

# **Agenda item # 2**

**INDIANA HORSE RACING COMMISSION  
BEFORE ADMINISTRATIVE LAW JUDGE**

INDIANA HORSE RACING COMMISSION STAFF,	)	In Re:	ADMINISTRATIVE COMPLAINT NO. 214003
	)		
Petitioner,	)		
	)		
vs.	)		
	)		
DR. ROSS RUSSELL,	)	Bernard L. Pylitt,	
	)	Administrative Law Judge	
Respondent.	)		

**NOTICE OF OPPORTUNITY TO PRESENT BRIEFS AND ORAL ARGUMENT**

This matter is pending before the Indiana Horse Racing Commission (“Commission”) on the Recommended Administrative Penalty against Dr. Ross Russell. On September 4, 2015, the Administrative Law Judge (“ALJ”) designated by the Commission, The Honorable Bernard L. Pylitt, issued his Findings of Fact, Conclusions of Law, and Recommended Order Denying Dr. Ross Russell’s Second Motion to Disqualify Bernard Pylitt as Administrative Law Judge (“Recommended Order”) in this case. On September 11, 2015, Dr. Russell, by counsel, timely filed his objections to the Recommended Order.

Notice is hereby given that the Commission will afford both parties an opportunity to present briefs concerning this case. Any briefs filed by Dr. Russell or the Commission Staff must be received in the offices of the Commission by 4:00 p.m. on October 30, 2015. The Commission will accept electronic filing at [lellingwood@hrc.in.gov](mailto:lellingwood@hrc.in.gov).

The Commission will also consider oral argument at its meeting on November 4, 2015. Oral argument will be limited to fifteen minutes per side.

SO ORDERED, 26th day of October 2015.

THE INDIANA HORSE RACING COMMISSION



BY: \_\_\_\_\_  
Thomas Weatherwax  
Chairperson  
Indiana Horse Racing Commission

Copies forwarded by electronic mail sent on October 26, 2015.

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**INDIANA HORSE RACING COMMISSION  
ADMINISTRATIVE COMPLAINT**

INDIANA HORSE RACING COMMISSION  
STAFF,

Petitioner

vs.

ADMINISTRATIVE COMPLAINT NO. 214003

DR. ROSS RUSSELL,

Respondent

Before the Hon. Bernard L. Pylitt,  
Administrative Law Judge

**RESPONDENT, DR. ROSS RUSSELL'S, OBJECTIONS TO FINDINGS OF FACT  
CONCLUSIONS OF LAW, AND RECOMMENDED ORDER DENYING DR. ROSS  
RUSSELL'S SECOND MOTION TO DISQUALIFY BERNARD PYLITT AS  
ADMINISTRATIVE LAW JUDGE**

Respondent, Dr. Ross Russell, by counsel, Peter J. Sacopulos and Gregory S. Carter, pursuant to I.C. 4-21.5-3-29 and in compliance with ALJ Bernard L. Pylitt's Findings of Fact, Conclusions of Law and Recommended Order Denying Dr. Ross Russell's Second Motion to Disqualify Bernard Pylitt as Administrative Law Judge, respectfully submits his objection to ALJ Pylitt's September 4, 2015, proposed Findings of Fact, Conclusions of Law and Recommended Order. In support of Dr. Ross Russell's objections set forth herein, Dr. Ross Russell states:

**OBJECTIONS TO PROPOSED FINDINGS OF FACT**

1. Dr. Ross Russell sets forth and incorporates by reference his objections to Administrative Law Judge Pylitt's Findings of Fact, Conclusions of Law and Recommended Order of June 19, 2015.
2. The Administrative Complaint speaks for itself. Dr. Russell objects to this finding to the extent that it is in any way attempting to minimize, footnote or otherwise downplay the significance of the ramifications of the allegations of September 19, 2014, the same being the reason for Dr. Ross Russell being summarily suspended which said suspension has been and continues to be in effect. In fact, Dr. Russell's suspension will eclipse a full year by the time the Indiana Horse Racing Commission hears argument on this matter.
3. Dr. Ross Russell admits and makes no objection to ALJ Pylitt's proposed third Finding of Fact.
4. Dr. Ross Russell admits and makes no objection to ALJ Pylitt's proposed fourth Finding of Fact. However, for completeness, Dr. Ross Russell advises and informs the Indiana Horse Racing Commission that Attorneys Christina Clark and Attorney Jared Jedick, both attorneys with the Indiana Attorney General's Office and both counsel of record defending the

State Court action involving Dr. Russell in Shelby County, Indiana, were present for the Granitz and Estvanko hearing. For reasons unknown to the undersigned counsel, ALJ Pylitt chose to reflect his presence but not the presence of the IHRC Staff counsel at said hearing.

5. Dr. Ross Russell objects to ALJ Pylitt's proposed fifth Finding of Fact. Dr. Ross Russell does so because Administrative Law Judge Pylitt has pre-judged Dr. Russell's case as well as his credibility and reliability as well as witnesses that will testify on his behalf at his trial, those witnesses include, but are not limited to, Stephanie Burchette, Callie Ramey, Christina Estvanko, and Kim Hammond. Additionally, ALJ Pylitt has pre-judged this matter and pre-determined the outcome of Dr. Russell's case by finding that those witnesses called by the Indiana Horse Racing Commission Staff in the Estvanko and Granitz trial are credible and reliable. The witnesses in question, called on behalf of the Indiana Horse Racing Commission Staff, include, but are not limited to, Jamie Kolls, Dee Thoman, and Joel Villalta. The evidence is clear that ALJ Pylitt has demonstrated prejudice and bias against Dr. Ross Russell. For ALJ Pylitt to now find that Dr. Russell, in Russell's case, is credible and reliable and to have the same findings with regard to those witnesses called by Dr. Russell at his trial in December of this year would stand on its head the findings of fact, conclusions of law and recommended order issued by this same ALJ in the Granitz and Estvanko matter. In short, ALJ Pylitt has pre-determined, pre-judged, and displayed both prejudice and bias by finding that Dr. Russell committed the acts of which he is accused on September 19, 2014. These are allegations that Dr. Russell has and continues to vehemently deny and which the preponderance of the evidence clearly proves did not occur. ALJ Pylitt has pre-judged not only Dr. Russell's witnesses but Dr. Russell himself as being without credibility or reliability. It is important for this Commission to note that credibility, from a legal standpoint, goes to the worthiness of belief of a witness. In short, this Administrative Law Judge has found that Dr. Russell himself as well as his witnesses are without any worthiness of belief. Given this pre-determination, and clear evidence of bias and prejudice, it is impossible for Dr. Russell to receive a fair and impartial hearing should the same be conducted by ALJ Pylitt.

6. Dr. Russell has no objection to ALJ Pylitt's sixth proposed Finding of Fact other than to the extent any findings of fact that should be more properly a Conclusion of Law, Dr. Russell hereby asserts as corresponding objections to said conclusions.

RESPONDENT, DR. ROSS RUSSELL'S OBJECTIONS TO ALJ PYLITT'S  
CONCLUSIONS OF LAW

1. Dr. Russell makes no objection to ALJ Pylitt's first proposed Conclusion of Law.
2. Dr. Russell makes no objections to ALJ Pylitt's second proposed Conclusion of Law.
3. Dr. Russell sets forth and incorporates by reference his objections to ALJ Pylitt's proposed Conclusions of Law and Findings of Fact and Recommended Order of June 19, 2015.

4. Dr. Russell objects to ALJ Pylitt's fourth proposed Conclusion of Law. Dr. Russell admits that his Second Motion to Disqualify ALJ Pylitt is filed pursuant to I.C. 4-21.5-3-10. Dr. Russell objects to ALJ Pylitt's fourth proposed Conclusion of Law in that said provision is the sole basis of analysis or evaluation. I.C. 4-21.5-3-10 is not the sole basis. Specifically, ALJ Pylitt is bound to conduct himself pursuant to and in compliance with the Indiana Code of Judicial Conduct. Further, ALJ Pylitt's role in judging this matter is similar to that of a trial judge and, as such, common law rules of disqualification for conflict of interest, bias and prejudice that apply to judges also apply to administrative tribunals and, in this specific case, to ALJ Pylitt. The pre-judging of this matter as ALJ Pylitt has done must be forbidden to guarantee Dr. Russell's right to due process is preserved. As such, I.C. 4-21.5-3-10 is one statute to be considered in evaluating ALJ Pylitt's disqualification. I.C. 4-21.5-3-10 must also be considered with the Indiana Code of Judicial Ethics as well as with the rights and safeguards afforded Dr. Ross Russell under both the State of Indiana and Federal Constitutions.

5. Dr. Russell objects to ALJ Pylitt's fifth proposed Conclusion of Law. ALJ Pylitt's fifth proposed Conclusion of Law of September 4, 2015, presents significant, serious and highly prejudicial and biased evidence that this Administrative Law Judge has pre-judged Dr. Russell and a series of witnesses that will be called to testify on Dr. Russell's behalf as well as witnesses that are anticipated to be called to testify on behalf of the Indiana Horse Racing Commission Staff. The "new evidence" includes Administrative Law Judge Pylitt's pre-judging and determination of the following:

- a. Dr. Russell entered a stall of an "in" horse on race day, injected that horse with a prohibited substance thereby pre-determining that Dr. Russell "did the deed" of which he is accused but of which he has not yet been afforded the due process of a hearing/trial.
- b. ALJ Pylitt has significantly pre-judged and pre-determined Dr. Russell himself as a witness stating and finding and concluding that Dr. Russell lacks "credibility and reliability."
- c. ALJ Pylitt has made a similar finding and conclusion relative to Dr. Russell's witnesses.
- d. Additionally, ALJ Pylitt has, as new evidence of further prejudice and bias, pre-judged, pre-determined and found and concluded that the witnesses to be called in Dr. Russell's case on behalf of the IHRC Staff are credible and are reliable. This "new evidence" is set forth in Respondent's Second Motion to Disqualify ALJ Pylitt and specifically at rhetorical paragraphs 13 through 28. A true and exact copy of Dr. Ross Russell's Second Motion to Disqualify Administrative Law Judge is attached hereto and made a part hereof, and marked as Exhibit "A."

6. Respondent, Dr. Ross Russell, objects to ALJ Pylitt's sixth proposed Conclusion of Law. ALJ Pylitt's Findings and Conclusions of July 28, 2015, in the Granitz and Estvanko matter absolutely present evidence and cause for the disqualification of ALJ Pylitt in this matter. ALJ Pylitt's pre-judging of Dr. Russell as lacking credibility and reliability alone is evidence of

bias and prejudice. Credibility is defined as the worthiness of belief, that qualify in a witness which renders his or her evidence worthy of belief. It is without question that Dr. Russell and witnesses Burchette, Ramey, Howard and Estvanko, as well as others, all of which ALJ Pylitt has determined/pre-determined to be unreliable show absolute bias and absolute prejudice. It is equally certain that these witnesses will testify as to the events of September 19, 2014, the very event that led to the IHRC/IHRC Staff's summary suspension of Dr. Russell. In essence, the same witnesses that testified in the Granitz and Estvanko matter both on Dr. Russell's behalf and those witnesses that were called and testified on behalf of the IHRC Staff will again appear and offer testimony with regard to the incident of September 19, 2014, in Dr. Russell's case in December of this year. These witnesses, including Dr. Russell himself, have been pre-judged and pre-determined to be credible or non-credible as well as reliable or unreliable by this exact Administrative Law Judge. Dr. Russell cannot receive a fair trial if Bernard A. Pylitt remains the Administrative Law Judge presiding over the hearing. As for additional evidence that legal cause exists for ALJ Pylitt's disqualification, Respondent relies on and refers the Indiana Horse Racing Commission to one of its own ALJ's positions on such issues, that being ALJ Gordon White. Specifically, Respondent refers the Indiana Horse Racing Commission to ALJ White's paper entitled: "Legal and Ethics Conference 2014: Administrative Hearings and the Right to An Impartial Decision Maker." Gordon White, Deputy Attorney General, Office of the Indiana Attorney General. A true and exact copy of ALJ Gordon White's paper identified above is incorporated herein, made a part hereof, and marked as Exhibit "B."

7. Respondent, Dr. Ross Russell, objects to ALJ Pylitt's seventh proposed Conclusion of Law. The evidence setforth, supra, by way of Respondent's objections to ALJ Pylitt's proposed Findings of Fact and Conclusions of Law not only meet but far exceed the burden of proof necessary under I.C. 4-21.5-3-10. Cannon 2.11(A)(6)(D) states: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality may reasonably be questioned, including, but not limited to the following circumstances . . . (6) the Judge: . . . (D) previously presided over the matter in another court." Judge Pylitt has presided over this matter in both the Tam Tuff case and the Estvanko and Granitz matters. Additionally, the Indiana Court of Appeals has held, consistently, that: ". . . even the appearance of partiality requires recusal . . ." *Thakkar vs. State* 644 N.E.2d 609, 612 (Ind.Ct.App. 1994). Likewise, our Indiana Court of Appeals has stated: "A judge should recuse himself under circumstances in which a reasonable person, knowledgeable of all circumstances, would have a reasonable basis for doubting the judge's impartiality." *State vs. Brown*, 648 N.E.2d 529, 534 (Ind.Ct.App. 1997).

8. Respondent, Dr. Ross Russell, objects to ALJ Pylitt's eighth proposed Conclusion of Law. The allegations are not separate, independent or distinct from Dr. Russell's case. In fact, there was extensive testimony by multiple witnesses that involved numerous exhibits regarding the events surrounding the allegation that Dr. Russell entered a stall of a "in horse" on September 19, 2014, at Indiana Grand. It is that incident for which Mr. Granitz and Mr. Estvanko were the subjects of administrative complaints based on the Absolute Trainer's Responsibility Rule. The alleged violation of the Absolute Trainer's Responsibility Rule related to Tam Tuff, another

matter over which ALJ Pylitt has presided and involved the same horse, and the same set of facts that will be heard in Dr. Russell's case. Dr. Russell admits that there are issues that are distinct and separate as to the IHRC Staff's complaint against him but there are many common, consistent, intertwined issues that have been pre-judged and pre-determined by ALJ Pylitt in his Findings of Fact, Conclusions of Law in the Tam Tuff matter and the Granitz and Estvanko matters and which clearly show, demonstrate and evidence ALJ Pylitt's prejudice and bias.

9. Respondent, Dr. Ross Russell objects to ALJ Pylitt's ninth Conclusion of Law. The evidence that will be presented by Dr. Russell at the four day hearing scheduled in December of this year includes witnesses that will be called on Dr. Russell's behalf that have been pre-judged as to credibility and reliability. That pre-judgment and pre-determination is unfavorable to Dr. Russell. Those witnesses will be testifying as to similar facts and circumstances in Dr. Russell's case as they did in prior matters before the same ALJ, for which he has pre-judged and pre-determined their credibility and reliability. This is also the case with regard to Dr. Russell himself as well as the IHRC Staff's expected witnesses. As such, Dr. Russell's case has been pre-judged by ALJ Pylitt. The events of September 19, 2014, the credibility and reliability of witnesses, the credibility and reliability of Dr. Russell himself, has all been pre-judged and pre-determined by this ALJ. As such, those "determinations" have been made and will not and cannot, assuming Judge Pylitt remains as ALJ on Dr. Russell's case, be determined by evidence presented in December of this year.

