

Agenda Item #1

Pitman, Deena

From: Rothenberg, David
Sent: Friday, June 9, 2023 6:06 PM
To: Pitman, Deena
Cc: Eggiman, Matt; Pennycuff, Dale L
Subject: FW: Vici Presentation for IHRC June Meeting
Attachments: VICI - IHRC Presentation (Jun'23) vF-c.pdf

Importance: High

FYI

From: Sebastian.Smelko@icemiller.com <Sebastian.Smelko@icemiller.com>
Sent: Friday, June 9, 2023 12:50 PM
To: Rothenberg, David <DRothenberg@hrc.IN.gov>
Subject: Vici Presentation for IHRC June Meeting
Importance: High

****** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ******

David-

As promised, here is the presentation which Vici put together for the IHRC related to both REITs generally and the specific matter at hand with the put/call between CZR and Vici.

Let me know if you have any questions or if I can be of assistance in any way.

Vici will have the following individuals in attendance for the presentation:
John W. R. Payne / President and Chief Operating Officer
David A. Kieske / Executive Vice President, Chief Financial Officer, Treasurer
Samantha Sacks Gallagher / Executive Vice President, General Counsel, Secretary
Elena Otero Keil / Vice President, Associate General Counsel

I will also attend.

Finally, I also understand that CZR is providing the following individuals (this was communicated to me by Vici who coordinated with CZR): Dan Nita, Joe Morris, Trent McIntosh and Colin Skidmore.

Thank you again for your help with this. Sebastian



J. Sebastian Smelko

Partner

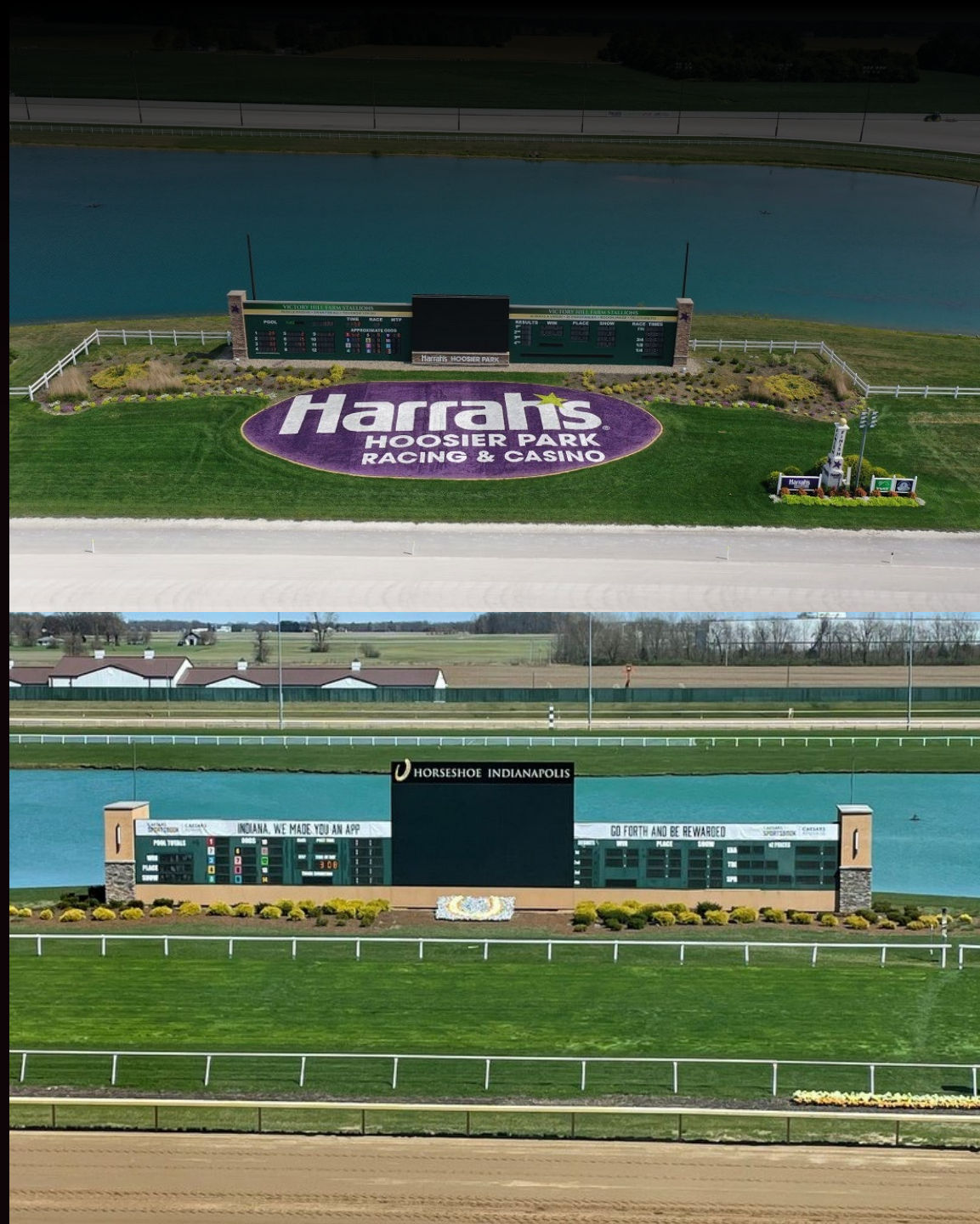
Sebastian.Smelko@icemiller.com

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VICI

INDIANA HORSE RACING COMMISSION

June 22, 2023



VICI PROPERTIES MANAGEMENT TEAM

VICI Properties is pleased to present to the Indiana Horse Racing Commission



John Payne

*President & Chief
Operating Officer*



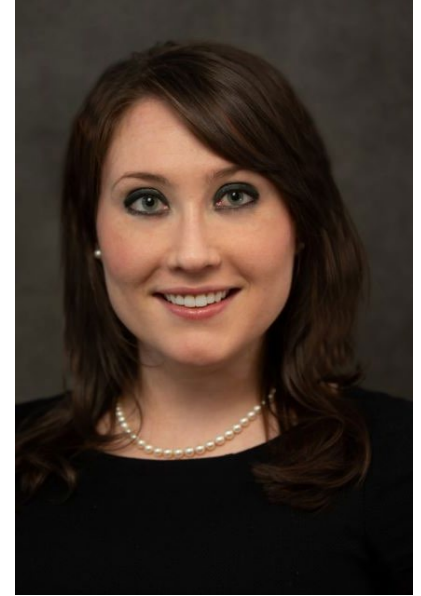
David Kieske

*Executive Vice
President, Treasurer &
Chief Financial Officer*



Samantha Gallagher

*Executive Vice
President, Secretary
& General Counsel*



Elena Keil

*Vice President,
Associate General
Counsel*

INTRODUCTION TO VICI PROPERTIES



CAESARS PALACE
LAS VEGAS, NV



MGM NORTHFIELD PARK
NORTHFIELD, OH



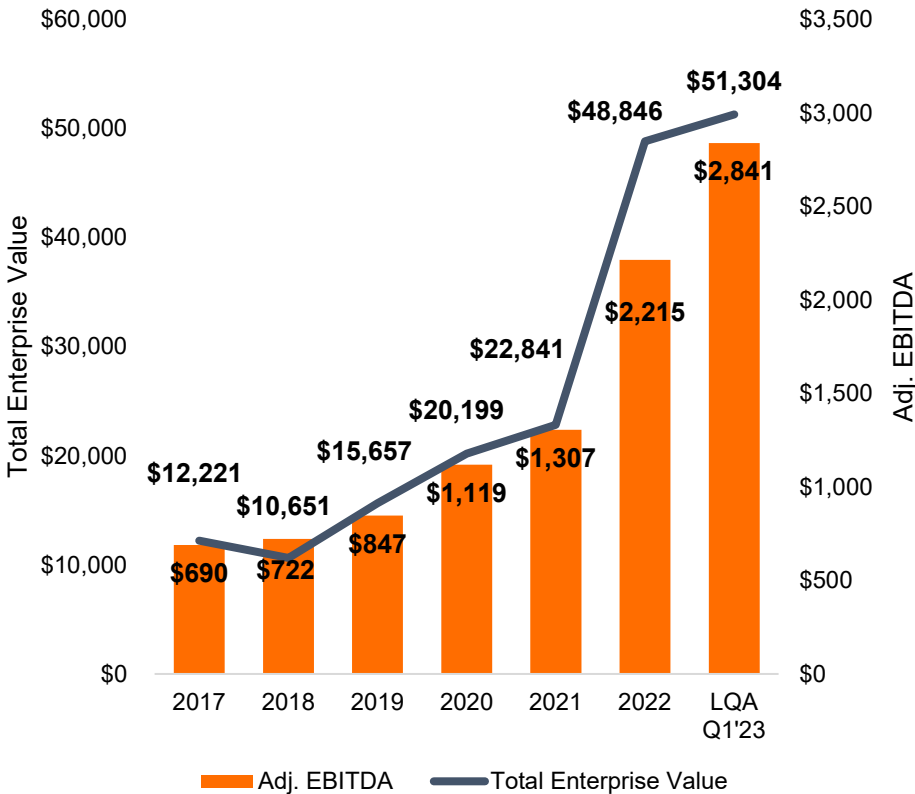
HARRAH'S PHILADELPHIA
CHESTER, PA

VICI'S EVOLUTION SINCE FORMATION

VICI has grown by more than **4x** since formation led by an executive management team with more than 100+ years of combined experience in gaming and experiential real estate, operations, finance and law

Total Enterprise Value & Adjusted EBITDA

(\$ in millions)



| | | |
|--|---|---|
| \$12Bn Enterprise Value at Formation | ➔ | \$51Bn Enterprise Value Today |
| 1 Tenant at Formation | ➔ | 11 Tenants Today |
| 19 Properties at Formation | ➔ | 54 Properties Today |

PASSIVE LANDLORD TO WORLD-CLASS OPERATORS OF GAMING & RACING FACILITIES⁽¹⁾

October 2017

Formation Date

June 2022

Addition to S&P 500 Index

26












VICI Employees

100%

Triple-Net Leases

100%

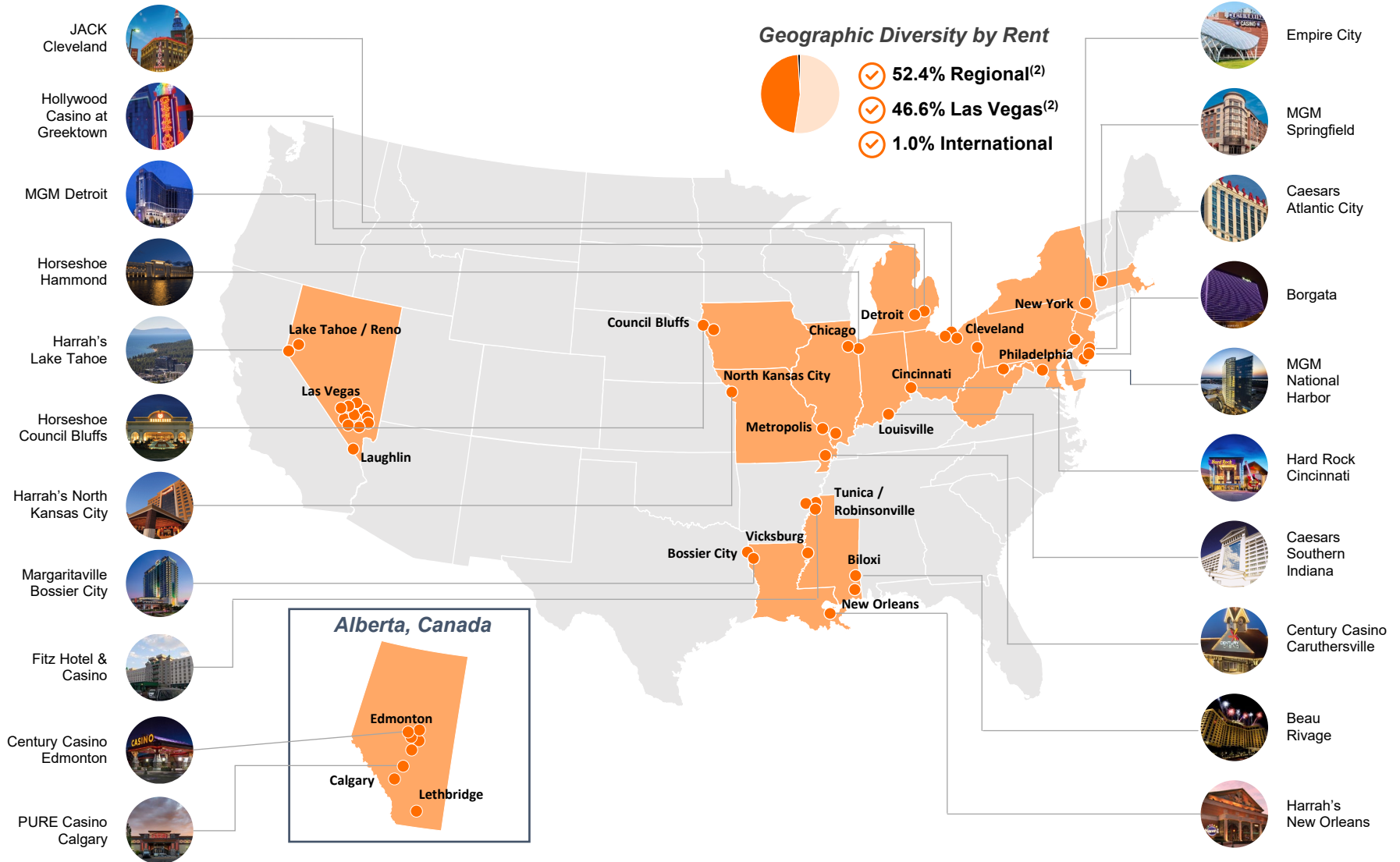
2022 Occupancy

| Tenant | Number of Properties | Weighted Average Lease Term ⁽²⁾ | Annualized Cash Rent (\$MM) ⁽³⁾ | % of Ann. Cash Rent |
|--|----------------------|--|--|---------------------|
|  CAESARS ENTERTAINMENT | 18 | 32.4 | \$1,158.2 | 40% |
|  MGM RESORTS | 13 | 52.0 | 1,054.5 | 36% |
|  THE VENETIAN LAS VEGAS | 1 | 49.0 | 257.5 | 9% |
|  Seminole Hard Rock Entertainment | 2 | 47.1 | 134.7 | 5% |
|  PENN ENTERTAINMENT | 2 | 31.1 | 77.8 | 3% |
|  J.A.C.K. ENTERTAINMENT | 2 | 31.9 | 70.0 | 2% |
|  CENTURY CASINOS | 8 | 35.0 | 55.8 ⁽⁴⁾ | 2% |
|  CHEROKEE NATION Entertainment | 1 | 54.1 | 40.0 | 1% |
|  Eastern Band of Cherokee Indians | 1 | 33.4 | 33.0 | 1% |
|  FOUNDATION GAMING & ENTERTAINMENT | 2 | 34.8 | 24.3 | 1% |
|  PURE CASINO | 4 | 44.9 | 16.1 ⁽⁴⁾ | 1% |
| 11 Tenants | 54 | 42.0 | \$2,921.8 | 100% |

(1) Adjusted for VICI's pending acquisition of an interest in the land and buildings associated with Rocky Gap and the pending acquisition of the Century Canadian Portfolio, which remain subject to customary closing conditions and regulatory approvals. No assurance can be provided that these transactions will close on the anticipated terms or timeline or at all. (2) Weighted average lease term inclusive of all tenant renewal options based on annualized cash rent as of March 31, 2023. (3) Annualized contractual rent as of May 2023. (4) Assumes an exchange rate of C1:00:US\$0.74 as of March 31, 2023.

