STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES F. MCCLELLAN AND
NATASHA NEMETH,

Petitioner,

v. DOAH Case No. 17-5238RU

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
____/

RESPONDENT'S MOTION FOR RECONSIDERATION OF PARTIAL SUMMARY FINAL ORDER

Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), by and through undersigned counsel, and pursuant to all applicable law, hereby moves this tribunal for reconsideration of the Partial Summary Final Order issued on December 22, 2017. In support of this Motion, Respondent states:

Background

1. Petitioners commenced this action on September 21, 2017, by filing their Petition for Administrative Determination of the Invalidity of: (1) Agency Policies and Statements as Unpromulgated Rules ("Count 1"); and (2) Florida Administrative Code Rules 61D-6.007 and 61D-6.012.

2. On October 3, 2017, Petitioners' served their First Requests for Admissions to Respondent. Request for Admission No. 9 provided:

> Admit that the Division and its representatives are still following the protocols and procedures outlined in Section 3 of the Manual as its protocol for sampling racing greyhounds' urine.

Filed December 27, 2017 4:04 PM Division of Administrative Hearings

3. The Division served its responses to Petitioners' First Requests for Admissions on October 10, 2017. As to Request No. 9, the Division responded: "The Division objects to the term "protocol" as used in this admission as the term is vague, otherwise denied."

4. Dissatisfied with the Division's responses, Petitioners' filed a Motion to Determine Sufficiency of Respondent's Responses to Petitioners' First Request for Admissions and for Sanctions on October 16, 2017. This tribunal conducted a telephonic hearing on the motion on October 27, 2017. A copy of the transcript from this motion hearing is attached as Exhibit A.

5. During the motion hearing, the Division agreed to amend several responses to Petitioners' requests for admissions, and ultimately amended its response to Request No. 9 to "admit" after the following dialogue with the tribunal:

> THE COURT: Well, I – okay, on that one though, I mean, Mr. Dewrell, that's one that you can just say, you know, "admitted" and **then argue to me later** that it's, you know, well this is irrelevant. Yeah, well, I mean, we admit it. That's like, you know, admit that you can't control the rising of the sun and the moon. And, I mean, yeah, I admit that, but what's that got to do with the case at hand. And that sounds like what you're – you don't like the implications of it but, you know, **the implications are something that you would argue to me**, not – the way it's phrased, to me, it seems like that's an easy one to admit or deny. I mean, you have or you haven't and then the implications, you know, **we take up at the hearing**.
>
> MR. DEWRELL: I agree, Your Honor. We have no problem amending our response to admit for Number 11. And, really, I mean, as I've already said, for the first 1 through 9 as well. I mean, like I said, we were trying to admit them and sort of give more detail than we should have, I guess, is what we did.

(See Ex. A, p. 26-27) (emphasis added).

6. On November 17, 2017, Petitioners filed a Motion for Summary Final Order as to Count I of the Petition ("Petitioners' Motion"), arguing that the Division violated Section 120.54(4)(e), Florida Statutes, by continuing to rely on Section 3 of the 2010 Manual, which was previously held to be an unadopted rule in Dawson v. Department of Business and Professional Regulation, Case No. 14-5276RU (Fla. DOAH Jan 29, 2015). A copy of Petitioners' Motion is attached hereto as Exhibit B.

7. The substance of Petitioners' Motion was based on the Division's amended response to Request No. 9 made at the motion hearing on October 27, 2017.

8. On November 22, 2017, the Division filed its Response in Opposition of Petitioners' Motion arguing that material facts were still in dispute with respect to whether Division employees rely on the 2010 Manual. A copy of the Division's response is attached hereto as Exhibit C.

9. On November 28, 2017, Petitioners' filed a reply in support of Petitioners' Motion, a copy of which is attached hereto as Exhibit D.

10. On December 4, 2017, Petitioners' Motion was heard during a telephonic motion hearing. A copy of the hearing transcript is attached hereto as Exhibit E.

11. During the motion hearing, the Division again clarified its amended response to Request No. 9, stating that the 2010 Manual was not used for training, that the Division's current practices (which are implemented via on-the-job training) are only generally similar to those outlined in the 2010 Manual, and that Division employees are not required to follow any specific procedures from the 2010 Manual. (See Ex. E, p. 8-11, 14-15).

12. During the hearing, counsel for the Division argued as follows:

> MS. MARSHMAN: …the Petitioner failed to show that the 2010 Manual is anything more than a historical type of internal

> management memoranda, based on the lack of evidence otherwise. So, the first issue, the testimony from Division employees shows that the issues of material fact exist as to whether [the] 2010 manual was being used, after it was determined unpromulgated rule. The Petitioner's burden is not merely to show similarities between old procedures and new procedures. In fact, as the Petitioner stated, the Division admitted, and I believe that the statement in the admission was that our practices and procedures are substantially similar. We would have to admit that our practices and procedures are substantially similar to many other states that do greyhound testing and many other countries that do greyhound testing. There aren't that many ways to do urine collection. However, what the Division is able to show based on the facts is that our employees are not using the manual for training purposes; our employees are not following the statement.
>
> …There's no testimony that Division employees trained using the manual, and furthermore, there's not testimony that the manual is being followed by the letter. Division employees, Pablo Medina and Casey Martin were shown the manual for the first time in their deposition testimony, and they were able to point out several differences. They're not able to prove that the manual is being followed to the letter, as it was being done in Dawson.

(<u>See</u> Ex. E, p. 8-9)

13. Based on the Division's arguments, the ALJ denied Petitioners' Motion and stated the following:

> THE COURT: Okay. Well, with some – I have to say, with some, I guess, degree of reluctance, I think I'm going to deny the motion. I'm putting the Department on notice. I think they're making a pretty good argument here. But, again, I think it's a strict standard for a summary order. **And I feel I should at least give the Department to go forward at hearing** and, you know, refute what seems to be a fairly – I don't want to use an adjective here, but they – they make a pretty good case, that the Department is still following this manual or the substance of the manual. But, again, I hear what you're saying, in terms of factual distinctions. I'm going to give you all the benefit of every doubt on this and deny the motion here today. But, you know, **just be ready next week to really address this stuff**.

(See Ex. E, p. 16) (emphasis Added)

14. Accordingly, on December 7, 2017, this tribunal entered an order denying Petitioners' Motion.

15. Thereafter, this matter came for a final hearing in Jacksonville, Florida on December 14, 2017. At the outset of the final hearing, Petitioners renewed their Motion for Partial Summary Final Order—the same motion that this tribunal had denied only seven days earlier.

16. In response, the Division reiterated its arguments against Petitioners' Motion and indicated its intention of presenting evidence that Division employees do not follow the 2010 Manual and that supervisors are given discretion to implement on-the-job training in compliance with applicable statutes and rules.

17. However, despite this tribunal's previous indication that the Division would have the opportunity to present such evidence, this tribunal granted Petitioners' Motion and denied the Division the opportunity to present its case with respect to Count I of the Petition.

18. Given the ALJ's ruling on Petitioners' Motion, the final hearing in this matter was held with respect to Count II only.

19. On December 22, 2017, the ALJ issued its Partial Summary Final Order. A copy of the Partial Summary Final Order is attached hereto as Exhibit F.

ARGUMENT

20. It is well established that when a trial court considers the record to determine the propriety of summary judgment, it is required to resolve all reasonable inferences against the movant. Moore v. Morris, 475 So. 2d 666 (Fla. 1985). Under Florida law:

> A stipulation . . . must be carefully examined to determine whether the language used actually discloses a clear, positive, and definite stipulated fact. The statement should not be vague or ambiguous. Nevertheless, **it should receive a construction in harmony with the apparent intention of the parties**. It is not to be construed technically, but rather in accordance with its spirit, in furtherance of justice, **in the light of the circumstances surrounding the parties, and in view of the result that they were attempting to accomplish**.

Travelers Ins. Co. v. VES Serv. Co., 576 So. 2d 1349, 1350 (Fla. 1st DCA 1991) (emphasis added.

21. In this case, the Division has made clear from beginning that it did not agree with the vague assertion that it and "its representatives are still following the protocols and procedures outlined in Section 3 of the Manual as its protocol for sampling racing greyhounds' urine." It initially denied Request No. 9 on October 10, 2017, and, only after this tribunal urged it to admit and assured the opportunity to present evidence and argument at the final hearing, did the Division amend its response to Request No. 9. The Division reiterated its position regarding its response to Request No. 9 at the December 4th hearing, explaining that there were material factual disputes that rendered the admission irrelevant—just as this tribunal had urged it to do just over a month prior. Though somewhat less understanding, this tribunal still indicated that it would give the Division the opportunity to present evidence and argument at the final hearing and appropriately denied Petitioners' motion.

