

Case No. 13-11043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABRAHAM & VENEKLASEN JOINT VENTURE;
ABRAHAM EQUINE INCORPORATED; JASON ABRAHAM,

Plaintiffs-Appellees,

v.

AMERICAN QUARTER HORSE ASSOCIATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION

BRIEF OF APPELLANT

David E. Keltner
State Bar No. 11249500
david.keltner@kellyhart.com
Marianne M. Auld
State Bar No. 01429910
marianne.auld@kellyhart.com
Mary H. Smith
State Bar No. 24075093
mary.smith@kellyhart.com
Kelly Hart & Hallman LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500
(817) 878-9280 (facsimile)

*Attorneys for Appellant
American Quarter Horse Association*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 5th CIR. R. 28.2.1, Appellant American Quarter Horse Association offers this Certificate of Interested Persons.

(1) Number and Style of the Case: Case No. 13-11043; *Abraham & Veneklasen Joint Venture; Abraham Equine Incorporated; Jason Abraham v. American Quarter Horse Association.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Appellant: American Quarter Horse Association

Counsel for Appellant:
David E. Keltner
Marianne M. Auld
Mary H. Smith

Appellees:
Abraham & Veneklasen Joint Venture
Abraham Equine, Incorporated
Jason Abraham

Counsel for Appellees:
Nancy J. Stone
Samuel L. Stein
Ron Nickum

/s/ Marianne M. Auld

Marianne M. Auld
Attorney of Record for Appellant,
American Quarter Horse Association

STATEMENT REGARDING ORAL ARGUMENT

Appellant American Quarter Horse Association (“AQHA”) believes that the Court’s decisional process would be aided significantly by oral argument.

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STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction over Appellees' claims under the Sherman Act pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Appellees' claim under the Texas Free Enterprise and Antitrust Act pursuant to 28 U.S.C. § 1367. This Court has jurisdiction over the District Court's Final Judgment pursuant to 28 U.S.C. § 1291. AQHA timely filed its notice of appeal on September 23, 2013. [ROA.2216].

STATEMENT OF ISSUES

1. Under Section 1 of the Sherman Act, the District Court's judgment should be reversed because, as a matter of law, (1) no concerted agreement existed among separate economic actors pursuing separate economic interests, (2) neither evidence nor law supports a finding that "elite Quarter Horses" constitutes a relevant product market, and (3) AQHA's decision not to register cloned Quarter Horses and their offspring caused no actual injury to competition.
2. Under Section 2 of the Sherman Act, the District Court's judgment should be reversed because, as a matter of law, (1) neither evidence nor law supports a finding that "elite Quarter Horses" constitutes a relevant product market, (2) AQHA has no power to control price or competition in any market, and (3) AQHA's decision not to register cloned Quarter Horses and their offspring has a rational business purpose.
3. Under the Texas Free Enterprise and Antitrust Act, the elements of which are the same as a comparable violation of the Sherman Act, the District Court's judgment should be reversed because no evidence supports Appellees' claims under the Sherman Act.
4. The District Court's judgment should be reversed because it contravenes the non-intervention doctrine by granting injunctive relief that requires AQHA to adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring.

STATEMENT OF FACTS

I. AQHA Advances Its Mission Through the Service of Volunteers.

AQHA is a voluntary non-profit association that was organized in 1940 to collect, record, and preserve the pedigrees of the American Quarter Horse. [ROA. 471]. AQHA members are diverse and have a wide variety of interests, but all share a passion for the Quarter Horse breed. AQHA's income derives, primarily, from memberships and the registration of Quarter Horses. [ROA.471-72].

AQHA has only two paid officers: Don Treadway, the Executive Vice-President, and Trent Taylor, the Treasurer. [ROA.490]. While AQHA employs numerous individuals to operate the day-to-day functions of the organization, AQHA's strategic business decisions are made by AQHA's Board of Directors (the "Board"), its Executive Committee, and its various standing committees. [ROA.490-91]. Members of these governing bodies serve voluntarily, without pay, on behalf and for the benefit of AQHA. [ROA.490-91].