VICI'S PORTFOLIO OF GAMING & RACING ASSETS

54 Properties Spanning 15 States and 1 Canadian Province⁽¹⁾



(1) Reflects assumed closing of the acquisition of an interest in the land and buildings associated with Rocky Gap announced on August 25, 2022, and the acquisition of the Century Canadian Portfolio announced on May 17, 2023, which remain subject to customary closing conditions and regulatory approvals. No assurance can be provided that these transactions will close on the anticipated terms or timeline or at all. (2) Assumes MGM Master Lease rent is allocated to Las Vegas and Regional properties based on internal rent allocations by property.

RECORD BREAKING CAPITAL MARKETS EXECUTION SUPPORTED BY INSTITUTIONAL INVESTORS

2018



4th Largest REIT IPO Ever

\$1.4 billion



Largest REIT First Follow-On Equity Raise Ever

\$725 million

2019



Largest REIT Follow-On Equity Raise Ever

\$2.5 billion

2021



Largest REIT Follow-On Equity Raise Ever

\$3.4 billion

2022



Largest REIT Investment Grade Bond Issuance Ever

\$5.0 billion

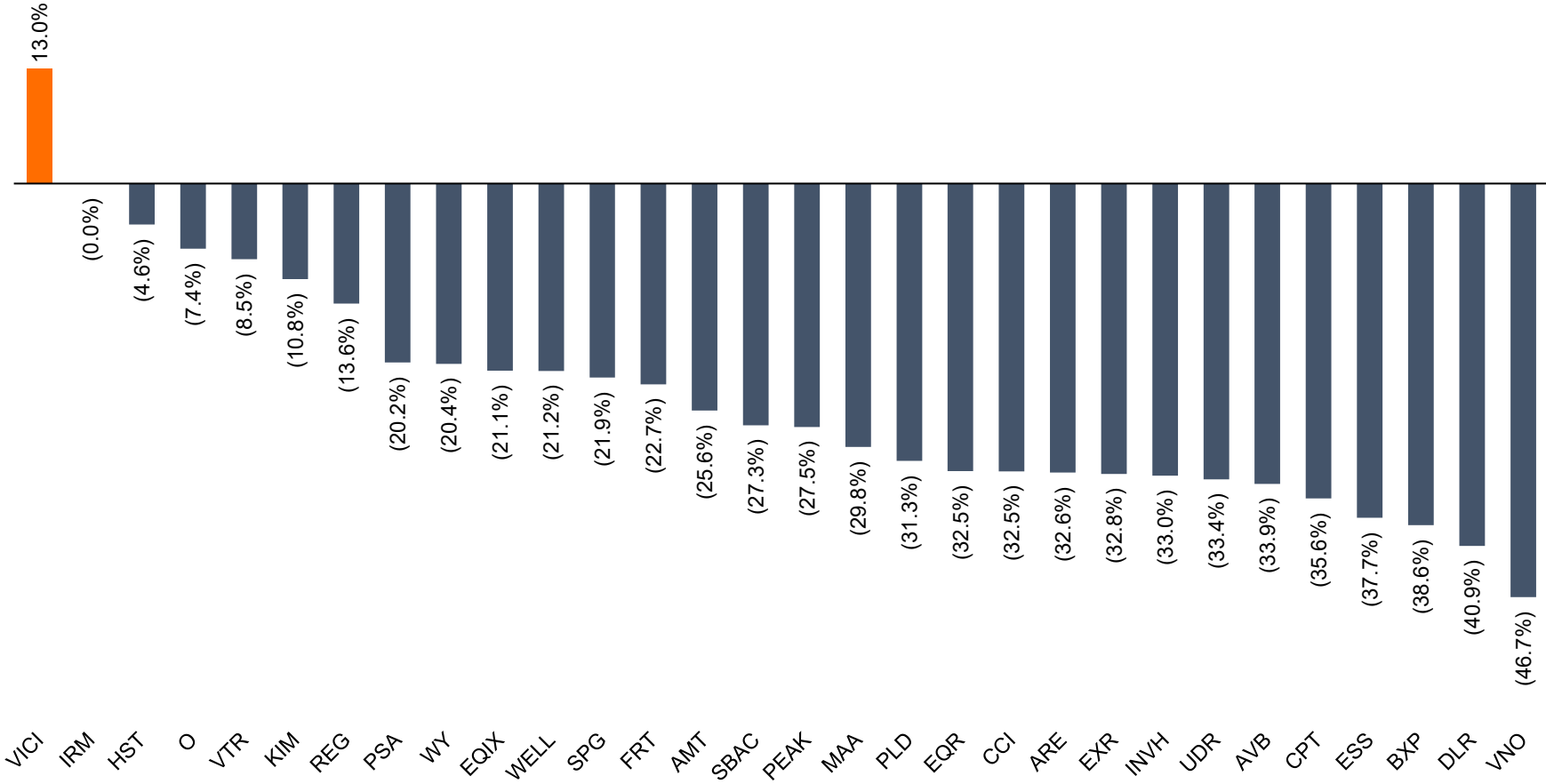
VICI has successfully raised \$14.3 billion of equity and \$9.8 billion of debt since 2017 to finance over \$33 billion of transactions – making VICI the fastest growing REIT in America with deep access to equity and debt capital, providing security as a long-term landlord to our operating partners

THE FASTEST REIT TO GET INTO THE S&P 500 INDEX...

The S&P 500 Index is widely accepted as one of the best measures of market-leading companies across each sector

| Rank | Company | Real Estate Sector | Years from IPO to S&P 500 Inclusion |
|------|-------------------------------------|--|-------------------------------------|
| 1 | VICI Properties | Passive, Triple Net Lease Experiential | 4.4 |
| 2 | Prologis | Industrial | 5.7 |
| 3 | Equity Residential Properties Trust | Multifamily | 8.2 |
| 4 | Simon Property Group | Malls | 8.5 |
| 5 | Boston Properties | Office | 8.8 |
| 6 | American Tower | Wireless & Broadcast Towers | 9.7 |
| 7 | Extra Space Storage | Self-Storage | 11.4 |
| 8 | Digital Realty Trust | Data Centers | 11.6 |
| 9 | Avalon Bay Communities | Multifamily | 12.8 |
| 10 | Iron Mountain | Data Centers | 12.9 |
| 11 | Crown Castle | Wireless & Broadcast Towers | 13.6 |
| 12 | SITE Centers | Shopping Centers | 14.1 |
| 13 | Kimco Realty | Shopping Centers | 14.4 |
| 14 | Equinix | Data Centers | 14.6 |
| 15 | Vornado Realty Trust | Office | 17.5 |
| 16 | SL Green Realty Trust | Office | 17.6 |
| 17 | Ventas | Healthcare | 18.1 |
| 18 | SBA Communications | Wireless & Broadcast Towers | 18.2 |
| 19 | Macerich | Shopping Centers | 19.2 |
| 20 | Alexandria Real Estate | Multifamily | 19.8 |

...AND THE ONLY S&P 500 REIT TO GENERATE POSITIVE TOTAL RETURN OVER 2022



Of the 65 youngest REITs in America, VICI is one of three that are included in the S&P 500 Index

Source: Bloomberg, FactSet as of December 31, 2022

INTRODUCTION TO THE TRIPLE NET LEASE REIT STRUCTURE



EMPIRE CITY
YONKERS, NY



JACK THISTLEDOWN RACINO
NORTH RANDALL, OH

REAL ESTATE INVESTMENT TRUSTS: TRIPLE NET LEASE OVERVIEW

VICI's leases are structured as long-term, triple net leases pursuant to which VICI passively leases land and real estate assets to its operating tenants

What is a Triple Net Lease?

- A triple net lease requires the tenant to conduct operations at the property and to pay all of the operating expenses, insurance and property taxes related to the property
- Triple net leases are typically structured with long terms compared to other categories of leases
 - VICI's weighted average lease term, including lease renewal options, was 43.4 years as of December 31, 2022
- Given the tenant has all of the property management responsibilities, the tenant owns all of the operating leverage of the asset and is rewarded for innovation/material improvements by capturing all of the economic upside
- VICI, as the **real estate landlord**, collects rent on its real estate portfolio and does not conduct or direct operations at the properties

Rental Payment from Tenant

No Operating Expenses & Maintenance Capex Paid by VICI

No Property Insurance Costs Paid by VICI

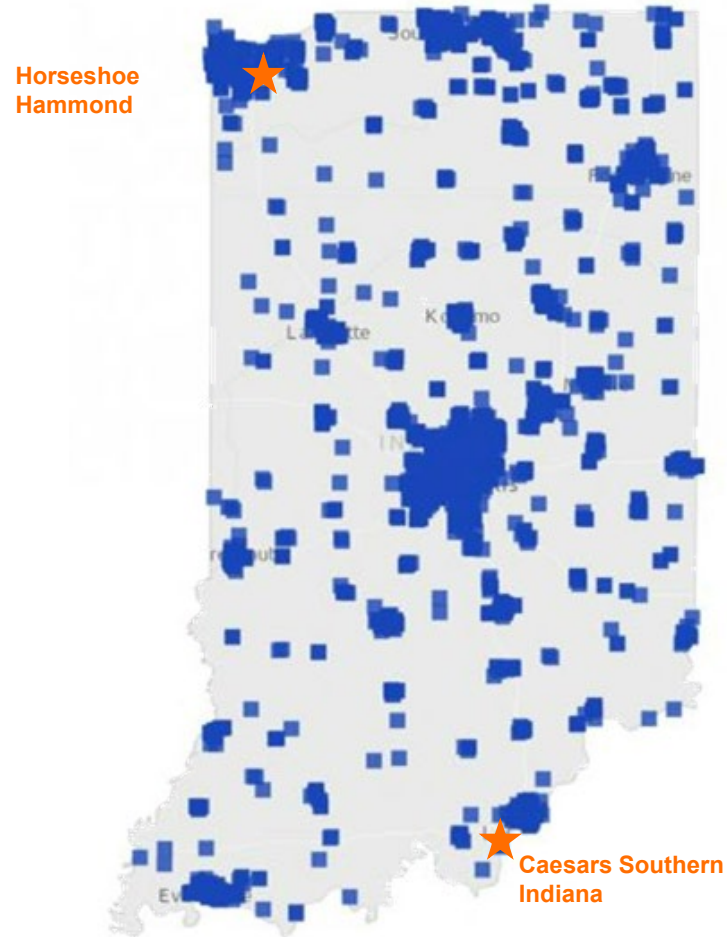
No Property Taxes Paid by VICI

= VICI Income

EXISTING REIT PRESENCE IN INDIANA

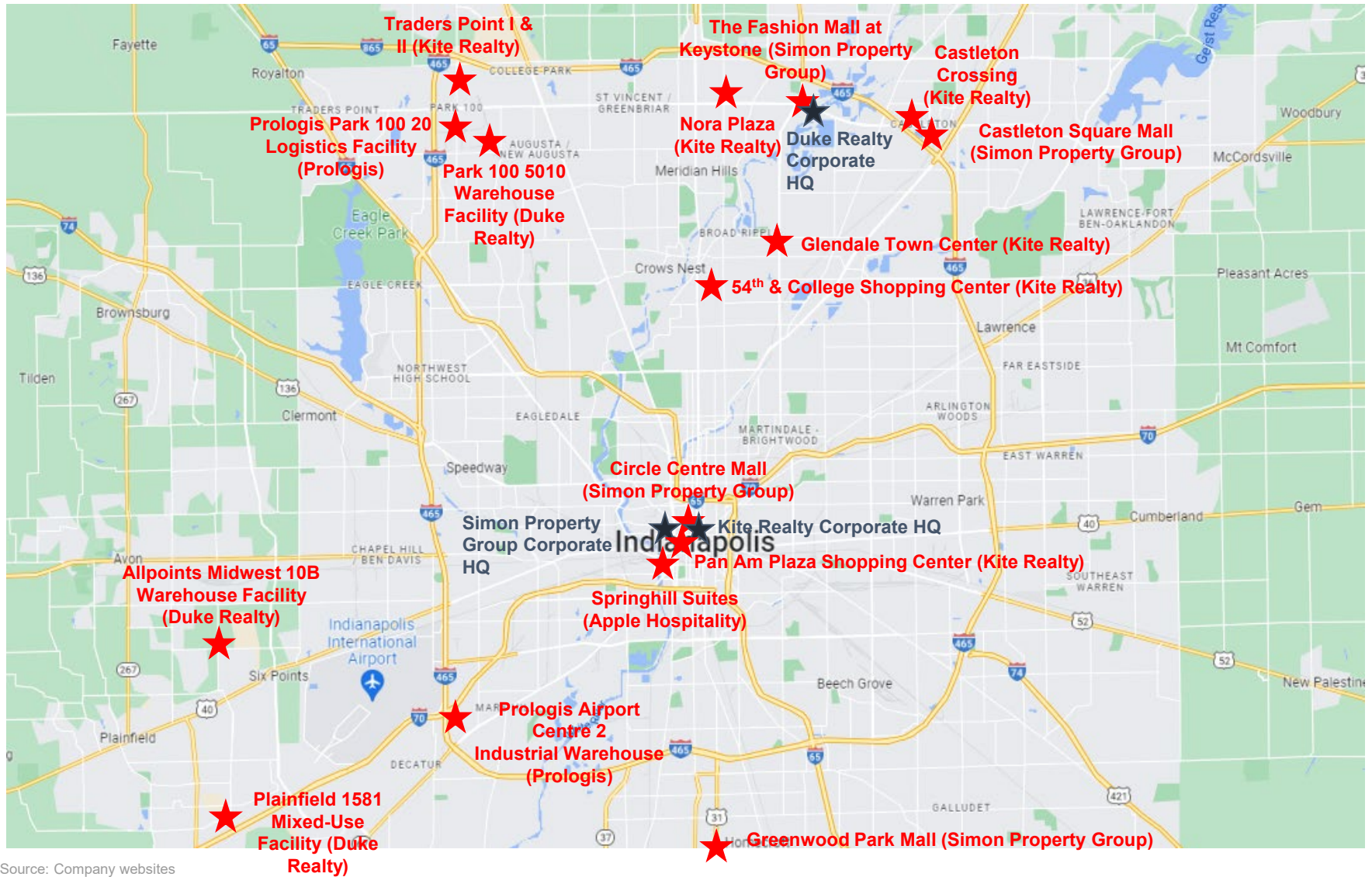
- Indiana is the **home of 4 REITs headquarters**
 - Duke Realty Corporation, Kite Realty Group Trust, Simon Property Group, Inc., and Strawberry Fields REIT⁽²⁾
- **102 REITs currently own property in Indiana⁽³⁾** across a variety of sectors, including:
 - **VICI and its Passive Triple Net REIT peers** like Agree Realty, EPR Properties, National Retail Properties, Realty Income, and Spirit Realty
 - **Lodging REITs** like Ashford Hospitality Trust, Apple Hospitality REIT, and RLJ Lodging Trust
 - **Mall REITs** like Simon Property and Macerich Company
 - **Strip Center REITs** like Acadia Realty, Brixmor Property Group, Kimco Realty, Kite Realty, Regency Centers and SITE Centers
 - **Manufactured Housing REITs** like Equity Lifestyle Properties and Sun Communities
- VICI currently owns the land and real estate assets of two assets in Indiana: Horseshoe Hammond and Caesars Southern Indiana