22. Despite having twice assured the Division that it would have the opportunity to present evidence and argument on the issue, this tribunal inexplicably and abruptly changed its mind on the date of the final hearing. This reversal was based on the Pre-Hearing Stipulation wherein the Division admitted to the exact same language used in Request No. 9—the exact same language that this tribunal had assured the Division it would have the opportunity to refute at the final hearing. Clearly the Division never intended to concede Count I of the complaint

with the stipulation. Thus, instead of resolving all reasonable inferences against Petitioners, this tribunal interpreted the stipulation in a manner that far exceeds the spirit of the agreement and the intent of the parties; it disregarded the circumstances surrounding the parties and the result the parties were attempting to accomplish. Therefore, it was improper to grant partial summary final order. Travelers Ins. Co. v. VES Serv. Co., 576 So. 2d at 1350. See also id. at 1351 (citing Chouest v. A&P Boat Rentals, Inc., 472 F.2d 1026, 1029 (5th Cir. 1973) (refusing to accept an interpretation of a stipulation whereby one of the parties 'would have nothing to gain, and everything to lose'")).

23. Furthermore, the Partial Summary Final Order also erroneously finds that it is "undisputed" that the Division has acted contrary to the Dawson order and section 120.56(4)(e). The Division emphatically disputes that it has acted contrary to Dawson and section 120.56(4)(e), and it was prepared to present evidence and argument on this point at the final hearing.

24. Moreover, the denial of the Division's ability to present evidence at the final hearing after the ALJ explicitly stated that the Division would be able to present a case only a week prior denied the Division with basic fairness that is fundamental to due process. See Seminole Entm't v. Casselberry, 811 So. 2d 693 (Fla. 5th DCA 2001). Further, the ALJ's change of position on Petitioners' Motion, which was appropriately denied only seven days before, violated the Division's due process rights and principles of fairness. See R.J. v. Dep't of Children & Families, 906 So. 2d 347 (Fla. 4th DCA 2005) (held that the due process rights of a mother were violated by reconsidering a petition without any new evidence after the court had twice previously denied the same petition).

25. The Division was denied the opportunity to present evidence with respect to the context of how the Division's current procedures are implemented throughout the state. Although the admission states that the Division is still following the protocols and procedures outlined in Section 3 of the 2010 manual, the Division was prepared to present live witness testimony from the Chief Operations Officer for the Division with respect to the training discretion given to regional supervisors in implementing policies and procedures that are in compliance with all applicable statutes and rules, and how any similarities between the protocols and procedures outlined in the Manual and those employed by the Division are coincidental, given that there are only a limited number of methods by which to collect and test greyhound urine.

26. Put simply, the Division was denied the opportunity to present factual evidence showing that all the procedures in the 2010 Manual are not being followed, that the Division has not made a statement that the procedures in the 2010 manual have to be followed, and that the instant case is distinguishable from Dawson by showing that the Division's current policies and procedures are consistent with the statutory requirements under Section 550.2415, Florida Statutes, and the rules promulgated thereunder.

27. The Division is without guidance as to how the ALJ has changed his position with respect to the Division's opportunity to address these factual disputes in such a short amount of time, given that the ALJ indicated only days before that the Division would need to "be ready to really address this stuff next week."

28. As indicated herein, the Division was prepared to address Count I of the Petition at the final hearing on December 14, 2017, but was denied the opportunity to be heard.

29. Here the Division was prepared to address facts that were still in dispute with respect to the Division's current policies and procedures associated with collecting urine samples from racing greyhounds as the ALJ had suggested in a hearing seven days prior to the Final Hearing. The Division was denied the opportunity to present evidence with respect to these facts in dispute, without any change in circumstances, facts, or law, and, as such, was denied due process and fundamental principles of fairness by the ALJ's Partial Summary Final Order.

30. The Division has conferred with counsel for Petitioners' who stated Petitioners' object to this motion.

WHEREFORE, for the reasons stated herein, the Division respectfully requests this ALJ reconsider its Partial Summary Final Order and grant the Division the opportunity to be heard with respect to Count I of the Petition.

Respectfully submitted on this 27th day of December, 2017.

/s/ Charles Dewrell
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CERTIFICATE OF SERVICE

I certify that on this 27th day of December, 2017, a true and correct copy has been served via email to the following:

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STATE OF FLORIDA
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DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, DIVISION OF
PARI-MUTUEL WAGERING,,

Respondent.
______________________________/

TELEPHONIC PROCEEDINGS

HELD BEFORE: LAWRENCE P. STEVENSON
Administrative Law Judge

DATE: October 27, 2017

TIME: Commenced at 11:15 a.m.
Concluded at 12:29 p.m.

LOCATION OF REPORTER: Department of Business and
Professional Regulation
1211 Governor's Square Boulevard
Third Floor
Tallahassee, Florida

REPORTED BY: Tracy Finan, RPR, FPR
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1 **T E L E P H O N I C P R O C E E D I N G S**
2 (On the record at 11:15 a.m. and a
3 telephonic connection is made with all
4 parties.)
5 THE COURT: Did we have someone just come on?
6 Counsel for Mr. McClellan?
7 MR. SLUSHER: Counsel for Mr. McClellan and
8 Ms. Nemeth. This is Jeremy Slusher. In the office
9 with me are Jennifer Rosenblum and Michael
10 Billings.
11 THE COURT: Okay. Great. Madam Court
12 Reporter, did you get those names?
13 THE COURT REPORTER: I did. Thank you, Your
14 Honor.
15 THE COURT: Okay. And who's on the line for
16 the Department?
17 MR. TROBETTA: Louis Trombetta for the
18 Department. I'm also here with C.J. Dewrell --
19 Charles Dewrell, sorry.
20 THE COURT: Okay. And, again, this is
21 Judge Stevenson, and we're here on a motion hearing
22 in DOAH Case Number 17-5238RU. I'll apologize in
23 the advance if I sound bad and you hear muffled
24 coughing on the line. I've been under the weather
25 this week. I'm just now, you know, getting over

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1 it, but there's still the aftermath to deal with.
2 Now, as I've got it listed, I've got
3 three pending motions. I've got a motion to stay
4 Count 1, a motion to determine the sufficiency of
5 the Division's responses to some admission
6 requests, and then a motion to compel answers to
7 interrogatories, the latter two being petitioners'
8 motions.
9 I don't know if the parties have
10 discussed, I mean, what order you want to take
11 these things up in?
12 MR. TROMBETTA: Your Honor, we haven't.
13 MR. SLUSHER: We have not.
14 MR. TROMBETTA: Go right ahead, Mr. Slusher.
15 We're okay in doing it however you'd like --
16 MR. SLUSHER: I just said we hadn't discussed
17 it.
18 THE COURT: I think y'all are talking over
19 each other. I'm just hearing garbled stuff.
20 MR. SLUSHER: We're saying the same thing,
21 Your Honor, which is we haven't discussed the
22 order.
23 THE COURT: Oh, you haven't.
24 MR. SLUSHER: Whatever is Your Honor's
25 preference.

EXHIBIT
A
exhibitsticker.com

1 THE COURT: Well, I've got the motion to stay
2 in front of me, so why don't we just plunge in on
3 that. And I'd just caution everybody, you know,
4 identify yourselves before you speak just so that
5 the court reporter can keep straight, you know,
6 who's talking.
7 MR. SLUSHER: Sure, Your Honor.
8 THE COURT: It's the Division's motion, so
9 I will turn it over to you, Mr. Trombetta.
10 MR. TROMBETTA: Thank you, Your Honor. And
11 just for purposes of, I guess, the record and just
12 so that you're aware too, I think Mr. Dewrell will
13 be presenting the Division's argument for the
14 discovery purposes for the two other motions, so
15 I'll just be doing the motion for the stay.
16 THE COURT: Okay. Great.
17 MR. TROMBETTA: So, I guess, first, thank you
18 for, I guess, holding this hearing. I think it's
19 going to be helpful moving forward.
20 I'm going to kind of just give you a
21 brief history. I'm not going to be arguing the
22 merits of the case, but I do think the factual
23 history of how we got here is relevant to your
24 decision and your, essentially, granting of the
25 motion.