The Board currently is comprised of 346 directors who represent various geographic regions worldwide. [ROA.491]. There are six categories of directors; some are appointed, some are tenured, and some are elected. [ROA.491]. Elected directors are nominated by the membership in their respective regions. [ROA.491]. Any AQHA member who meets eligibility requirements may apply to be an elected director, and AQHA members who attend the membership meeting at

AQHA's annual convention are responsible for electing the slate of nominees. [ROA.491]. In order to continue serving on the Board, elected directors must be re-nominated and re-elected every year. [ROA.491]. The Board is the only governing body that may change AQHA bylaws and the rules and regulations pertaining to the registration of horses. [ROA.491].

The Stud Book and Registration Committee (the "SBRC") is one of several standing committees that report to AQHA's membership and the Board. [ROA.491]. The purpose of the SBRC is to review proposed changes to AQHA's registration rules and make recommendations regarding those rules to the general membership during AQHA's annual convention. [ROA.492]. Although the composition of the SBRC varies from year to year, on average, 30 members serve at any given time. [ROA.491-92]. Individuals who would like to serve on the SBRC submit a request to the Executive Vice President. [ROA.492]. The President, with the advice and majority vote of the full Executive Committee, makes the final selection. [ROA.492]. Although SBRC members, like AQHA members generally, have a wide range of interests and participate to varying degrees in the Quarter Horse market, [ROA.473, 3390-91], most SBRC members have some breeding experience, which helps them understand how various factors impact the advancement of the Quarter Horse breed. [ROA.3825-27].

Any AQHA member may propose a rule change by December 31 of the year preceding each annual convention. [ROA.492]. During the SBRC meeting at the annual convention, AQHA members are permitted to speak before the SBRC, listen to the SBRC's discussion, and observe as the SBRC votes. [ROA.492]. After the SBRC makes its recommendations, the membership decides whether to recommend approval, denial, or modification of the SBRC's recommendation. [ROA.492]. The membership recommendation then is submitted to the Board for final approval, denial, or modification. [ROA.492].

II. AQHA Adopts and Retains a Rule Prohibiting Registration of Horses Produced by Cloning.

In 2003, scientists in Italy used a process called somatic cell nuclear transfer ("SCNT") to clone a horse. [ROA.2851]. Rule 227(a), now REG106.1 (the "Rule"), was adopted by the Board at the 2003 convention and provides as follows:

227. HORSES NOT ELIGIBLE FOR REGISTRATION

(a) Horses produced by any cloning process are not eligible for registration. Cloning is defined as any method by which the genetic material of an unfertilized egg or an embryo is removed and replaced by genetic material taken from another organism, added to/with genetic material from another organism or otherwise modified by any means in order to produce a live foal.

[ROA.492; PX 78]. The Rule codified the members' long-held understanding that AQHA is built upon a sire/dam paradigm and only registers horses produced from the breeding of a sire and dam. [ROA.492].

Between 2008 and 2013, AQHA received four requests to change the Rule from individual members, including Blake Russell (the CEO for ViaGen, the company that holds the patent for the cloning technology Appellees used), Appellee Jason Abraham (a 10% royalty owner on the revenue from all horse cloning ViaGen may perform over the next ten years), and Appellee Gregg Veneklasen (a veterinarian who transfers embryos, foals horses, and collects data for ViaGen). [ROA.493-94, 2426-27, 2752-53, 2877-79; DX 200 at 2]. In 2008, the SBRC considered the first proposal and recommended that further study of the cloning process be undertaken. [ROA.493]. In 2009, with the proposal still pending, the SBRC recommended the creation of a task force to investigate potential issues associated with cloning. [ROA.493]. In 2010, the SBRC voted to recommend that AQHA deny the proposal to change the Rule. [ROA.493].