REIT OWNERSHIP ACROSS INDIANA⁽¹⁾



























(1) Source: NAREIT (Per S&P Global Market Intelligence as of November 16, 2021). (2) Per NAREIT member directory. (3) Per NAREIT analysis of S&P Capital IQ Pro and member company data.

EXAMPLES OF EXISTING REIT OWNERSHIP IN INDIANAPOLIS



Source: Company websites

REIT-OWNED RACETRACKS ACROSS THE U.S.

| Property | State | REIT Owner | Operator | Opened |
|----------------------------------|-----------------|--|--|--------|
| Empire City | New York | VICI |  MGM RESORTS | 2006 |
| JACK Thistledown Racino | Ohio | VICI | J·A·C·K ENTERTAINMENT | 2013 |
| MGM Northfield Park | Ohio | VICI |  MGM RESORTS | 2013 |
| Harrah's Philadelphia | Pennsylvania | VICI |  CAESARS ENTERTAINMENT | 2007 |
| Mountaineer Casino | West Virginia | VICI |  CENTURY CASINOS | 1951 |
| Bally's Dover Casino Resort | Delaware |  GAMING & LEISURE PROPERTIES, INC. |  | 1969 |
| Hollywood Bangor Casino | Maine |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2007 |
| Plainridge Park Casino | Massachusetts |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 1999 |
| Zia Park Racetrack | New Mexico |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2004 |
| Belterra Park | Ohio |  GAMING & LEISURE PROPERTIES, INC. |  BOYD GAMING | 2014 |
| Hollywood Gaming Dayton | Ohio |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2014 |
| Hollywood Gaming Mahoning Valley | Ohio |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2014 |
| Meadows Racetrack & Casino | Pennsylvania |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 1963 |
| Hollywood Casino Penn National | Pennsylvania |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2008 |
| Hollywood Casino Charles Town | West Virginia |  GAMING & LEISURE PROPERTIES, INC. |  PENN ENTERTAINMENT | 2010 |
| 15 Assets | 8 States | 2 REITs | 7 Operators | |

Source: Casino World Directory, respective racetrack websites

(1) Estimate based on 2021-2022 racing season. (2) Does not include live harness racing from September – December 2022. (3) Average racing days excludes Hollywood Gaming Dayton.

VICI'S EXISTING RACINO OWNERSHIP SUMMARY

- VICI, through its subsidiaries, is currently the passive owner of the real property associated with 5 racinos:
 - **Empire City Casino** (operated by MGM International)
 - **MGM Northfield Park** (operated by MGM International)
 - **Harrah's Philadelphia Casino & Racetrack** (operated by Caesars Entertainment)
 - **JACK Thistledown Racino** (operated by JACK Entertainment)
 - **Mountaineer Casino & Racetrack** (operated by Century Casinos)
- In its capacity as a passive landlord, **VICI is restricted from participating or directly influencing, casino or horse racing operations** (including number of race days in a season, the scheduling of such race days, determination, calculation or award of purses)



CONTINUED CAPITAL INVESTMENT AT RACINOS

Properties that are owned by REITs continue to see large capital investments from the gaming operators. VICI's income (rent) is largely fixed so the gaming operators are incentivized to continue spending capital at the properties to grow profitability and market share

Since VICI Acquired the Real Estate And Related Assets

JACK THISTLEDOWN

- JACK Entertainment has spent nearly **\$36mm of capital on JACK Thistledown Racino** after spending over \$90mm to expand the property, reconfigure the gaming floor and add a new parking garage in 2016-2017

MGM NORTHFIELD PARK

- MGM has spent nearly **\$32.6mm of capital** on MGM Northfield, including over \$20mm to transition the property from Hard Rock to MGM Northfield Park, nearly \$1mm refurbishing the racetrack and over \$8.5mm improving and expanding the gaming floor

EMPIRE CITY

- MGM has spent nearly **\$22.5mm on capital initiatives** at Empire City, including \$14.4mm spent transitioning to the MGM brand, over \$6mm spent expanding the gaming floor and smoking patio areas and nearly \$1.3mm of planned spend on barn improvements in the upcoming year

HARRAH'S PHILADELPHIA

- Caesars has spent **~\$655k on growth capital** at the property, consistent with its spending levels prior to VICI's passive real estate ownership

MOUNTAINEER

- Century Casinos has spent **\$492k of capital on the Mountaineer racetrack** including over \$220k on resurfacing the main track, ~\$110k on new drag floats and diamond harrows, ~\$31k on new track lighting and ~\$38k on replacing the dormitory roof



VICI & CAESARS PUT-CALL AGREEMENT



HARRAH'S HOOSIER PARK
ANDERSON, IN



HORSESHOE INDIANAPOLIS
SHELBYVILLE, IN

VICI & CAESARS PUT-CALL AGREEMENT

- In connection with the acquisition of Caesars by Eldorado (resulting in Caesars Entertainment, Inc.), VICI paid Caesars approximately \$3.2 billion and, in connection therewith, among other things, the parties entered into a put-call agreement with respect to all of the land and real estate assets associated with Harrah’s Hoosier Park and Horseshoe Indianapolis (the “Properties”)
 - The put-call agreement, and VICI’s rights thereunder, were specifically negotiated between VICI and Caesars as a way of compensating VICI for one of the many items of value that VICI provided to Caesars in order to facilitate the overall acquisition transaction – a transaction that could not have been consummated without VICI’s involvement
 - Pursuant to the put-call agreement, VICI is entitled to buy and Caesars is entitled to sell all of the land and real estate assets associated with the Properties
 - Consummation of the acquisition of the Properties pursuant to the put-call agreement is subject to certain conditions, including the requirement to obtain approval of the Indiana Horse Racing Commission and the Indiana Gaming Commission

| | Terms of Put/Call Agreement |
|-------------------|---|
| Put Price | <ul style="list-style-type: none"> • 12.5x the initial annual rent of each facility |
| Call Price | <ul style="list-style-type: none"> • 13.0x the initial annual rent of each facility |
| Rent | <ul style="list-style-type: none"> • Initial annual rent would be equal to the property’s trailing four quarter EBITDA at the time of the acquisition divided by 1.3 (1.3x rent coverage) |
| Structure | <ul style="list-style-type: none"> • The Properties would be leased pursuant to the existing Regional Lease between subsidiaries of VICI as passive landlords and subsidiaries of Caesars as operating tenants • The existing Regional Lease is a triple net lease, meaning VICI has no operational control over any properties subject to such lease |
| Term | <ul style="list-style-type: none"> • Each party may trigger its respective put or call, as applicable, beginning on January 1, 2022 and ending on December 31, 2024 |



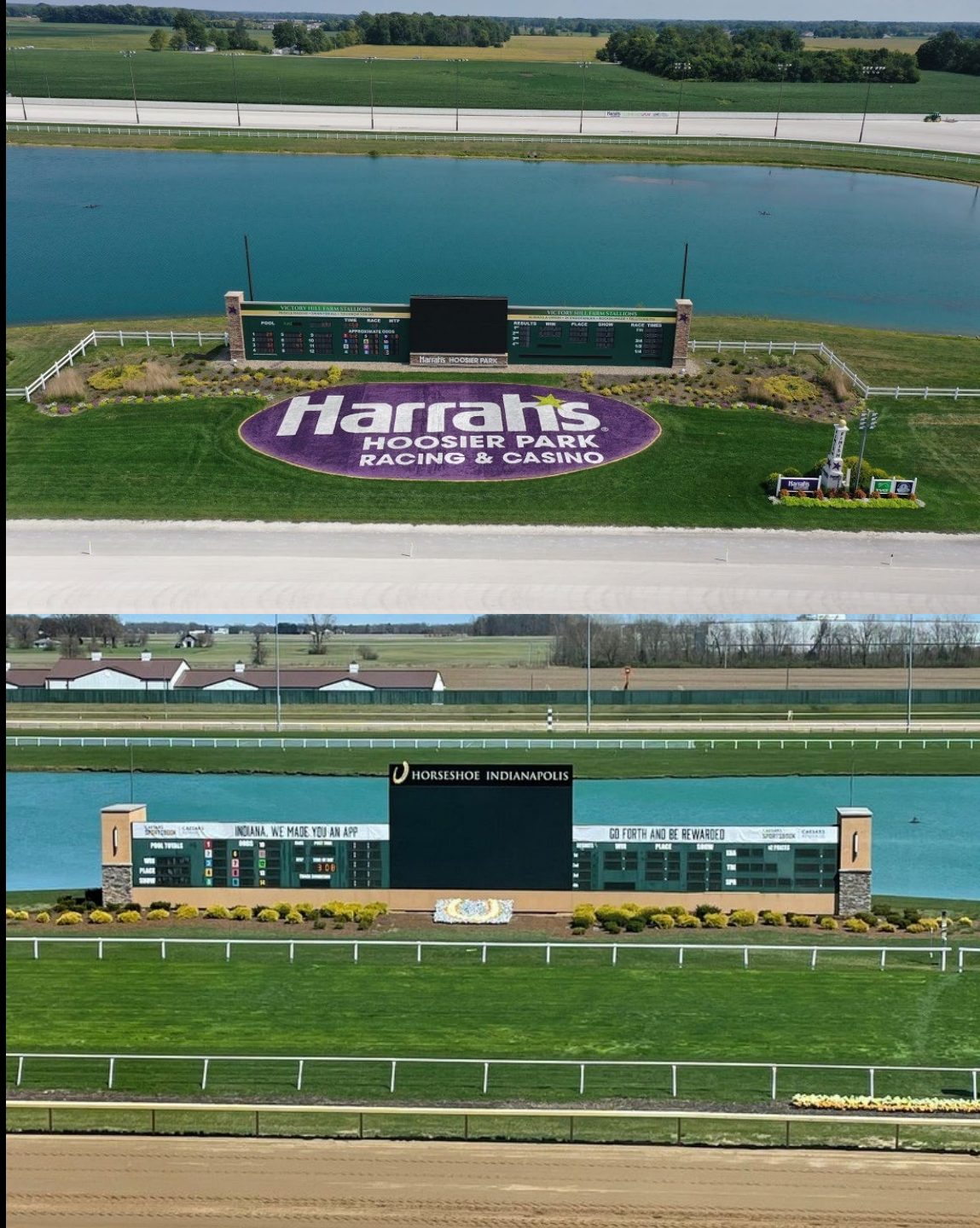
NEXT STEPS

IHRC Approval of the Purchase Transaction and Subsequent Sale Leaseback

- **Initiation of Approval Procedures:** IHRC is respectfully requested to initiate necessary procedures to review VICI (and any relevant subsidiaries) and Caesars in connection with the requested approval for the transactions involving Harrah's Hoosier Park and Horseshoe Indianapolis (the "Properties")
- **Caesars / VICI Transaction:** VICI will purchase the real property and related assets of the Properties; simultaneously with closing of the acquisition, VICI and Caesars will enter into an amendment to the existing regional master lease to include these properties such that Caesars will continue to operate the properties with VICI owning the real property and related assets
- **VICI and Caesars Current Licensure:** VICI holds a Supplier License from the IGC and Caesars holds licenses from both the IGC and the IHRC, so both parties are well positioned to be responsive to IHRC requests
- **No Change to Operating Gaming and Racing Licenses:** There will be no change to the holding company of the gaming and racing licenses for either Harrah's Hoosier Park or Horseshoe Indianapolis – Caesars will continue to operate both Harrah's Hoosier Park and Horseshoe Indianapolis and maintain licenses as appropriate in the ordinary course



QUESTIONS?
THANK YOU



Agenda Item #2

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into between the Indiana Horse Racing Commission ("Commission"), by Deena Pitman ("Director Pitman"), Executive Director of the Indiana Horse Racing Commission Staff ("Commission Staff") and Thomas "Tom" Murray Amoss ("Amoss"), a licensee subject to regulation by the Commission. Collectively, the Commission Staff and Amoss shall be referred to herein as "the Parties." This Agreement is subject to the review and approval of the Commission.