10. Respondent, Dr. Ross Russell has no objection to ALJ Pylitt's tenth proposed Conclusion of Law, other than to the extent any conclusion of law, should be more properly deemed a finding of fact, Dr. Russell asserts a corresponding objection as setforth herein.

#### RESPONDENT'S OBJECTION TO ALJ PYLITT'S ULTIMATE FINDING OF FACT

Respondent, Dr. Ross Russell, objects to ALJ Pylitt's proposed Ultimate Finding of Facts. Because ALJ Pylitt's proposed Ultimate Finding of Fact incorporates Findings and Conclusions setforth in his Findings and Conclusions and Recommended Order of September 4, 2015, and because Respondent, Dr. Ross Russell, has setforth his objections to the same above, he incorporates by reference those objections relative to the proposed Ultimate Finding of Fact setforth herein.

Respectfully submitted,

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By:   
Peter J. Sacopulos, #14403-84



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served upon the following counsel of record by email and Certified Mail, postage prepaid, this 18<sup>th</sup> day of September, 2015:

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ICE MILLER  
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Bernard L. Pylitt  
Administrative Law Judge  
KATZ & KORIN, PC  
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Indiana Horse Racing Commission  
ATTN: Mr. Joe Gorajec, Executive Director  
1302 N. Meridian Street, Suite 175  
Indianapolis, IN 46202

  
Peter J. Sacopulos

# **EXHIBIT A**

INDIANA HORSE RACING COMMISSION  
ADMINISTRATIVE COMPLAINT

INDIANA HORSE RACING COMMISSION  
STAFF,

2015 AUG 13 P 3:01

INDIANA HORSE RACING COMM

Petitioner

vs.

ADMINISTRATIVE COMPLAINT NO. 214003

DR. ROSS RUSSELL,  
Respondent

Before the Hon. Bernard J. Pylitt,  
Administrative Law Judge

**RESPONDENT, DR. ROSS RUSSELL'S, SECOND MOTION TO  
DISQUALIFY ADMINISTRATIVE LAW JUDGE**

Respondent, Dr. Ross Russell, by counsel, Peter J. Sacopulos, pursuant to I.C. 4-21.5-3-10, respectfully moves to disqualify Administrative Law Judge Bernard Pylitt. The Respondent states that this is his second such Motion to Disqualify, the first having been filed in May of this year and, subsequent to this Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommended Order of Denial, the same was denied by the Indiana Horse Racing Commission, following oral argument, on July 15<sup>th</sup> of this year. Dr. Ross Russell's Second Motion to Disqualify is being filed relative to ALJ Pylitt's Findings of Fact, Conclusions of Law and Recommended Order that was issued July 28, 2015, in connection with In Re: The Matter of Richard Estvanko and Anthony Granitz vs. Indiana Horse Racing Commission Staff, IHRC Ruling #14694 and #14695. In support of this Second Motion to Disqualify Administrative Law Judge, Dr. Russell states:

1. On September 20, 2014, the Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff summarily suspended the Respondent, Dr. Ross Russell, for an alleged incident that occurred on September 19, 2014. Specifically, the Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff alleged that Dr. Russell entered the stall of a certain thoroughbred horse named Tam Tuff and injected said horse in violation of Indiana horse racing rules. Dr. Russell has and continues to deny that/those allegations.

2. The subject thoroughbred horse, Tam Tuff, was at all times pertinent herein, trained by Tony Granitz and by assistant trainer, Richard Estvanko.

3. The subject thoroughbred horse, Tam Tuff, was/is owned by Captain Jack Stables, LLC.

4. On October 23, 2014, the Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff filed an Administrative Complaint against the Respondent Dr. Ross Russell. The allegations set forth in said Administrative Complaint include the allegation that Dr. Russell injected the thoroughbred horse, Tam Tuff, on September 19, 2014, at Indiana Grand racing facility located in Shelbyville, Indiana, with a prohibited substance in violation of Indiana's horse

racetrack rules.

5. On November 12, 2015, the Indiana Horse Racing Commission assigned Bernard Pylitt to serve as Administrative Law Judge in connection with the Administrative Complaint filed and currently pending against Dr. Ross Russell.

6. Subsequently, the Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff commenced disciplinary hearings against both the trainer of the thoroughbred horse, Tam Tuff, Tony Granitz, and also against the assistant trainer of said horse, Richard Estvanko.

7. The Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff issued a summary suspension against assistant trainer Richard Estvanko and notified trainer Tony Granitz that disciplinary action was being taken against him, all in connection with the alleged incident involving the thoroughbred horse, Tam Tuff, and the alleged injection of said thoroughbred horse by Dr. Russell allegedly occurring on September 19, 2014.

8. Trainer Tony Granitz and assistant trainer Richard Estvanko, disputed any and all allegations of wrongdoing. On October 31, 2014, a hearing was conducted by the Stewards at Indiana Grand, Stanley Bowker, Tim Day, and Bill Troilo, relating to the events of September 19, 2014, and specifically to the horse, Tam Tuff, for which Mr. Granitz and Mr. Estvanko were trainer and assistant trainer respectively. At the conclusion of said hearing, the Stewards, in their Findings of Fact and Conclusions of Law, stated the issue for review was/is: "Did Dr. Ross Russell inject the Granitz/Estvanko-trained horse, Tam Tuff, on September 19, 2014, with an unknown substance prior to the time for the administration of furosemide?"

9. Dr. Russell was not afforded his right, pursuant to I.C. 4-21.56-3-25 to cross examine witness(es) in the Granitz/Estvanko matter despite being the/a subject of the same. The Granitz/Estvanko hearing was an orchestrated trial of the case against Dr. Russell without Dr. Russell being afforded his rights pursuant to I.C. 4-21.5-3-25.

10. The Stewards at Indiana Grand, on November 19, 2014, entered their Findings of Fact and Conclusions of Law in favor of the Indiana Horse Racing Commission/Indiana Horse Racing Commission Staff and concluded, that: "Between the hours of 10 a.m. and 11 a.m. on September 19, 2014, Dr. Ross Russell did inject the horse Tam Tuff with a substance, other than furosemide." (Stewards' Findings and Conclusions, specifically paragraph 7 of Section V. Findings of Fact, dated November 19, 2014); and: "IHRC Staff established, by a preponderance of the evidence that Dr. Ross Russell was in Stall 61 of Barn 6 on September 19, 2014, injecting the horse Tam Tuff with a substance other than furosemide." (Stewards' Findings and Conclusions, specifically paragraph 1 of Section VI. Conclusions of Law, dated November 19, 2014.)

11. Trainer Anthony Granitz and assistant trainer Richard Estvanko timely sought review of the Stewards ruling and both Granitz and Estvanko have and are appealing that/those

rulings. Administrative Law Judge Pylitt was assigned to the Granitz and Estvanko matters and a hearing was held on June 23 and 24, 2015 and, subsequently on July 28, 2015, ALJ Pylitt issued Findings of Fact, Conclusions of Law and Recommended Order, a true and exact copy of which is attached hereto, made a part hereof, and marked as Exhibit A.

12. As in Dr. Russell's case, the Indiana Horse Racing Commission appointed Bernard Pylitt to serve as Administrative Law Judge in both the Granitz and Estvanko matters.

13. In the Findings of Fact, Conclusions of Law and Recommended Order in the Granitz and Estvanko matters, ALJ Pylitt has pre-judged and determined that the thoroughbred race horse Tam Tuff received a prohibited injection on September 19, 2014, in violation of 71 IAC 8.5-1-1.5(b). This is a pivotal, critical and vehemently disputed alleged fact in Dr. Russell's case that is also pending before ALJ Pylitt. In fact, witnesses in the Estvanko and Granitz matter testified on June 23 and 24<sup>th</sup> that this did not occur and that test results from the subject horse were negative.

14. ALJ Pylitt has pre-judged this issue; Dr. Russell cannot receive a fair and impartial hearing if his hearing is conducted by an Administrative Law Judge that has pre-judged the events of September 19, 2014 as well as Dr. Russell's action on said date.

15. ALJ Pylitt further, in connection with issuing Findings of Fact, Conclusions of Law and Recommended Order in the Granitz and Estvanko matter on July 28, 2015, found that: "Findings of Facts underlying the Violations: (B) The version of events from the witnesses and testimony offered by Estvanko and Granitz (other than Dee Thoman) lacked credibility and reliability."

16. In making the finding set forth in the previous rhetorical paragraph, ALJ Pylitt has determined/predetermined that the following witnesses, including Dr. Russell himself; "...lack credibility and reliability. . . ."

- a. Dr. Ross Russell;
- b. Stephanie Burchette;
- c. Callie Ramey;
- d. Christina Estvanko;
- e. Kim Hammond;

17. Conversely, ALJ Pylitt found, and specifically in his Findings of Fact identified as fact underlying the violations to be, that: "Substantial, credible, and reliable evidence and testimony support the version of events presented by the Commission Staff."

18. In doing so, ALJ Pylitt has determined/predetermined that the following witnesses provided: "...substantial, credible and reliable evidence. . . ." Those witnesses are:

- a. Jamie Kolls (barn walker);
- b. Dee Thoman (IHRC Security Shift Supervisor); and
- c. Joel Villalta.

19. The testimony offered and provided in the Granitz/Estvanko hearing on June 23 and 24, 2015, in a hearing before ALJ Pylitt, is testimony by witnesses that have been and are listed on Dr. Russell's witness list as well as on the witness lists filed by and on behalf of the Indiana Horse Racing Commission Staff. ALJ Pylitt has, in making his Findings of Fact, Conclusions of Law and Recommended Order, determined/predetermined and prejudged Dr. Russell's case by determining that many of the witnesses that have been identified and will be called on behalf of Dr. Russell, including Dr. Russell himself, to lack: "credibility and reliability."

20. Given the pre-judgment and determination of events that occurred on September 19, 2014, and centered on Dr. Russell's actions on that date, finding as to the credibility and reliability of key, substantial and critical witnesses to Dr. Russell's case, including Dr. Russell himself, results in it being impossible for Dr. Russell to receive a fair and impartial hearing if this matter is tried to Administrative Law Judge Pylitt. Dr. Russell is entitled to a fair, impartial hearing before an Administrative Law Judge, as part of the administrative process, and that is not possible if Administrative Law Judge Pylitt continues as the administrative law judge and hearing officer in this matter.

21. ALJ Pylitt also makes findings as to the "lab testing of Tam Tuff's blood and urine." (See page 35 of the Findings of Fact, Conclusions of Law and Recommended Order dated July 28, 2015 – Exhibit A)

22. Significantly, ALJ Pylitt correctly finds: "After the sixth race on September 19, 2014, blood and urine samples were taken from Tam Tuff." (See Findings of Fact, Conclusions of Law and Recommended Order of July 28, 2015, and specifically Finding 142/Exhibit A)

23. Equally significant is ALJ Pylitt's lack of finding that the test results of Tam Tuff for the sixth race ran at Indiana Grand on September 19, 2014, were negative.

24. ALJ Pylitt has made a finding, that despite the blood and urine test being negative, a negative is not really a negative. This, despite any scientific evidence of any prohibited substance being found in or identified in the subject samples taken from Tam Tuff following the sixth race at Indiana Grand on September 19, 2014. This finding is contrary to the evidence, extremely prejudicial to Dr. Russell and relied upon by ALJ Pylitt in his finding that:

"At some time between the hours of 10 a.m. and 11 a.m. on September 19, 2014, Dr. Russell injected the thoroughbred filly Tam Tuff with an unidentified Substance other than furosemide in Stall 61 of Barn 6." (See Findings of Fact, Conclusions and Recommended Order dated July 28, 2015 and specifically Finding of Fact 163 in Exhibit A.)

This finding is an additional example that ALJ Pylitt has pre-judged, pre-determined, and pre-convicted Dr. Russell for an event that Dr. Russell has not yet been allowed to defend at a hearing nor been afforded the opportunity to be heard. This is an absolute denial of Dr. Russell's due process rights.

25. ALJ Pylitt, in his Findings of Fact, Conclusions of Law and Recommended Order, attached as Exhibit A, finds, further, as a portion of his "Findings of Fact Underlying the Violations the following:

"D. Substantial, credible, and reliable evidence support the conclusion that a practicing veterinarian (Dr. Russell) (emphasis added) made prohibited contact with the thoroughbred race horse Tam Tuff on September 19, 2014, in violation of 71 IAC 8.5-4-12 and that Estvanko and Granitz failed to discharge their responsibilities as trainer and assistant trainer pursuant to 71 IAC 5.5-3-3." (See Findings of Fact, Conclusions of Law and Recommended Order dated July 28, 2015/Exhibit A and specifically "Findings of Fact Underlying the Violations (D) at page 38 of said Exhibit.

26. ALJ finding and conclusion demonstrate bias and prejudice as against Dr. Russell, all of which, pursuant to Indiana Code 4-21.5-3-10, require Administrative Law Judge Pylitt to disqualify himself.

27. ALJ Pylitt found in his Conclusions of Law that Mr. Estvanko and Mr. Granitz failed to present substantial, credible or reliable evidence and, to the contrary, Commission Staff did establish, by substantial, credible and reliable evidence: ". . . by substantial, credible and reliable evidence that Dr. Russell was present in Stall 61 of Barn 6 between 10 and 11 a.m. on September 19, 2014, injecting an "in-today" horse Tam Tuff with a substance other furosemide . . . ." (See Findings of Fact, Conclusions of Law and Recommended Order/Exhibit A at Conclusion of Law 176).

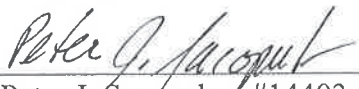
28. By way of this Conclusion, as well as the findings and conclusions in Exhibit A, Judge Pylitt has shown bias and prejudice adverse to Dr. Ross Russell and should, pursuant to Canon 2.11(A)(6)(D) disqualify himself. Canon 2.11(A)(6)(D) states, in pertinent part: "A judge shall disqualify himself or herself in any proceeding which the Judge's impartiality might be reasonably questioned, including but not limited to the following circumstances . . . . (6) the Judge . . . (D) previously presided as a judge over the matter in another court. . . ." Additionally, ALJ Pylitt should recuse himself and/or be disqualified pursuant to I.C. 4-21.5-3-10. Findings and Conclusions contained in Exhibit A clearly show reflected bias and prejudice against the Respondent, Dr. Ross Russell.

WHEREFORE, Respondent, Dr. Ross Russell respectfully requests, pursuant to I.C. 4-21.5-3-10 as well as Canon 2.11(A)(6)(D) that Administrative Law Judge be disqualified in sitting in judgment of his case as the Administrative Law Judge assigned by the Indiana Horse

Racing Commission and that a panel of independent ALJ be named from which an alternative ALJ will be selected as required by rule, to fairly, impartially, and without bias adjudicate the pending administrative complaint pending against him and for all other just and proper relief in the premises.

Respectfully submitted,

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By:   
Peter J. Sacopulos, #14403-84

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served upon the following counsel of record by first class U.S. Mail, postage prepaid, the 11<sup>th</sup> day of August, 2015:

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# **EXHIBIT A**

**INDIANA HORSE RACING COMMISSION  
AN APPEAL BEFORE ADMINISTRATIVE LAW JUDGE BERNARD L. PYLITT**

IN RE: THE MATTER OF RICHARD  
ESTVANKO and ANTHONY GRANITZ,

Petitioners,

v.