Each year since 2010, the SBRC has considered a different proposal to change the Rule, the SBRC has voted to recommend that AQHA retain the Rule, and the membership and the Board have accepted the SBRC's recommendation. [ROA.493-94]. The individual votes by SBRC members reflect, among other things, their desires to promote the integrity of the breed, to advance the breed's genetics, to ensure accurate and scientific parentage verification, to protect against genetic diseases and dilution of genetic variety, to respect the overwhelming

sentiment of the membership, and to honor their own sincerely-held moral convictions. [ROA.3316-17, 3327-28, 3398-99, 3745-46, 3783].

III. AQHA is Sued and, Ultimately, Found Liable Under Antitrust Laws.

Appellees filed suit against AQHA on April 23, 2012, claiming antitrust violations under the Sherman Act and the Texas Free Enterprise and Antitrust Act. [ROA.22-43]. Specifically, Appellees claimed that, by prohibiting registration of cloned horses and their offspring, AQHA restrained and illegally monopolized trade in the market for “elite” Quarter Horses. [ROA.22-43, 364-86].

AQHA filed a Motion for Judgment as a Matter of Law. [ROA.1892-904, 2138-50]. Despite a dearth of evidence on several crucial elements, the District Court allowed Appellees’ antitrust claims to go to the jury and provided each side with only 20 minutes to present closing arguments. [ROA.2151, 3891]. Unsurprisingly, the jury was confused and sent out two notes—one informing the court that it could not reach a unanimous agreement and another asking the court to explain how its answers could accomplish registration of cloned horses and their offspring. [ROA.1943, 3950-53].

Ultimately, the jury found in favor of Appellees but declined to award any damages. [ROA.1935-38]. The District Court, therefore, awarded injunctive relief. Specifically, in its Final Judgment, the District Court enjoined AQHA’s enforcement of the Rule and mandated that AQHA adopt and incorporate specific

language into its rules to accomplish registration of cloned horses and their offspring. [ROA.2129-37].

Shortly after filing its notice of appeal, AQHA filed in the District Court a Motion for Stay of Equitable Relief Pending Appeal. [ROA.2216; Dkt. Nos. 167, 169, 174]. The District Court granted AQHA's Motion in part, staying the requirement that AQHA actually register cloned horses and their offspring pending this Court's resolution of the appeal. [Dkt. No. 180].

SUMMARY OF ARGUMENT

Appellees' claims against AQHA—a voluntary non-profit breed registry—fail as a matter of law because the underlying dispute is not what antitrust laws were designed to address. The impossibility of Appellees' theory becomes obvious when the claims are distilled to their essential elements. For example, Appellees contend that the relevant product market is limited to “elite” or “tippy top” Quarter Horses, but neither evidence nor reality supports the existence of a quality-based Quarter Horse submarket. Horses are not machines; they are living organisms with no guarantees. Appellees also argue that AQHA controls prices in the market by restricting the supply of “elite” registered Quarter Horse mares, but AQHA neither participates in the market nor compels consumers to purchase only registered Quarter Horses. Because Appellees' claims are legally insupportable

and no evidence supports the jury's findings of antitrust liability, this Court should reverse and render judgment in AQHA's favor.

Even if the Court affirms on the merits, however, reversal is warranted. By mandating that AQHA adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring, the District Court exceeded the permissible scope of injunctive relief and contravened the non-intervention doctrine.

ARGUMENT

I. This Court Should Reverse and Render Judgment in Favor of AQHA Because the District Court Erred in Denying AQHA's Motion for Judgment As a Matter of Law.

No evidence supports the jury's verdict on Appellees' claims, and the District Court, therefore, erred by refusing to grant AQHA's Motion for Judgment as a Matter of Law. [ROA.2138-51]. This Court reviews the denial of a motion for judgment as a matter of law de novo. *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007). "A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1999).