RECITALS

- A. The Indiana Horse Racing Commission ("IHRC") is the administrative agency in the State of Indiana that regulates horse racing pursuant to provisions of the Indiana Code, Title 4, Article 31.
- B. At all times relevant to the violations in this Settlement Agreement, Amoss was licensed as a trainer and authorized agent with the IHRC.
- C. As a licensee of the IHRC, Amoss was subject to IHRC rules and regulations.
- D. As a licensee, Amoss was required to be knowledgeable of all IHRC rules and regulations.
- E. Pursuant to 71 IAC 8.5-1-1.5(a): "No horse participating in a race or entered in a race shall carry in its body any foreign substance as defined in 71 IAC 1.5 or IC 4-31-2 [IC 4-31-2 was repealed by P.L.105-2022, SECTION 1, effective July 1, 2022.], except as provided for in this rule."
- F. Pursuant to 71 IAC 8.5-1-2: "(a) No horse participating in a race shall carry in its body any foreign substance except as provided by these rules. A finding by the chemist or commission designee that a foreign substance is present in the test sample shall be prima facie evidence that such foreign substance was administered and carried in the body of the horse while participating in a race. Such a finding shall also be taken as prima facie evidence that the trainer and his or her agents responsible for the care or custody of the horse have been negligent in the handling or care of the horse. (b) Upon a finding of a violation of this section, the owners or lessees of the horse from which the specimen was obtained shall forfeit any purse money and any trophy or award. However, forfeiture of any purse, trophy, or award for an overage of phenylbutazone, flunixin, ketoprofen, or furosemide in violation of these rules shall be consistent with Recommended Penalties of the Association of Racing Commissioners, International, as revised by the ARCI in 2014 and any other subsequent revision effective after said date, which are incorporated by reference herein, copies of which are available at the commission office."
- G. Pursuant to 71 IAC 8.5-1-7.1(a) and (g): "A trainer who receives a penalty for a medication violation based upon a horse testing positive for a Class [3] medication with Penalty Class [B], as provided in the most recent version of the ARCI Uniform Classification Guidelines



for Foreign Substances or similar state regulatory guidelines, may be assigned” four (4) multiple medical violation points for a noncontrolled substance, and “[i]n addition to the penalty for the underlying offense, the following enhancement[] may be imposed upon a licensed trainer based upon the cumulative points contained in his or her official ARCI record:” a suspension of thirty (30) to sixty (60) days for six (6) to eight and one-half (8.5) points.

H. Pursuant to 71 IAC 5.5-3-2(a)(2) and (b): “The trainer is responsible for ... the presence of any prohibited drug, medication, or other substance, including permitted medication in excess of the maximum allowable level, in horses he or she trains; regardless of the acts of third parties. A positive test for a prohibited drug, medication, or substance, including permitted medication in excess of the maximum allowable level, as reported by a commission-approved laboratory, is prima facie evidence of a violation of this rule. In the absence of substantial evidence to the contrary, the trainer shall be responsible,” and “[a] trainer shall prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these rules.”

I. Amoss was the trainer of the Thoroughbred racehorse Malibu SS, which placed first in the first race at Horseshoe Indianapolis in Shelbyville, Indiana, on October 17, 2022.

J. The Thoroughbred racehorse Malibu SS tested positive in post-race biological samples for the prohibited foreign substance Sotalol – a Class 3, Penalty Class B, substance as provided in the most recent version of the ARCI Uniform Classification Guidelines for Foreign Substances. Primary lab results were confirmed by an approved referee laboratory in split-sample analysis.

K. The Stewards’ scheduled a disciplinary hearing for April 12, 2023.

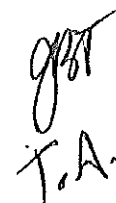
L. In lieu of the Stewards’ hearing, settlement negotiations were entered on or about Wednesday, April 12, 2023.

M. Now, in full and complete resolution of any and all further administrative proceedings involving Amoss relative to the Sotalol positive from the October 17, 2022, race and the violations referenced above, the Commission Staff and Amoss agree to the terms and conditions set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and the promises and covenants to be performed as set forth herein, the Parties agree as follows:

1. Commission Staff maintains that it has sufficient evidence to prove by a preponderance of the evidence that Amoss committed the violations charged. Amoss contests the same and maintains that he has sufficient evidence to prove by a preponderance of the evidence that he did not commit the violations charged.



2. This agreement does not cover any violations that may be discovered that are not referenced above.
3. Amoss agrees to dismiss with prejudice, withdraw and/or waive all related pending legal and administrative proceedings including any related appeals, and release all claims and potential claims against the Commission, the Commission Staff and/or its current or former representatives, agents and/or employees relating to the Commission actions that are the subject of this Settlement Agreement. Amoss specifically agrees to release and forever discharge any claims and/or complaints against the Commission, the Commission Staff and/or its current or former representatives, agents and/or employees and/or the stewards arising from, relating to, or in any way connected with the issues associated with the Commission Staff's initiation and/or pursuit of the underlying disciplinary action against Amoss.
4. As a result of the racehorse Malibu SS testing positive in post-race biological samples for the prohibited foreign substance Sotalol (and confirmation by split-sample testing), Amoss agrees to the following:
 - a. A sixty (60) day suspension whereby:
 - i. Amoss serves fifteen (15) days starting on April 15, 2023; and
 - ii. Forty-five (45) days are deferred as outlined below.
 - b. The forty-five (45) days deferred will be served as an active suspension if Amoss receives notice of any medication violation of a Class 1, 2, or 3 nature under the ARCI rules, or that of a penalty consequence of a Category A or B level under the ARCI rules, on or before November 17, 2023, regardless of the final disposition date of the violation, once an adverse ruling on the violation is issued by any racing authority, to be served consecutive to any sanctions arising from said violation. When considering such violations, 71 IAC 8.5-1-4.1-(a)(2) shall be determinative to the applicable penalty category
 - c. Amoss is fined the sum of five thousand dollars (\$5,000.00).
 - d. Amoss shall forfeit any purse money and any trophy or award from the first race on October 17, 2022, at Horseshoe Indianapolis in Shelbyville, Indiana.
 - e. Malibu SS shall be disqualified and placed last in the first race on October 17, 2022, at Horseshoe Indianapolis in Shelbyville, Indiana.
 - f. Multiple Medication Violation points are assessed pursuant to 71 IAC 8.5-1-7.1.
 - g. Amoss and the Commission Staff agree not to comment if asked about the resolution of, or handling of the violation by the IHRC.
5. The Parties specifically agree that this Agreement shall be governed by applicable Indiana regulations and any failure to comply with those rules is subject to enforcement by the Stewards and/or the Commission.
6. Amoss and Commission Staff acknowledge that this Agreement is subject to the approval of the Indiana Horse Racing Commission.

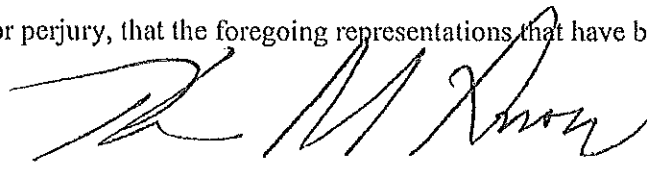
Handwritten signature and initials in the bottom right corner of the page. The signature appears to be 'JST' and the initials below it are 'T.A.'.

7. Any waiver of any provision of this Agreement must be in writing and must be approved by the Commission or the Commission Staff. No waiver of any provision of this Agreement shall constitute either a waiver of any provision hereof (whether or not similar) or a continuing waiver.
8. If and to the extent any provision of this Agreement is held invalid or unenforceable at law, such provision will be deemed stricken from the Agreement and the remainder of the Agreement will continue in effect and be valid and enforceable to the fullest extent permitted by law.
9. This Agreement shall be deemed executed in the State of Indiana, and shall be governed and construed in accordance with the laws of Indiana, without regard to its choice of law provisions, and all claims relating to or arising out of this Agreement, or the breach thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of Indiana, without regard to its choice of law provisions. Exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this Agreement shall be brought only in a state court of competent jurisdiction located in Marion County, Indiana.
10. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, fully enforceable counterpart of all purposes, but all of which constitute one and the same instrument.
11. Amoss represents that he has carefully read and reviewed the foregoing Agreement, acknowledges its contents, has had the right to consult with his own counsel, and agrees to be bound by its terms. Amoss acknowledges that he has voluntarily entered into this Agreement as of the date and year herein set forth.

IN WITNESS HEREOF, the Parties have executed this Agreement on the dates listed below.

I swear, under penalties for perjury, that the foregoing representations that have been made by me are true and correct.

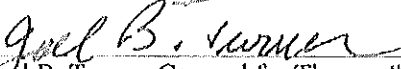
4/12/23
Date

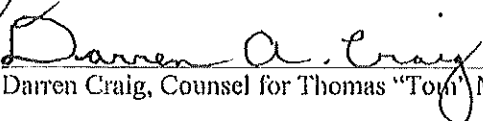


Thomas "Tom" Murray Amoss


J.A.


Witnessed and Approved:


Joel B. Turner, Counsel for Thomas "Tom" Murray Amoss


Darren Craig, Counsel for Thomas "Tom" Murray Amoss

ON BEHALF OF THE INDIANA HORSE RACING COMMISSION:

4-12-23
Date


Deena Pitman, Executive Director

Approved as to form:


David Rothenberg, General Counsel

Tom



Agenda Item #3



FILED:
March 17, 2023

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

PETITIONER: CYNTHIA LOOMIS

RESPONDENT: IHRC STAFF

OALP CAUSE NUMBER: HRC-2211-002419

UNDERLYING ACTION OR ORDER NUMBER: Appeal of Stewards Ruling No. IG-2022-2876

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND NON-FINAL ORDER**

This matter came before the undersigned Administrative Law Judge Michael Buker for hearing on the appeal of Ruling No. IG-2022-2876 issued by the Indiana Horse Racing Commission Staff (“Commission Staff”) against Petitioner, Dr. Cynthia Loomis, DVM. On December 13, 2022, a hearing was conducted on this matter (the “Hearing”). The Commission Staff was represented by its co-counsel Matthew M. Eggiman and Mr. Dale Lee Pennycuff. Respondent was represented by her counsel, Mr. Darren A. Craig and Ms. Carolyn S. Trachtman of Frost Brown Todd LLC. Having considered the administrative record, the arguments of the parties, having conducted the Hearing, and being in all respects duly advised, the ALJ now issues the accompanying Proposed Findings of Fact, Conclusions of Law, and Non-Final Order.

BACKGROUND AND PROCEDURAL SETTING

Dr. Loomis is a practicing veterinarian who was at all times relevant licensed by the Indiana Horse Racing Commission (“IHRC”) to practice at its race tracks in Indiana. On November 7, 2022, the Racing Stewards issued Ruling No IG-2022-2876 against Dr. Loomis under 71 IAC 10-

Non-Final Order (Loomis2)

8.5-5-2 (Prohibited Practices) and 71 IAC 5.5-1-14 (Grounds for Sanctions) alleging a number of violations of the IHRC rules governing horse racing activities in Indiana (the “Stewards Ruling”).¹ Pursuant to the Stewards Ruling, Petitioner was fined in the amount of \$5,000 and suspended for 60 days (i.e., from November 7, 2022 through January 5, 2023). Petitioner timely filed her appeal and requested a stay of the penalties pending an evidentiary Hearing. On November 14, 2022, the matter was assigned to the undersigned. A hearing on a request for stay was scheduled for December 13, 2022 at the offices of the Indiana Horse Racing Commission (“IHRC”), 1302 N. Meridian Street, Suite 175, Indianapolis, Indiana, 46202 at which Petitioner would have had the burden of proof to establish that good cause existed to stay her suspension until an evidentiary hearing was conducted. During a prehearing conference conducted on December 8, 2022, the parties agreed the hearing set for December 13, 2022 would be a full evidentiary hearing with respect to the merits of Petitioner’s appeal under I.C. § 4-21.5-3 and 71 IAC 10-3, *et seq.*, pursuant to which Respondent would have the burden of proof to establish the penalties imposed by the Racing Stewards should be sustained, and the request for stay hearing would be treated as having been withdrawn.²

In rendering findings and conclusions, I am required to weigh the credibility of witnesses about the matters to which they testified including each witness’s interest, if any, in the outcome of the matter. Having considered the administrative record, conducted a hearing with evidence and testimony presented by both parties, weighed the credibility of the witnesses and considered the arguments of counsel, I hereby issue the following Findings of Fact, Conclusions of Law and

¹ On October 27, 2022, the stewards conducted a hearing at which both parties were represented by counsel, witnesses were called and subject to cross-examination, and exhibits were admitted into evidence pursuant to which the Stewards issued the Stewards Ruling (the “Stewards Hearing”).

² The parties’ agreement to this effect was entered into the record without objection at the Hearing (Tr. pp. 7-8).

Non-Final 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.

EXHIBITS ADMITTED DURING THE HEARING

Commission Staff's Exhibits:

- A. Copies of Indiana Code and administrative rules including
 - 1. 71 IAC 8.5-5-2, Prohibited practices;
 - 2. 71 IAC 5.5-1-14, Grounds for sanctions; and
 - 3. I.C. § 4-31-12-15, Sanctions by stewards or judges.
- B. A copy of Petitioner's 2022 IHRC veterinarian license application.
- C. A list of substances found by IHRC investigator Harold Davis in the tack room used by Petitioner at Horseshoe Indianapolis (i.e., the IHRC sanctioned racetrack in Shelbyville, Indiana formerly known as Indiana Grand) on or about July 5, 2022.
- D. Approximately 36 photographs, identified as Exhibits D1-D25c, of the substances listed in (C) above.
- E. A copy of an email and attached memorandum and veterinary treatment record template, identified as E1-E3, sent by IHRC Medical Director, Dr. Kerry Peterson on or about August 20, 2021 to all IRCH licensed veterinarians.
- F. A copy of an Advisory Notice to Horsemen and IHRC Licensed Veterinarians, dated February 22, 2022, regarding Isoxsuprine Hydrochloride Drug Products.
- G. A copy of an Advisory Notice to Horsemen, dated October 25, 2021, regarding Over-The-Counter Equine Supplements and Herbals.

- H. A copy of a Property Record and Receipt, dated July 5, 2022, including inventory and chain of custody, for the substances found by Mr. Davis in the tack room used by Petitioner at Horseshoe Indianapolis.
- I. A copy of Stewards Ruling No. IG-2022-2876.