INDIANA HORSE RACING COMMISSION  
STAFF,

Respondent.

ISSUE: IHRC Ruling #14694  
IHRC Ruling #14695

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER**

This matter came before Administrative Law Judge Bernard Pylitt (“ALJ Pylitt”) for a consolidated hearing on the appeal of Stewards’ Rulings 14694 and 14695 by Petitioners Richard Estvanko (“Estvanko”) and Anthony Granitz (“Granitz”).

ALJ Pylitt conducted a hearing in this matter on June 23 and 24, 2015, at the offices of Katz & Korin P. C. in Indianapolis, Indiana by agreement with the parties. The Petitioners were present in person and represented by their counsel Joseph Eddingfield. The Indiana Horse Racing Commission Staff (“Commission Staff”) was represented by its Deputy General Counsel, Holly Newell, and outside counsel, Robin Babbitt. Peter Sacopolous, counsel for Dr. Ross Russell was present during the hearing.

Estvanko and Granitz did not raise or question the appropriateness or reasonableness of the penalties imposed by the Stewards as part of their appeals. They simply appeal the finding that they violated certain regulations.

At the conclusion of the hearing, ALJ Pylitt commended counsel for their complete cooperation during discovery and for a thorough and concise presentation of the evidence including the submission of lengthy stipulations which facilitated the presentation of evidence

and substantially shortened the length of the hearing. Additionally, ALJ Pylitt commended the Petitioners for their demeanor and behavior during the lengthy hearing.

In rendering his findings, ALJ Pylitt was required to weigh the credibility of several witnesses who offered diametrically opposed explanations of where and when a barn walker observed Dr. Ross Russell on Friday morning September 19, 2014.

In considering prior inconsistent statements made by several witnesses, as well as their interest in the outcome in the matter, ALJ Pylitt relied upon the factors set forth in Rule 616 of Indiana's Rules of Evidence. In weighing the testimony, ALJ Pylitt kept in mind the guidance of the Indiana Supreme Court recited in Pattern Jury Instruction 1.17 to use his own personal knowledge, experience, and common sense from daily living, keeping in mind that the number of witnesses who testified about a particular fact need not control the ultimately determination of truth of that fact.

Having considered the administrative record, having conducted a hearing with evidence presented by both sides, having weighed the credibility of the witnesses presented by both sides, and having considered the arguments of counsel, ALJ Pylitt issues the following Findings of Fact, Conclusions of Law, and Recommended Order. To the extent that any of the Findings of Fact are more appropriately considered Conclusions of Law, or conversely, they shall be so treated.

#### FINDINGS OF FACT

##### **I. The Parties**

1. During 2014, Petitioners Richard Estvanko ("Estvanko") and Anthony Granitz ("Granitz") were licensees of the Indiana Horse Racing Commission. (Joint Exhibit 1, Stipulations 1, 2.) As a licensee, each acknowledged:

I understand that participation in racing in Indiana is a privilege, not a right ... By acceptance of said license, I agree to abide by the statutes of the State of Indiana relating to racing, the Indiana Rules and Regulations and rulings or decisions of the Judges/Stewards with the knowledge that rulings or decisions of the Judges/Stewards shall remain in force until reversed or modified by the Indiana Horse Racing Commission ....

2. The Indiana Horse Racing Commission (“Commission”) is an administrative agency created by the legislature pursuant to its enabling statute, I.C. 4-31 *et seq.* The Commission was created for the purpose of ensuring “that pari-mutuel wagering on horse races in Indiana will be conducted with the highest of standards and the greatest level of integrity.” I.C. 4-31-1-2. The Commission has a long-standing directive in its governing statute and related administrative regulation that allows the Commission to sanction a licensee if the person has engaged in conduct that is against the best interest of horse racing or compromises the integrity of operations at a track or satellite facility. 71 IAC 5.5-1-14(a)(10).

3. The Commission has specific rules prohibiting the race day injection of all substances except furosemide (foreign or otherwise) medications and regulations that prohibit a licensed veterinarian from having contact with a horse within twenty-four hours prior to the scheduled post time for the first race on that day with the exception of the highly regulated administration of furosemide. 71 IAC 8.5-1-1.5, 71 IAC 8.5-1-2, 71 IAC 8.5-1-4.2.

4. A trainer is fully responsible for the condition of all horses he trains for guarding and protecting horses in his/her care and for reporting any contact that a practicing veterinarian or their staff may have with a horse within twenty-four (24) hours of a scheduled race. 71 IAC 5.5-3-2, 71 IAC 5.5-3-3 (26) and (30).

5. The Commission Staff is responsible for the day-to-day operations of the Indiana Horse Racing Commission, including enforcement of regulations, and prosecution of violations.

6. The Commission Staff is distinct and separate from the Commission.

7. The Commission Staff is the proper party to this proceeding.

## II. Procedural History

8. On September 20, 2014, the Board of Stewards (“Stewards”) received a report from Indiana Grand security that a barn walker observed Dr. Ross Russell, DVM (“Dr. Russell”) in the stall of an “in-today” horse, injecting the horse approximately nine hours prior to its scheduled post time. (Commission Staff Exhibit K., Indiana Grand Incident Report Number 14-090185, dated September 20, 2014; Commission Staff Exhibit J, Equibase Results Chart for the 6<sup>th</sup> race on September 19, 2014 at Indiana Grand; Commission Staff Exhibit G.)

9. The horse in question Tam Tuff, was a thoroughbred filly trained by Granitz and Estvanko. (Joint Exhibit 1; Stipulations 4 & 5)

10. Granitz was the trainer of record for Tam Tuff and Estvanko was the assistant trainer. (Joint Exhibit 1; Stipulation 4)

11. The September 20, 2014 incident report from Indiana Grand Security served as the basis for the Stewards summary suspension of Estvanko that same day. (Commission Staff Exhibit G, Stewards’ Findings and Conclusions dated November 19, 2014, p.1)

12. Granitz, was out of state at Keeneland on September 19, 2014, and was not summarily suspended. (Commission Staff Exhibit G, Stewards’ Findings and Conclusions November 19, 2014, p. 1).

13. The Stewards upheld the summary suspension of Estvanko on October 2, 2014. (Stewards Ruling #14658.)

14. Estvanko and Granitz timely requested a hearing on the merits before the Stewards.

15. On October 31, 2014, the Stewards conducted a hearing on the merits of this matter.

16. On November 19, 2014, the Stewards issued Findings and Ruling Nos. 14694 and 14695. (Commission Staff Exhibit G, Stewards' Findings dated November 19, 2014.)

17. The Stewards concluded that Estvanko and Granitz were in violation of a number of Commission Rules, suspended Estvanko for 60 days, and fined him \$1,000.00. Granitz was not suspended, but was fined \$2,000.00.

18. Estvanko and Granitz filed a timely appeal of the Stewards' Rulings.

19. Administrative Law Judge Pylitt was assigned to hear the cases *de novo*, and decide the issues framed by the appeal.

20. Estvanko and Granitz bore the burden of persuasion and the burden of going forward and proof before ALJ Pylitt. (I.C. 4-21.5-3-14(c))

21. Estvanko and Granitz each testified during the hearing before ALJ Pylitt. Also testifying on their behalf were Dr. Russell, Stephanie Burchette ("Burchette"), Callie Ramey ("Ramey"), Christina Estvanko and Dee Thoman ("Thoman"). Estvanko and Granitz also presented exhibits into evidence.

22. The Commission Staff presented the testimony of former Indiana Grand barn walker Jamie Kolls ("Kolls"); Dr. Richard Sams, Laboratory Director for LGC, ("Dr. Sams"); Dr. Scot Waterman, DVM, consulting veterinarian to Commission Staff ("Dr. Waterman"); groom Joel Villalta ("Villalta") and trainer Kimberly Hammond ("Hammond"). The Commission Staff also presented exhibits into evidence.

23. Pursuant to I.C. 4-21.5-3-26(f), ALJ Pylitt took official notice of the Indiana pari-mutuel enabling statute (I.C. 4-31 *et seq.*, and I.C. 4-35 *et seq.*), and the IHRC rules that regulate pari-mutuel racing in Indiana (71 IAC *et seq.*).

24. Three telephonic Prehearing Conferences were conducted by ALJ Pylitt to establish deadlines and facilitate discovery by the parties and to establish a mutually agreeable hearing date.

25. Prior to the hearing, the parties agreed to 22 stipulations, the authenticity and admissibility of 38 documents, and the authenticity of one additional document. The stipulations were admitted into evidence as Joint Exhibit 1.

26. Contained within the parties stipulations were the following facts:

- a. On the morning of September 19, 2014, Tam Tuff was housed at Indiana Grand in Barn #6, Stall #61. (Joint Exhibit 1; Stipulation 6)
- b. On the morning of September 19, 2014, Jamie Kolls ("Kolls") was employed by Indiana Grand as a Barnwalker. (Joint Exhibit 1; Stipulation 7)
- c. On the morning of September 19, 2014, at approximately 10:00 a.m. Kolls began her duties at the Indiana Grand stable gate and then walked to Barns 6, 7, 8, and 9. (Joint Exhibit 1; Stipulation 8)
- d. On September 19, 2014, Tam Tuff was under the direct care, control and training of Estvanko. (Joint Exhibit 1; Stipulation 9)
- e. Tam Tuff participated in the 6<sup>th</sup> Race conducted at Indiana Grand on September 19, 2014. (Joint Exhibit 1; Stipulation 10)
- f. At all relevant times, Dr. Russell was providing veterinary services to horses stabled at Indiana Grand, including horses trained by Estvanko, Granitz, and Hammond (Joint Exhibit 1; Stipulation 11)

- g. Barns 6 and 7 are in close proximity at Indiana Grand and a person could move from one to the other within a short period of time. (Joint Exhibit 1; Stipulation 16)
- h. Industrial Laboratories tested the Tam Tuff specimens on or about September 24, 2014. (Joint Exhibit 1; Stipulation 23(f))
- i. Industrial Laboratories issued a report on or about October 3, 2014, concluding that the Tam Tuff specimens did not include any prohibited substances.

27. By their stipulation, the parties agreed to the authenticity and admissibility of certain documents, including, but not limited to:

- a. Google map aerial photograph of Indiana Grand barn area (Joint Exhibit 1; Stipulation 23(w));
- b. Exhibit A to the Stewards' Hearing: Diagrams of Barns 6 and 7 at Indiana Grand, Aerial photograph of the backside at Indiana Grand including barns (Joint Exhibit 1; Stipulation 23(c));
- c. Respondents' Exhibit 4 to the Stewards' Hearing, Day Sheets of Dr. Ross Russell for September 19, 2014 (5 pages) (Joint Exhibit 1; Stipulation 23(p));
- d. Photograph of Barn 6, Stall 61 (face-on view of Stall 61) (Joint Exhibit 1; Stipulation 23(y));
- e. Photograph of Barn 6, Stall 61 (looking into Stall 61 from right side) (Joint Exhibit 1; Stipulation 23(z));



- f. Photograph of Barn 6, Stall 61(looking into Stall 61 from left side) (Joint Exhibit 1; Stipulation 23(aa));
- g. Photograph of Barn 7, Stall 31 (photographed from interior of stall, looking out) (Joint Exhibit 1; Stipulation 23(ff));
- h. Photograph of Barn 7, Stall 31 (looking into Stall 31 from right side) (Joint Exhibit 1; Stipulation 23(gg));
- i. Photograph of Barn 7, Stall 31 (looking into Stall 31 from left side) (Joint Exhibit 1; Stipulation 23(hh));
- j. Affidavit of Joe Gorajec (with Exhibits) dated June 5, 2015 (Joint Exhibit 1; Stipulation 23(ii)); and
- k. September 19, 2014 Barnwalker Sheets (3 pages) for Kolls relating to Indiana Grand Barns 2, 3, 4, 6, 7, 8 and 9 (Joint Exhibit 1; Stipulation 23(jj)).

**III. Exhibits offered during the hearing**

Petitioners' Exhibits (which were mislabeled as Respondents exhibits):

- 1. Jamie Kolls, Incident Report 14-090185 dated September 20, 2014.
- 2. Transcription of Jamie Kolls, Interview dated September 20, 2014.
- 3. Affidavit of Jamie Kolls, dated September 20, 2014.
- 4. Deposition of Jamie Kolls dated October 6, 2014.
- 5. Deposition of Dee Thoman dated October 15, 2014.
- 6. Diagram of Barn 6 stall layout at Indiana Grand Racing.
- 7. Diagram of Barn 7 stall layout at Indiana Grand Racing.
- 8. Aerial Photograph of Barns at Indiana Grand, including Barns 6 & 7.

9. Redacted Day Sheets of Dr. Ross Russell for September 19, 2014 removing identifying information about the treatment of other horses.
10. Transcript of Stewards Hearing on October 31, 2014.
11. Stewards findings and conclusions dated November 19, 2014.
12. ARCI Uniform Classification Guidelines for Foreign Substances with Recommended Penalties and Model Rules, as revised January, 2014. (withdrawn).
13. Barn Walker log sheets for Indiana Grand on September 19, 2014.
14. Industrial Laboratories Certificate of Analysis dated October 3, 2014.
15. Deposition of Dr. Ross Russell, March 30, 2015.
16. Written Statement of Stephanie Burchette dated September 23, 2014.
17. Written Statement of Callie M. Ramey dated September 23, 2014.
18. Written Statement of Joel Villalta dated September 24, 2014.

