we want to continue to see them work on their path to strengthen the rules and regulations in New Mexico. But, on our own out in New Mexico at Zia Park, again we took what we think our private rights and have excluded six trainers and two jockeys just in this current year.

At Beulah Park, we had an incident with violation of our anti-slaughter policy and we took action against a couple licensees there. At Charlestown, we had an incident going back to 2009 with jockeys misrepresenting their weights. We'll talk about that further in the coming slides, and at Penn National just recently there's a well-reported case about a trainer who was caught exiting the stall with syringes, which we attempted to take actions with, and again in the "it's not so simple" category, I'll show you what happened on that.

So again, private property actions, right of exclusion, Penn National Gaming or any private racetrack, we have full control of what happens on our property. That's the assumption. The answer is, not always.

Case in point, in the state of West Virginia, again going back to 2009, there was an incident where a number of jockeys over a period of time were misrepresenting their weights. We had surveillance tape of the incidents, the racing commission took action as well, and suspended the riders and our clerk of scales. We then took the additional action of firing our employee, the clerk of scales, and we ejected the jockeys. That then went into the court system in terms of appeals, injunctions, dragged out until approximately 2011 and the end result after the Racing Commission and the Jockeys' Guild joined the case, was that the Supreme Court of Appeals in the state of West Virginia gave the licensees, the jockeys, the right to appeal to the Racing Commission for review of their track ejections.

Any licensee ejected by the racetrack has the right to go then to the Racing Commission to appeal and the Commission can hear the case and rule on that case. That was in late 2011. They developed regulations, that's been in effect in 2012. So far, there's been six cases heard for Charlestown in that time. We've only had one of those that actually our ejection has been upheld.

Our concern in this process now that it's been set up going forward, the standards being used to — by the Commission, by the hearing officers to determine the track ejections, and used by the Commission in that decision-making process. That causes us a lot of concern. We're obviously watching each case closely. There's other ones in the pipeline that we're waiting to see what the end result is.

Again, it is, the best word is frustrating, when even in the words of the Commission stewards, this action was — involved dishonest acts and conspiracy that we are not allowed to take what we feel our private acts, exclusion acts, against these individuals to — as we see fit. The West Virginia matter is evolving and again we're trying to see how these other cases will come about, but so far, and I don't know what the experience has been with Mountaineer Park with — because they're subject to the same rules, but it's something that we're watching very closely in terms of how this affects our future decision-making process.

In the state of Pennsylvania we own Penn National Race Course. I think it was August of this year, a trainer, during a routine walkthrough two investigators from the Pennsylvania Racing Commission saw this trainer exit a stall with, the horse was in to go that night. The trainer had syringes on his possession which is a violation of the Pennsylvania State racing rules. We had interviewed the trainer within a day of the issue, and his lawyer. They agreed to certain sanctions by the track and surprise surprise, once those sanctions were put into writing they turned around and they were in court getting a temporary restraining order on us within 24 hours.

That went to the middle district court in the state of Pennsylvania. She granted an injunction against the track from acting any further, and the troubling part of her ruling was that she found that there was state action by the racetrack. There's a case going back to 1979, Fitzgerald v. Mountain Laurel, actually dealing with another case in Pennsylvania, a harness track, where the judge ruled that the track was a state actor because the racing secretary acted supposedly in collusion with the stewards.

In this case, the judge ruled that because our racing secretary who in the rules and regulations of the state of Pennsylvania is listed as a racing official, that person was not involved in the decision making process, but just sat in on meetings with our Vice President of Racing and the individual licensee. She took that as being a state action by the racetrack.

Again, troubling nexus there, and again putting us in that state action category opens up a whole new can of worms. We then took the tactic of going — there is a process in Pennsylvania with licensees, which we had chosen not to do. First and foremost, we thought we had an agreement with the trainer. We went through the regular racing commission process. We won our objection hearing with the Commission. However, that same judge, the appropriately-named Judge Rambo, she ruled in upholding the injunction of our actions and then ruled that the Pennsylvania statute regarding their review process was unconstitutional.