Petitioner's Exhibits:

- A. Copies of photographs numbered 2-11 of substances found in Petitioner's tack room on or about July 5, 2022. Petitioner's Exhibits 2-11 appear to be copies of photographs of Commission Staff's Exhibits as follows:
 - a. Petitioner's Exhibit #2 corresponds to Commission Staff's Exhibit #D4;
 - b. Petitioner's Exhibit #3 corresponds to Commission Staff's Exhibit #D5;
 - c. Petitioner's Exhibit #4 corresponds to Commission Staff's Exhibit #D7;
 - d. Petitioner's Exhibit #5 corresponds to Commission Staff's Exhibit #D8;
 - e. Petitioner's Exhibit #6 corresponds to Commission Staff's Exhibit #D15;
 - f. Petitioner's Exhibit #7 corresponds to Commission Staff's Exhibit #D20b;
 - g. Petitioner's Exhibit #8 corresponds to Commission Staff's Exhibit #D21;
 - h. Petitioner's Exhibit #9 corresponds to Commission Staff's Exhibit #D20c;
 - i. Petitioner's Exhibit #10 corresponds to Commission Staff's Exhibit #D22c; and
 - j. Petitioner's Exhibit #11 corresponds to Commission Staff's Exhibit #D25a.
- B. A copy of an email string of correspondence between Petitioner and Dr. Peterson, identified as Petitioner's Exhibit #14, to which copies of Petitioner's June 2021 "daysheets" (i.e., daily treatment records) are attached.

RELEVANT STATUTORY AND REGULATORY AUTHORITY

71 IAC 8.5-5-2(c) Prohibited practices

(a) – (b) ...

(c) The possession or use, or both, of a drug, substance, or medication on the premises of a facility under the jurisdiction of the commission that has not been approved by the United States Food and Drug Administration (FDA) for any use (human or animal) is forbidden without prior permission of the commission. For purposes of this rule, the term “drug” is any substance, food or nonfood, that is used to treat, cure, mitigate, or prevent a disease and any nonfood substance that is intended to affect the structure or function of the animal. The term includes any substance administered by injection, other than vaccines licensed by the USDA....

(d) ...

(e) Notwithstanding subsection (c), veterinarians may possess compounded drugs with the restrictions listed in subdivisions (1) through (4). Compounding includes any manipulation of a drug beyond that stipulated on the drug label, including, but not limited to, mixing, diluting, concentrating, or creating oral suspensions or injectable solutions as follows: ...

(1)

(2) Compounded drugs may only be made from other FDA approved drugs.

(3) Veterinarians may not possess compounds where there are FDA approved, commercially available drugs that can appropriately treat the horse.

(4) Compounded drugs must be in containers that meet the prescription labeling requirements in subsections (i) and (j).

Combining two (2) or more substances with pharmacologic effect constitutes the development of a new drug. This may only be done in accordance with state and local laws and must contain FDA approved medications, if available.

(f), (g) ...

(h) A veterinarian shall not possess any drug that is not labeled pursuant to the requirements of subsection (i) or (j).

(i) Drugs possessed by practicing veterinarians on the premises of a facility under the jurisdiction of the commission that have not yet been prescribed or dispensed to horses with which the veterinarian has a veterinarian-client-patient relationship must be affixed with the manufacturer's label, which must include:

- (1) recommended or usual dosage;
- (2) route for administration, if it is not for oral use;
- (3) quantity or proportion of each active ingredient;
- (4) names of inactive ingredients, if for other than oral use;
- (5) an identifying lot or control number;
- (6) manufacturer, packer, or distributor's name and address; and
- (7) net quantity contents.

If any information as described in this subsection is not included on the manufacturer's label, but instead is on the manufacturer's package insert, the package insert must be maintained on the veterinarian's truck.

(j) When issuing a prescription for or dispensing a drug to a horse with which the veterinarian has a veterinarian-client-patient relationship, the veterinarian must affix or cause to be affixed a label that sets forth the following: ...

- (1) – (6) ...
- (7) For compounded drugs, the established name of each active ingredient.
- (8) Any necessary cautionary statements.

(k)

FINDINGS OF FACT

1. Pursuant to I.C. § 4-21.5-3-26(f), Official Notice was taken with respect to both the United States Food and Drug Administration's "Green Book", which is a repository of all FDA

approved medications for veterinary use, and “Orange Book”, which is a similar repository for FDA approved medications for human use. [Tr. pp. 49-50]

2. Petitioner was at all times relevant to this appeal licensed to practice veterinary medicine in Arkansas, Indiana, Kentucky, Louisiana and Minnesota. [Tr. p. 45]
3. Petitioner has held her license in Indiana since 2018. [Tr. p. 113]
4. Petitioner was at all times relevant to this appeal a veterinarian licensed by Respondent who acknowledged being subject to the statutes, regulations and rules governing horse racing in Indiana. [Commission Staff’s Ex. B]
5. Petitioner was at all times relevant to this appeal a member of Kentucky Equine Medical Association (“KEMA”) and worked as a veterinarian. [Tr. p. 118]
6. In June 2021, pursuant to a request from Dr. Peterson, Petitioner provided copies of her daysheets for approximately 30 days. [Tr. pp. 94, 114]
7. On August 20, 2021, Dr. Peterson sent an email and memorandum to all IHRC licensed veterinarians to provide guidance on IHRC medication rules and veterinary treatment record keeping. [Tr. p. 72; Commission Staff’s Ex. E].
 - a. Dr. Peterson warned IHRC licensed veterinarians that future IHRC rules violations could result in sanctions.
 - b. Dr. Peterson warned IHRC licensed veterinarians about the use of non-FDA approved substances and provided references to the FDA’s Green Book and Orange Book.
 - c. Dr. Peterson specifically admonished IHRC licensed veterinarians “it is absolutely imperative that every drug that you possess on grounds or administer is FDA approved for use in the horse (71 IAC 8-6-2(c) or 71 IAC 8.5-5-2(c)). If the

substance is not FDA approved, you must contact the commission for approval prior to administering the non-FDA approved substance. **NOTE:** Compounded drugs are **NEVER** FDA-approved. However, compounded drugs may be administered under strict adherence of the provisions of 71 IAC 8-6-2(e) or 71 IAC 8.5-5-2(e).” (emphasis in original text)

- d. Dr. Peterson encouraged veterinarians to keep lines of communication open with her so she could provide assistance to them with respect to compliance with IHRC rules.
8. On or about August 23, 2021, Petitioner, her colleague, Dr. Nicole Wettstein and Dr. Peterson met to discuss Petitioner’s daysheets and her use of the substance Omeprazole. [Tr. pp. 94, 115]
9. Other than the discussion about Omeprazole, Dr. Peterson did not identify potential violations or problems with other substances identified on the daysheets that are now the subject of this litigation. [Tr. pp. 117, 118]
10. Following the August 23, 2021 meeting, in response to a text message from Petitioner, Dr. Peterson advised Petitioner that if she preferred to use a non-FDA approved Omeprazole product, she would need “case-by-case” approval as outlined in IHRC rules, to which Petitioner responded with a thumbs-up text message. [Tr. pp. 77-78]
11. In connection with her review of Petitioner’s daysheets, Dr. Peterson did not identify or otherwise “flag” any issues with respect to Petitioner’s use of any medications other than omeprazole. [Tr. p. 117]

12. On October 25, 2021, the IHRC issued an Advisory Notice to Horsemen and to IHRC licensed veterinarians cautioning against the use of supplements and holistic medications to treat horses participating in racing. [Tr. pp. 82-84; Commission Staff's Ex. G]
13. On February 22, 2022, Dr. Peterson sent an Advisory Notice to Horsemen and IHRC Licensed Veterinarians regarding the withdrawal of FDA approval for products containing the substance Isoxsuprine. [Tr. pp. 80-81; Commission Staff's Ex. F]
14. A storage trailer owned by KEMA, previously assigned to a location in Louisiana, was assigned to Horseshoe Indianapolis sometime before the Tack Room Search (defined hereunder) was conducted. [Tr. p. 123]
15. The trailer contained medications and other non-perishable items used for treating horses. [Tr. p. 124]
16. Following its arrival at Horseshoe Indianapolis, medications in the trailer were moved to a tack room used by Petitioner at Horseshoe Indianapolis. [Tr. pp. 21, 122-127]
17. The tack room was kept locked when not in use. [Tr. p. 134]
18. The tack room used by Petitioner also was used by her colleague at KEMA, Dr. Wettstein, and Ms. Lucina Gonzalez, a veterinary assistant. [Tr. pp. 20, 21]
19. On July 4 and 5, 2022, IHRC investigators, Dr. Peterson and other IHRC personnel entered, secured and searched Petitioner's tack room (the "Tack Room Search"). [Tr. pp. 20, 45]
20. Petitioner was not present during the Tack Room Search. [Tr. p. 119]
21. In connection with the Tack Room Search, at the direction of Dr. Peterson, Respondent identified and seized approximately 25 different substances (the "Seized Substances"). [Tr. pp. 21-23, 28, 46-70; Commission Staff's Ex. C; D1-25c]

A. **Substantial and reliable evidence exists to support a conclusion that the Disputed Exhibits are admissible for purposes of the Hearing.**

22. Under I.C. § 4-21.5-3-14(d), proceedings before an administrative law judge are de novo.
23. At the Hearing, Commission Staff's Exhibits C, D1; D2; D3; D6; D9-14; D16-19; D22a, b and d; D 23 and D24; G; and H were admitted over objection by Petitioner because they had not been considered by the Stewards at the Stewards Hearing (collectively, the "Disputed Exhibits"), and, accordingly, should not form part of the basis in support of upholding the Stewards Ruling. [Tr. pp. 14, 15, 24, 28]
24. During the Hearing, Petitioner generally did not address allegations with respect to violations that involved the substances identified in the Disputed Exhibits; i.e., Petitioner did not provide evidence with respect to why those substances allegedly were in her possession, were or were not FDA approved, failed to satisfy labeling requirements, or otherwise violated IHRC rules.
25. The undersigned administrative law judge presided at the Hearing. Accordingly, the Hearing constituted a de novo proceeding under IC 4-21.5-3-14(d). I find the Disputed Exhibits were properly admitted and can be considered for purposes of this Non-Final Order.

B. **Substantial and reliable evidence exists to support a conclusion that Respondent did not consent to Petitioner's use of non-FDA approved substances based solely on a review of Petitioner's daysheets and related correspondence.**

26. As a threshold matter, Petitioner argues as a defense that because Dr. Peterson did not identify or flag any issues with respect to Petitioner's daysheets (other than with respect to Omeprazole, which is discussed below), the IHRC had effectively consented to the

possession and use of the substances that form the basis for the alleged violations. As discussed below, I do not find this argument persuasive.

27. In July 2021, Dr. Peterson conducted a review of the daysheets of all IHRC-licensed veterinarians to determine compliance with existing IHRC rules and in anticipation of pending federal legislation (i.e., the Horseracing Integrity and Safety Act of 2020 (HISA)). [Tr. pp. 72-73] On August 20, 2021, she issued a memorandum to all IHRC-licensed veterinarians that summarized her findings. [Tr. pp. 75, Commission Staff's Exhibit E2] As she explained in the email accompanying her memorandum, the review of the daysheets "was for information purposes only with intent to provide all of you with guidance moving forward." (emphasis added). [Commission Staff's Ex. E1] In Section 3 of the memorandum, Dr. Peterson explained she had identified a number of substances being used by IHRC-licensed veterinarians that were not FDA approved. [Commission Staff's Ex. E2] Dr. Peterson then emphasized in underlined language that every drug possessed on IHRC grounds must be FDA approved or approved by the IHRC and reiterated: "[i]f the substance is not FDA approved, you must contact the commission for approval prior to administering the non-FDA approved substance." [Commission Staff's Ex. E2] In the second paragraph of Section 3 of the memorandum, Dr. Peterson further elaborated "[i]f the drug is not listed [in the FDA Green or Orange book], then it is not FDA approved for use and may not be administered without the prior approval of the commission." [Commission Staff's Ex. E2]
28. On August 23, 2021, Dr. Peterson met with Petitioner and Dr. Wettstein to discuss certain follow up questions Petitioner had regarding the daysheet review. [Tr. pp. 76-78] In follow up to their meeting, Petitioner and Dr. Peterson discussed by text messaging the use of

compounded Omeprazole. [Tr. p. 77] Dr. Peterson informed Petitioner that if Petitioner preferred to use a non-FDA compounded product in lieu of the FDA approved product (due to certain known issues with the FDA approved product), Dr. Peterson would approve that use “on a case by case basis” as outlined in IHRC rules, to which Petitioner responded with a thumbs-up text reply. [Tr. pp. 77-78]

29. To imply that blanket consent was granted by the IHRC for the future use of non-FDA approved drugs identified in the daysheet reviews is illogical in the context of the daysheet review, the August 20, 2021 email and memorandum, and the subsequent text discussion between Petitioner and Dr. Peterson.
30. Based on the foregoing, I find that Petitioner was not granted approval to use non-FDA substances based on the review of Petitioner’s daysheets and the related activities and communications.

C. Substantial and reliable evidence exists to support a conclusion that Petitioner possessed non-FDA approved substances in violation of 71 IAC 8.5-5-2.

31. Under 71 IAC 8.5-5-2(c), the possession or use, or both, of a drug, substance, or medication on the premises of a facility under the jurisdiction of the commission that has not been approved by the United States Food and Drug Administration (FDA) for any use (human or animal) is forbidden without prior permission of the commission.
32. Based on the testimony of Dr. Peterson, and as summarized on Commission Staff’s Ex. C, seventeen of the Seized Substances were not FDA approved³ [Tr. pp. 47-70]

³ Specifically, the seventeen substances identified as Commission Staff’s Exhibits D1 (Lactanase), D4 (Caco Copper Iron), D5 (Sodium Cacodylate/Ferrous Gluconate/Strychnine Sulfate), D7 (P-Bloc), D8 (Sarraceniaceae), D9 (Stop Two), D10 (Stop 20), D11 (Broncholixir), D12 (Red Lung), D13 (Liver Happy), D14 (Yunnan Baiyao Powder), D15 (Yunnan Paiyao), D17 (Dr. Burch’s Oralene), D19 (Butecort Sweat Rx), D21 (Isoxsuprine HCl), D22 (Toltrazuril) and D24 (Traumeel).