In reviewing the denial of a motion for judgment as a matter of law, this Court applies the same standard that the District Court should have on initial consideration. *Id.* Specifically, this Court examines the sufficiency of the

evidence under the standard set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc):

Under *Boeing*, we must find a conflict in substantial evidence to create a jury question. Substantial evidence is defined as evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. Consequently, a mere scintilla of evidence is insufficient to present a question for the jury. *Even if the evidence is more than a scintilla, Boeing assumes that some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield to a [motion for judgment as a matter of law].*

Gaia Techs., Inc. v. Recycled Prods. Corp., 175 F.3d 365, 374-75 (5th Cir. 1999) (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc)) (alteration in original) (emphasis added). Because “the facts and inferences point so strongly and overwhelmingly in favor of [AQHA] that . . . reasonable men could not arrive at a contrary verdict,” this Court should reverse and render judgment in AQHA’s favor. *Boeing*, 411 F.2d at 374.

A. No Evidence Supports Appellees’ Claim Under Section 1 of the Sherman Act.

Appellees claim that AQHA violated Section 1 of the Sherman Act, which provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. To prevail on their Section 1 claim, Appellees were required to prove each of the following elements:

(1) a contract, combination, or conspiracy existed within AQHA; (2) the contract, combination, or conspiracy had the effect of restraining trade; and (3) trade was restrained in the relevant product market. *See Apani Sw., Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 627 (5th Cir. 2002). Because no evidence supports these elements, Appellees failed to satisfy their burden, and this Court should reverse and render judgment in AQHA’s favor.

1. There is no evidence of a contract, combination, or conspiracy.

Faced with the burden to prove their claim that, since 2008, the SBRC has conspired to exclude clones and their offspring from AQHA’s registry—and no evidence to support that conclusion—Appellees resorted to innuendo.¹ While repeatedly and derisively referring to the SBRC as a “good ol’ boys club” may have influenced the jury, those references are not evidence and do not relieve Appellees of their burden. The evidence conclusively establishes that AQHA decided to retain the Rule after years of study and independent deliberation by each member of the SBRC, and there is no evidence of a concerted agreement among those members. Accordingly, there is no evidence of a contract, conspiracy, or combination within AQHA.

¹ Although the District Court charged the jury that “Plaintiffs claim that the AQHA Board of Directors and its [SBRC], acting on AQHA’s behalf, conspired to exclude Plaintiffs from the elite Quarter Horse market by agreeing to prevent registration of clones,” Appellees never alleged or attempted to prove that the Board conspired. [ROA.1914].

a. The SBRC is a single entity that cannot conspire with itself as a matter of law.

Section 1 does not proscribe independent action by a single entity because—as a matter of legal and practical reality—a single entity cannot conspire with itself. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189-90 (2010). Although members of a single entity regularly act in combination with one another, their joint action is ““really unilateral behavior flowing from decisions of a single enterprise.”” *Id.* at 195 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984)). Section 1 prohibits only *concerted* action and does not proscribe independent or parallel action, regardless of its purpose and effect on competition. *Id.* at 190. This distinction is crucial because it avoids judicial scrutiny of routine, internal business decisions. *Id.*

To determine whether alleged conspirators were acting as a single entity, “the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved ‘seem’ like one firm or multiple firms in any metaphysical sense.” *Id.* at 195. The relevant inquiry is whether the decision resulted from a concerted agreement between *separate economic actors pursuing separate economic interests* such that the agreement deprived the marketplace of independent centers of decision-making and a diversity of entrepreneurial interests. *Id.*; *Jack Russell Terrier Network v. Am.*

Kennel Club, Inc., 407 F.3d 1027, 1034 n.14 (9th Cir. 2005).² Because there was no concerted agreement within the SBRC, but rather a mutual conclusion reached by individual members that the Rule should remain in place for the benefit of AQHA, the decision was made by a single entity incapable of conspiring.