1 Just to start, you know, my argument's
2 essentially that the statute's pretty clear that
3 this motion should be granted. And, I guess, once
4 I get through kind of where we've come from and
5 where we are now, I think you'll see that that's
6 the case.
7 So we've gone down this road of
8 rulemaking for collecting animal specimens for a
9 period of time now. As to the Division, we
10 regulate pari-mutuel facilities, and both horses
11 and greyhounds get samples collected. Horses get
12 collected after they race; greyhounds get collected
13 prior to the race.
14 In 2016, the Division filed an AC against
15 a horse trainer, Mrs. Pompay. And Mrs. Pompay --
16 and this is DOAH Case 16-6423.
17 THE COURT: Uh-huh.
18 MR. TROMBETTA: Ms. Pompay challenged our
19 sample collection rules as a defense. She
20 ultimately was successful in that challenge.
21 She -- the ALJ found that the Division was
22 conducting non-rule policy in the way we were
23 centrifuging, which is spinning of the blood that
24 was taken from the horse to produce serum because
25 we did not have that in our sample collection rule,

1 which is 6.005, which is also relevant to the
2 current case.
3 So on March 24th, 2017, the Division did
4 three things: First, we granted -- well, we didn't
5 grant -- the Division issued the final order in
6 that Pompay case where we found that we had an
7 unadopted rule in the horse collection procedures.
8 On the same day, the Division published
9 its emergency rule -- or noticed its emergency
10 rule. This is Emergency Rule 61DER17-1. And the
11 purpose of the emergency rule was to, you know,
12 ensure public safety, make sure that the races were
13 continuing to run safely so that trainers --
14 because without 6.005, we were left in the
15 situation where trainers essentially could put
16 whatever they wanted in the horses and the Division
17 couldn't do anything.
18 So the purpose of the emergency rule
19 specifically says we are trying to adopt procedures
20 for collecting samples from racing animals. It was
21 not limited to horses. And it was not limited to
22 horses because the collection rule, 6.005, was
23 written a while ago, and to be fair, it's not the
24 cleanest rule. It contains both horse and
25 greyhound collection procedures in that rule. So

1 the Division thought it was appropriate to,
2 you know, produce this emergency rule. And on the
3 same day, they also issued a notice of rule
4 development in which the Division -- the purpose of
5 that was to apply comprehensive updates to sample
6 collection processes that were identified in the
7 emergency rule.
8 So as the Division opened up these
9 collection rules -- that was on March 24th, 2017.
10 About a month later, on April 27th, the Division
11 issued a notice of proposed rules. And in this
12 notice, there was specific language that is
13 relevant, again, to this motion and this rule
14 challenge.
15 The proposed rules that the Division
16 produced -- there's three of them: Proposed
17 Rule 61D-6.0051, which is collection in horses;
18 6.0052, which is collection in greyhounds; and
19 6.006, which is split sample procedures. A split
20 sample is essentially when you take a sample from
21 an animal and you split it into two. So you test
22 one and then the trainer, if a positive is called,
23 they have a secondary opinion.
24 THE COURT: Uh-huh.
25 MR. TROMBETTA: When those -- once those rules

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1 were noticed, we had a proposed rule challenge
2 filed by Mrs. Pompay, a horse trainer. And
3 specifically she was challenging proposed
4 Rule 6.0051 and 6.006, so the horse and the split
5 sample collection, not the greyhound rule.
6 The Division admits that the greyhound
7 rule was not specifically addressed in that
8 challenge; however, the Division's position is that
9 when those rules were challenged, because the
10 greyhound rules were also a part of, you know,
11 essentially the subject matter that the Division
12 was promulgating, the greyhound rules were also
13 held just as a normal rule package would be held
14 when there's, you know, a challenge to it.
15 So I'm jumping forward a little bit. The
16 parties to the Pompay -- the second, that proposed
17 the rule challenge by Pompay eventually settled.
18 And part of that settlement was that the Division
19 would issue a notice of change to proposed
20 Rule 6.0051 and 6.006. That notice of change was
21 filed last week, October 16th. On October 20th,
22 the Pompay case was closed, and the Division, in
23 that same time, filed this motion to stay Count 1.
24 So the Division's position is that the --
25 there's outstanding rulemaking in that 6.0052, the

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1 collection procedures in greyhounds, which is the
2 subject matter of this case identified in the
3 petition by petitioners, did not expire because it
4 was a part of the rules that were challenged in
5 that proposed rule challenge.
6 And the Division's position is that
7 according to 120.56(4)(b), that the plain language
8 of the statute makes it clear that upon
9 notification to the administrative law judge
10 provided before the final hearing that the agency
11 has published a notice of rulemaking under
12 Section 120.54(3), such notice shall automatically
13 operate as a stay of proceedings pending adoption
14 of the statement as a rule. And the Division
15 believes, specifically in this case, that this
16 makes sense.
17 So the petitioners in this rule challenge
18 were both served ACs earlier this year, essentially
19 from February through, it looks like, May, maybe
20 even to June, with Mrs. Nemeth. They did bring up
21 a non-rule challenge argument as a defense, but
22 they chose to file the separate action and not
23 pursue -- and they filed motions to continue or a
24 motion to stay or abate. I forget the exact status
25 that those cases -- the AC cases are in. But those

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1 cases are essentially put on hold until this
2 separate action was completed.
3 So, once again, the Division feels it's
4 appropriate that, you know, the petitioners chose
5 to pursue this other hearing, this separate matter.
6 And the Division feels that the first count, the
7 unadopted rule count, should be stayed until the
8 Division adopts 61D-6.0052 formally, or they should
9 be able to raise it in the defense to the AC cases
10 when those hearings are ever held. But it's
11 irrelevant for all purposes going forward. Any
12 decision you make is going to be a waste of
13 resources for everybody.
14 And to be candid, the rule's going to be
15 adopted, in all likelihood, prior to any final
16 order that comes out of this case. So the Division
17 just -- we've been overwhelmed with discovery.
18 We've been overwhelmed -- you know, it seems every
19 filing has a mention of sanctions, which we would
20 also like to discuss. And we just feel it would be
21 in everybody's best interest, other than the
22 petitioners', to get this motion to stay.
23 And even -- and it's not that the
24 petitioners don't have any redress. The
25 allegations about the two petitioners, the drug

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1 positive allegations, can be dealt with in the
2 defense to the ACs as provided in Chapter 120.
3 So, I mean, with that, I mean, I think --
4 if you have any questions, I'd be happy to answer.
5 I hope that that -- the background there was
6 helpful and not, you know, confusing or a waste of
7 time, but I think the Division's position is
8 somewhat straightforward. And I would be happy to
9 answer any questions.
10 THE COURT: I may have some -- I want to hear
11 from the petitioners and then I may have some
12 questions.
13 MR. TROMBETTA: Absolutely, Your Honor.
14 Thank you.
15 MR. SLUSHER: Your Honor, this is
16 Jeremy Slusher. I want to give you a little bit of
17 the history here as well.
18 The Division's position now is that a
19 petition that we filed in September should be
20 automatically stayed now, over a month later in
21 October, because of a notice of rulemaking that
22 they filed in April.
23 Your Honor, if the petitioner -- if the
24 Division actually believed the argument it's making
25 now, this would have been the first thing they

1 filed in this case. Instead, what they did was
2 they waited until over a month down the line when,
3 candidly, I think they're looking at the facts and
4 realizing, oops, we're going to lose, and so
5 they're now raising it over a month later, tens of
6 thousands of dollars in discovery later directed
7 towards these issues -- and, candidly, not
8 withstanding the argument he made this morning, two
9 or three days ago, Mr. Trombetta admitted to me
10 that even if Rule 52 is now going to be adopted,
11 which it can't be because it's a dead rule, it will
12 not change this case because 61D-52 -- 0052, in
13 Mr. Trombetta's own words, does not adopt the
14 procedures that we are claiming are an unadopted
15 rule.
16 In that regard -- I'm reading from a
17 footnote in the case called *Saunders v Florida*
18 *Department of Children and Families*, a First DCA
19 case, and it was cited -- this is the primary
20 citation upon which the Division is relying for
21 their position that there's an automatic stay. And
22 here's what the footnote they cite says, and this
23 is a part of it, Your Honor: Under Section 120.56,
24 "if an agency initiates rulemaking to adopt the
25 challenged policy statement, the unpromulgated rule