Now there's two paths going on with this case. I'm not sure what the Racing Commission's planning to do. The main crux with the Racing Commission case was you have 48 hours to appeal, and the Commission has 48 hours to schedule a hearing, however when that hearing actually takes place could be two days, it could be two months, it could be two years, theoretically.

I think the Commission probably is going to review how they could maybe change or adapt to fit within the ruling as Judge Rambo saw it. From our side, we are likely to appeal the case based on the section 1983, is the clause in regards to the state action, and we are likely to appeal that.

What this sets up in terms of dangerous precedents, as I mentioned the state actor definition, I mean, taken to its extreme, possibly my being on the same panel with the state racing commission here I've now created a state action. So, we really have to re-assess our

relationship with the Commission, our actions with the Commissions, our interactions with the Commission, and it's already caused us to do some things which we normally wouldn't have done in the past. You can't get around it. The state, the racing commission, is involved in every matter of racing, so this is something which really we're trying to figure it out and figure out how we can go forward and still keep our rights intact.

It also brings up, you can follow this to the Nth degree about other regulated industries and we're in the gaming business too, and the interaction between gaming commissions and the properties as well. That's going to be something that we're really trying to kind of untangle what the consequences are of that, and again first and foremost, we want to get that ruling vacated or overturned as much as possible.

The other issue which the injunction of Judge Rambo, she kind of glossed over the issue of one of the conditions we had attached to our ejection, was that the individual was going to lose the stalls. Again, if the rights of the individual are to be able to participate in racing, and she was upholding his rights to do that through her injunction, that's fine. Again, that's something we can fight, but the injunction also basically said that we could not throw him out of his stalls, which again is a — we feel a — it's our property, it's our rights, it's a privilege for the stalls and the application, and again, for her to basically make us neutered in that respect is troubling. As I said, she really just glossed over that fact in her ruling.

As I mentioned, the Racing Commission rule was deemed unconstitutional in terms of their process. What does that mean? Is it an opportunity that maybe the whole law in terms of the review might get thrown out? Probably not. Again, this — their review process, same but a little bit different from West Virginia. It's been in effect for about I think maybe 20, 25 years. We've learned to work with it and we feel that process has been fair in terms of the standards that have been applied, but I don't think there'll be an overhaul or an elimination of that process again. There's likely just to be a reform by the Racing Commission in that respect regarding their process.

What does this mean going forward? Plenty of work for lawyers. The — as I mentioned, we're involved in eight different jurisdictions so as we found out each jurisdiction individual rules and regulations, in New Mexico, our only duty is to inform the Racing Commission if we are choosing to exclude an individual, we just have to send them a letter. We go through those points and up to this point as Vince did mention, we have not been challenged on our exclusions there yet. But, every jurisdiction is a little bit different, and we are constantly reviewing the rules and regulations in each jurisdiction to make sure that we're going through the proper processes.

This clarity on the state action issue, interestingly, Rick mentioned the Pena case. Pena had a case in New Jersey recently with the Meadowlands, the Meadowlands where I was formerly at was quasi-state agency. We could never exclude anyone because of that state status, without due process. Meadowlands has been leased to a private operator, Pena's case was that they were still an extension of the state because of the lease, there was still a nexus there, and actually the middle district — or the District Court of New Jersey Federal Court, which is in the same circuit as us, the Middle District Third Circuit, they actually ruled that there was no state action.

Again, sometimes depends on the judge, depends on the jurisdiction, but that was actually a victory for the state action, or anti-state-action clauses. This is really a mine field going forward, and troubling in terms of how they're making the connections there.

Again from our side, again, we may have to adjust, regroup, and take a look at how we're doing things, but again in going forward we are not going to back down in terms of not trying to pursue where appropriate, and where needed. We understand it's not something that can be used lightly and unilaterally, but we definitely want to continue to enforce what we feel are our private property rights when appropriate.

Mr. Rick Goodell: Thank you, Chris. We'd like to invite any questions, if anyone has any questions or comments or observations. I think there are a lot of people as well-qualified as the panelists out in the audience to talk on these issues. If you'd mention your name and then pose your question, please?