33. With respect to seven of the Seized Substances (i.e., the substances addressed at the Stewards Hearing), the following testimony was provided:

- a. Petitioner testified that six of the Seized Substances were not being currently used because they were expired⁴ or mislabeled⁵ and Petitioner only was in possession of the substances pending their destruction. [Tr. pp. 120-129]. Petitioner testified “[n]obody has ever said anything about Indiana having any means to properly dispose of expired medications”, and that KEMA’s internal policies provided that expired drugs would be returned to its home office in Louisville for destruction at the end of the racing season. [Tr. p 123]
- b. Dr. Peterson testified it is well known among veterinarians, that expired drugs may be taken to approved drug disposal sites (including approximately 38 CVS Pharmacy locations in central Indiana) or collected for destruction by approved service companies that operate in central Indiana because veterinarians routinely deal with medications that expire if not used frequently enough. She also testified she was taught in veterinary school about the need to establish a plan for disposal of expired drugs that conforms with applicable law. [Tr. pp. 85-86]
- c. Petitioner argues that one of the Seized Substances was in her possession despite the fact that it was not FDA approved, because, in her professional opinion, it was an essential ingredient in the vitamin jugs provided to horses after workouts.⁶

⁴ Specifically, the five substances identified as Commission Staff’s Exhibits D5 (Sodium Cacodylate/Ferrous Gluconate/Strychnine Sulfate), D7 (P-Bloc), D8 (Sarraceniaceae), D21 (Isoxsuprine HCl) and D22 (Toltrazuril).

⁵ Specifically, the substance identified as Commission Staff’s Exhibit D15 (Yunnan Paiyao). Dr. Fenger testified that possession of this substance was in violation of IHRC rules. [Tr. p. 152]

⁶ Specifically, the substance identified as Commission Staff’s Ex. D4 (Caco Copper Iron).

d. Dr. Clara Fenger, in testimony recorded during the Stewards Hearing and admitted during the Hearing without objection, provided general and historical explanations regarding why she believed the IHRC could permit their possession and use. For example:

- i. Appetite stimulants Caco Copper and Western No. 2, both non-FDA approved, should be permissible because currently there is no FDA approved appetite stimulant available;
- ii. Serraceniaceae should be permissible because the alternative Serapin, an FDA-approved product, is not currently being manufactured; and
- iii. P-Bloc is FDA listed but not FDA approved. [Tr. pp. 147-153]

Dr. Fenger did not directly testify whether the foregoing substances could be possessed or used under 71 IAC 8.5-5-2 without the consent of the IHRC, and accordingly, I find that Dr. Fenger's testimony was not persuasive in this regard.

34. Petitioner provided no evidence with respect to why ten of the Seized Substances were in her possession on July 5, 2022.⁷
35. Except as discussed in Section B above, no evidence was provided that Petitioner had obtained IHRC consent for possession of any of the foregoing substances.
36. Petitioner was aware that IHRC consent for use of non-FDA approved substances could be obtained because she had previously obtained verbal approval for use of Omeprazole in August 2021. [Tr. p. 116]

⁷ Specifically, the ten substances identified in the Disputed Exhibits as Commission Staff's Ex. D1 (Lactanase), D9 (Stop Two), D10 (Stop 20), D11 (Broncholixir), D12 (Red Lung), D13 (Liver Happy), D14 (Yunnan Baiyao Powder), D17 (Dr. Burch's Oralene), D19 (Butecort Sweat Rx) and 24 (Traumeel).

37. As set forth above, Petitioner did not testify why ten substances (i.e., those substances identified in the Disputed Exhibits) were in her possession on July 5, 2022. With respect to the seven substances for which Petitioner provided evidence, her evidence did not satisfy the regulatory requirements. Possession of non-FDA approved substances is expressly prohibited without regard to the reason for such possession unless Petitioner obtained the prior consent of the IHRC which she failed to obtain. Petitioner acknowledged responsibility to know and abide by IHRC rules. [Commission Staff's Ex. B] Moreover, more than nine months before the Tack Room Search, Petitioner was explicitly warned in Dr. Peterson's memorandum that every drug in her possession was required to be FDA approved or approved by the IHRC. Despite this warning, she continued to store the Seized Substances at the race track; i.e., a highly regulated area.

38. Based on the foregoing, I find Petitioner possessed seventeen non-FDA approved substances at the time of the Tack Room Search, and that such possession violated 71 IAC 8.5-5-2.

D. Substantial and reliable evidence exists to support a conclusion that Petitioner possessed non-FDA approved compounds where there are FDA approved, commercially available alternatives in violation of 71 IAC 8.5-5-2(e)(3).

39. Under 71 IAC 8.5-5-2(e)(3), veterinarians may not possess compounded substances where there are FDA approved, commercially available drugs that can appropriately treat a horse.

40. Based on the testimony of Dr. Peterson, and as summarized on Commission Staff's Ex. C, five of the Seized Substances were non-FDA approved compounds where there were FDA

approved, commercially available medications to appropriately treat a horse (the “Non-FDA Approved Compounds”).⁸ [Tr. pp. 50, 55, 65-70]

41. With respect to two of the Non-FDA Approved Compounds (i.e., the substances addressed at the Stewards Hearing), the following testimony was provided:

a. Petitioner argues that one of the Non-FDA Approved Compounds, Phenylbutazone Powder/Paste,⁹ was in her possession because FDA approved alternative substances were on backorder for approximately two years, and thus not commercially available. [Tr. p. 127] Petitioner did not provide any evidence other than her own testimony that the substances were, in fact, on backorder at the time of the Tack Room Search.

b. Petitioner argues that one of the Non-FDA Approved Compounds, ACTH,¹⁰ was in her possession in compounded form because an FDA approved alternative was “not currently available”. [Tr. p. 128] Dr. Peterson testified that FDA approved alternatives for this substance were commercially available under different trade names for both animals and humans. [Tr. p. 70]

42. Dr. Peterson testified that she previously granted permission to another IHRC licensee for use of a non-FDA approved compound where an FDA approved substance was not commercially available. [Tr. p. 95]

⁸ Specifically, the five substances identified as Commission Staff’s Ex. D2 (Methocarbamol), D6 (Glycopyrrolate), D20 (D20b (Phenylbutazone Powder)/D20c (Phenylbutazone Paste)), D23 (Sulfadiazine/Pyrimethamine Suspension) and D25 (ACTH).

⁹ Specifically, the substance identified in Commission Staff’s Ex. D20 (D20b (Phenylbutazone Powder)/D20c (Phenylbutazone Paste))

¹⁰ Specifically, the substance identified in Commission Staff’s Ex. D25 (ACTH).

43. Petitioner provided no evidence with respect to why three of the Non-FDA Approved Compounds¹¹ (i.e., those identified in the Disputed Exhibits) were in her possession at the time of the Tack Room Search.
44. As set forth above, Petitioner provided no evidence with respect to why three of the Non-FDA Approved Compounds identified in the Disputed Exhibits were in her possession at the time of the Tack Room Search. With respect to the remaining two Non-FDA Approved Compounds in Petitioner's possession, I find (a) Respondent did not meet its burden of proof with respect to Phenylbutazone Powder/Paste¹² and (b) Respondent did meet its burden of proof with respect to ACTH.^{13, 14} Based on Petitioner's thumbs-up response to Dr. Peterson's text message regarding Omeprazole, Petitioner was aware that IHRC consent to possess non-FDA approved compounds could be obtained, but she failed to do so.
45. Based on the foregoing, I find Petitioner possessed four Non-FDA Approved Compounds at the time of the Tack Room Search, and that such possession violated 71 IAC 8.5-5-2(e)(3).

E. Substantial and reliable evidence exists to support a conclusion that Petitioner possessed compounded substances containing non-FDA approved ingredients in violation of 71 IAC 8.5-5-2(e)(2).

46. Under 71 IAC 8.5-5-2(e)(2), compounded drugs may only be made from other FDA approved drugs. Dr. Peterson testified one of the Seized Substances was compounded from

¹¹ Specifically, the three substances identified in Commission Staff's Ex. D2 (Methocarbamol), D6 (Glycopyrrolate) and D23 (Sulfadiazine/Pyrimethamine Suspension).

¹² Specifically, the substance identified in Commission Staff's Ex. D20 (D20b (Phenylbutazone Powder)/D20c (Phenylbutazone Paste))

¹³ Specifically, the substance identified in Commission Staff's Ex. D25 (ACTH).

¹⁴ Specifically, I find that the testimony of Petitioner to be less credible than that of Dr. Peterson, who, in addition to testifying in person, was more specific in her responses to the questions about the substance.

non-FDA approved substances.¹⁵ Specifically, Dr. Peterson testified the substance was a compounded drug made from a non-FDA approved substance that included strychnine sulfate, which is a Class 1A drug and a prohibited substance. [Tr. p. 54]. The testimony of neither Petitioner nor Dr. Fenger addressed whether the drug was compounded from non-FDA approved drugs. [Tr. pp. 122-123, 149]

47. Based on the foregoing, I find that Petitioner possessed compounded drugs made from substances that were non-FDA approved at the time of the Tack Room Search, and that such possession violated 71 IAC 8.5-5-2(e)(2).

F. Substantial and reliable evidence exists to support a conclusion that Petitioner possessed substances which did not satisfy the IHRC labeling requirements under 71 IAC 8.5-5-2(i) and 71 IAC 8.5-5-2(j).

48. Under 71 IAC 8.5-5-2(i), drugs possessed by practicing veterinarians on the premises of a facility under the jurisdiction of the commission must be affixed with the manufacturer's label and include the following information: (1) recommended or usual dosage; (2) route for administration, if not for oral use; (3) quantity or proportion of each active ingredient; (4) names of inactive ingredients, if for other than oral use; (5) an identifying lot or control number; and (6) manufacturer, packer, or distributor's name and address; and net quantity contents.
49. Under 71 IAC 8.5-5-2(j)(8), when issuing a prescription or dispensing a drug to a horse, veterinarians must affix a label that includes any necessary cautionary statements.

¹⁵ Specifically, the substance identified as Commission's Exhibit D5 (Sodium Cacodylate/Ferrous Gluconate/Strychnine Sulfate)

50. Dr. Peterson testified that twelve of the Seized Substances did not satisfy the IHRC labeling requirements under 71 IAC 8.5-5-2(i) and 71 IAC 8.5-5-2(j).¹⁶ [Tr. pp. 48-70]

a. Improper labelling information included the following:

- i. Lack of recommended dosage¹⁷,
- ii. Lack of route of administration,¹⁸
- iii. Lack of manufacturer contact information,¹⁹ and
- iv. Lack of necessary cautionary statements.²⁰

b. Labels on two of the Seized Substances reflected a prescribing veterinarian who was not licensed by the IHRC.²¹

51. The IHRC labelling requirements under 71 IAC 8.5-5-2(i) and (j) provide the framework with which IHRC-licensed veterinarians must comply for labelling drugs and substances possessed on commission property. Petitioner testified she has always maintained labels on medications as provided by manufacturers and pharmacies. [Tr. p. 129] However, compliance with regulatory bodies and rules other than the IHRC may or may not be sufficient to satisfy the IHRC labelling rules. Regardless of what may be required by other regulatory bodies or statutes, Petitioner, an IHRC licensed veterinarian, is required to comply with the IHRC labelling requirements under 71 IAC 8.5-5-2(i) and (j).

¹⁶ Specifically, the substances identified as Commission Staff's Ex. D2 (Methocarbamol), D3 (Arginine), D4 (Caco Copper Iron), D5 (Sodium Cacodylate/Ferrous Gluconate/Strychnine Sulfate), D6 (Glycopyrrolate), D7 (P-Bloc), D8 (Sarraceniaceae), D15 (Yunnan Paiyao), D16 (Chloramphenicol), D18 (Meclofenamate Sodium), D23 (Sulfadiazine/Pyrimethamine Suspension), and D25 (ACTH).

¹⁷ Recommended dosage was not provided for: Methocarbamol, Arginine, Caco Copper Iron, Sodium cacodylate/Ferrous Gluconate/Strychnine Sulfate, Sarraceniaceae, Glycopyrrolate, or ACTH.

¹⁸ Route of administration information was not provided for: Methocarbamol, Arginine, Caco Copper Iron, Sodium cacodylate/Ferrous Gluconate/Strychnine Sulfate, Glycopyrrolate, or ACTH.

¹⁹ Manufacturer contact information was not provided for Yunnan Paiyao.

²⁰ Necessary cautionary statements were not provided for: P-Bloc, Chloramphenicol, or Meclofenamate Sodium.

²¹ Dr. P. Tripp, a colleague of Petitioner at KEMA, was identified as the veterinarian to whom the substance was issued for Sarraceniaceae and Sulfadiazine/Pyrimethamine Suspension.

52. Based on the foregoing, I find Petitioner possessed twelve substances that were not properly labeled at the time of the Tack Room Search, and that such possession violated 71 IAC 8.5-5-2(i) and (j).

G. Substantial and reliable evidence exists to support a conclusion that the penalties imposed against Petitioner are reasonable and appropriate under IHRC rules.

53. The commission has adopted rules under I.C. § §§ 4-31-12-15(a), 4-31-13-2(a), and 71 IAC 3.5-2-3(b) to delegate to racing stewards the authority to conduct disciplinary hearings on the behalf of the commission.

54. Under I.C. § § 4-31-12-15(a) and 71 IAC 3.5-2-3(i), stewards may impose a penalty of suspension of a license for not more than one year and a fine no to exceed \$5,000 for each violation.

55. Under 71 IAC 10-2-7(a), issues considered at a disciplinary hearing must be decided by a majority vote of the stewards.

56. Under 71 IAC 10-2-6(c), the burden of proof in a disciplinary hearing conducted by the stewards is preponderance of the evidence.

57. On October 27, 2022, stewards at Horseshoe Indianapolis conducted a hearing on alleged violations of IHRC rules by Petitioner at which all three Horseshoe Indianapolis stewards were present, witnesses were called and subject to cross-examination by both Petitioner and Respondent, and testimony and evidence were presented. [Tr. pp. 24, 106-108]

58. On November 7, 2022, the stewards unanimously issued Ruling No. IG-2022-2879 pursuant to which Petitioner was suspended for 60 days and a fine of \$5,000 was imposed. [Tr. p. 109]

59. The stewards believed the violations sustained against Petitioner were “serious” violations that warranted a “substantial time off of work”, and wanted to provide a deterrent to prevent other licensees from committing similar violations. [Tr. pp. 109, 110]
60. In mitigation, the stewards believed that the maximum sanctions (i.e., a one year suspension and \$5,000 for each violation) were too severe in light of Petitioner’s previously “clean historical record of violations”. [Tr. p. 109]
61. Based on the foregoing, I find that, in light of Petitioner’s clean disciplinary record, the sanctions imposed by the stewards against Petitioner are reasonable and appropriate.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over this matter pursuant to his appointment by the Indiana Office of Administrative Proceedings and the provisions of I.C. § 4-21.5, *et seq.* and 71 IAC 10-3-7.
2. The IHRC 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 violate its rules.
3. At all times relevant, Petitioner was duly licensed by the IHRC and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.
4. The Stewards Ruling was issued in accordance with Indiana statutes and IHRC rules and were supported by substantial, reliable and credible evidence presented to the undersigned administrative law judge.
5. Commission Staff had the burden of persuasion and the burden of going forward with proof on the Stewards Ruling by a preponderance of the evidence pursuant to I.C. § 4-21.5-3-14.