1 challenge may be stayed until such time as the
2 agency completes the rulemaking process."
3 By Mr. Trombetta's own admission -- and
4 by admission of Mr. Dewrell as well, which I'm
5 going to get to in a second -- the Division is not,
6 is not and has not initiated rulemaking to adopt
7 the procedures that we are challenging in this
8 action.
9 Now, in fact, Your Honor, we had
10 represented -- and they are still prosecuting
11 people, except for our clients, at this moment
12 under these unadopted rules. I think it was just
13 Monday or Tuesday that a two-day hearing to
14 prosecute a client -- a client we formerly
15 represented but from whose claims we withdrew --
16 under these unadopted rules.
17 And, in fact, Your Honor, we were
18 previously representing a gentleman named
19 Robert Dawson. And when they published their
20 notice of rulemaking, we thought, well, gee, this
21 may require a stay because we had raised an
22 affirmative defense in that and all of the other
23 cases that they were following unpromulgated rules.
24 And the Division, who was the petitioner in that
25 case, argued vehemently, vehemently that it didn't

1 stay the case because they weren't doing anything
2 to adopt the unpromulgated rule.
3 I'm reading now -- and this is attached
4 to our response to their motion, from Judge Boyd's
5 order denying the continuance of the final hearing.
6 And this is a quote: "Petitioner" -- being the
7 Division -- "opposed continuance arguing that the
8 rulemaking was prompted by other circumstances" --
9 and I'm going to emphasize here -- "with little
10 bearing on the instant case."
11 In the *Dawson* case, Mr. Dewrell argued
12 that the rulemaking had little bearing on the same
13 argument we're making now, which is the specific
14 procedures in Count 1 that are an unadopted rule.
15 While they're looking to stay this
16 case -- and, by the way, they told you the
17 underlying administrative complaints against
18 Ms. Nemeth and Mr. McClellan are stayed -- they
19 have, on an emergency basis, taken away our
20 clients' licenses so that they can't work in the
21 only industry in which they've ever known.
22 So what they're really -- the effect of
23 what would be happening here is we're now going to
24 further delay -- because, Your Honor, candidly, we
25 think we're going to win -- they're going to

1 further delay our clients' ability to work at all,
2 at all.
3 Now, Mr. Trombetta, although he, again,
4 candidly admitted to me that perhaps the rule --
5 it's Rule 1.010, he told me the other day that it's
6 a "may" and not a "shall," he still seems to be
7 arguing it's a "shall."
8 There's no such word of art, term of art
9 in any rule I've seen called a "rule package." And
10 there is absolutely no requirement that rules that
11 are noticed together go through and be adopted
12 together. There is, instead, a requirement that
13 unless there is -- and I'm using the expression
14 loosely -- some change to the rulemaking, some --
15 some debate, a petition challenge filed to the
16 rulemaking, that the -- that that 90 days is
17 extended.
18 The only rule that they're arguing that
19 has any effect on -- or should stay this case --
20 they've actually admitted it will have no effect on
21 this case even if it's adopted -- but the only one
22 they say should stay the case is 52. There has
23 been no challenge to 52. There has been no
24 amendment to 52. It was filed back in -- I'm
25 looking, it was filed -- the notice, I said, were

17

1 back in April. It's been more than 90 days and
2 it's expired.
3 The rule they're relying on in their
4 motion that says, well, we have to put all these
5 together, put all of these -- adopt all of these at
6 the same time even though it's been more than
7 90 days and it's expired, doesn't say that.
8 What it says is that if they have
9 presented rules and given notice together, they may
10 adopt them together. It's in the certification.
11 They have to file a certification that's there's
12 been no challenge or that any challenge is
13 resolved, et cetera, and it says it may.
14 Well, it's a "may" because in an instance
15 like this where one -- where one notice is going to
16 expire while the other two don't, they better get
17 that one adopted. They didn't. It has now
18 expired. And the rule says that.
19 And, frankly, Your Honor, it shows bad
20 faith. This should -- if this was really their
21 position, it should have been the first thing they
22 filed. I've heard no explanation for why it
23 wasn't. Mr. Trombetta's told me that nothing's
24 changed since April as it relates to Rule 52. In
25 other words, if it should be stayed now, it should

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1 have been stayed a month ago.
2 So here we are -- Your Honor may also
3 remember the other times -- one of the other times
4 I've spoken with Your Honor, we were asking for a
5 continuance and Mr. Dewrell was opposing. This
6 whole thing needed to be tried right away within
7 30 days, and at no time did he say only Count 2.
8 The whole thing needed to be tried.
9 And if they would have won that argument,
10 Your Honor, we would have tried this case already.
11 We'd already be done. So with that, they really
12 have no legal basis for their position. There's no
13 basis for a stay. We need to go forward.
14 THE COURT: Okay. Anything further?
15 MR. SLUSHER: Not at this time, Your Honor.
16 If Your Honor has any questions, I'm happy to
17 answer them.
18 THE COURT: No. I mean, I've read everything
19 and I'm persuaded -- I mean, I'm going to deny the
20 stay and specifically on the ground that I agree
21 with the point that I think 52, at this point, is a
22 dead letter, that it's -- I'm not getting into all
23 of the estoppel stuff. I don't think I need to.
24 And I think what he said is correct, that
25 from my look at everything, I mean, the latest,

19

1 I saw there was a notice of public hearing on these
2 rules in May. So if that public hearing was even
3 held, that might -- that would have extended the
4 time for filing the adoption notice of 52 maybe
5 into August. But, I mean, in any event, I mean,
6 we're well past that now.
7 And I think -- I don't think 52 can be
8 adopted in the manner you were suggesting,
9 Mr. Trombetta. It might slide through, but I think
10 it would be challengeable because I don't think --
11 I don't think the assertions or the things that you
12 have to say under Rule 1.1.010, you have to make
13 these assertions as to each one of the rules you're
14 putting in there in your package. And I don't
15 think you can make them for 52 because, I mean, the
16 time for 52 has passed. And if 52 is your basis
17 here, then I see no choice but to deny the stay.
18 MR. SLUSHER: Then should we move on,
19 Your Honor, to the motion to determine sufficiency
20 of their request for admissions?
21 THE COURT: Yeah, I think so. You're going to
22 have to give me a second to get that in front of
23 me. And I just will let you know, I'm going to do
24 a written order, you know, just saying all that.
25 I just wanted to make sure, at least on this -- the

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1 other ones, these -- the responses to admissions
2 and the answers to interrogatories, I may end up
3 taking under advisement. But I just wanted to let
4 you know as to the stay that I'm going to rule that
5 that one's denied.
6 MR. SLUSHER: And as you turn to it,
7 Your Honor, let me just tell you that they have
8 amended -- we're only going to be arguing half of
9 the motion today because -- on the admissions
10 because they amended some of their responses.
11 THE COURT: Okay. Sufficiency of admission --
12 well, I see, is that the one -- okay, well, y'all
13 just tell me what's going to be in front of us
14 here.
15 MR. SLUSHER: Nine and -- which ones did you
16 amend? Do you know -- I think 1 through 9, 11 --
17 THE COURT: Oh, okay. Yeah, they said in
18 their response -- they had sent you amended
19 responses for 12 through 16 -- or 12 through 20,
20 I think. There's only 1 through 9 and 11 that are
21 still -- I mean, it seems to me are still at issue.
22 MR. SLUSHER: That's correct.
23 THE COURT: Okay. And, again, I'm happy to
24 hear argument. I guess, petitioners, it's your
25 motion so -- I mean, obviously, I mean, I'm

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1 familiar with them and could undertake to write an
2 order without any oral argument, but I mean, I'm
3 happy to hear anything you want to add to it to try
4 to give me more than I've read.
5 MR. SLUSHER: Well, I would first like to say
6 by starting out that I know Mr. Trombetta takes
7 umbrage with the fact that he says in every motion
8 we ask for sanctions. I'm sure Your Honor's aware
9 that that's exactly what the rules of civil
10 procedure provide for when you get unnecessary
11 objections and evasive responses.
12 And, in fact, there was a suggestion
13 that -- maybe I'm misremembering, but I think there
14 was a suggestion that there's nothing that says
15 that an evasive response to a request for
16 admissions deems it admitted. There actually is.
17 It's right in the language of 1.370. It's right
18 there.
19 So, Your Honor, it's just -- we just keep
20 getting -- they don't want to respond to our
21 inquiries. It's all very evasive. If you look at
22 our Request Number 1, we ask that Rule 61D-6.005
23 does not contain the entire protocol or procedure
24 specifying the collection of greyhound urine. And
25 they object to the phrase "entire protocol" as