Mr. David Switzer: I'll be glad to, and I've got a whole list of 'em, but we won't go through it all. I'm David Switzer, I'm the Executive Director of the Kentucky Thoroughbred Association. I want to applaud the gentleman from New Mexico for the actions you're taking, but I'd also say that I believe every racing jurisdiction ought to thank their situation that the New York Times did not write about you, because there's not a racing jurisdiction, I don't believe, in the United States, that could pass a smell test.

I think we need to look at this. I've had the privilege of serving on the RMTTC board since its inception. We've dealt with a number of these issues and we'll continue to do. I think we have two issues here. I think we have the one percent situation, which is the persistent violator, and then we have the one that you spoke about with Penn National where your hands are tied on a positive or something immediately. I can understand that. With the persistent situation, why are the regulatory bodies continuing to issue a license?

When I took out my trainer's license 50 years ago, I was told by King Dangerfield, the head steward, "It's a privilege, son, don't abuse it." With the racetracks, why are you all continuing to give stalls and allowing these persistent people, violators, to enter horses — so when the license comes up for renewal, why are you renewing the license?

Mr. Rick Goodell: Chris, do you want to pose as lawyer on the first question? I could answer from a legal standpoint.

[Laughs]

Mr. Chris McErlean: Well again, I'm not — again we don't, as everybody knows, the racetracks don't issue the licenses. The one interesting thing, it's a sidebar, but it's a comment that was made actually by one of our casino general managers who's involved with the racing. Just to show the distinction between the, or the differences between two industries, licensing for a casino license. Even for a cook at a casino, it's probably that thick, probably takes six months to get done. He mentioned that he filed his application about two years ago, and still hasn't been completed or reviewed and looked at. They're still checking everything. He went to get his Racing Commission license, and he was out of there in five minutes.

Again, that's an issue that we certainly share similar concern in terms of again, the first step is, they can compete in the industry which is getting your license. That barrier is from the Racing Commission side, which again I can't talk about the Racing Commission because that's state action.

Mr. Rick Goodell: I can.

[Laughter]

There's an Illinois case that involved a jockey who had an electrical device to stimulate the horse during the race, and the Commission gave him a suspension period, I forget if it was six months or two years, something like that. At the conclusion of his licensing period he reapplied for his license and they denied him a license, and the court subsequently held that the time to impose the punishment was when they did it, when they gave the first penalty and they couldn't use the same underlying violation without anything additional to later essentially give him a greater penalty.

On the other hand, if that individual were to go to another state where he didn't have continuing licensing rights, that would be another story and I know that RCI in 2011, and I think there was some interest in Pennsylvania in this, was trying to encourage states to take a look at the history of RCI rulings before they allowed someone to enter their state.

I have a related question for Chris, if I can find my notes. Some people feel that those who drug horses are bolder now than they used to be in the past, maybe because the drugs are stronger, and have a bigger impact on the outcome and are harder to detect — but when you see as Mr. Gural did I think, in the Meadowlands example, an extraordinary training record, a record that you as an experienced person would recognize as defying the odds too many times to really be plausible, can you ever cross the line and actually — I even consider taking action against somebody like that as a private matter without waiting or each other some sort of proof, a positive test result?

Mr. Chris McErlean: Yeah, and I guess that's the Black Cloud Theory, or — the answer is yeah, I guess again, we could go and say hey, you can't race here because it's private property. As I said, it's not that simple, and I can tell you obviously from Penn National Gaming, it is now a bigger company, a bigger corporate structure. We do have a lot of lawyers and lawyers, their first point is to not get involved in litigation if they can. Obviously, once we do, then they certainly go full throttle.

I think there are some hesitations, unless there is, you know — we certainly want to do our due diligence if we're going to take an action against someone that there's a reason for it. Again to unilaterally use that quote-unquote right, you know, you use it too many times it becomes less effective.

It's really a case-by-case basis. You know, again, the interesting thing on the Pena case is, up until they came up with the New Jersey — or the New York ruling, he never had a positive test. That's again, if you look things at face value, say there's no way, there's something happening here, on the other end nothing has been necessarily proven at that extent. It's a fine line. It really comes down to how strong you believe in that case, and how strong you think it could potentially affect your business going forward.

Mr. Rick Goodell: Right.