6. Indiana Code § 4-21.5-3-14(c) provides that the party asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the affirmative defense.
7. Under the foregoing provisions, Petitioner had the burden of persuasion with respect to all affirmative defenses raised by her.
8. By a preponderance of the evidence, Commission Staff met its burden of proof as to all violations alleged against Petitioner as set forth above.
9. By a preponderance of the evidence, Commission Staff met its burden of proof with respect to each of the following at the time of the Tack Room Search:
 - a. Petitioner was in possession of non-FDA approved substances;
 - b. Petitioner was in possession of non-FDA approved compounds;
 - c. Petitioner was in possession of compounds containing non-FDA approved ingredients; and
 - d. Petitioner was in possession of substances which were not labeled in accordance with IHRC regulations.
10. Petitioner did not meet her burden of proof as follows:
 - a. Petitioner did not establish by a preponderance of the evidence that she had received IHRC consent to use or possess non-FDA approved substances solely by virtue of the review of her daysheets and related subsequent communications.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated each of the following IHRC rules at the time of the Tack Room Search:
 - a. 71 IAC 8.5-5-2(c), by possessing non-FDA approved substances on IHRC grounds;
 - b. 71 IAC 8.5-5-2(e)(2), by possessing improperly compounded substances which contained non-FDA approved ingredients;
 - c. 71 IAC 8.5-5-2(e)(3), by possessing non-FDA compounds where there were FDA approved, commercially available medications available to appropriately treat a horse; and
 - d. 71 IAC 8.5-5-2(i) and (j), by possessing substances that did not comply with IHRC labelling requirements.
2. Petitioner's violations of the foregoing regulations are contrary to the best interests of horseracing in Indiana as set forth in 71 IAC 5.5-1-14(10), especially in light of the fact that IHRC licensed veterinarians enjoy positions of trust at a racetrack because they are among the few individuals who can possess drugs, needles, syringes, etc., and thus, a finding that they may possess a prohibited substance is especially significant because of the ability to repeat, hide and cover-up their actions.
3. The 60 day suspension and \$5,000 fine levied against Petitioner by the stewards are reasonable and appropriate in light of the allegations established.

NON-FINAL ORDER

Commission Staff may recommend penalties and an administrative law judge may accept, reject or modify the recommended penalty. 71 IAC 10-3-12(f). The 60 day suspension and fine

of Five Thousand Dollars (\$5,000) recommended against Petitioner in the Stewards Ruling are each reasonable in light of the substantial, credible and reliable evidence presented during the Hearing. Having considered all of the facts and evidence presented by the parties, including facts in mitigation, I recommend that a Final Order be entered by the Indiana Horse Racing Commission in favor of the Indiana Horse Racing Commission Staff and against Petitioner affirming Ruling No. IG-2022-2876 in all material respects, and sanctions be adopted recommending that Petitioner:

(a) Be suspended for a period of 60 days (credited for time previously served under suspension), and

(b) Be fined in the amount of Five Thousand Dollars (\$5,000).

In accordance with I.C. § 4-15-10.5-12(b), the undersigned's order disposing of this matter is not final. Specifically, this Non-Final Order is subject to review by the Indiana Horse Racing Commission. Pursuant to I.C. § 4-21.5-3-29(d), Petitioner has fifteen (15) calendar days following receipt of this Non-Final Order to file written exceptions with the Indiana Horse Racing Commission.

ORDERED: March 17, 2023

/S/ Michael Buker

Hon. Michael Buker
Administrative Law Judge
Office of Administrative Law Proceedings

Distributed to Parties:

Petitioner, Cynthia Loomis, served by Co-Counsel by electronic mail from OALP EService: Darren A. Craig, Frost Brown Todd LLC, at dcraig@fbtlaw.com and Cameron S. Trachtman, Frost Brown Todd LLC, by OALP EService email at: ctrachtman@fbtlaw.com.

Indiana Horse Racing Commission Staff (Agency), Respondent, served by Co-Counsel by electronic mail from OALP EService: Matthew M. Eggiman at MEggiman1@hrc.in.gov and Dale L. Pennycuff at DPennycuff@hrc.in.gov.

Agenda Item #4



FILED:

April 4, 2023

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

PETITIONER: CYNTHIA LOOMIS

RESPONDENT: IHRC STAFF

OALP CAUSE NUMBER: HRC-2301-000115

UNDERLYING ACTION OR ORDER NUMBER: Appeal of Stewards Ruling No. IG-2023-2903

ORDER TO DISMISS

On December 30, 2022 pursuant to Stewards Ruling No. IG-2023-2903 (the “Current Ruling”), Petitioner was fined by the Stewards in the amount of \$5,000 and suspended for one year¹ for alleged violation of race day administration rules. As set forth in the Current Ruling, Petitioner also was sanctioned for fraud or attempted fraud in connection with horse racing or pari-mutuel wagering and engaging in conduct against the best interests of horse racing or which compromises the integrity of operations at a race track under 71 IAC 5.5-1-14. In addition, the matter was referred to the Indiana Horse Racing Commission (the “Commission”) for review and consideration of penalties in excess of the limitations on the Stewards’ authority. Petitioner timely appealed the Current Ruling and requested a stay of the penalties pending an evidentiary hearing. The matter was assigned to Administrative Law Judge Michael Buker on January 13, 2023. A telephonic Hearing with respect to the request for stay was set for February 21, 2023 (the “Stay Hearing”) pursuant to 71 IAC 10-2-10.

In lieu of a Stay Hearing, pursuant to IC 4-21.5-3-19 and as agreed by the parties, each party was ordered to submit its brief with respect to whether good cause exists to stay the sanctions imposed under the Current Ruling pending an evidentiary Hearing. Responsive briefs were filed by each party on February 28, 2023. Neither party requested an opportunity to present oral arguments.

¹ As set forth in the Current Ruling, Petitioner was suspended for one year and the “period of suspension shall be served consecutively to the sixty (60) day suspension imposed by Stewards ruling No. IG-2022-2876 which ends on January 05, 2023.” After being granted credit for the 109 days of summary suspension Petitioner previously served (i.e., from July 4, 2022 through October 17, 2022), the ending date of Petitioner’s suspension was determined by the Stewards to be on September 21, 2023.

In its initial brief, Petitioner argues the Current Ruling was untimely under I.C. § 4-31-13-2(b).² In its response, Respondent argued that the deadline imposed under I.C. § 4-31-13-2(b) should be “tolled” in a manner similar to what occurs under the Indiana criminal procedure rules. Consequently, the parties were each ordered to file no later than March 16, 2023, “a brief of arguments whether, and to what extent, the concept of ‘tolling time’ under Ind. R. Crim. P. 4(A), or such similar concept, should apply in Indiana to civil matters, administrative law, horseracing rules, and in particular to this appeal.”

FINDINGS OF FACT³

1. The “First Ruling”. On July 4, 2022, Petitioner was alleged to have administered a prohibited foreign substance to the horses “Justa Doll” and “Overthetopjustice” in violation of 71 IAC 8.5-1-1.5(b) (the “July 4 Incident”). Petitioner was summarily suspended pursuant to Ruling No. IG-2022-2715 (amended July 12, 2022) for actions not in the best interests of racing and which compromise the integrity of operations at a racetrack. Petitioner’s summary suspension under Ruling No. IG-2022-2715 ended on October 3, 2022 pursuant to the “Order Regarding Summary Suspension; Motion for Reconsideration” issued on October 15, 2022.
2. The “Second Ruling”. On November 7, 2022, the Stewards issued Ruling No. IG-2022-2876 against Petitioner alleging a number of violations of IHRC rules under 71 IAC 10-8.5-5-2 (Prohibited Practices) and 71 IAC 5.5-1-14 (Grounds for Sanctions).⁴ Pursuant to the Second Ruling, Petitioner was fined in the amount of \$5,000 and suspended for 60 days from November 7, 2022 through January 5, 2023.
3. The Current Ruling. On December 28, 2022, the Stewards conducted another hearing with respect to the July 4 Incident at which Petitioner (by video conferencing) and legal counsel appeared and at which testimony and evidence were presented. Pursuant to the December 28, 2022 Stewards hearing, the Current Ruling was issued under which Petitioner was fined \$5,000 and suspended for one year. Pursuant to the Current Ruling, Petitioner’s suspension began on January 6, 2023; i.e., the day after the suspension imposed under Second Ruling ended.
 - a. The “Date of Ruling” set forth in the Current Ruling is December 30, 2022.
 - b. The Current Ruling was issued on January 4, 2023.⁵

² In addition to arguments whether the Current Ruling was untimely, both parties argued that good cause exists (or does not exist) to justify a stay of the imposed penalties pending an evidentiary Hearing. For reasons discussed hereunder, these arguments were not addressed in this Order.

³ To the extent any of the Findings of Fact are more appropriately considered Conclusions of Law, or conversely, they shall be so treated.

⁴ The facts underlying the Second Ruling were substantially distinct than the facts that were the subject of the July 4 Incident.

⁵ An issue exists with respect to when the Current Ruling was issued. Under 71 IAC 10-2-7(a), the issues at a disciplinary hearing shall be decided by a majority vote of the racing judges; and under 71 IAC 10-2-7(c), a ruling must be signed by a majority of the racing judges. As set forth above, the “Date of Ruling” set forth in the Current

- c. The date that is one hundred eighty days after July 4, 2022 is December 31, 2022.

ANALYSIS

Indiana Code section 4-31, *et seq.* sets forth the general statutory framework with respect to the conduct of pari-mutuel wagering on horse racing in Indiana. Pursuant to I.C. § 4-31-13-2, the Commission has delegated to racing Stewards and Judges⁶ the power to conduct disciplinary hearings on behalf of the commission. Under I.C. § 4-31-13-2(a), provided that at least two of the Stewards or Judges concur, Stewards or Judges may impose one or more of the following sanctions against a licensee: (1) a penalty of up to \$5,000, (2) a summary suspension, (3) suspension of a license for up to one year, (4) exclusion from an IHRC-licensed facility, and (5) referral of the matter to the Commission for its consideration. However, I.C. § 4-31-13-2(b) limits the timeframe under which the Stewards may exercise their authority and provides:

“Unless a suspension of a license or the imposition of a civil penalty under this section is appealed by the person sanctioned not more than fifteen (15) days after being sanctioned, the suspension of a license or the imposition of a civil penalty under this section must occur within one hundred eighty (180) days after the date of the violation.”

In addition, IHRC administrative rules under the general heading “Proceedings by Judges” provide “[t]he suspension of a license or the imposition of a civil penalty must occur within one hundred eighty (180) days after the date of the violation under I.C. § 4-31-13-2(b).”⁷ For purposes of this Order, the 180 day period during which sanctions must occur after the date of an alleged violation under I.C. § 4-31-13-2(b) or 71 IAC 10-2-7(f) shall be referred to as the “180 Day Limitation”.

Petitioner argues the sanctions imposed under the Current Ruling did not occur within 180 days after the date of the alleged violation as required under I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f) and thus, the Current Ruling is “untimely.” Respondent sets forth several arguments why the 180 Day Limitation should not apply and thus, the Current Ruling would not be untimely.

As set forth above, the Current Ruling was issued and the underlying sanctions were imposed on January 4, 2023, which is after the date that is 180 days after the alleged violation date of July 4, 2022. Accordingly, I find (1) the sanctions imposed pursuant to the Current Ruling occurred more than 180 days after the date of the alleged violation date of July 4, 2022, and (2)

Ruling is December 30, 2022. The date set forth next to signatures of two of the three Stewards who signed the Current Ruling is January 2, 2023; the date set forth next to the signature of the third Steward was January 4, 2023. Accordingly, the Current Ruling could arguably be deemed to have been issued on January 2, 2023, the date on which a majority of the Stewards signed it. However, Respondent concedes the Current Ruling was issued on January 4, 2023. [Commission Staff’s Motion to Deny Petitioner’s Request for Stay and Brief in Support Thereof”, paragraph 20] Based on the foregoing, and as set forth above, I find that January 4, 2023 is the issue date of the Current Ruling.

⁶ Under 71 IAC 1.5-3-9, a “judge” or “steward” is defined to mean a duly appointed racing official or judge with powers and duties specified by these rules. For purposes of I.C. § 4-31-13-2(b), 71 IAC 10-2-7(f) and this Order, the terms generally are used interchangeably.

⁷ 71 IAC 10-2-7(f).

unless an exception to the 180 Day Limitation applies as discussed hereunder, the sanctions imposed pursuant to the Current Ruling do not satisfy the requirements under either I.C. § 4-31-13-2(b) or 71 IAC 10-2-7(f).

A. Substantial and reliable evidence does not exist to support a conclusion that the 180 Day Limitation should not apply because the Current Ruling was appealed within fifteen days after sanctions were imposed.

Respondent argues the Current Ruling is not untimely based on the first clause of I.C. § 4-31-13-2(b). In other words, Respondent argues the 180 Day Limitation should not apply because Petitioner appealed the Current Ruling within fifteen days after being sanctioned. Respondent provides no authority to support this position. The purpose of the first clause of the statute appears to be to ensure that an otherwise timely imposed sanction (e.g., a sanction that would occur within 180 days after the date of a violation) may still be enforced despite the fact the effective date of the sanction is delayed because the appeal process does not conclude until after the expiration of the 180 Day Limitation period. Applying I.C. § 4-31-13-2(b) in the manner suggested by Respondent appears contrary to this purpose and Respondent should not be able to avoid application of 180 Day Deadline simply because Petitioner appealed the Current Ruling. Moreover, the sanctions imposed by the Stewards under the Current Ruling could never have occurred within the 180 Day Limitation period because the Current Ruling was not issued until after the 180 Day Limitation period had expired. Based on the foregoing, I find the sanctions imposed by the Stewards were required to occur within the 180 Day Limitation period without regard to the fact Petitioner appealed the Current Ruling within fifteen days of being sanctioned.