22

1 that's vague.
2 I don't know how that's vague, the entire
3 protocol. There is no other protocol. I don't
4 know how to say that more specifically. I don't
5 think there are any other words that say "entire
6 protocol" more clearly than "entire protocol."
7 And then they read -- since they
8 objected, they just say that the rules and statute
9 provide guidance. Well, if they provide guidance,
10 then isn't that -- and they only provide guidance,
11 isn't that an admission that they don't contain the
12 entire protocol and shouldn't they just be
13 admitting it?
14 And we kind of get that, just by way of
15 flavor, Request No. 5, we requested that the
16 guidelines do not contain the entire protocol for
17 specifying -- and one (indiscernible) said they do
18 and one said they didn't. And we get the same
19 thing, the objection to "entire protocol." And
20 it's just evasive responses, Your Honor.
21 If Your Honor's read it, I'm not one for
22 simply repeating myself. So I don't know that I
23 want to just repeat myself. I just think it's
24 really clear.
25 THE COURT: I guess, Mr. Dewrell, you were

23

1 going to respond on this one?
2 MR. DEWRELL: Yes. Thank you, Your Honor.
3 Yeah, I mean, we took objection to
4 "entire protocol" just not really knowing what
5 exactly that's pointing towards. You know, I mean,
6 even --
7 THE COURT: Mr. Dewrell, was the problem -- as
8 I read your response, I took it that the problem
9 wasn't with the word "protocol," it was with the
10 word "entire."
11 MR. DEWRELL: Right.
12 THE COURT: That you were saying, you know,
13 you didn't know what "entire protocol" referenced
14 or what was the -- was that more of an objection to
15 the scope of what they were asking for? I mean,
16 you understood what a protocol was; you just didn't
17 know what they meant by "entire protocol."
18 MR. DEWRELL: That's correct, Your Honor. And
19 even after the objection, I mean, our admission was
20 that, you know, we're basically trying to say,
21 yeah, we have rules and statutes, you know, that,
22 you know, sort of tell us what it is that we're
23 doing, if you want to call it our protocol.
24 You know, they do provide guidance to what it is
25 that we do and that's what we try to follow.

24

1 So, I mean, I guess we were, in a sense,
2 trying to admit, I guess, maybe we did it in a --
3 didn't word it very well, but, yeah, that's our
4 position on those.
5 MR. SLUSHER: If he's trying to admit them,
6 Your Honor, why can't we just get it admitted?
7 I don't know what else -- I don't know how I can
8 clarify "entire." It's their protocol. There is
9 no other protocol. I don't know how to make that
10 more clear. I don't think "entire" is a vague
11 word.
12 THE COURT: I was asking just to clarify,
13 Mr. Slusher.
14 MR. SLUSHER: No. No. I understand,
15 Your Honor, and I'm sorry if I'm speaking out of
16 turn.
17 THE COURT: No, not at all. I'm happy to hear
18 from you.
19 MR. SLUSHER: Yeah, I mean, I don't know to
20 make "entire" more clear. If -- Mr. Dewrell just
21 said we meant to admit them, maybe we didn't do it
22 clearly. I think it would be a lot clearer if they
23 just say admitted.
24 THE COURT: That's what it sounds like -- it
25 sounds like he just did.

25

1 MR. SLUSHER: Well, he did here, but not in a
2 response to our request for admissions that I can
3 then rely on as a stipulation in my pretrial stip
4 for evidence at trial -- or at the final hearing.
5 So why can't they just respond to -- if
6 they meant to admit them, why can't Numbers 1
7 through 9 and 11 just be admitted if Mr. Dewrell
8 just said he meant to admit them?
9 MR. DEWRELL: And, again, Your Honor it's the
10 scope of what they're asking for. It's -- I don't
11 know how else to say it. I mean, the question for
12 Admission 1 is admit that Rule 61D-6.005 does not
13 constitute the entire protocol and/or procedures
14 specifying how you collect racing greyhounds'
15 urine.
16 And in our answer we admit that, you
17 know, there's other rules and statute that provide
18 guidance as to our drug collection and testing
19 procedures. But, again, this "entire protocol,"
20 I just -- I guess we're really just trying to
21 clarify what we're trying to say.
22 MR. SLUSHER: I mean, the whole point of our
23 position, Your Honor, is that they're following
24 protocols that aren't specified in the rules. And
25 so what they don't want to do is admit it because

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1 they know that means they lose their case.
2 That's the bottom line here. It's just
3 evasion. If there are other -- if protocols are
4 found somewhere besides the rules, just admit and
5 let's move on. But if the protocols are -- and
6 that is the case. It sounds like they just don't
7 want to say it. We can make this whole case a lot
8 shorter if they just admitted to it, which it
9 sounds like they're doing.
10 THE COURT: Okay. Well, how about where are
11 we on -- let's see, what's the other -- 11? Eleven
12 was the chain of custody, nonadopted rule
13 specifying chain of custody. What is -- yeah, what
14 is the -- that's the one that gets -- what is the
15 Division's -- I'm trying to figure out what's your
16 objection to that?
17 MR. DEWRELL: Let's see. "Admit that the
18 Division has an unadopted rule specifying the
19 Division's chain-of-custody procedures." I think
20 our position there, Judge, is that we're not really
21 required to adopt rules that specifies every single
22 step of any chain of custody. We sort of took
23 objection to the way they phrased the admission.
24 THE COURT: Well, I -- okay, on that one
25 though, I mean, Mr. Dewrell, that's one that you

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1 can just say, you know, "admitted" and then argue
2 to me later that it's, you know, well, this is
3 irrelevant. Yeah, well, I mean, we admit it.
4 That's like, you know, admit that you can't control
5 the rising of the sun and the moon. And, I mean,
6 yeah, I admit that, but what's that got to do with
7 the case at hand.
8 And that sounds like what you're -- you
9 don't like the implications of it but, you know,
10 the implications are something that you would argue
11 to me, not -- the way it's phrased, to me, it seems
12 like that's an easy one to admit or deny. I mean,
13 you have or you haven't and then the implications,
14 you know, we take up at the hearing.
15 MR. DEWRELL: I agree, Your Honor. We have no
16 problem amending our response to admit for
17 Number 11. And, really, I mean, as I've already
18 said, for the first 1 through 9 as well. I mean,
19 like I said, we were trying to admit them and sort
20 of give more detail than we should have, I guess,
21 is what we did.
22 THE COURT: Okay. Yeah. And you're going to
23 do, I guess, amended responses in --
24 MR. SLUSHER: Oh, I'm amenable -- Your Honor,
25 it's Jeremy Slusher. I'm amenable, if by order you

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1 just want to say on the record that they've agreed
2 to deem 1 through 9 and 11 admitted, and they don't
3 have to do anything further.
4 THE COURT: Okay. Well, I mean, that's fine
5 with me.
6 MR. DEWRELL: Sure. That works.
7 THE COURT: Okay. We'll just put that in the
8 order then. Great. So now the only thing left is
9 the motion to compel answers.
10 MR. SLUSHER: Tell me when you're ready, Your
11 Honor.
12 THE COURT: Give me a second here. Let's get
13 to -- I'm trying to save trees here. I've got all
14 this stuff on my computer here rather than printing
15 all this stuff.
16 And I wanted to tell somebody, I think
17 it's petitioners, when you're -- someone was
18 printing excerpts from the Florida Administrative
19 Register, but was including the entire edition of
20 the register. And it's fine if you just include
21 the relevant portions and, you know, not the whole,
22 you know, 50 pages of that date's register. I
23 can't remember who was doing that but --
24 MR. SLUSHER: It was us, Your Honor, and would
25 you believe I consider myself an environmentalist.