Mr. Mark Rocker: Good morning, everybody. My name's Mark Rocker, I'm a student in the program. My question is to Vince. With New Mexico being so close to the border, how do you handle people that race in Mexico that are either in drug cartels or have connections with the cartel?

Mr. Vince Mares: I knew that question was going to come up.

[Laughter]

I really did. It is, it — without giving information about ongoing investigations, which there are, we are seeing in particularly two cases that I would like to discuss — one was at the Ruidoso Downs, where actually the drug cartel was involved. I'm sorry, going back — the drug cartel was involved, Zeta drug cartel, one of the most violent ones in Mexico, was involved in the Ruidoso Downs racing.

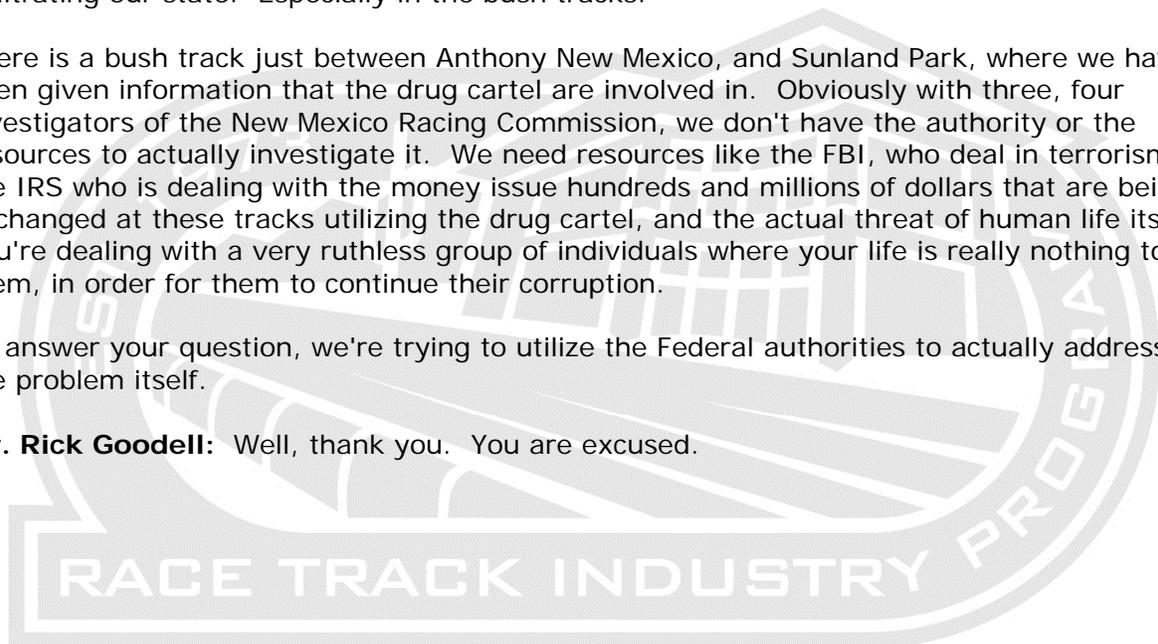
When it all, when all the dust cleared up, they ended up seizing I believe like 700 horses, several arrests, questions were surrounding about a very important race, a big race in the country, that I know that is still being investigated.

To answer your question, it's very difficult with our current resources to address, is this why the New Mexico Racing Commission has gotten the FBI involved because the FBI has the resources, the IRS has the resources, to address these individuals that are actually infiltrating our state. Especially in the bush tracks.

There is a bush track just between Anthony New Mexico, and Sunland Park, where we have been given information that the drug cartel are involved in. Obviously with three, four investigators of the New Mexico Racing Commission, we don't have the authority or the resources to actually investigate it. We need resources like the FBI, who deal in terrorism, the IRS who is dealing with the money issue hundreds and millions of dollars that are being exchanged at these tracks utilizing the drug cartel, and the actual threat of human life itself. You're dealing with a very ruthless group of individuals where your life is really nothing to them, in order for them to continue their corruption.

To answer your question, we're trying to utilize the Federal authorities to actually address the problem itself.

Mr. Rick Goodell: Well, thank you. You are excused.



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