Appellees contend that SBRC members were acting as separate economic actors pursing separate economic interests each time they voted to recommend retention of the Rule because the SBRC—whose membership changes from year to year—is a “good ol’ boys club” intent on protecting the interests of existing breeders. [ROA.2681, 2837, 2853-54]. However, Appellees offered only their own speculative testimony as proof. For example, Abraham professed to “know” that “about seventy percent” of the SBRC members “are breeders of elite horses,” but he was unable to name a single member who falls within that category. [ROA.2697-98]. Veneklasen went even further—listing twenty SBRC members who he represented to be “actual elite breeders that are in this good ol’ boys club” and “within the market for elite registered Quarter Horses[.]” [ROA.2837-40]. But Veneklasen later changed his testimony, when faced with indisputable

² Appellees argued that AQHA is a trade association and that “[a] trade association that consists of competitors automatically qualifies as a combination under Section 1[.]” [ROA.1199, 1194]. The District Court properly rejected these arguments and instructed the jury in accordance with the standard set forth in *American Needle*. [ROA.1920, 3877-80]. Curiously, however, the District Court entered a post-verdict Finding in support of its injunctive relief that “AQHA is a trade association.” [ROA.2120]. Because the jury found AQHA violated Section 1 of the Sherman Act without considering AQHA’s alleged trade association status, the Finding is superfluous, improper, and constitutes no evidence of that fact. *Tsai v. Rosenthal*, 297 F.2d 614, 618 (8th Cir. 1961); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 432 (2d Cir. 1995).

evidence that many of those members never were elite breeders or have retired, claiming his list referred to SBRC members who “are influential as opposed to being breeders” in the market for “elite” Quarter Horses. [ROA.2857-64]. The testimony of Abraham and Veneklasen is no evidence that the SBRC is full of “actual elite breeders that are in [a] good ol’ boys’ club that are keeping [Appellees’] horses out of the registry” to protect their own interests. [ROA.2837].

As the evidence conclusively establishes, most members of the SBRC have *no economic interest* that would be adversely affected by the registration of clones and their offspring. Of the twenty alleged SBRC conspirators Veneklasen listed, only four—Glenn Blodgett, James Eller, James Helzer, and Butch Wise—actually breed “elite” Quarter Horses, as Appellees have attempted to define that term. The other sixteen either have retired from breeding operations or never were breeders of so-called “elite” Quarter Horses to begin with. [ROA.2857-64].

Section 1 proscribes only concerted action by *separate economic actors pursuing separate economic interests*. Because the evidence conclusively establishes that most members of the SBRC have no separate economic interest to advance by recommending that the Rule be retained—and a single entity lacks capacity to conspire with itself—this Court should reverse and render judgment.

b. There is no evidence of a contract, combination, or conspiracy between SBRC members.

Even if the SBRC were capable of conspiring, there is no evidence of a contract, combination, or conspiracy to restrain trade. An agreement for purposes of Section 1 must be the result of concerted action, which “deprives the market place of independent centers of decisionmaking that competition assumes and demands.” *Am. Needle*, 560 U.S. at 190 (quoting *Copperweld*, 467 U.S. at 768-69). Therefore, to prove the existence of a conspiracy, Appellees had to show that the SBRC’s recommendation to deny each rule-change proposal “was the result of an agreement and not the result of separate decisions made by each Committee member on her or his own.” [ROA.1921]; *Am. Needle*, 560 U.S. at 195-96. Appellees presented no evidence that this type of agreement occurred.

Appellees heavily relied upon Frank Merrill’s deposition testimony, in which he agreed with the following general statement made by Appellees’ counsel: “[A]t all times since 2008, the members of the [SBRC] have agreed to exclude horses produced through somatic nuclear transfer and their offspring from the registry of the [AQHA].” [ROA.800-01, 2518, 2599-600, 2649, 3926]. Joan Schroeder—a breeder of western pleasure horses and SBRC member—likewise agreed with Appellees’ counsel “that, in 2012 and 2013, the members of the [SBRC] agreed to exclude horses produced through somatic cell nuclear transfer and their offspring from the registration of the [AQHA].” [ROA.3407].

According to Appellees, these statements constitute “direct evidence” of a concerted agreement. [ROA.3926].