B. Substantial and reliable evidence does not exist to support a conclusion that the 180 Day Limitation should not apply because the sanctions imposed pursuant to the Current Ruling were based on the July 4 Incident.

Respondent argues that because the summary suspension imposed under the First Ruling was effective on July 4, 2022 (i.e., within the 180 Day Limitation period), then subsequent sanctions based on the July 4 Incident are not subject to the 180 Day Limitation. The ability of the Stewards to impose multiple sanctions is not questioned; however, Respondent provides no authority to support its contention that sanctions imposed pursuant to Stewards rulings may be “piggy-backed” in this manner to avoid the 180 Day Limitation. Accordingly, I find the sanctions imposed by the Stewards pursuant to the Current Ruling were required to occur within the 180 Day Limitation period without regard to the fact the summary suspension imposed pursuant to the First Ruling occurred within the 180 Day Limitation period.

C. Substantial and reliable evidence does not exist to support a conclusion that the 180 Day Limitation period should be “tolled”.

Respondent argues that the 180 Day Limitation period should be “tolled” until January 6, 2023 because Petitioner requested a six day continuance of the date of the Stewards hearing and, under Indiana criminal procedure rules, tolling would be permitted for delays caused by

Petitioner.⁸ Neither the statute nor the administrative rules provide for an exception to the 180 Day Limitation, and Respondent did not provide authority to support that Indiana criminal procedure rules apply to administrative matters in Indiana. However, Petitioner provided authority under which attempts to apply court rules to administrative matters were rejected.⁹ Moreover, the fact that neither the legislature nor the IHRC provided tolling provisions in either I.C. § 4-31-13-2(b) or 71 IAC 10-2-7(f) supports the conclusion that tolling should not be applied with respect to the sanctions imposed pursuant to the Current Ruling. “[N]othing may be read into a statute which is not within the manifest intention of the legislature as ascertained from the plain and obvious meaning of the words of the statute”. State of Indiana, Indiana Civil Rights Comm’n v. Indianapolis Newspapers, Inc., 716 N.E.2d 943, 946 (Ind. 1999).¹⁰ Based on the foregoing, I find that tolling principles, pursuant to either the Indiana rules of criminal procedure or otherwise, do not apply to administrative matters and thus, the sanctions imposed by the Stewards under the Current Ruling were required to occur within the 180 Day Limitation period.

D. Substantial and reliable evidence does not exist to support a conclusion that the 180 Day Limitation should not apply because Stewards are authorized to interpret IHRC rules when conducting disciplinary hearings of a quasi-judicial nature.

Stewards have been granted authority by the legislature and the IHRC to conduct disciplinary hearings which are quasi-judicial in nature. Respondent argues that situations may arise where due to time constraints, weather, illness, recently discovered evidence or other reasons, Stewards do not have sufficient guidance under 71 IAC 10 to discharge their obligations to protect the integrity of horseracing in Indiana. In such cases, Stewards should be able interpret IHRC rules by using other rules of trial procedure not contemplated under the IHRC rules (e.g., to toll the 180 Day Limitation period). Respondent provides no authority that the legislature or the Commission intended to grant to the Stewards an ability to conduct hearings in a manner that circumvents duly enacted statutory and administrative deadlines. Moreover, and as discussed hereunder, although the Stewards are time barred by the 180 Day Limitation on imposing sanctions, the IHRC is not. As such, in situations where Stewards are faced with a possible

⁸ Ind. R. Crim. P. 4(A) provides generally that a defendant should not be detained in jail for more than six months after the filing of criminal charges “except where a continuance was had on [Defendant’s] motion, or the delay was caused by [Defendant’s] act...”

⁹ “It is well established in Indiana law that the trial rules do not govern the operations of administrative agencies, nor even conditions precedent to judicial review of administrative decisions.” Solar Sources, Inc. v. Air Pollution Control Bd., 409 N.E.2d 1136 (Ind. Ct. App. 1980), citing Clary v. National Friction Products (1972), 259 Ind. 581, 290 N.E.2d 53; State v. Bridenhager (1972), 257 Ind. 699, 279 N.E.2d 794.

¹⁰ Petitioner further argues that tolling should not apply even if permitted because tolling is only appropriate in two circumstances: (1) where it is the clear intent of the legislature, or (2) for reasons beyond control of the moving party judicial review becomes impossible. Groves v. Groves, 704 N.E.2d 1072, 1077 (Ind. Ct. App. 1999). With respect to legislative intent, as set forth above, neither the statute nor the administrative regulation includes a tolling provision and Respondent provided no authority to support that the legislature intended for tolling to apply. With respect to reasons beyond control of the moving party, the IHRC could have complied with the 180 Day Limitation by issuing the Current Ruling and related sanctions during the three day period between the December 28, 2022 Stewards Hearing and the expiration of the 180 Day Limitation period on December 31, 2022. Moreover, Respondent was not required to agree to a continuance if it believed it could not otherwise comply with the 180 Day Limitation.

expiration of the 180 Day Limitation period, the Stewards have an ability to transfer such matters to the IHRC for finalization of the disciplinary process. Based on the foregoing, I find the sanctions imposed by the Stewards were required to occur within the 180 Day Limitation period without regard to the fact the Stewards were granted authority to interpret IHRC rules while conducting disciplinary proceedings of a quasi-judicial nature.

E. Substantial and reliable evidence does not exist to support a conclusion that the 180 Day Limitation should not apply because the language of I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f) should be interpreted as directory instead of mandatory.

Respondent argues the term “must” should be interpreted as directory rather than mandatory with respect to I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f) based on legislative intent.¹¹ ¹² Respondent asserts “there is simply no language in [I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f)]” to prevent the IHRC from acting on the violation following expiration of the 180 Day Limitation period”. Respondent further argues that failure to interpret the cited statutory and administrative language in a manner that permits the 180 Day Limitation to be avoided would lead to an “unreasonable and absurd result” under Langen.

Again, Respondent ignores that fact that only the Stewards are time barred with respect to the sanctions imposed pursuant to the Current Ruling. Moreover, sanctions imposed by the Stewards are one of the first steps in adjudicating a matter under a legislative scheme that provides administrative appeal rights, appeal to the Commission and judicial review rights. Ignoring statutory and administrative deadlines by disrupting the legislative scheme to resolve disputes in a timely, predictable and efficient matter would arguably produce the “unreasonable and absurd results” to be avoided under Langen. Based on the foregoing, I find the language of I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f) should be construed as mandatory, and the sanctions imposed by the Stewards pursuant to the Current Ruling were required to occur within the 180 Day Limitation period.

CONCLUSIONS OF LAW

The Indiana Court of Appeals has previously recognized the validity of the time limits set forth in 71 IAC 10-2-7(f) with respect to disciplinary proceedings conducted by the Stewards.¹³ In P’Pool, the court discussed distinctions between disciplinary proceedings conducted by Stewards and those conducted by the IHRC.¹⁴ Specifically, the Court of Appeals ruled:

¹¹ See Hancock Cty. Rural Elec. Membership Corp. v. Greenfield, 494 N.E.2d 1294, 1295 (Ind. Ct. App. 1986); State v. Langen, 708 N.E.2d 617, 623 (Ind. Ct. App. 1999).

¹² The presumption of “shall” as mandatory is rebutted if “it appears from the context or the manifest purpose of the act that the legislature intended a different construction.” Johnson v. Johnson, Ind. App. 460 N.E.2d 978, 979-80 (1984).

¹³ P’Pool v. Indiana Horse Racing Comm’n, 916 N.E.2d 668, 676 (Ind. Ct. App. 2009). At the time P’Pool was decided, the applicable time limitation was 60 days and not 180 days as 71 IAC 10-2-7(f) provides currently.

¹⁴ Disciplinary hearings conducted by Stewards and Judges are addressed generally in 71 IAC 10-2; disciplinary hearings conducted by the IHRC are addressed generally in 71 IAC 10-3.

“71 IAC 10-2-7 requires racing judges to impose penalties within sixty days of a violation. As such, disciplinary proceedings before the racing judges have an implied time bar to bringing disciplinary action. At the time of the hearing before the racing judges, the violations regarding [three of the eleven violations at issue in P’Pool] were older than sixty days. As such, the racing judges did not have jurisdiction to impose discipline for those violations.”

The Court provided that 71 IAC 10-3-1(b) provides the IHRC independent investigative and disciplinary authority in addition to that provided to racing Judges and Stewards, and that “[n]o rule or statute imposes a time bar to disciplinary actions brought by the IHRC.” P’Pool is controlling with respect to the current matter; i.e., the administrative rule at issue in P’Pool and the current matter (i.e., 71 IAC 10-2-7(f) are identical (with the exception of a 60 day limitation period instead of 180 days).

Based on the foregoing, I find the Current Ruling was issued on January 4, 2023, and the underlying sanctions occurred thereafter, which is more than 180 days after the alleged violation date of July 4, 2022. I further find Respondent did not establish by substantial and reliable evidence that an exception to the 180 Day Limitation applies to this matter. Accordingly, I find the sanctions set forth in the Current Ruling did not satisfy the requirements set forth in I.C. § 4-31-13-2(b) and 71 IAC 10-2-7(f) that sanctions imposed by the Stewards must occur within 180 days after the alleged violation date. Consequently, the Stewards did not have jurisdiction under P’Pool to impose the penalties set forth in the Current Ruling. Accordingly, this matter is **DISMISSED**, without prejudice, for lack of jurisdiction under 71 IAC 10-3-16 (as authorized under I.C. § 4-31-3-9) in favor of Petitioner and against Respondent, and the sanctions imposed against Petitioner under Ruling No. 2023-2906 (including, without limitation, the fine of \$5,000 and the suspension of Petitioner’s license) are hereby vacated.¹⁵

¹⁵ Because this matter was dismissed for lack of jurisdiction by the Stewards, the parties’ arguments with respect to whether good cause exists to justify a stay of the penalties imposed under the Current Ruling were not considered for purposes of this Order.

ORDERED: April 4, 2023

/S/ Michael Buker

Hon. Michael Buker
Administrative Law Judge
Office of Administrative Law Proceedings

Distributed to Parties:

Petitioner, Dr. Cynthia Loomis – served by Co-Counsel, Darren A. Craig, Frost Brown Todd LLC, by OALP EService email at: dcraig@fbtlaw.com and Cameron S. Trachtman, Frost Brown Todd LLC, by OALP EService email at: ctrachtman@fbtlaw.com.

Respondent, Indiana Horse Racing Commission Staff (Agency) – served by Co-Counsel by OALP EService email: Matthew M. Eggiman at MEggiman1@hrc.in.gov, Dale L. Pennycuff at DPennycuff@hrc.in.gov and David Rothenberg at drothenberg@hrc.in.gov

Agenda Item #5



State of Indiana Indiana Horse Racing Commission

Eric Holcomb, Governor

www.in.gov/hrc

June 8, 2023

Todd Bowker
General Manager
Premier Turf Club, LLC
c/o PointsBet USA
1331 17th St., Suite 900
Denver, CO 80202

Secondary Pari-Mutuel Organization Probationary License Approval

Dear Mr. Bowker,

This letter is to inform you that the Indiana Horse Racing Commission (“IHRC”) has received the amendment to the Premier Turf Club, LLC (“PTC”) Operating Plan to deploy their new wagering product, PointsBetRacing.com, based on XpressBet’s 1/ST Bet product solution:

- 05-01-23_Operating_Plan_Update_PointsbetRacing.pdf

The IHRC has authorized probationary approval of the amendment to PTC’s secondary pari-mutuel organization (“SPMO”) license application.

Pursuant to 71 IAC 9-2.2-2, the IHRC may issue an SPMO license if the commission: (1) finds that the applicant satisfies the requirements of this article; and (2) approves the contract submitted under section 6 of the rule. The IHRC has determined that it is in the best interest of the horse racing industry and the betting public to expedite the approval process and ensure that advance deposit wagering (“ADW”) is being offered as a wagering option legally at both Indiana racetracks.

The issuance of this probationary approval confirms that IHRC has found that PTC’s amendment is substantially compliant with the application requirements set forth in 71 IAC 9-2.2-3. This probationary approval does not, however, waive any right of the IHRC to request additional application information or conduct additional investigation of amendment information, pursuant to the authority set forth in 71 IAC 9-2.2-4. PTC’s probationary approval is contingent upon its ongoing commitment to supplement or amend its SPMO application as required by the IHRC.

The PTC SPMO license amendment will be presented to the commission for approval/denial at the next publicly scheduled meeting of the Commission. PTC must continue to comply with IHRC requests for additional information and/or IHRC investigations of the information offered. Any failure to cooperate with IHRC in its continuing evaluation process may result in immediate revocation of the probationary license.

If you have any additional questions or concerns, please do not hesitate to contact IHRC Staff Attorney Dale Lee Pennycuff via email at DPennycuff@hrc.IN.gov or General Counsel David Rothenberg via email at DRothenberg@hrc.IN.gov or Deputy General Counsel Matt Eggiman via email at MEggiman1@hrc.IN.gov.

Sincerely,

Deena Pitman
Executive Director
Indiana Horse Racing Commission



May 1, 2023

Connie Winn, Executive Director
Oregon Racing Commission
PO Box 366
Gresham, OR 97030

Re: New PointsBet Racing App

Dear Connie:

Premier Turf Club would like to provide the following update to our Operating Plan, as we are ready to announce our new wagering product, PointsBetRacing.com, which was developed in conjunction with XpressBet and is based on its 1/ST Bet product. The new site will be available with both browser-based access for PC, tablet and mobile phone support, and with an IOS app through Apple's App Store.

The PointsBet Racing system will utilize the same infrastructure as the 1/ST Bet applications, with the front-end being hosted by Google Cloud, and the backend is hosted in the XpressBet data center in Beaverton, OR. We are currently using the same ACH vendor for deposits and withdrawals (Paya), and a combination of our current and previous vendors for KYC services (IDology and EVS).

Thank you for taking the time to do a walkthrough with the new product today. We are excited to launch the new system, and think it will be well received by our customers.

If you have any questions, or need any further information, please do not hesitate to contact me.

Sincerely,

Todd Bowker
VP of Racing

cc: Micah Lloyd, ORC
David Trueman, PointsBet USA