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1 THE COURT: Well, like I say, I didn't print
2 any of this, so you didn't kill any trees, but I'm
3 just doing a lot of scrolling. Okay. Motion to
4 complete answers to interrogatories. I've got them
5 in front of me, Mr. Slusher.
6 MR. SLUSHER: Okay. And, Madam Court
7 Reporter, I was trying to let you know earlier as
8 well it was me speaking.
9 (Reporter requests clarification.)
10 MR. SLUSHER: I'm sorry, Madam Court Reporter,
11 it's Jeremy Slusher, and I was just trying to let
12 you know earlier as well that it was me speaking.
13 THE COURT REPORTER: Thank you.
14 MR. SLUSHER: Your Honor, this is the same
15 kind of stuff with these evasive answers. So, I
16 mean, just taking it one by one, I mean, it seems
17 so clear it's very hard for me -- Interrogatory
18 Number 6 we ask: Describe in detail the
19 Division's, quote, established procedures, end
20 quote, associated with the collection, recordation,
21 handling, processing, storing, and transportation,
22 end quote, of racing greyhounds' urine samples as
23 referenced in Section 5 of the guidelines, page 4,
24 bottom paragraph.
25 And their response was: "Established

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1 procedures refers to procedures used at facilities
2 pursuant to applicable law."
3 Your Honor, we weren't asking for a
4 definition of established procedures. We asked
5 them to describe in detail what those procedures
6 are. It's -- I can't even, frankly, figure out how
7 they got to that response.
8 And it's the same thing with 7. We asked
9 them to describe in detail the Division's, quote,
10 established procedures, end quote, for protecting
11 and preserving racing greyhounds' urine samples.
12 And their response is "See answer to Interrogatory
13 Number 6, which is the one where they give us their
14 definition of established procedures.
15 I'm not looking for a definition. I know
16 what those words mean, Your Honor, but they need to
17 give me a list of: Here's the established
18 procedures. One, we stick a cup under the
19 greyhound's genitals; two, we make sure the cup is
20 clean. Whatever their procedures are, they need to
21 just tell me.
22 I don't know if you want to take these
23 one by one. I can move on to --
24 THE COURT: Sure. Yeah. Go ahead.
25 MR. SLUSHER: Okay. So 16, we ask them to

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1 describe in detail the potential causes of a racing
2 animal's testing positive for cocaine metabolites.
3 So first they object by saying it asks
4 them to speculate, then they go ahead and
5 speculate. They find it much more likely that a
6 prohibited substance is provided to a racing animal
7 purposely by an animal's trainer.
8 So they can't tell us what all the
9 possible -- what any potential causes are because
10 that would be speculative, but they'll go ahead and
11 speculate what they think is the most likely cause.
12 It just doesn't make sense.
13 And Number 19's very similar. We ask to
14 describe in detail whether the Division or anyone
15 acting on its behalf follows, or once followed, an
16 unpublished BZE threshold. They object that it's
17 irrelevant, which we think it's relevant, Your
18 Honor, because if they were once following a
19 threshold and the fact that they're not following
20 one now certainly implies that that is arbitrary
21 and capricious that they're not following it now.
22 They should be following it now.
23 But then they say, without admission,
24 they admit to the extent that this may have
25 occurred in years past. What does that mean? Did

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1 it occur? Did it not occur? I don't know what
2 they're saying.
3 And, now, in response to a request for
4 admission, they say that it's denied. So which is
5 it? Is it too ambiguous? Is it irrelevant? Is it
6 admitted? Is it denied? To the extent it was once
7 there, they'll admit it was once there?
8 I will tell you, Your Honor, we deposed
9 the former -- I can't remember her title -- the
10 chief of the racing lab, who admitted in deposition
11 so I don't know how they could possibly deny it
12 with response to request for admissions. I don't
13 know how they could say they don't know. The
14 person who was in charge of the darn thing told us
15 in deposition that there was a threshold. Why the
16 Division just won't give us a straight answer is
17 beyond me.
18 And in Number 22 we ask: Describe why
19 the Division adopted rules establishing urinary
20 thresholds in greyhounds for caffeine, theophyline,
21 theobromine, procaine, and flunixin. And they
22 object as not relevant.
23 Well, of course it's relevant because
24 they have not adopted thresholds for the very
25 things our clients are being charged with and for

1 things we think they are required to have
2 thresholds. There must be a reason they're
3 choosing to have thresholds for, in this instance,
4 let's say, caffeine, but not a cocaine derivative.
5 (Simultaneous and indiscernible
6 crosstalk.)
7 THE COURT: Mr. Slusher, caffeine -- is that a
8 list of -- that's a list of legal things, right?
9 (Simultaneous and indiscernible
10 crosstalk.)
11 THE COURT: Okay.
12 MR. SLUSHER: No. These are also considered
13 illegal substances.
14 THE COURT: Okay. I knew there was some list
15 of legal things. I got it wrong. Okay. Thanks.
16 MR. SLUSHER: These are medications --
17 (Inaudible background discussion on
18 telephone.)
19 MR. SLUSHER: These are non-medications, but
20 these are also considered things that aren't
21 supposed to be given. I know that there's been --
22 like, for instance, I know that procaine can show
23 up as a false positive for cocaine. I just happen
24 to know that. I'm not a -- I can't testify to
25 Your Honor. I'm not a expert in that. I just

1 happen to know that.
2 Your Honor, it's the same thing. I don't
3 know why the Division just doesn't want to give us
4 answers. On the one hand they tell us they feel so
5 certain that everything they're doing is okay; on
6 the other hand, as you just saw with the
7 admissions, they don't want to just say, here's
8 what it is.
9 And I -- it's one of those things where
10 I'm arguing where I almost see there's no argument
11 necessary. I mean, Number 6 and 7 are just so
12 obvious, it almost, I mean -- tell me what the
13 established procedures are. It's like what's the
14 soup du jour? Oh, that's the soup of the day.
15 It's not helpful.
16 Other than answering questions,
17 Your Honor, I'm done.
18 THE COURT: Okay. Mr. Dewrell?
19 MR. DEWRELL: Yeah. With respect to
20 Questions 6 and 7, Judge, they did file a second
21 set of interrogatories on us that were, in my
22 opinion, much clearer as to what they were getting
23 at. We served those today, and we did go through a
24 pretty step-by-step list of what happens, so
25 I think we've kind of covered that base at this

1 point.
2 But with respect to the question asked
3 here, I mean, our answers pretty much say,
4 you know, we have a set of guidelines that mentions
5 these established procedures. Well, to us, that is
6 what's in the rules and statutes. Those are our
7 established procedures and that's what that quote
8 means in Section 5 of our guidelines. And I took
9 it to -- their question to ask me to interpret that
10 and that's the answer that I give. But, like I
11 said, we have pretty much given them the entire
12 rundown of our procedures at this point in the most
13 recent set of interrogatories we responded to.
14 With respect to Interrogatory 16, I think
15 our objection was pretty clear. I mean, they're
16 asking us to -- I don't know how many responses
17 would have been appropriate for this, sort of,
18 infinite possibilities of how cocaine can show up
19 somewhere. But, you know, that's -- I just
20 didn't -- we objected to speculating as to
21 potential causes because it's an unlimited amount.
22 You know, with doing that, you know, one
23 potential cause is that it was associated with the
24 trainer, and, I guess, you know, we put that in
25 there. And, you know I think most of our -- a lot

1 of our arguments are in the response that we sent
2 you. I'm not just going to repeat everything.
3 What was the next one? Nineteen?
4 THE COURT: Nineteen. That's the BZE
5 threshold. Now, that one, Mr. Dewrell, I have a
6 problem with your answer in that it seems like, you
7 know, when you say you may -- it may have occurred,
8 I mean, it seems like, you know, the Division would
9 be -- you would know whether or not you did. I
10 mean, why you're couching it in those terms --
11 MR. DEWRELL: Well, candidly, Your Honor,
12 we're still investigating that. We don't -- we
13 truly do not think that there was any threshold for
14 cocaine or its metabolites that was written down
15 anywhere or on paper. We've heard what Dr. Cole
16 has to say.
17 We've also talked to her since her
18 deposition and think that, you know, some new
19 information may have come out with regard to how
20 cocaine was treated back in those days, which,
21 you know, I would submit are not relevant to the
22 cases we're dealing with today.
23 But it's our understanding that there
24 wasn't a threshold. There was a policy that
25 cocaine positives were still called, but that the

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1 amount of penalty, in terms of like an
2 administrative fine, may have been different for
3 different levels of the drug.
4 And, like I said, we're still
5 investigating that. You know, we're still going
6 through discovery, and I hope to be concrete on
7 what really was going on back then by the time of
8 the hearing, but we're not there yet, which is why
9 we say that may or may not have been happening.
10 We're sort of still looking into it, and I think
11 petitioners are as well. But that's where we're at
12 on that one.
13 THE COURT: Okay.
14 MR. SLUSHER: Your Honor, may I reply real
15 briefly?
16 THE COURT: Sure.
17 MR. SLUSHER: And, Madam Court Reporter,
18 again, Jeremy Slusher.
19 I heard a couple of things that I find
20 concerning. The first one was Mr. Dewrell saying
21 he tried to answer these to the best of his
22 ability. These aren't interrogatories to an
23 attorney. These are interrogatories to the
24 Division. When we insisted, we actually got them
25 verified.