In fact, these statements constitute *no evidence* of a concerted agreement because—as Schroeder made clear—the SBRC members only “agreed” by *voting* at AQHA’s annual meetings to recommend that the Board take no action or deny the rule-change proposals. [ROA.3407]. “The fact that each of the [SBRC] members voted in the same manner is not, by itself, sufficient to prove the existence of an alleged agreement” in violation of Section 1. [ROA.1921]; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (noting, in the context of a Section 1 claim, “[t]he inadequacy of showing parallel conduct or interdependence, without more”).

Because the testimony of Merrill and Schroeder proves only that SBRC members voted to recommend that the Rule not be changed—not that the SBRC members “got together and discussed with each other to agree that they won’t register clones”—there is no “direct evidence” of a concerted agreement. [ROA.3407]. To the contrary, the evidence establishes that each SBRC member decided independently—and for different reasons—to vote in favor of retaining the Rule.³ [ROA.3398-99 (Schroeder voted based on AQHA’s mission, moral issues,

³ Appellees’ mere subjective belief that the members’ proffered reasons are “excuses” is no evidence of that fact. [ROA.2407, 2414, 3851-52, 3862]; *see, e.g., Lawrence v. Univ. of Tex.*

and parentage verification concerns); 3745-46 (Walker voted based on AQHA’s mission); 3783 (Wise voted based on parentage verification and genetic disease concerns); 3327-28 (Merrill voted based on parent verification concerns and moral convictions)].⁴

There also is no circumstantial evidence from which the jury reasonably could have inferred that the SBRC’s votes between 2008 and 2013 were the result of a concerted agreement to exclude clones and clone-offspring. Appellees attempted to make much of the following uncontroversial facts: (1) the members of the SBRC know one another through AQHA and the Quarter Horse business [ROA.3452-64]; (2) only a few “vocal” members of the SBRC spoke up at the annual meetings [ROA.2516-18, 2855]; and (3) there was limited public discussion surrounding the SBRC’s votes [ROA.2394-95, 2397, 2671, 2825, 2880, 2884]. However, the only reasonable inference to be drawn from this evidence is that SBRC members engaged in private study and discussion before the annual meetings and arrived appropriately prepared on each topic. [ROA.2578-80, 3395-96, 3742]. Indeed, it is undisputed that, between 2008 and 2013, SBRC members engaged in discussions with one another outside of the annual meetings—at the

Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir. 1999) (holding that a subjective belief of discriminatory intent, however genuine, is legally insufficient to create such an inference).

⁴ Appellees’ counsel attempted to explain some of this evidence in closing argument by asserting that “[t]he agreement to exclude horses produced through somatic nuclear transfer was made when Duane Walker and Joan Schroeder were not in the room.” [ROA.3946]. However, statements by counsel are not evidence, and no rational jury could reach such an inference based on the evidence presented during trial.

October 2008 meeting to learn more about the science of cloning⁵ [ROA.2462-63, 3740-41]; with other members of their task force subcommittees [ROA.3595-601, 3316, 3744, 3827-28]; and at annual convention activities [ROA.3748].⁶

Whether considered individually or collectively, the facts upon which Appellees rely do not give rise to a reasonable inference in Appellees' favor. The fact that SBRC members know one another through AQHA and the Quarter Horse industry is hardly surprising given that the SBRC has only 30 members and AQHA is a voluntary association that revolves around the Quarter Horse breed. [ROA.2497, 3793]. Likewise, the fact that few SBRC members have spoken during their annual meetings does not indicate that "a vocal minority" runs the SBRC. There are countless reasons that a member might choose to speak or not speak during the convention and no evidence whatsoever that influence or intimidation played a role.⁷ Finally, the fact that the SBRC voted at its annual

⁵ Several witnesses—including Appellees' witnesses—testified that the October 2008 presentation was both balanced and informative. [ROA.2466-68, 3740-41].