Commission Staff's Exhibits:

A. Indiana Statutes governing Pari-Mutuel Wagering, found at Title IV, Article 31 of the Indiana Code and Administrative Rules of the Indiana Horse Racing Commission, including, but not limited to:

1. IC 4-31-13;
2. 71 IAC 5.5-1-14;
3. 71 IAC 5.5-3-2;
4. 71 IAC 5.5-3-3;
5. 71 IAC 5.5-3-5;
6. 71 IAC 8.5-1-1.5; and
7. 71 IAC 8.5-1-2;

- B. Redacted 2014 IHRC License Application of Richard Estvanko (removing personal identifying information);
- C. Redacted 2014 IHRC License Application of Anthony Granitz (removing personal identifying information);
- D. Transcript of October 31, 2014 Hearing Before the Board of Stewards with exhibits thereto;
- E. IHRC Ruling Number 14694;
- F. IHRC Ruling Number 14695;
- G. Stewards' Findings and Conclusions in re the Matter of Richard Estvanko and Anthony Granitz, dated November 19, 2014;
- H. September 19, 2014 Indiana Grand "In Today" list;
- I. September 19, 2014 Indiana Grand Program;
- J. Equibase Results Chart for the 6th Race on September 19, 2014 at Indiana Grand;
- K. Indiana Grand Incident Report Number 14-090185, dated September 20, 2014;
- L. Affidavit of Jamie Kolls;
- M. Indiana Grand Barn Map;
- N. Diagram of Indiana Grand Barn 6;
- O. Diagram of Indiana Grand Barn 7;
- P. Aerial view of Indiana Grand Barns 6 and 7;
- Q. Google map aerial photograph of Indiana Grand barn area;
- R. Photograph of Barn 6 (wide view of stalls on southeast side of Barn 6);
- S. Photograph of Barn 6, Stall 61 (face-on view of Stall 61);
- T. Photograph of Barn 6, Stall 61(looking into Stall 61 from right side);

- U. Photograph of Barn 6, Stall 61(looking into Stall 61 from left side);
- V. Photograph of gap between Barns 6 and 7 (taken from southeast side of barns);
- W. Photograph of Barn 7 (wide view of stalls on southeast side of Barn 7);
- X. Photograph of Barn 6 (wide view of stalls on southeast side of Barn 6);
- Y. Photograph of Barn 7, Stall 26 (looking into Stall 26 from left side);
- Z. Photograph of Barn 7, Stall 31 (photographed from interior of stall, looking out);
- AA. Paragraph of Barn 7, Stall 31 (looking into Stall 31 from right side);
- BB. Photograph of Barn 7, Stall 31 (looking into Stall 31 from left side);
- CC. September 19, 2015 Barnwalker Sheets (3 pages) for Kolls relating to Indiana Grand Barns 2, 3, 4, 6, 7, 8 and 9;
- DD. Indiana Grand “In Today” Report dated September 19, 2014;
- EE. IHRC Document titled: “Report Times for Ship-Ins Indiana Grand”;
- FF. Transcript of recorded Statement of Ross Russell, taken October 7, 2014;
- GG. Deposition of Ross Russell, taken March 30, 2015;
- HH. October 28, 2014 letter from Dr. Richard Sams to Joe Gorajec;
- II. Deposition of Kimberly Hammond, taken October 13, 2014;
- JJ. Photo of red-top glass vacutainer blood collection tube;
- KK. Photo of Photo of Tiger-top glass vacutainer blood collection tube;
- LL. Photo of 20 gauge vacutainer needle (pink with red cap);
- MM. Photo of Vacutainer holder (clear);
- NN. Photo of 12 ml syringe in casing (empty);
- 00. Photo of 6 ml syringe in casing (empty);
- PP. Photo of 6 ml syringe filled with yellow liquid, with 18-gauge needle attached;
- QQ. Photo of 12 ml syringe filled with yellow liquid, with 18-gauge needle attached;

RR. Affidavit of Joe Gorajec (with Exhibits) dated June 5, 2015;

SS TT UU

VV. Drawing by Stephanie Burchette during the hearing;

WW. Drawing by Jamie Kolls during the hearing- offered for demonstrative purposes only.

Petitioners' Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 17 were admitted into evidence without objection from the Commission's Staff. Petitioners' Exhibit 2, the transcribed Interview of Jamie Kolls on September 20, 2014 was admitted over the objection of the Commission Staff. Petitioners Exhibits 13, 15, and 16 were not offered into evidence.

Commission Staffs' Exhibits lettered A, B, C, D, E, F, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, RR, VV, WW and XX were admitted into evidence without objection from the Petitioners. Commission Staff Exhibits PP and QQ were admitted for demonstrative purposes over the objection of Petitioners. Exhibit G was withdrawn. Photographs of blown up photographs marked as Exhibits N, O, Q, and XX were offered into the record in lieu of the blown up photographs utilized during the hearing. Color photographs of Exhibits JJ through QQ were offered in lieu of needles, collection tubes, and liquids which were utilized during the hearing.

The original, non-redacted versions of Commission Staff Exhibits A and B, and Petitioners Exhibit 9 were placed under seal and part of the record. The original of Commission Staff Exhibits JJ, KK, LL, MM, NN, OO, PP, and QQ were ordered to be maintained and preserved by the Commission Staff until there is a final resolution of this matter or further order.

### Findings of Facts underlying the Violations

A. Substantial, credible, and reliable evidence support the conclusion that the thoroughbred race horse Tam Tuff received a prohibited injection on race day on September 19, 2014, in violation of 71 IAC 8.5-1-1.5(b).

28. On September 19, 2014, Estvanko and Granitz were licensees of the Indiana Horse Racing Commission. (Joint Exhibit 1; Stipulations 1, 2)

29. Estvanko and Granitz were subject to sanction in the event they “violated or attempted to violate a provision of this article, these rules, or a law or rule with respect to horse racing in a jurisdiction.” (71 IAC 5.5-1-14(b)(4)).

30. On September 19, 2014, 71 IAC 8.5-1-1.5 (b) (1) was in full force and effect which provided in pertinent part:

(b) No substance, foreign or otherwise, shall be administered to a horse entered to race by: (1) injection; . . . within twenty four (24) hours prior to the scheduled post time for the first race except furosemide as provided for in this rule.

31. Estvanko and Granitz responsibilities pursuant to 71 IAC 5.5-3-3(a) included, but were not limited to:

(14) Maintaining a knowledge of the medication record and status of all horses in his or her care; . . .

(26) Guard and protect all horses in his/her care; . . .

(30) Immediately notifying the stewards , or in their absence commission or track security, of any contact a practicing veterinarian or his or her helper has with a horse within twenty-four hours of its scheduled race except for the administration of furosemide in accordance with commission rules.

32. On September 19, 2014, a trainer was required to “prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these rules.” pursuant to 71 IAC 5.5-3-2 (b).

33. On September 19, 2014, an assistant trainer had the “same duties, responsibilities and restrictions as imposed on the licensed trainer” pursuant to 71 IAC 5.5-3-5. “The trainer

shall be jointly responsible for the assistant trainer's compliance with these rules" pursuant to 71 IAC 5.5-3-5,

34. Estvanko and Granitz were further subject to sanctions if they "engaged in conduct that is against the best interest of horse racing or compromises the integrity of operations at a track or satellite facility." (71 IAC 5.5-1-14(b) (10))

35. On September 19, 2014, Granitz was the trainer of record of the 3-year-old filly Tam Tuff. (Joint Exhibit 1; Stipulation 4)

36. Granitz had been a horse trainer for 33 years and was licensed in several racing jurisdictions. (Transcript, p. 266)

37. On September 19, 2014, Estvanko was the assistant trainer of Tam Tuff. (Joint Exhibit 1; Stipulation 5) He was hired by Gravitz approximately four (4) years earlier. (Transcript, Estvanko Testimony, p. 266)

38. On the morning of September 19, 2014, Tam Tuff was housed in Stall 61 of Barn 6 at Indiana Grand. (Joint Exhibit 1; Stipulation 6)

39. Tam Tuff was entered and raced in the sixth race at Indiana Grand on September 19, 2014. (Joint Exhibit 1; Stipulation 10)

40. On September 19, 2014, Tam Tuff placed second in the sixth race at Indiana Grand. Commission Staff Exhibit D (Transcript of October 31, 2014 Hearing Before the Board of Stewards, Exhibit J thereto)

41. Numerous witnesses testified and offered totally different recollections about the location of the events that barn walker Kolls observed on the backside of Indiana Grand on the morning of September 19, 2014.

42. Two diametrically opposite version of events were presented during the testimony and evidence that was presented to the Administrative Law Judge:

- a. Estvanko and Granitz presented the testimony of Burchette, Ramey, and Dr. Russell to support their contention that Commission Staff witness, Jamie Kolls saw Dr. Russell and his assistant, Ramey, in and around Stall 31 of Barn 7 during the morning of September 19, 2014. At that time, Stall 31 housed the racehorse, Moonlight Success, trained by Hammond. Moonlight Success was not scheduled to race at Indiana Grand on September 19, 2014. Therefore, Moonlight Success was not an “in-today” horse that day which would have substantially restricted the access of a licensed veterinarian to that particular animal. 71 IAC 8.5-4-12.
- b. The Commission Staff presented the testimony of Kolls, Villalta, and Thoman to support its contention that the barn walker observed Dr. Russell injecting Tam Tuff, a horse trained by Estvanko and Granitz, in Stall 61, Barn 6, which was scheduled to race that same evening. Tam Tuff was an “in-today” horse that was prohibited from having unrestricted contact with a licensed veterinarian and/or a race day injection of any substance other than furosemide. Furosemide could only be administered under controlled circumstances in the presence of track security commonly known as a “vet shadower”.

43. The two completely opposite versions of events presented during the hearing varied so significantly that they cannot be reconciled. Accordingly, ALJ Pylitt was required to accept one version of the events to the exclusion of the other.



44. Based upon substantial, credible, and reliable evidence, Jamie Kolls observed Dr. Russell inject an “in-today” horse Tam Tuff between 10:00 and 11:00 o'clock a.m. on September 19, 2014, in and around Barn 6, Stall 61 at Indiana Grand.

**B. The version of events from the witnesses and testimony offered by Estvanko and Granitz (other than Dee Thoman) lacked credibility and reliability.**

45. Estvanko and Granitz have the greatest interest in the outcome of the proceedings.

46. Estvanko was in Barn 6 from 10:00 a.m. to 10:27 a.m. on September 19, 2014 other than going out to the “manure bins and stuff” but did not see Dr. Russell. (Transcript<sup>1</sup>, Estvanko Testimony, pp. 257-258)

47. Neither Estvanko or Granitz had an ownership interest in Tam Tuff on September 19, 2014.

48. There is no evidence that Estvanko or Granitz specifically directed Dr. Russell to inject Tam Tuff on September 19, 2014.

49. Granitz, was out of state at Keeneland on September 19, 2014, and was not summarily suspended. (Commission Staff Exhibit G, Stewards’ Findings and Conclusions November 19, 2014, p. 1).

Dr. Russell’s Testimony:

50. Dr. Russell was a licensed vet at Indiana Grand from 2011 until September 20, 2014. (Transcript, Dr. Russell Testimony, p. 146)

51. During 2014, Dr. Russell provided veterinary services to horses stabled at Indiana Grand, including horses trained by Estvanko, Granitz and Kimberly Hammond.

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<sup>1</sup> The testimony at the hearing before ALJ Pylitt on June 23 and 24, 2015 will be referenced in this Recommended Order as “Transcript”.

52. Dr. Russell faces disciplinary proceeding that partially involves the underlying events at issue in this matter. A ruling exonerating the Petitioners would help his own disciplinary case. (Transcript, Dr. Russell Testimony, p. 214).

53. At some time during the morning of September 19, 2014, Dr. Russell drew blood from two horses trained by Hammond located in Barn 7, Stall 31 (Moonlight Success) and Barn 7, Stall 26 (the Cubs Success).

54. Immediately after drawing blood from those two horses, Dr. Russell administered jugs to two horses trained by Hammond located in Barn 7, Stall 37 (Indiana Rodey) and Barn 7, Stall 43 (Will Gracie Shine).

55. No treatment sheets for these two horses were offered into evidence.

56. Dr. Russell and his assistants were all in a “very big rush” that morning. (Transcript, Ramey Testimony, p. 117; Transcript, Dr. Russell Testimony, p. 181) There was a Cobalt meeting scheduled at 11o'clock that morning and they were trying to push in as much as possible. (Transcript, Ramey Testimony, p. 103)

57. Dr. Russell administered multiple injections in eight different barns on the back side at Indiana Grand over an 11 minute period during the afternoon of September 19, 2014. (Transcript, Dr. Russell Testimony, pp. 181-185) (Summary Demonstrative Exhibit)

58. Dr. Russell’s Day Sheet for September 19, 2014 were admitted into evidence as Petitioners Exhibit 9. (Transcript, Burchette Testimony, pp. 26, 28-29,36-37,57,74,78-79, 81-84; Transcript, Dr. Russell Testimony, pp. 139-143). The time entries were not entered in any logical order. Day Sheets were clearly not filled out as treatments were completed. Burchette began logging information on the September 19, 2014 Day Sheet around 9:00 a.m. (Transcript,

Burchette Testimony, pp. 27-28) Burchette also transferred times from treatment sheets later in the day. (Transcript, Burchette Testimony, p. 36)

59. Dr. Russell had no issue with or any significant interaction with barn walker Kolls prior to the morning of September 19, 2014. (Commission Staff Ex. GG, Deposition of Dr. Russell taken March 30, 2015, p. 62)

60. Dr. Russell denies ever injecting an in-race horse with any substance other than Lasix. (Transcript, Dr. Russell Testimony, p. 175)

Stephanie Burchette's Testimony:

61. On September 19, 2014, Stephanie Burchette was employed as a Vet Assistant by Russell Equine Sports Management ("RESM"), a LLC owned by Dr. Russell and his wife, Sarah. (Transcript, Burchette Testimony, p. 22; Transcript, Dr. Russell Testimony, pp. 175-176)

62. Following Dr. Russell's summary suspension by the Stewards on September 20, 2014, Burchette was paid \$400 per week until the end of the meet in November 2014 even though she and Dr. Russell were banned from Indiana Grand. (Transcript, Burchette Testimony, pp. 64-66) She also was given \$250 for gas money to drive to Florida after the meet to continue working for Dr. Russell.

63. The "Sworn Affidavit of Events"<sup>2</sup> she signed in September 2014 was typed by Sarah, included information that was provided to her by others, and was not made based upon her own personal knowledge. (Transcript, Burchette Testimony, pp. 74-75) By submitting her Affidavit, Burchette was hopeful that Dr. Russell's summary suspension would be removed and she would be able to continue her work with RESM.

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<sup>2</sup> The purported "Sworn Affidavit of Events" is not a proper Affidavit since it is not sworn to or made under the penalties for perjury. Ramey and Villalta signed similarly deficient Sworn Affidavits of Events.

64. At the time of the hearing, Burchette was the Practice Manager for Dr. Russell at RESM. (Transcript, Burchette Testimony, p. 65)

65. Dr. Russell and Burchette maintained a log containing columns to record which horses, trainer, stall, treatment provided, as well as the time for each horse in a given day which they called "Day Sheets". (Transcript, Burchetter testimony, pp. 20-21)

66. Burchette began logging information on the September 19, 2014 Day Sheet around 9:00 a.m. (Transcript, Burchette Testimony, pp. 27-28)

67. The time entries were not entered in any logical order. Day Sheets were not filled out as treatments were completed. Burchette occasionally entered time in the car and also transferred times from treatment sheets later in the day. (Transcript, Burchette Testimony, pp. 36-37)

68. The September 19, 2014 Day Sheet failed to reflect that Dr. Russell attended the Cobalt meeting at 11:00 a.m., was called away for an emergency around 11:15 a.m., left the Indiana Grand grounds with Ramey, and returned approximately 90 minutes later.

69. Prior to September 19, 2014, Dr. Russell produced treatment records to the Commission's investigators who determined that his records were lacking since they did not contain times or detailed explanations of treatment recorded. (Transcript, Burchette testimony, p. 86) After that, they took steps to make sure the records were accurate.