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1 These shouldn't be Mr. Dewrell's answers.
2 These should be the answers of a designated
3 witness, a corporate representative of the
4 Division. And I don't want to be put into a
5 position where Mr. Dewrell is going to be a
6 witness, so I'm concerned. And I need to say that.
7 It's highly concerning.
8 MR. DEWRELL: Well --
9 MR. SLUSHER: Certainly a party can consult
10 with its counsel when it writes an interrogatory
11 answer, but that's not what Mr. Dewrell just said.
12 THE COURT: I was taking that to be what
13 Mr. Dewrell meant, but I guess he could clarify for
14 us.
15 MR. DEWRELL: I'll go ahead and clarify it,
16 Your Honor. I sat down with Glenda Ricks, who
17 works in my office, went through every question
18 with her. She answered them and I drafted the
19 response with her answers, which is what I meant.
20 Sorry if I misled you there.
21 MR. SLUSHER: Your Honor, just going back to
22 the specific responses we got, Mr. Dewrell said,
23 well, we think the guidelines refer to rules which
24 have the entire procedures. That's not the
25 response they gave. They just said the entire

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1 procedures refers to the procedures used at
2 facilities pursuant to applicable law and
3 administrative rules.
4 Your Honor, what are those procedures?
5 It's not an ambiguous question. Number 7's the
6 same thing. There's just nothing ambiguous about
7 it. I don't know what Dr. Cole may have told
8 counsel after her deposition, but in this case and
9 in other cases, she has testified that there was a
10 threshold applied when she was the director of the
11 racing greyhound -- of the racing facility at UF of
12 100 nanograms of BZE. And she said that it
13 wouldn't -- she wouldn't even be notified of a
14 positive that was under 100.
15 So it's a -- I mean, I'm -- if she --
16 I don't know if she -- I'm befuddled, Your Honor,
17 because I don't want to accuse anyone of lying, but
18 what I'm being told she said post-deposition cannot
19 be read in concert with what she had said in
20 deposition in this case and in other cases that
21 counsel knows we're aware of. So I just don't --
22 I, frankly, can't even understand. And I find that
23 concerning. It's -- I can't have a moving target
24 here.
25 THE COURT: Well, it sounds like if you have a

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1 moving target, you'll have plenty of impeachment
2 material in any event. I mean --
3 MR. SLUSHER: Yeah --
4 THE COURT: -- look at the bright side.
5 MR. SLUSHER: -- I suppose that's true.
6 And then the idea that -- I mean, first
7 of all, Your Honor, I love the fact that
8 Mr. Dewrell's admitting that there's an infinite
9 number of ways in which cocaine can get into a
10 greyhound's urine because that, frankly, as far as
11 I'm concerned, sounds like an admission that it's
12 arbitrary and capricious and vests unbridled
13 discretion in the Division to charge trainers with
14 doping their dogs, when, in fact, there's an
15 infinite number of ways, presumably an infinite
16 number of which do not involve the greyhound's
17 trainer doping the dog that the cocaine could be
18 getting into the greyhound's system. So that's
19 great.
20 But there's got to be at least some
21 Mr. Dewrell and the Division know about that they
22 can list. They listed one, which was the one that
23 they want to use about the doping, so how about the
24 others? There's just no reason they can't list
25 them. If they felt enough to list the one that's

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1 good for them, they should also be compelled to
2 list the ones that are bad for them. It's just
3 evasive responses, Your Honor.
4 THE COURT: Well, in that one, though,
5 Mr. Slusher, frankly, I'm not so sure -- I think
6 the question is so broad, I'm not -- because
7 I think he's right. I mean, there are an infinite
8 number of ways, you know, potential causes of a
9 racing animal's testing positive, it seems to me.
10 I mean, there would be -- I could invent all kinds
11 of ways the cocaine could have got in there.
12 I mean, if that's what you were after, I
13 think, like you said, you've gotten that admission
14 from them. But I'm not sure, you know -- you need
15 to be more specific in your question, if you're
16 asking them, well, give us the likely ways or give
17 us, you know -- do you see what I'm saying?
18 MR. SLUSHER: That's no problem, Your Honor.
19 THE COURT: It's like way over broad for what
20 you say you're getting at.
21 MR. SLUSHER: No problem. I agree with
22 Your Honor that we got the response that we need,
23 and we can always serve a request for admissions
24 and we have it, again, as a stipulated fact for the
25 pre-final hearing stipulation.

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1 THE COURT: And we have come down to -- I
2 think Mr. Dewrell had not yet -- I mean, I don't
3 know if you wanted to, Mr. Dewrell, but you hadn't
4 gotten to 22.
5 MR. DEWRELL: And that was with regard to the
6 caffeine thresholds?
7 THE COURT: Yeah, why -- why the Division
8 adopted rules establishing urinary thresholds in
9 greyhound samples for caffeine -- I'm not going to
10 try to pronounce the others.
11 MR. DEWRELL: Yeah. We objected to the
12 relevance because, I mean, none of those drugs were
13 at issue in Count 2. And, further, I mean, really
14 what my understanding of Count 2, the crux of the
15 argument is whether or not we're following what
16 Section 550.2415 requires us to do in terms of
17 adopting any types of thresholds for medications.
18 And, you know, our position is that it
19 tells us to adopt what ARCI puts in their schedule.
20 Cocaine and its metabolites aren't in there.
21 You know, these drugs are. So I don't see how it's
22 relevant to Count 2 of their petition, especially
23 given that none of these drugs are at issue.
24 MR. SLUSHER: And none of those drugs are
25 listed in ARCI, Your Honor, so if that's what they

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1 were following -- but there's no thresholds for
2 those drugs in ARCI, so if that was the basis for
3 them not wanting to give us an answer, it doesn't
4 make any sense.
5 MR. BILLINGS: Your Honor, Michael Billings.
6 I just want to clarify what Mr. Slusher is talking
7 about. Our point is that while they may have
8 actually been listed in those guidelines, the
9 concentrations that the Division had passed in
10 Rule 6.007 are inconsistent with the concentrations
11 that are listed in the very publication that they
12 are saying that they only need to follow. They
13 are, in fact, not following it.
14 MR. SLUSHER: So why chose a threshold for
15 those substances and not a threshold for BZE and
16 EME? It really is an important question.
17 MR. TROMBETTA: Your Honor, this is
18 Lou Trombetta. I'll jump in just because somebody
19 else just jumped in.
20 THE COURT: Sure. No problem.
21 MR. TROMBETTA: The -- I'm with Mr. Dewrell
22 here. The relevance -- the issue with this
23 question was the relevance. Everything about this
24 case is about cocaine and metabolites of cocaine.
25 We have no idea how this can lead to anything that

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1 would be admissible at the hearing, so we chose
2 just not to deal with it.
3 And the other thing, I mean -- I mean,
4 I guess, I thought we weren't really supposed to
5 get into the merits of the case, but it seems like
6 it keeps coming up, so I think I have to respond
7 here. But the statute in Subsection 13 of
8 550.2415, it allows the Division to come up with
9 thresholds as provided by other -- by other -- by
10 the lab essentially. The caffeine thresholds,
11 I mean, I -- I don't know -- I don't even want to
12 respond because I'm sure that Mr. Slusher will at
13 some point say that I admitted something or do
14 something else.
15 But, I mean, look at -- 550.2415,
16 Subsection 13, allows the Division to implement
17 thresholds for some rules. It gives the
18 Division -- it says the Division may implement
19 rules.
20 And, I guess, I mean, if we have to
21 answer the question, we probably did it under 13.
22 I don't have any evidence from the lab on this.
23 I have never seen a document from the lab on this.
24 Part of the problem, like Mr. Dewrell
25 said, that a lot of this stuff happened -- there's

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1 a lot of turnover here. A lot of us were not here
2 when a lot of these things went into place, and
3 it's hard to figure out why and who and when some
4 of these things happened.
5 And that's just kind of generally about
6 all these admissions. That that's -- you know,
7 Glenda Ricks, the head of operations, was not here
8 when Dr. Cole was the director of the lab, which
9 was when -- the relevant time that Dr. Cole would
10 be testifying about.
11 So it's hard for us, as attorneys, to
12 gather some of this information, and we're
13 constantly having it thrown in our face by opposing
14 counsel, and they're holding out like we're
15 misrepresenting things or doing something in
16 bad faith. We're not. We are trying to answer
17 their questions appropriately. We're trying to
18 move forward on this case.
19 And we're just -- I mean, this is a good
20 example of a question that's just, you know, we see
21 it one way and they see it another. And that's
22 part of the reason why I think this conference is
23 going to be helpful going forward.
24 MR. SLUSHER: Your Honor, they didn't try to
25 answer this question. They just objected. And it