⁶ Appellees also attempt to make much of these non-public discussions, but "[a] mere opportunity to conspire, even in the context of parallel conduct, does not plausibly suggest collusion." *Adv. Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 182 (D. Mass. 2013) (emphasis added) (citing *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011)); see also 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1417, at 115-17 (3d ed. 2010). Moreover, as Veneklasen acknowledged, no rule prohibits SBRC members from talking amongst themselves about the rule-change proposals, and many people prefer to converse in a one-on-one setting as opposed to a group setting. [ROA.2883-84].

⁷ In responding to conclusive evidence that Merrill is not capable of financially influencing SBRC members, Veneklasen claimed that "the power he has over people is the power to badger them indefinitely." [ROA.2866-67]. This statement is absurd, purely speculative, and contradicted by conclusive evidence. [See ROA.3402-04 (Schroeder not influenced by Merrill or

meetings without engaging in lengthy public discussion does not indicate the existence of a concerted agreement to exclude cloned horses and their offspring from AQHA's registry. As Veneklasen conceded, the SBRC's efficiency was not confined to the issue of cloning but "was true of other topics as well[.]" [ROA.2884]. "There wasn't any discussion on anything." *[Id.]*.

Tellingly, neither Abraham nor Veneklasen could explain how the evidence supports a finding of concerted action. Abraham could not name a single alleged conspirator and conceded that his theory rests entirely upon assumption:

Q. . . . What persons on the [SBRC] would be in favor of changing the rule but for this conspiracy that you've alleged? Can you name anyone?

A. I don't know them that good.

Q. Well, so how do you know that they are not against cloning simply because they're not in favor of it?

A. Well, I – and they've got the right to be against cloning. I'm not – I'm not trying to – just like if you like to drive Dodge pickups, I don't want to make you drive Dodge [sic] pickups; I'll drive Fords. I'm just saying, if you're using your power as a monopoly to exclude me, that's illegal. And I don't care if everybody is against it, you can't – you can't – that doesn't make it legal.

Q. Okay. Well, I'm asking you about the conspiracy that you've alleged.

A. Okay.

any other SBRC member); 3785, 3789-92 (Wise has neither intimidated nor been intimidated by Merrill or any other SBRC member)].

* * *

Q. All right. Now, tell me which people on that list would otherwise be in favor of the registration of clones except for this alleged conspiracy that you've told this jury about?

A. I don't know any of them personally.

Q. So you don't know that any of them have been swayed by a conspiracy, do you?

A. No.

Q. You don't know that any of them are in a conspiracy, do you?

A. Well, I think they – I think if there is a conspiracy, that I've seen what the – what they – what I've seen of these guys, of the Frank Merrill and the Butch Wise, these guys will certainly go along with it, so if – So my opinion is, if they go along with the Butch Wises and the Frank Merrills, then they're – they're part of the conspiracy.

Q. So if they are like-minded with Butch and Frank and don't want to register clones, then they are automatically in this conspiracy against you?

A. If they're going along with them, I assume they are.

Q. Well, do you think they might have reasons why they oppose the registration of clones other than being a part of a conspiracy?

A. Like I said, I don't know them. I don't talk to them.

[ROA.2694-96]. Although Veneklasen identified several SBRC members as alleged conspirators, he could not articulate why:

Q. Dr. Veneklasen, why would you say that these 2012 members of the [SBRC] that you – whose names you've read off, why would you say that they were part of any kind of a conspiracy as you've described?

A. Because they're – well, you know, a conspiracy is a difficult thing to define, and I – you can be part of a conspiracy by not allowing your – or by allowing yourself to be a part of it, to be intimidated by a few people, so whether you're directly or indirectly – any time someone votes, and it's all the same? Any time – and there's no discussion? I mean, to me, I mean, someone has – there's always a discussion. There's always – everything I saw that day was all the same. So I – I think when everybody agrees that they don't want cloning in these meetings, I think a vocal few can go ahead and push everybody, and I think that's why I believe the whole thing was, and especially after seeing what they've done.