70. On September 19, 2014, Burchette and Dr. Russell could get from Barn 6 to Barn 7 in about 20 seconds. "It's not a very long walk." (Transcript, Burchette Testimony, pp.79-80)

Callie Ramey Testimony:

71. She was employed as a Vet Assistant by RESM from June to September 2014. (Transcript, Ramey Testimony, p. 90-91) Initially, she gave misleading testimony that she was a vet tech which requires special credentials. (Transcript, Ramey Testimony, pp. 90, 111)

72. Ramey had been to Dr. Russell's house, attended a concert with his wife, and her children had played with Dr. Russell's children. (Transcript, Ramey Testimony, p. 133; Commission Staff Exhibit D, Transcript of October 31, 2014 Hearing Before the Board of Stewards, p. 124)

73. Following Dr. Russell's summary suspension by the Stewards on September 20, 2014, Ramey was also paid through the end of the meet even though she and Dr. Russell were banned from Indiana Grand. (Transcript, Ramey Testimony, pp. 111-112)

74. Ramey was hopeful that Dr. Russell's summary suspension would be removed and she would be able to continue her work with RESM. (Transcript, Ramey Testimony, p. 112)

75. On September 19, 2014, Ramey and Dr. Russell could get from Barn 6 to Barn 7 in about 20 seconds. (Transcript, Ramey Testimony, p. 131)

76. Ramey testified that her interaction with Kolls took place between 10:00 a.m. and 10:15 a.m. while Burchette was at the truck pulling vitamin jugs. (Transcript, Ramey Testimony, p. 101)

Christina Estvanko's Testimony:

77. She is, and was during September 2014, married to Richard Estvanko. (Transcript, Christina Estvanko Testimony, p. 233) The Estvanko family income is dependent upon Estvanko's ability to train horses. (Transcript, Christina Estvanko Testimony, p. 245)

Christina Estvanko had previously been employed by RESM and considered Dr. Russell a “close friend”. (Transcript, Christina Estvanko Testimony, pp. 245-246)

78. Christina Estvanko gave misleading testimony during the hearing that she was a vet tech. However, on cross-examination she admitted that she was not truthful since a Vet Tech required special training which she did not have. (Transcript, Christina Estvanko Testimony, p. 245)

79. Christina Estvanko was in Barn 6 on September 19, 2014 at 10:12 a.m. but did not see Dr. Russell. (Transcript, Christina Estvanko’s Testimony, p. 240)

80. Christina Estvanko was summarily suspended by the Stewards during 2014 for calling Kolls a “whore” and a “stupid bitch”, after Kolls was identified as the barn walker who witnessed Tam Tuff being injected on race day.

81. Christina Estvanko’s license is probationary. (Transcript, Christina Estvanko Testimony, p. 249)

Kimberly Hammond’s Testimony:

82. Hammond was the trainer of the horse, Moonlight Success, which was housed in Stall 31 of Barn 7 during the morning of September 19, 2014. Hammond considered Dr. Russell a friend since she was the recipient of a “huge favor” when he treated a colt at her farm on the evening of September 18, 2014. (Transcript, Hammond Testimony, p. 366)

83. During her earlier deposition, Hammond testified that she would “help Dr. Russell anyway [she] could.” (Transcript, Hammond Testimony, p. 367-368.)

84. Hammond was not at Indiana Grand, or in or around Barn 7, on September 19, 2014 (Transcript, Hammond testimony, p. 368) and therefore had no way of knowing what time a blood draw occurred in Barn 7. (Transcript, Hammond testimony, pp. 368-369)

85. On September 24, 2014, Hammond met with her groom, Joel Villalta, and handed him a “Sworn Affidavit of Events” which contained a misspelling of Villalta’s last name. The “Sworn Affidavit of Events” was in English. (Transcript, Hammond Testimony, p. 372; Transcript, Villalta Testimony, p. 224) Hammond spoke no Spanish and Villalta spoke very limited English. (Transcript, Hammond Testimony, p. 369; Transcript, Villalta Testimony, pp. 222-223) Villalta had not discussed this incident with Hammond or Dr. Russell prior to that time. (Transcript, Villalta Testimony, p. 225) Hammond advised Villalta to sign the Affidavit, which he did. (Transcript, Villalta Testimony, p. 225)

86. During her prehearing deposition, Hammond testified that she did not know where the “Sworn Affidavit of Events” she had given Villalta to sign had come from or even if she had presented it to him for signature. Nine months later, during the hearing, she testified that she “recently remembered” that she obtained the unsigned version of the “Sworn Affidavit of Events” from Dr. Russell. (Transcript, Hammond Testimony, p. 371)

87. The “Sworn Affidavit of Events” signed by Burkette, Ramey, and Villalta were all prepared by or for Dr. Russell.

88. Koll’s direct supervisor, Dee Thoman (“Thoman”) was Subpoenaed as a witness for Petitioners and had no interest in the outcome of the proceedings. Her testimony corroborated Koll’s version of events.

**C. Substantial, credible, and reliable evidence and testimony support the version of events presented by the Commission Staff.**

Jamie Koll’s Testimony:

89. On September 19, 2014, Kolls was a barn walker employed by Indiana Grand. She was not an employee or representative of the Commission or the Commission Staff. (Transcript, Kolls Testimony, p. 302; Transcript, Thoman Testimony, p. 410)

90. Kolls became a barn walker in mid-July 2014. (Transcript, Thoman Testimony, p. 410)

91. As a barn walker, Kolls would check on “in-today” horses. (Transcript, Kolls Testimony, p. 302)

92. Kolls received little or no training prior to assuming her role as a barn walker.

93. On September 19, 2014, Kolls did not personally know Dr. Russell (Petitioners Ex. 4, Deposition of Jamie Kolls dated October 6, 2014, p. 3) but she knew who he was from previously seeing him in the receiving barn.

94. Dr. Russell had no issue or any significant interaction with Kolls prior to September 19, 2014. (Commission Staff Ex. GG, Deposition of Dr. Russell taken March 30, 2015, p. 62)

95. On September 19, 2014, Kolls worked the 10 a.m. to 4 p.m. shift. (Transcript, Kolls Testimony, p. 303) The weather was nice. When Kolls arrived that morning she went to the stable gate and received her “round sheets” for the day which identified the “in-today” horses (Transcript, Kolls Testimony, pp. 303-304) and a walkie-talkie radio. (Transcript, Kolls Testimony, pp. 333-334)

96. The first barn on Kolls route for the day was Barn 6. (Transcript, Kolls Testimony, pp. 305-306) Kolls first visited Barn 6 “in-today” stalls 9 and 18. (Transcript, Kolls Testimony, p. 306) There is a breezeway/walkway located in the middle of Barn 6. Kolls then walked through this breezeway. (Transcript, Kolls Testimony, p. 307)

97. Kolls first passed Stall 61 in Barn 6 at 10:12 a.m. (Transcript, Kolls Testimony, p. 305)



98. Within 12 minutes after beginning her duties, Kolls saw a blonde girl with a clipboard outside of Stall 61 of Barn 6. She later identified a photograph of this person as Callie Ramey. (Transcript, Kolls Testimony, p. 317) As she approached the stall, Kolls felt that Ramey was acting "suspicious". (Transcript, Kolls Testimony, pp. 310-311) Ramey was clearly annoyed that she had been approached by Kolls. (Transcript, Kolls Testimony, p. 303) Kolls asked her whether she needed a vet shadower. (Transcript, Kolls Testimony, pp. 311, 317-318) Ramey was short with Kolls, and her body language uninviting, so Kolls left after watching the first injection. (Transcript, Kolls Testimony, p. 318)

99. At almost the same time, Kolls saw Dr. Russell entering Stall 61 of Barn 6 with two syringes. One contained a yellow fluid. (Transcript, Kolls Testimony, pp. 307, 310, 311-314)

100. As she stood within four feet of the stall, Kolls observed Dr. Russell administering a shot into the neck of the horse in the stall. (Transcript, Kolls Testimony, p. 313). She was confident that she saw Dr. Russell with needles and syringes that were not the type of serum separator tube that she was shown at the hearing. (Transcript, Kolls Testimony, p. 315) The needles and syringes contained a yellow liquid and did not contain red blood. (Transcript, Kolls Testimony, pp. 313-314)

101. The equipment used by Dr. Russell for drawing blood looked different than a loaded syringe. (Transcript, Burchette Testimony, p. 78) In addition, the process of drawing blood was different than the process of administering an injection. (Transcript, Ramey Testimony, pp. 130-131)

102. If a person were to observe Dr. Russell drawing blood, they would see the tube filling up quickly with the bright red substance. (Transcript, Ramey Testimony, p. 130)

103. It only takes 30-40 seconds for Dr. Russell to draw a blood sample. (Transcript, Russell Testimony, p. 163)

104. There was a man whom Kolls could not see standing behind the horse in Stall 61 of Barn 6 who was speaking English and did not have an accent. (Transcript, Kolls Testimony, pp. 308, 310, 317)

105. Kolls was confident that she had seen Ramey and Dr. Russell in and around Stall 61 of Barn 6, and not in Barn 7, on September 19, 2014. (Transcript, Kolls Testimony, p. 320)

106. Kolls was “absolutely positive” she saw Dr. Russell injecting a horse in Stall 61 of Barn 6 on the morning of September 19, 2014 and not withdrawing blood. (Transcript, Kolls Testimony, pp. 323 and 339)

107. On September 19, 2014, Kolls finished her last round at 3:26 p.m. (Transcript, Kolls Testimony, p. 333)

108. Kolls’ lack of training in how and when to report suspicious activity around “in-today” horses is irrelevant to the outcome of this hearing and does not serve as a defense to the allegations against Estvanko and Granitz.

109. Kolls testimony was credible and believable.

Dee Thoman’s Testimony:

110. Thoman was employed as a Security Shift Supervisor at Indiana Grand on September 19, 2014. (Transcript, Thoman Testimony, p. 395)

111. When Kolls reported to work the day following September 19, 2014, she reported the incident to Thoman as her direct supervisor. (Transcript, Kolls Testimony, p. 320; Thoman Testimony, pp. 396-397.) Kolls told Thoman that she had seen Dr. Russell giving some sort of an injection to an in-today horse. (Transcript, Thoman Testimony, pp. 396-397)

112. During the afternoon of September 19, 2014, Thoman was responsible for “shadowing” Dr. Russell. She did not complete her shadowing of Dr. Russell until about around 4:42 p.m. after Kolls had left for the day.

113. As the vet shadower she recorded the actual and official time that Dr. Russell administered Lasix. (Transcript, Thoman Testimony, p. 415)

114. Although Kolls did not report seeing Dr. Russell in Barn 6 on the morning of September 19, 2014, she did ask Thoman as her direct supervisor, about the significance of what she had seen the very next time that she saw her. (Transcript, Thoman Testimony, pp. 414-416)

115. Kolls told Thoman that the encounter had taken place in Bunny’s barn. Bunny was a gentleman who worked in Barn 6. (Transcript, Thoman testimony, p. 412)

116. Kolls told Thoman she was positive this had taken place in Stall 61 of Barn 6. (Transcript, Thoman Testimony, p. 413)

117. Thoman told Kolls that this was an extremely serious allegation and that she wanted to walk the route with Kolls so she could “be one hundred percent sure of what she saw and where she saw it. (Transcript, Thoman Testimony, p. 397)

118. On September 20, 2014, Thoman and Kolls walked the circumference of Barns 6 and 7 on two successive trips. (Transcript, Thoman Testimony, p. 400)

119. After the two walked a couple times around Barns 6 and 7, Thoman went to the security office at the stable gate to get a blank incident report and took it to Kolls to fill out in the Receiving Barn where she was working that morning. (Transcript, Thoman Testimony, pp. 399-400, 402). Thoman helped Kolls fill out the first page but did not assist her with the second page of the report, which Kolls filled out on her own. (Transcript, Thoman Testimony, p. 404,405;

Transcript, Kolls Testimony, pp. 322-323; Commission Staff Exhibit K., Indiana Grand Incident Report Number 14-090185, dated September 20, 2014 ).

120. Kolls narrative in the incident report was consistent with what Thoman had been told by Kolls earlier that morning. (Transcript, Thoman Testimony, p. 404)

121. The substantial, credible and reliable testimony supports the conclusion that Kolls observed Dr. Russell inject the in-today horse Tam Tuff injected with a substance other than furosemide in Barn 6, Stall 61 on September 19, 2014.

Joel Villalta's Testimony:

122. Since Villalta does not speak English fluently, an Indiana Supreme Court approved translator provided translation throughout his testimony before ALJ Pylitt.

123. Villalta did not have a personal relationship with Dr. Russell nor an interest in the proceedings that would call into question the veracity of his testimony.

124. On the morning of September 19, 2014, Villalta's boss, trainer Kimberly Hammond was not at Indiana Grand and therefore not in or around Barn 7. (Transcript, Hammond Testimony, p. 368.)

125. On September 19, 2014, Hammond spoke no Spanish and Villalta spoke very little English. (Transcript, Villalta Testimony, pp. 222-223)

126. On September 24, 2014, Hammond met with Villalta alone, handed him a "Sworn Affidavit of Events" (Petitioners Exhibit 17), which was completely in English, and told him he "needed to sign it". (Transcript, Villalta Testimony, p. 224)

127. Villalta had not discussed the underlying incident with Hammond or Dr. Russell prior to meeting with Hammond on September 24, 2014 to sign his Affidavit. (Transcript,

Villalta Testimony, p. 225) Hammond had no way of knowing where Villalta had been or what he had observed on the morning of September 19. (Transcript, Villalta Testimony, p. 225)

128. Villalta clearly did not understand the substance of the Affidavit that he was asked to sign when it was presented by his former boss Hammond.

129. Villalta consistently testified that he was **not** in Stall 31 of Barn 7 where Dr. Russell claims Villalta was present and holding Moonlight Success while he was drawing blood on the morning of September 19, 2014.

130. Villalta was standing five stalls away from Dr. Russell when Dr. Russell was taking blood from Moonlight Success. (Transcript of October 31, 2014 Stewards Hearing, Commission Staff Exhibit D, p. 145).

131. Villalta was not in the stall at the time that blood was drawn by Dr. Russell on the morning of September 19, 2014. (Transcript of October 31, 2014 Stewards Hearing, Commission Staff Exhibit D, p. 146).

132. Villalta did not hold a horse when Dr. Russell drew blood on September 19, 2014. (Transcript of October 31, 2014 Stewards Hearing, Commission Staff Exhibit D, p. 148).

133. Villalta never held any horse while Dr. Russell drew blood (Transcript of October 31, 2014 Stewards Hearing, Commission Staff Exhibit D, p. 148):

a. “Q· I want to be very clear about this, Joel. Isn’t it true that on the morning of September 19, 2014 that you were never in Barn 7, Stall 31 holding a horse for Doctor Russell while he pulled blood from the horse in that stall?

A· I was never in that stable.

Q· All right· And, in fact, during that morning, you were never in any stall in Barn 7 holding a horse for Doctor Russell while he pulled blood from a horse, were you?

A· No.”

(Transcript, Villalta Testimony, p. 226; *Emphasis Added*);

- b. Villalta was in the middle of the barn in Stall 37 while Dr. Russell claimed Villalta was holding a horse that he was pulling blood in Stall 31 on the morning of September 19, 2014. (Transcript, Villalta Testimony, pp. 227-228)

134. Villalta's testimony was credible and believable despite being in direct conflict with the testimony of Dr. Russell, Burchette, and Ramey, all who claim that Villalta was physically present in Stall 31 of Barn 7 holding the horse at the time Dr. Russell was allegedly drawing blood from Moonlight Success. (Transcript, Dr. Russell Testimony, pp. 155-156; Exhibit 7 to Commission Staff Exhibit GG, Deposition of Ross Russell taken March 30, 2015; Transcript, Burchette Testimony, p. 42; Commission Staff Exhibit VV; Transcript, Ramey Testimony, pp. 97, 99, 120, 127; Commission Staff Exhibit WW)

135. Villalta was the only disinterested witness who testified that he was not in Stall 31 of Barn 7 while Dr. Russell was drawing blood from Moonlight Success the morning of September 19, 2014.