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1 sounds like there is an answer, or even if the
2 answer is "we don't know," that's an answer. They
3 didn't answer. They said it's not relevant. It is
4 absolutely relevant why they chose to have
5 thresholds, why they choose to have thresholds for
6 some things, but not for others.
7 If the rules vest unbridled discretion in
8 the agency, then it's an invalid rule. And the
9 fact that they would just randomly, say, okay,
10 well, you have to have this much caffeine for it to
11 be a problem but any amount of BZE is a problem, no
12 matter where that BZE is derived from or how you
13 got it, is unbridled discretion. So if they don't
14 want to explain that away, how that -- how could
15 that possibly not be relevant?
16 THE COURT: Well, and my problem -- and this
17 is just a practical problem, Mr. Trombetta, with
18 relevance objections at this stage of the
19 proceeding, when, you know, basically all I have is
20 some pleadings in front of me --
21 MR. TROMBETTA: Right.
22 THE COURT: -- everybody on this phone knows a
23 lot more about this subject matter than I do. And
24 making a ruling on relevance right now -- what I'm
25 more inclined to do is say go ahead and answer the

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1 interrogatory, and we'll take the relevance --
2 whether or not you think it's relevant, answer it,
3 and we'll take up the relevance question, you know,
4 at the hearing when I've got a better handle on,
5 you know, just everything that's going on.
6 I've got a lot of moving parts here that I haven't
7 quite, you know, gotten my arms around yet.
8 MR. TROMBETTA: Understandable, Your Honor.
9 THE COURT: And, as I say, directing you to
10 answer the interrogatory is not a ruling on the
11 relevance of that answer. You know, that's still
12 out there whether I'm going to let, you know,
13 evidence in about that or not.
14 MR. TROMBETTA: Sure. Then --
15 (Simultaneous and indiscernible
16 crosstalk.)
17 UNIDENTIFIABLE SPEAKER: -- broaden the
18 scope of relevance. So any ruling on
19 discoverability is not a ruling on relevance --
20 THE COURT: Exactly. It's just, you know,
21 some likelihood of leading to relevant evidence.
22 I mean, it's not -- yeah. I get -- I get a little
23 queasy when I see, you know, objections that are
24 based purely on relevance at this stage of
25 proceedings.

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1 MR. TROMBETTA: Understandable, Your Honor.
2 Then, can I request that we have maybe a
3 few days to try to track people down that might
4 know the answer to this question?
5 THE COURT: Sure. Oh, absolutely. I mean,
6 you know, my order is just going to -- I don't
7 know. I mean, how long do you need?
8 And I guess I should also ask
9 Mr. Slusher, I know that Mr. Dewrell said that
10 they've filed a second set of responses that may
11 take care of your problem with 6 and 7. Have you
12 had a chance to review those?
13 MR. SLUSHER: Well, they filed them about ten
14 minutes before this hearing, so that would be
15 difficult to read through that.
16 THE COURT: Yeah. No, that's why I asked. I
17 didn't know whether you'd had a chance to or not
18 because -- I know 6 and 7 are the two that -- I
19 mean, when I read those, they do seem a little bit
20 like the Division's tap dancing a little bit to,
21 you know, avoid answering the question.
22 I mean, it does seem like -- I mean, the
23 Division's own document references established
24 procedures, and they're simply saying, what are
25 those. And, you know, you've come back with some

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1 boilerplate instead of saying, you know, exactly
2 what are the procedures, how do you do these
3 things.
4 MR. TROMBETTA: Your Honor, would -- just as a
5 possible solution, could we file our answer on
6 DOAH, DOAH's portal, so you could have a chance to
7 look at them?
8 THE COURT: I'm sorry, say that again.
9 MR. TROMBETTA: I just -- you know, we'd be
10 willing to file the second response to
11 interrogatories with the DOAH's, you know, e-portal
12 so you could view them, you know, if that helps.
13 THE COURT: Oh, that might, yeah, in terms of,
14 you know, ruling on this, yeah.
15 MR. SLUSHER: I don't think we asked the same
16 question twice so --
17 THE COURT: Well, I guess the idea would be is
18 there an answer in there that does answer this
19 question if it -- do they give -- tell you what
20 their established procedures are.
21 MR. SLUSHER: Well, but then, if they really
22 think that, they can cut and paste it. It's a
23 different question though. And I'm concerned a
24 bit, Your Honor, because I mean, you know, we
25 have -- when are set for final hearing set for

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1 final hearing? We're set the 16th and -- the 15th
2 and 16th. That's just barely over two weeks. I've
3 been waiting for depo dates -- and I'm not
4 suggesting the Division's not trying, but I've been
5 waiting for depo dates for people they listed in
6 response to my interrogatories for two and a half
7 weeks.
8 I mean, I've got to get -- I kind of have
9 to get moving, you know what I mean? I'm just
10 concerned about waiting for a response. If they
11 want to give our clients their licenses back in the
12 meantime, we can continue the final hearing, but,
13 otherwise, I've got to get moving.
14 MR. TROMBETTA: This is a rule challenge,
15 not -- it has nothing to do with the ACs that are
16 filed against your clients. This is a separate
17 action.
18 MR. SLUSHER: I wasn't arguing that we're
19 entitled to it. I was just making a suggestion if
20 we --
21 (Simultaneous and indiscernible
22 crosstalk.)
23 THE COURT: Well, I guess the thing to do then
24 is to direct -- you know, direct you to answer 6
25 and 7. I mean, if you can, just, you know, cut and

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1 paste from what you've already filed and say that,
2 well, these are our answers to Interrogatories 6
3 and 7, all the better. But, you know, answer 6 and
4 7. Now, I said I'm going to deny on 16 because
5 I just thought that was too broad. I mean, I'm not
6 going to direct you to do anything else on 16.
7 And was it 19 -- 19 and 22,
8 Mr. Trombetta, you thought y'all needed more time?
9 I mean, I'm going to direct you to answer, but
10 you're going to need a few days to do that?
11 MR. TROMBETTA: Let me just read 19 again,
12 Your Honor.
13 THE COURT: Nineteen was the unpublished --
14 well, Mr. Dewrell said that you're -- that's one
15 you're sort of working on.
16 MR. TROMBETTA: Yes. And our -- Dr. Cole was
17 deposed. I don't know if she's read her transcript
18 yet, but that's, I think, what Mr. Dewrell was
19 discussing is that I think she's going to be filing
20 some kind of, you know, supplemental amendment to
21 the depo that I'm sure she'll want to be deposed on
22 again. But, you know, that will be available when
23 that happens. We've been trying to get in touch
24 with her so that is something that we can update.
25 THE COURT: Okay. Well, should I -- what if I

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1 give you until, I don't know, Wednesday of next
2 week?
3 MR. TROMBETTA: That should be enough.
4 Thank you.
5 THE COURT: Okay. I think that takes care of
6 it then.
7 MR. SLUSHER: That's everything I think that
8 was set for today, Your Honor. But we are working
9 on the depos. I don't want to suggest they're not
10 so --
11 THE COURT: Well, it sounds like the parties
12 are definitely talking to each other, which is
13 always a good thing and -- okay, well, in that
14 case, I'll get an order out -- if I don't it get
15 out -- you know what I've ruled in any event. I'm
16 going to try to get it out today so that you'll
17 have it in your hands for the weekend. So with
18 that, I guess, we can sign off.
19 MR. TROMBETTA: Thank you, Your Honor.
20 MR. SLUSHER: I think the only thing, Your
21 Honor -- I guess the only thing that I would
22 suggest, Your Honor, and I don't know if you want
23 to reserve ruling on this --
24 THE COURT: Uh-huh.
25 MR. SLUSHER: -- but, I mean, the rules of

1 civil procedure entitles us -- my clients are
2 spending tens of thousands of dollars for this
3 stuff. The rules of civil procedure would entitle
4 us to seek attorney fees for having to file and
5 bring these motions. I don't know if Your Honor
6 wants to reserve it until post hearing or --
7 THE COURT: I would prefer to do it that way,
8 Mr. Slusher, rather than hear argument on that.
9 I would almost like to get, you know, written
10 briefs on the fee question.
11 MR. SLUSHER: Okay.
12 THE COURT: Okay.
13 MR. SLUSHER: I just didn't want it to sound
14 as if we had waived it. That's all.
15 THE COURT: Oh, no, no, no. Yeah, absolutely.
16 You've requested it and I have -- I didn't -- well,
17 I should have said myself, but I came into this
18 firmly expecting to reserve ruling on any attorney
19 fees.
20 MR. SLUSHER: No problem. Have a good
21 weekend, Your Honor.
22 THE COURT: Thank you all.
23 MR. SLUSHER: Bye.
24 THE COURT: Bye-bye.
25 (The phone connection was terminated and

1 the hearing was concluded at 12:29 p.m.)
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