136. Dr. Russell's treatment records for blood draws on Kimberly Hammond's horses, including Moonlight Success, on September 19, 2014 were not offered into evidence.

137. Substantial, credible, and reliable testimony support the conclusion that the interaction between Ramey, Dr. Russell and Kolls during the morning of September 19, 2014 did not take place in or around Stall 31 of Barn 7, but instead took place in and around Stall 61 of Barn 6.

138. Estvanko and Granitz' witnesses' versions of events on September 19, 2014 defy common sense:

- a. Dr. Russell had been under investigation by the Commission Staff for two months prior to the September 19, 2014 incident in Stall 61 of Barn 6. (Commission Staff Exhibit RR, Affidavit of Joe Gorajec with exhibits dated June 5, 2015; Transcript, Burchette Testimony, p.80, 85; Transcript, Ramey Testimony, p. 134) “[W]e were pretty aware that we had a close eye on us.” (Transcript, Burchette Testimony, p. 85)
- b. On September 19, 2014, Dr. Russell understood that he would be in trouble with the regulatory authorities if he even walked into the stall of an “in-today” horse without a vet shadower. (Transcript. Dr. Russell Testimony, p. 211)
- c. Had Dr. Russell been drawing blood from Moonlight Success, he and/or his assistant could have clarified the situation and advised the barn walker that it was not an “in-today” horse. (Transcript, Ramey Testimony, pp. 135-136; Transcript, Dr. Russell Testimony, p. 211), particularly after the barn walker asked whether he needed a vet shadower.

139. The testimony from several witnesses called on behalf of Estvanko and Granitz included other factual discrepancies which could not be reconciled, thereby calling into question those witnesses’ credibility:

- a. Ramey was picked up at the trailer by Burchette around 9:00 a.m. on September 19, 2014. (Transcript, Burchette Testimony, p. 32) Burchette and Ramey both testified that Dr. Russell was not in the car with them. (Transcript, Burchette Testimony, pp. 32, 34, 35; Transcript, Ramey Testimony, pp. 93-113) Dr. Russell “believed” he was in the car when

Ramey was picked up. (Transcript, Dr. Russell Testimony, p. 152, 179-181)

- b. Dr. Russell's Day Sheet for September 19, 2014 was admitted into evidence as Petitioners Exhibit 9. (Transcript, Burchette Testimony, pp. 26, 28-29, 36-37, 57, 74, 78-79, 81-84; Transcript, Dr. Russell Testimony, pp. 139-143). The time entries were not recorded in any chronological order. The Day Sheet was not filled out in real time as treatments were completed. Burchette began logging information on the September 19, 2014 Day Sheet around 9:00 a.m. (Transcript, Burchette Testimony, pp. 27-28)
- c. Burchette also transferred times from treatment sheets to the Day sheet later that day. (Transcript, Burchette Testimony, pp. 36-37)
- d. There was a 28 minute gap on the Day Sheet between the time that they treated the last horse in Carolyn Murphy's Barn (Barn 10, Stall 7 at 9:52 a.m.) and the time recorded for the blood draw for Moonlight Success in Barn 7, Stall 31 at 10:20 a.m. (Petitioners Exhibit 9)
- e. Burchette and Ramey agree that they could get from Barn 6 to Barn 7 with Dr. Russell in about 20 seconds. (Transcript, Burchette Testimony, pp. 79-80; Transcript, Ramey Testimony, p. 131)
- f. Ramey and Dr. Russell were in a "very big rush" during the morning of September 19, 2014. (Transcript, Ramey Testimony, p. 117; Transcript, Dr. Russell Testimony, p. 181) There was a cobalt meeting scheduled at



11o'clock that morning and they were trying to push in as much as possible. (Transcript, Ramey Testimony, p. 103)

- g. When asked at his deposition whether there was ever a point on the morning of September 19 that his truck was behind Barns 5, 6 or 7, Dr. Russell testified that when he was in a hurry to get from the new barns (Barns 10-12 and 14) to the barns on the other side that he "would take the back way where [he] didn't have to drive through the main row where the horses were." (Commission Staff Exhibit G, Deposition of Dr. Russell taken on March 30, 2015, pp. 42-43. Russell and Ramey acknowledged that there was less traffic, less congestion and less horses in that passageway. (Commission Staff Exhibit G, Deposition of Dr. Russell taken on March 30, 2015, p. 49; Transcript, Ramey Testimony, p. 118). Ramey acknowledged that the use of the "field side" roads would allow them to get closer to the stalls of the horse on that side of the barns. (Transcript, Ramey Testimony, pp. 116-117; Transcript, Thoman Testimony, pp. 419-420).
- h. Despite the fact that they were in a "very big rush" that morning, Dr. Russell claims to have taken an alternate route to reach the Hammond stalls (all on the "field side" of Barn 7) on the morning of September 19, 2014. (Exhibit 5 to Commission Staff Exhibit G, Deposition of Dr. Russell taken on March 30, 2015). In conflict with his deposition testimony, Russell testified that about 99% of the time he did not use the field side roads during the morning.

- i. Burchette claims to have seen the alleged interaction between Ramey and the barn walker in Barn 7. (Transcript, Burchette Testimony, p. 44) According to Ramey's testimony, Burchette turned around into the breezeway to return to the truck before this would have taken place and would not have been able to witness what she claims to have seen. (Transcript, Ramey Testimony, pp. 121-122)
- j. During the treatment of Hammonds' horses on the morning of September 19, 2014, Ramey and Dr. Russell claim that Dr. Russell's truck was in front of Barn 7 in a different location than Burchette. (Transcript, Burchette Testimony, pp. 76-77; Transcript, Ramey Testimony, pp. 96-97; Exhibit 6 to Commission Staff Exhibit G, Deposition of Dr. Russell taken on March 30, 2015)
- k. Burchette and Dr. Russell testified that Villata was assigned to the horses in Hammond Stalls 31 and 26 in Barn 7 on September 19, 2014, where they claimed to be drawing blood from Hammond's horse. (Transcript, Burchette Testimony, pp. 45-46; Transcript, Dr. Russell Testimony, p. 155) According to Burchette, Ramey held the horses that vitamin jugs were administered to after the blood draws had been completed. (Transcript, Burchette Testimony, pp. 45-46) Villalta, however, indicated that a "crazy" horse in Stall 43, Will Gracie Shine, was assigned to him that day and that he held that horse while Dr. Russell administered the vitamin jug. (Transcript, Villalta Testimony, pp. 226-227)

- l. Dr. Russell administered multiple injections in eight different barns on the back side at Indiana Grand over an 11 minute period during the afternoon of September 19, 2014. (Transcript, Dr. Russell Testimony, pp. 181-185) (Summary Demonstrative Exhibit)
- m. According to the official records, Lasix was legally administered to Tam Tuff by Dr. Russell at 3:19 p.m. on September 19, 2014. Lasix was legally administered by Dr. Russell 4 minutes later in Barn 7 to Loving Way. (Commission Staff Exhibit DD)

140. Burchette's explanation about the times recorded on the Day Sheet for September 19, 2014 (Petitioners Exhibit 9), as well as the times recorded, lack any credibility or trustworthiness based, in part, upon the following facts:

- a. Dr. Russell circled and numbered each page of his Day Sheets at the top left corner to keep the information sequential and to make sure that they did not accidentally get lost. (Transcript, Burchette Testimony, p. 81). However, the entries made by Burchette were not chronological. For example, she made the following entries listing times for sequential treatment on page 8 as 1:50, 3:00, 2:00, 2:15, 3:23, 1:42, 3:42, 3:35, 2:50, and 3:22.
- b. Dr. Russell treated 104 horses on September 19, 2014 during a very busy day.
- c. The Day Sheet failed to list the Stall and Barn number for most of the horses treated.

- d. There is a 28 minute gap on the Day Sheet between the time Dr. Russell treated the last horse in Carolyn Murphy's Barn (Barn 10, Stall 7 at 9:52 a.m.) and the time recorded for the alleged blood draw of Moonlight Success in Barn 7, Stall 31 at 10:20 a.m.
- e. There are no entries between 10:45 a.m. and 1:50 p.m.
- f. The Day Sheet fails to reflect that Dr. Russell and his two assistants attended the Cobalt meeting at 11:00 a.m., Dr. Russell was called away for an emergency around 11:15 a.m., he then left the Indiana Grand grounds with Ramey, and returned approximately 90 minutes later.
- g. The Day Sheet erroneously indicates that Dr. Russell gave Tam Tuff Lasix at 6:45 p.m. while official track records clearly indicate that Lasix was administered at 3:19 p.m. in Barn 6.
- h. The Day Sheet erroneously indicates that Dr. Russell gave Tam Tuff Lasix after administering it to Loving Lady, while official track records prove that Loving Lady was administered Lasix at 3:23 p.m., four minutes after Tam Tuff, in Barn 7, including travel time, between Barn 6 and Barn 7, according to Ramey. (Transcript, Ramey Testimony, p. 132)

141. Since it is undisputed that during September 2014, Dr. Russell and his assistants traveled between Barns 6 and 7 in 20 seconds, there was sufficient time for him to have been in Stall 61, Barn 6 with Tam Tuff between 10:00 a.m. and 10:20 a.m. on September 19, 2014.

Laboratory Testing of Tam Tuff's Blood and Urine:

142. After the sixth race on September 19, 2014, blood and urine samples were taken from Tam Tuff. (Joint Exhibit 1, Stipulation 17)

143. LGC Science Laboratory (“LGC”) was an official testing lab for the Indiana Horse Racing Commission from March through September 2014. (Transcript, Dr. Sams Testimony, pp. 280 and 294)

144. LGC tests samples for racing commissions that are collected from horses. (Transcript, Dr. Sams Testimony, pp. 279 and 280)

145. LGC’s contract with the Indiana Horse Racing Commission was terminated in September, 2014 since it was unable to keep up with the sample load. (Transcript, Dr. Sams Testimony, p. 293) It was not terminated for quality reasons or lack of integrity of test results. (Transcript, Dr. Sams Testimony, p. 299)

146. Dr. Sams served as the Scientific Director of LGC during 2014. (Transcript, Dr. Sams Testimony, p. 279)

147. Dr. Sams is qualified by training and experience to issue expert opinions with respect to this matter. (Joint Exhibit 1; Stipulation 22)

148. Dr. Sams described the testing methods employed by LGC and the limitations as to substances chosen by LGC to be tested for. (Commission Exhibit HH, Transcript, Dr. Sams Testimony, pp. 283, 284, 285, and 289)

149. There are substances that will not be detected because they disappear from the blood and urine samples at such a rapid rate that they decompose before testing occurs. (Transcript, Dr. Sams Testimony, p.284)

150. Designer drugs are synthetic substances produced in laboratories with little knowledge about their chemical makeup thereby making them incapable of being detected. (Transcript, Dr. Sams Testimony, pp. 290-291)

151. Dr. Sams further acknowledged “that we have attempted to add substances to this data base, as we become aware of them, but there are designer drugs and other substances that we have not added to the database because we are not aware of them”. (Commission Exhibit “HH”, p. 2; Transcript, Dr. Sams Testimony, p. 290)

152. A negative test is not definitive proof that a horse was not improperly injected on race day. “It is incorrect to assume that a report of no significant finding for a blood or urine sample submitted for analysis is proof that no drugs were administered to the horse from which the samples were collected.” Numerous substances could have been administered to the horse. (Commission Staff Exhibit HH, October 28, 2014 letter from Dr. Sams to Gorajec; Transcript, Dr. Sams Testimony, pp. 281-283, 283-285, 288)

153. Dr. Scot Waterman is a Veterinarian employed as an animal medical and welfare advisor for the Arizona Department of Racing. (Transcript, Dr. Waterman Testimony, p. 378)

154. Dr. Waterman’s employment includes review of laboratory testing results. (Transcript, Dr. Waterman Testimony, p. 379)

155. Dr. Waterman is also a contract consultant with the Indiana Horse Racing Commission. (Transcript, Dr. Waterman Testimony, p. 378)

156. Dr. Waterman was tendered as an expert (with no objection from Petitioners) in the field of equine medicine as it relates to horse racing. (Transcript, Dr. Waterman Testimony, p. 380)

157. According to Dr. Waterman, “Unfortunately, there are substances that are available that we simply do not have testing methods for.” (Transcript, Dr. Waterman Testimony, p. 381)

158. Not all prohibited substances administered to race horses test positive. (Transcript, Dr. Waterman Testimony, p. 381)

159. Industrial Laboratories in Colorado currently serves as the official lab for the Commission.

160. Testing conducted by Industrial Laboratories did not indicate the presence of any foreign substances in the samples obtained from Tam Tuff on September 19, 2014.

161. Tam Tuff raced on some unknown date “probably 30 days” after September 19, 2014 and finished first. (Transcript, Granitz Testimony, p. 269) Granitz was not informed of any negative post-race result. (Transcript, p. 270) However, no evidence was offered as to the date, location or outcome of that race.

162. The administration to a horse of any substance, other than furosemide, on race day is a violation of the rules of pari-mutuel racing. 71 IAC 8.5-1-1.5(b)

163. At some time between the hours of 10 a.m. and 11 a.m. on September 19, 2014, Dr. Russell injected the thoroughbred filly Tam Tuff with an unidentified substance other than furosemide in Stall 61 of Barn 6.

**D. Substantial, credible, and reliable evidence support the conclusion that a practicing veterinarian made prohibited contact with the thoroughbred race horse Tam Tuff on September 19, 2014, in violation of 71 IAC 8.5-4-12 and that Estvanko and Granitz failed to discharge their responsibilities as trainer and assistant trainer pursuant to 71 IAC 5.5-3-3.**

164. The ALJ incorporates by reference the facts previously found in paragraphs 28 through 163 of this Recommended Order.

165. On September 19, 2014, Estvanko and Granitz, as trainer and assistant trainer of the horse Tam Tuff, were required to “guard and protect” all horses in their care from unauthorized contact pursuant to 71 IAC 5.5-3-3(a)(26).

166. On September 19, 2014, practicing veterinarians and their helpers were prohibited from having contact with a horse within twenty-four (24) hours of a scheduled race with the exception of the administration of furosemide pursuant to 71 IAC 8.5-4-12.

167. In addition, on September 19, 2014, Estvanko and Granitz were obligated to “immediately” notify the Stewards of any unauthorized contact of a veterinarian with an in-today horse. 71 IAC 5.5-3-3(a)(30).

168. A practicing veterinarian was present in the stall of Tam Tuff within twenty-four hours of its race on September 19, 2014, and that Estvanko and Granitz failed to fulfill the obligations imposed upon them by 71 IAC 5.5-3-3.

#### CONCLUSIONS OF LAW

169. ALJ Pylitt has jurisdiction over this matter pursuant to his appointment by the Commission and the provisions of I.C. 4-21.5 et seq. and 71 IAC 10-3-7.

170. The Commission has promulgated rules, consistent with its legislative directive, that provide for the assessment of sanctions, including license suspension, revocation and/or fines to those who impermissibly medicate race horses on race day.

171. On September 19, 2014, Estvanko was a licensee of the Indiana Horse Racing Commission, and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.

172. On September 19, 2014, Granitz was a licensee of the Indiana Horse Racing Commission, and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.



173. Since Estvanko and Granitz requested that the Commission set aside the Stewards' Findings and Conclusions dated November 19, 2014, they have the burden of persuasion and the burden of going forward with proof pursuant to I.C. 4-21.5-3-14.

174. Based upon substantial, credible, and reliable evidence, Jamie Kolls observed Dr. Russell inject an "in-today" horse Tam Tuff between 10:00 and 11:00 o'clock a.m. on September 19, 2014, in and around Barn 6, Stall 61 at Indiana Grand. Therefore, Estvanko and Granitz failed to meet their burden.

175. Estvanko and Granitz failed to present substantial, credible, and reliable evidence that established that the Stewards' Findings and Conclusions dated November 19, 2014, and related rulings were not based upon substantial, credible, and reliable evidence or were somehow not in accordance with Indiana law.

176. The Commission Staff established, by substantial, credible, and reliable evidence that Dr. Ross Russell was present in Stall 61 of Barn 6 between 10 a.m. and 11 a.m. on September 19, 2014, injecting an "in-today" horse Tam Tuff with a substance other than furosemide.

177. Stewards' Rulings Nos. 14694 and 14695 were issued in accordance with Indiana statutes and Commission rules, and were supported by substantial and reliable evidence.

178. On September 19, 2014, Estvanko was responsible for the condition of Tam Tuff, pursuant to 71 IAC 5.5-3-5, which provided that "An assistant trainer may substitute for and shall assume the same duties, responsibilities, and restrictions as imposed on the licensed trainer. In which case, the trainer shall be jointly responsible for the assistant trainer's compliance with these rules."

179. Estvanko violated 71 IAC 8.5-1-1.5(b), which stated that “no substance, foreign or otherwise, shall be administered to a horse entered to race...within twenty-four (24) hours prior to the scheduled post time for the first race except furosemide...”

180. Estvanko violated 71 IAC 5.5-3-2(b), which provided that “A trainer shall prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these rules.”

181. Estvanko violated 71 IAC 8.5-3-3(a)(14), which provided that a trainer is responsible for “Maintaining a knowledge of the medication record and status of all horses in his or her care.”

182. Estvanko violated 71 IAC 8.5-3-3(a)(26), which provided that a trainer is responsible to “Guard and protect all horses in his/her care.”

183. Estvanko violated 71 IAC 8.5-3-3(a)(30), which provided that a trainer is responsible to “Immediately notifying the stewards, or in their absence commission or track security, of any contact a practicing veterinarian or his or her helper has with a horse within twenty-four (24) hours of its scheduled race...”

184. On September 19, 2014, Granitz was responsible for the condition of Tam Tuff, pursuant to 71 IAC 5.5-3-2, which provided that a trainer is responsible for the condition of horses she or she trains, regardless of the acts of third parties.

185. Granitz violated 71 IAC 8.5-1-1.5(b), which provided that “no substance, foreign or otherwise, shall be administered to a horse entered to race...within twenty-four (24) hours prior to the scheduled post time for the first race except furosemide...”

186. Granitz violated 71 IAC 5.5-3-2(b), which provided that “A trainer shall prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these rules.”

187. Granitz violated 71 IAC 8.5-3-3(a)(14), which provided that a trainer is responsible for “Maintaining a knowledge of the medication record and status of all horses in his or her care.”

188. Granitz violated 71 IAC 8.5-3-3(a)(26), which provided that a trainer is responsible to “Guard and protect all horses in his/her care.”

189. Estvanko and Granitz’ violations of the aforementioned regulations were contrary to the best interests of horse racing in the State of Indiana.

190. The 60 day suspension imposed upon Estvanko was reasonable in light of the substantial and reliable evidence presented at the hearing before the Stewards. The suspension has been served.

191. The fines paid by Estvanko and Granitz were reasonable in light of substantial and reliable evidence presented at the hearing and have been paid prior to the hearing.

192. Pursuant to 71 IAC 10-3-12(f), the special skills and experience of the Stewards, including over one hundred years of experience in racing, may be used in evaluating the evidence.

193. Tam Tuff, having received an administration of a substance, other than furosemide, on race day, in violation of the regulations cited herein is disqualified from the 6<sup>th</sup> race of September 19, 2014, and the purse is subject to redistribution pursuant to the provisions of 71 IAC 7.5-7-4.

194. ALJ Pylitt recommends that a Final Order be entered by the Indiana Horse Racing Commission in favor of the Indiana Horse Racing Commission Staff and against Estvanko and Granitz, and that said Order affirm Stewards' Ruling Nos. 14694 and 14695 and Commission Staff Exhibit G, Stewards' Findings and Conclusions dated November 19, 2014 in all material respects.

195. ALJ Pylitt adopts the following sanctions from the Stewards' rulings, and recommends that Estvanko:

- a. Be suspended for a period of 60 days from the date of the summary suspension September 20, 2014 up to and including November 18, 2014;
- b. Be fined \$1,000.00; and

196. ALJ Pylitt adopts the following sanctions from the Stewards' rulings, and recommends that Granitz:

- a. Be fined \$2,000.00.

197. ALJ Pylitt adopts the following sanction from the Stewards' rulings, and recommends that:

- a. The horse at issue be ordered unplaced, and all purse monies earned be forfeited, returned, and redistributed pursuant to the provisions of 71 IAC 7.5-7-4(a);
- b. Accordingly, Tam Tuff is disqualified from second place in the sixth race on September 19, 2014 at Indiana Grand for the purpose of receiving purse money;

198. ALJ Pylitt adopts the following sanction from the Stewards' Rulings:

a. Captain Jack Racing Stable LLC as the owner of Tam Tuff is ORDERED to return the purse money earned by Tam Tuff and the Horsemen's Bookkeeper is directed to redistribute the purse money for the 6<sup>th</sup> race on September 19, 2014, as follows:

- (i) #4 Lovin Lady
- (ii) #10 Lil Lionne
- (iii) #8 Junethesecond
- (iv) #9 Mary Fired Again
- (v) #2 Hey Hey You You
- (vi) #6 Fly Jayne
- (vii) #7 Patton's Speech
- (viii) #1 Parke Miss

Pursuant to I.C. § 4-21.5-3-29(d), Estvanko and Granitz, have 15 days following the receipt of this Recommended Order to file written exceptions with the Indiana Horse Racing Commission.

RESPECTFULLY SUBMITTED THIS 28th DAY OF JULY, 2015.



Bernard L. Pylitt  
Administrative Law Judge

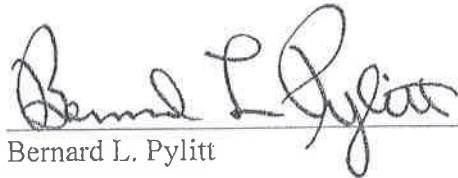
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served via first-class United States mail, postage prepaid and via email this 28th day of July, 2015 to the following counsel of record:

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# **EXHIBIT B**

Gordon White  
Deputy Attorney General  
Office of the Indiana Attorney General

## LEGAL AND ETHICS CONFERENCE 2014

### ADMINISTRATIVE HEARINGS AND THE RIGHT TO AN IMPARTIAL DECISION MAKER

#### Legislative development

#### I. Administrative Adjudication Act (AAA).

##### A. 1947

Whenever a hearing is conducted by an agent or representative of an agency such agent or representative who presides at such hearing shall not consult any person or party on any fact in issue unless upon notice and an opportunity for all parties to participate.

**IC 4-22-1-20 [63-3020] Acts of 1947, ch.365, Sec. 20.**

##### B. 1985

An administrative law judge's conduct shall be in a manner which promotes public confidence in the integrity and impartiality of the administrative hearing process.

**IC 4-22-1-20(a), P.L. 30-1985, Sec. 6.**

An administrative law judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, or in which the judge's personal bias, prejudice, or knowledge of a disputed evidentiary fact might influence the decision.

**IC 4-22-1-20(b), P.L. 30-1985, Sec. 6.**

#### II. Administrative Orders and Procedures Act (AOPA).

##### A. 1986

Any individual serving . . . as an administrative law judge is subject to disqualification for:

(1) bias, prejudice, or interest in the outcome of a proceeding;

...

(2) any cause for which a judge of a court may be disqualified.

**IC 4-21.5-3-10(a) P.L. 18-1986, Sec. 10.**



Any party to a proceeding may petition for the disqualification of an individual serving alone or with others as an administrative law judge upon discovering facts establishing grounds for disqualification under this chapter. The administrative law judge assigned to the proceeding shall determine whether to grant the petition, stating facts and reasons for the determination.

**IC 4-21.5-3-9(d) P.L. 18-1986, Sec. 9.**

An individual who:

- (1) is serving alone or with others as an administrative law judge or as a person presiding in a proceeding under sections 28 through 31 of this chapter; and
- (2) knowingly or intentionally violates section 11, 12, or 13 of this chapter; commits a Class A misdemeanor.

**IC 4-21.5-3-36, P.L. 18-1986, Sec.1.**

A person who:

- (1) aids, induces, or causes an individual serving alone or with others as an administrative law judge or as a person presiding in a proceeding under sections 28 through 31 of this chapter to violate section 11, 12, or 13 of this chapter; and
- (2) acts with the intent to:
  - (A) have the individual described in subdivision (1) disqualified from serving in a proceeding; or
  - (B) influence the individual described in subdivision (1) with respect to any issue in a proceeding;commits a Class A misdemeanor.

**IC 4-21.5-3-37, P.L. 18-1986, Sec.1.**

B. 1987

If the administrative law judge ruling on the disqualification issue is not the ultimate authority for the agency, the party petitioning for disqualification may petition the ultimate authority in writing for review of the ruling within ten (10) days after the notice is served. The ultimate authority shall conduct proceedings described in section 28 of this chapter to review the petition and affirm, modify, or dissolve the ruling within thirty (30) days after the petition is filed. A determination by the ultimate authority under this subsection is a final order subject judicial review under IC 4-21.5-5.

**IC4-21.5-3-9(d)(1987) P.L. 35-1987 Sec. 7.**

C. 2014

- (a) An agency may share an administrative law judge with another agency:
  - (1) to avoid bias, prejudice, interest in the outcome, or another conflict of interest;
  - (2) if a party requests a change of administrative law judge;
  - (3) to ease scheduling difficulties; or

(4) for another good cause. An agency may adopt rules under IC 4-22-2 to implement this subsection.

(b) To the extent practicable, an administrative law judge must have expertise in the area of law being adjudicated.

(c) An agency shall post on the agency's Internet web site the:

(1) name;

(2) salary and other remuneration; and

(3) relevant professional experience; of every person who serves as an administrative law judge for the agency.

**IC 4-21.5-3-8.5, P.L.72-2014, SEC.3.**

(a) Except to the extent that a statute other than this article limits an agency's discretion to select an administrative law judge, the ultimate authority for an agency may:

(1) act as an administrative law judge;

(2) designate one (1) or more members of the ultimate authority(if the ultimate authority is a panel of individuals) to act as an administrative law judge; or

(3) designate one (1) or more:

(A) attorneys licensed to practice law in Indiana; or

(B) persons who served as administrative law judges for a state agency before January 1, 2014;to act as an administrative law judge. A person designated under subdivision (3) is not required to be an employee of the agency.

**IC 4-21.5-3-9(a), P.L.72-2014, SEC. 4.**

D. Inspector General's responsibilities under P.L. 72-2014.

Sec. 9. (a) The inspector general shall adopt rules under IC 4-22-2 establishing a statewide code of judicial conduct for administrative law judges. The statewide code of judicial conduct for administrative law judges must apply to every person acting as an administrative law judge for a state agency.

(b) The inspector general:

(1) shall review 312 IAC 3-1-2.5 and 315 IAC 1-1-2 in adopting a statewide code of judicial conduct for administrative law judges; and

(2) may base the statewide code of judicial conduct for administrative law judges on 312 IAC 3-1-2.5 and 315 IAC 1-1-2.

(c) A state agency may adopt rules under IC 4-22-2 to establish a supplemental code of judicial conduct for a person acting as an administrative law judge for that agency, if the supplemental code is at least as restrictive as the statewide code of judicial conduct for administrative law judges.

(d) The inspector general may adopt emergency rules in the manner provided under IC4-22-2-37.1 to implement a statewide code of judicial conduct for administrative law judges.

(e) The statewide code of judicial conduct for administrative law judges shall be enforced under IC 4-21.5. The inspector general is not responsible for enforcing

the statewide code of judicial conduct for administrative law judges or for investigating a possible violation of the statewide code.

**IC 4-2-7-9, P.L. 72-2014, Sec. 2.**

E. Rules the Inspector General is to consider.

1. *Rules of the Natural Resources Commission.*

312 IAC 3-1-2.5 Applicable provisions of the code of judicial conduct to administrative law judges

(a) The following definitions apply throughout this section:

\*\*\*  
(2) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2009).

\*\*\*  
(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an administrative law judge. These provisions shall be liberally construed to implement the intention of IC 14-10-2-2.

2. *Rules of the Office of Environmental Adjudication.*

315 IAC 1-1-2 Applicable provisions of the code of judicial conduct to environmental law judges

(a) The following definitions apply throughout this section:

(1) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2008).

\*\*\*  
(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an environmental law judge. These provisions shall be liberally construed to implement the intention of IC 4-21.5-7-6.

3. *Code of Judicial Conduct.*

*RULE 1.2 : Promoting Confidence in the Judiciary*

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

## Comment

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

...

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

...

[5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

## Case law development

The AOPA does not apply to all administrative hearings but due process concepts are universal to administrative proceedings.

### I. U.S. Supreme Court.

And, of course, an impartial decision maker is essential.  
***Goldberg v. Kelly* (1970) 397 U.S. 254 at 271.**

### II. Indiana Supreme Court.

An administrative hearing “though regular in form” must “be in truth a fair hearing.”  
***Stiver v. State ex rel. Kent*, 211 Ind. 380, 7 N.E.2d 183, 184 (Ind.1937).**

It is essential that the fact finders comport to due process standards. It also follows that the fact finding process should be free of suspicion or appearance of impropriety.  
***City of Mishawaka v. Stewart*, 261 Ind. 670, 677, 310 N.E.2d 65, 69 (Ind. 1974).**

The Due Process Clause ensures that “no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance

that the arbiter is not predisposed to find against him.” *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). Thus, self-dealing or bias on the part of a hearing officer would contravene not only the AOPA but the Constitution itself.

***LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1261 f.n.23 (Ind.2000).**

### III. Indiana Court of Appeals.

Our discussion first observes, by way of background, that it is settled law the tenure given a fireman or police officer such as Atkinson is a constitutionally protected interest requiring the opportunity for a fair hearing conducted in good faith before a full and impartial body. . . . Although such proceedings are not subject to all of the procedural safeguards afforded at a trial, it is evident, as our courts have held, that the procedural standards should be at the highest level workable under the circumstances, and that the fact-finding process should be free of suspicion or even the appearance of impropriety. (citations omitted). ***Atkinson v. City of Marion*, 411 N.E.2d 622, 628 (Ind.App.1980).**

Finally, the Clinic argues it was denied due process because the hearing officer who ruled on its claims was not impartial. Due process requires that those functioning in a quasi-judicial capacity be impartial. *Schweiker v. McClure*, (1982) 456 U.S.188, 102 S.Ct. 188, 72 L.Ed.2d 1. It is presumed, however, that hearing officers are unbiased, absent “a showing of conflict of interest or some other specific reason for disqualification.” *Id.* At 195, 102 S.Ct. at 1669. ***Hearing and Speech Clinic of Evansville, Inc. v. Indiana Dept. of Welfare, Medicaid Div.*, 466 N.E.2d 462, 466 (Ind.App.1984).**

Due process requirements in the context of administrative proceedings are clear in requiring that a hearing be conducted before an impartial body. . . . This, of course, means that agency members may not be swayed in their decisions by preconceived biases and prejudices.

...



Even though we must take New Trend's allegations of bias on the part of individuals as true, we may not assume that the Board will act on those biases and prejudices. To the contrary, we must presume the Board will act properly with or without recusal of the allegedly biased members. In the absence of a demonstration of actual bias, the courts should not interfere with the administrative process. (citations omitted) ***New Trend Beauty School, Inc. v. Indiana State Bd. of Beauty Culturist***

***Examiners*, 518 N.E.2d 1101, 1104-5 (Ind.App1988).**

Due process in administrative hearings requires that all hearings be conducted before an impartial body. . . . This requirement means that agency members may not be swayed in their decisions by preconceived biases and prejudices. . . . We presume, however, that administrative agencies will act properly with or without recusal of allegedly biased members. *Id.* When a biased board member participates in a decision, the decision will be vacated. . . . In the absence of a demonstration of actual bias, however, we will not interfere with the administrative process. (citations omitted).

***Ripley County Bd. Of Zoning Appeals v. Rumpke of Indiana, Inc.*, 663 N.E.2d 198, 209 (Ind.App.1996).**

Due process requirements in the context of administrative proceedings are clear in requiring that a hearing be conducted before an impartial body. . . . However, we will presume that an administrative board will act properly. . . . In the absence of a demonstration of actual bias, the courts should not interfere with the administrative process. (citations omitted)

***Kollar v. Civil City of South Bend*, 695 N.E.2d 616, 623 (Ind.App1998).**

Due process in administrative hearings requires that all hearings be orderly, judicious, fundamentally fair, and conducted before an impartial body. . . . This requirement means that agency members' decisions may not be swayed by preconceived biases and prejudices. . . . When a biased board member participates in a decision, the decision will be vacated. *Id.* Nevertheless, because a zoning board is a body usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure. . . . Furthermore, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. (citations omitted).

***City of New Haven v. Chemical Waste Management of Indiana, L.L.C.*, 701 N.E.2d 912, 921 (Ind. App.1998).**

Although *Fail* involved the same statute at issue here, the case arose from an administrative, or quasi-judicial, determination. Due process requires a neutral, unbiased decision maker in such situations. *Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind.1996) (quoting KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 (1994)).

***Perry-Worth Concerned Citizens v. Board of Com'rs of Boone County*, 723 N.E.2d 457, 460 (Ind.App.2000).**

Due process also requires that administrative bodies may not reach their decisions on the basis of preconceived bias or prejudice. . . . Biased behavior may be demonstrated by extreme partisan political considerations, personal conflicts of interest and gain, or invidious discriminatory intent. (citations omitted)

***City of Hobart Common Council v. Behavioral Institute of Indiana, LLC*, 785 N.E.2d 238, 253 (Ind.App.2003).**

In the context of an administrative proceeding, due process requires that a hearing be conducted before an impartial body. . . . This requirement suggests that agency decisions may not be swayed by preconceived biases and prejudices. . . . Consequently, when a biased board or panel member participates in a decision, the decision will be vacated. *Id.* Nevertheless, because many administrative boards or panels are usually composed of persons without legal training, courts are reluctant to impose strict technical requirements upon their procedure. *Id.* Indeed, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. *Id.* Instead, we presume that an administrative board or panel will act properly and without bias or prejudice. (citations omitted).

***In re Change to Established Water Level of Lake of Woods in Marshall County*, 822 N.E.2d 1032, 1041 (Ind.App.2005).**

Police merit board hearings are administrative actions that, although less formal than civil proceedings, as a matter of due process require a full and fair hearing conducted in good faith before an impartial body. . . . With respect to administrative boards or panels generally, because they often are composed of persons without legal training, “courts are reluctant to impose strict technical requirements upon their procedure.” *In re Change to Established Water Level of Lake of Woods in Marshall County*, 822 N.E.2d 1032, 1041 (Ind.Ct.App.2005) *trans. denied*. “Indeed, in the absence of a demonstration of actual bias, we will not interfere with the administrative process. Instead, we presume that an administrative board or panel will act properly and without bias or prejudice.” *Id.* (citation omitted).

. . .

For guidance on this point, we look to some cases addressing the political activities of a judge and whether recusal of the judge is necessary, while keeping in mind that judges are held to a higher standard when it comes to conflicts of interest than are members of an administrative body.

***Jandura v. Town of Schererville*, 937 N.E.2d 814, 819 & 820 (Ind.App.2010).**

Thus, where a municipality actively seeks to avoid the appearance of impropriety and there is no evidence of actual impropriety, due process rights are not violated when a municipality's employees serve as advocates and different employees of the same municipality serve as decision-makers in administrative proceedings. *Utility Center, Inc. v. City of Fort Wayne*, 960 N.E.2d 824, 873 (Ind.App.2012), *trans. granted, opinion vacated by Utility Center, Inc. v. City of Fort Wayne*, 985 N.E.2d 731 (Ind.2013).

848211



**INDIANA HORSE RACING COMMISSION  
APPEAL BEFORE BERNARD PYLITT, ADMINISTRATIVE LAW JUDGE**

INDIANA HORSE RACING	)	
COMMISSION STAFF,	)	
	)	
Petitioner,	)	Administrative Complaint No. 214003
	)	
v.	)	
	)	
DR. ROSS RUSSELL,	)	
	)	
Respondent.	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
RECOMMENDED ORDER DENYING DR. ROSS RUSSELL’S  
SECOND MOTION TO DISQUALIFY BERNARD PYLITT  
AS ADMINISTRATIVE LAW JUDGE**

Dr. Ross Russell was summarily suspended by the Stewards on September 20, 2014 as a result of an incident that allegedly occurred on September 19, 2014 involving a horse named Tam Tuff which was owned by Captain Jack Stable, LLC.

On October 23, 2014 Administrative Complaint 214003 was issued against Dr. Ross Russell. A timely request for hearing was filed by Dr. Ross Russell (hereinafter referred to as “Dr. Russell”). On November 12, 2014, Bernard Pylitt was appointed to serve as the Administrative Law Judge in the above referenced matter.

An initial telephonic prehearing conference was conducted on November 20, 2014, followed by a subsequent telephonic prehearing conference on March 24, 2015. Holly Newell and Robin Babbitt appeared on behalf of the Commission Staff. Peter Sacopulos appeared on behalf of Dr. Russell. A Prehearing Order was issued establishing discovery deadlines and scheduling the matter for a four day hearing beginning Tuesday, December 1, 2015.

On May 13, 2015, Dr. Russell filed his Motion to Disqualify Administrative Law Judge Pylitt pursuant to I.C. 4-21.5-3-10 based upon a finding contained within a January 30, 2015 Recommended Order to the Indiana Horse Racing Commission issued by Administrative Law Judge Pylitt (“ALJ Pylitt”) recommending that Captain Jack Stable, LLC’s Motion to Intervene (“Recommended Order”) in the separate consolidated appeals brought by Tam Tuff’s trainers Richard Estvanko and Tony Granitz be denied. (Appeal from Stewards Rulings #14694 and 14695)

On June 3, 2015, the Commission Staff filed its Opposition to the Motion to Disqualify and suggested that Dr. Russell mischaracterized the ALJ’s previous rulings. The Commission Staff concluded that Dr. Russell failed to provide any legitimate evidence to support his allegation of bias or prejudice required by the statute mandating the disqualification of ALJ Pylitt given that the “law presumes that a judge is unbiased and unprejudiced in the matters which come before the judge”. *Smith v. State*, 477 N. E. 2d 857, 864 (Ind. 1985).

On June 17, 2015, Dr. Russell filed his Reply to IHRC Staff’s Opposition to his Motion to Disqualify ALJ Pylitt and argued that ALJ Pylitt cannot remain neutral in handling the two matters and that the lawyer handling the other hearing “may have had less experience” and that the two cases may somehow begin “to blur” in the ALJ’s mind preventing him from fairly hearing the two matters.

On June 19, 2015 ALJ Pylitt issued Findings of Fact, Conclusions of Law, and a Recommended Order Denying Dr. Russell’s Motion to Disqualify ALJ Pylitt.

On July 15, 2015, the full Indiana Horse Racing Commission heard oral argument during a public meeting and unanimously affirmed the ALJ’s Recommended Order in totality denying Dr. Russell’s Motion to disqualify the ALJ.

Subsequently, on August 13, 2015, Dr. Russell filed his Second Motion to Disqualify ALJ Pylitt (hereinafter referred to as “Second Motion to Disqualify”) suggesting that ALJ Pylitt “pre-judged” the allegations against Dr. Russell based upon Findings of Fact, Conclusions of Law, and a Recommended Order issued on July 28, 2015, following a two day hearing in the consolidated Appeals of trainers Richard Estvanko and Anthony Granitz.

On August 21, 2015, Robin Babbitt advised counsel for Dr. Russell and ALJ Pylitt by email that the Commission Staff would not be filing a response:

Given that the legal issues in the second motion mirror those raised and addressed by the ALJ (and Commission) in response to the first motion to disqualify, the Staff does not intend to file a response to the most recent filing.

#### **RELEVANT STATUTE**

Indiana Code § 4-21.5-3-10 (a) sets forth the applicable standard for disqualification of an ALJ in an administrative proceeding:

Sec. 10. (a) Any individual serving or designated to serve alone or with others as an administrative law judge is subject to disqualification for:

- (1) Bias, prejudice, or interest in the outcome of the proceeding;
- (2) ...
- (3) ...any cause for which a judge of a court may be disqualified.

#### **REASONS FOR DETERMINATION AND RECOMMENDED ORDER DENYING SECOND MOTION TO DISQUALIFY ALJ PYLITT**

Unlike Trial Rule 76, which allows for an automatic change of judge upon the timely filing of a motion requesting a change, an ALJ cannot be automatically removed under IC 4-21.5-3-10 (a). The party seeking disqualification has the burden of proof and must demonstrate that grounds exist under that statute requiring disqualification. There is simply no new evidence

offered by Dr. Russell in his Second Motion to Disqualify that supports his belief that there is any bias or prejudice on the part of ALJ Pylitt against Dr. Russell.

### **FINDINGS OF FACT**

From the pleadings submitted, the ALJ finds that:

1. All Findings of Facts previously found in ALJ Pylitt's original Recommended Order issued on June 19, 2015 Denying Dr. Russell's initial Motion to Disqualify the ALJ are hereby incorporated as if set forth in full.

2. The eighteen (18) page Administrative Complaint against Dr. Russell contains numerous allegations with one brief reference to the September 19, 2014 incident on page 7.

3. Dr. Russell testified on behalf of Estvanko and Granitz in their consolidated hearing before ALJ Pylitt on June 23 and 24, 2015.

4. Dr. Russell's counsel was present throughout the two day hearing but was not entitled to cross-exam any witness or present any evidence since Dr. Russell was not a party to that hearing.

5. Nothing in the record from the Estvanko and Granitz Recommended Order issued July 28, 2015 suggests that ALJ Pylitt is incapable of giving Dr. Russell a fair hearing or that he is prejudice or biased against Dr. Russell.

6. Any Finding of Fact more properly a Conclusion of Law shall be treated as such.

### **CONCLUSIONS OF LAW**

1. ALJ Pylitt was lawfully and properly designated by the Indiana Horse Racing Commission to serve as the Administrative Law Judge to handle Dr. Russell's Administrative Complaint.

2. ALJ Pylitt is not the ultimate authority over this matter.

3. All Conclusions of Law previously found in ALJ Pylitt's Recommended Order issued June 19, 2015 Denying Dr. Russell's initial Motion to Disqualify the ALJ are hereby incorporated as if set forth in full.

4. Dr. Russell's Second Motion to Disqualify ALJ Pylitt must be evaluated pursuant to I.C. 4-21.5-3-10.

5. Dr. Russell presented no new evidence that ALJ Pylitt is prejudiced or biased against Dr. Russell, or has any interest in the outcome of the proceeding as required by I.C. 4-21.5-3-10.

6. Dr. Russell presented no new evidence that any legal cause exists for which ALJ Pylitt may be disqualified to hear his case.

7. Dr. Russell failed to meet his burden of proof pursuant to I.C. 4-21.5-3-10.

8. Any Finding of Fact or Conclusion of Law rendered by ALJ Pylitt in his Recommended Order following the two day hearing in the consolidated appeals of trainers Estvanko and Granitz were independent, separate, and distinct from the numerous allegations in the Administrative Complaint against Dr. Russell.

9. Dr. Russell's Administrative Complaint shall be determined upon the evidence presented at during the scheduled four (4) day hearing.

10. Any Conclusion of Law more properly a Finding of Fact shall be treated as such.

#### **ULTIMATE FINDING OF FACT**

Nothing in the record of this matter, or any ruling in the appeals by trainers Estvanko and Granitz from the Stewards rulings, demonstrates any prejudice or bias on the part of ALJ Pylitt against Dr. Russell, or any interest in the outcome of the proceeding against Dr. Russell,

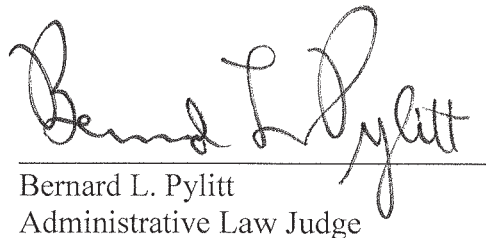
requiring that he be disqualified pursuant to I.C. 4-21.5.3-10. Dr. Russell has failed to meet his burden.

**RECOMMENDED ORDER**

Therefore, ALJ Pylitt recommends that Dr. Russell's Second Motion to Disqualify ALJ Pylitt from presiding over his Administrative Complaint pursuant to I.C. 4-21.5-3-10 be DENIED.

Pursuant to I.C. 4-21.5-3-29(d), the party petitioning for disqualification may petition the Indiana Horse Racing Commission as the ultimate authority, in writing, for review of the ruling within ten (10) days after notice of the ruling is served. Any objection to the proposed findings of fact, conclusions of law, and recommended order must be submitted to the Commission as the ultimate authority within fifteen (15) days of having received notice of this recommended order, which is being sent to counsel via email this date.

IT IS SO RECOMMENDED THIS 4th DAY OF SEPTEMBER, 2015.

  
Bernard L. Pylitt  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

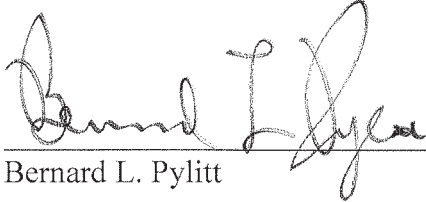
I hereby certify that a copy of the foregoing has been duly served via first-class United States mail, postage prepaid, and via email this 4th day of September, 2015 to the following:

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