[ROA.2880]. The reason for Appellees' ineloquence is clear: the evidence simply does not support their speculation that SBRC members conspired to exclude clones and clone-offspring from AQHA's registry. Because Appellees presented no evidence of a contract, conspiracy, or combination—and the evidence conclusively establishes that the SBRC's votes were the result of independent decision-making and parallel agreement—this Court should reverse and render judgment.

2. There is no evidence of a relevant product market.

The determination of a relevant product market can make or break an antitrust claim because market considerations provide the “objective benchmarks” for ascertaining the existence of a Section 1 violation. *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983). For that reason,

the market must be defined precisely and in accordance with commercial realities.

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482 (1992).

In an attempt to avoid the fact that healthy competition exists within the Quarter Horse market, Appellees crafted a submarket that artificially amplifies their perceived injury. Specifically, Appellees argued—and the District Court and the jury accepted—that the relevant product market in this case is *not* the Quarter Horse market, but rather a narrow submarket for horses that are “elite” or at the “tippy top” based on their pedigree and performance potential. [ROA.3126-27, 3132]. Far from being defined precisely, the submarket is described differently in Appellees’ Complaint, in testimony, and in the District Court’s charge. [ROA.373 (“high-quality registered Quarter Horses”); ROA.3161-62, 2616, 2839 (“elite registered Quarter Horses”); ROA.1919 (“elite Quarter Horses”)].

This alleged submarket—however described—is improper as a matter of law and supported by no evidence.⁸ Not only is there no legal test according to which an “elite” Quarter Horse can be defined, the submarket fails to encompass all

⁸ A party seeking to establish a Section 1 violation has the burden to define the relevant product market. *See Apani Sw.*, 300 F.3d at 627. “The propriety of reviewing a determination of the relevant market as a factual or legal conclusion is not clearly or uniformly resolved in the case law. However, the preponderance of authority holds that the determination of a relevant market is composed of the articulation of a legal test which is then applied to the factual circumstances of each case.” *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 499-500 (6th Cir. 1983) (citing *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1348-50 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981)). A finding concerning the market should be overturned when it is clearly erroneous or when no evidence supports the finding. *See, e.g., Associated Radio Serv. Co.*, 624 F.2d at 1348-50.

reasonably interchangeable products and, therefore, is improper as a matter of law. *See infra* at 21-34. Because a submarket for “elite” Quarter Horses has neither relevance in the real world nor parameters that can be tested, there is no evidence of a relevant product submarket within the larger Quarter Horse market.

a. “Elite Quarter Horses” is not a proper product market because it fails to encompass all reasonably interchangeable products.

The outer boundaries of a product market are determined by the reasonable interchangeability of use and the degree of cross-elasticity of demand between the product itself and substitutes for it. *Apani Sw.*, 300 F.3d at 626; *see also Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962). Stated another way, a relevant product market is determined by eliminating from the market all products that are not reasonably interchangeable substitutes for the product at issue. *See U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-404 (1956). Whether one product is reasonably interchangeable with another depends on the purpose for which the products are produced. *Id.* at 404. Cross-elasticity of demand is the responsiveness of consumers to price changes among products that are reasonably interchangeable. *Id.* at 394-95, 400. Establishing boundaries is crucial because competition only exists among products that are reasonably substitutable from a consumer’s perspective. *R.D. Imports Ryno Indus. v. Mazda Distribs.*, 807 F.2d 1222, 1225 (5th Cir. 1987), *cert. denied*, 484 U.S. 818 (1987).

Within a broad product market, well-defined and economically significant submarkets may exist, which, in themselves, “constitute product markets for antitrust purposes.” *Brown Shoe Co.*, 370 U.S. at 325. “The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Id.*

Obviously, the narrower the market defined by plaintiffs, the easier it is to show monopoly power or a restraint of competition within the relevant market. *See First & First, Inc. v. Dunkin’ Donuts, Inc.*, Civ. A. No. 90-1060, 1990 WL 36139, at *90 (E.D. Penn. 1990). However, plaintiffs cannot manufacture an antitrust violation simply by defining the market narrowly. Courts have, on many occasions, rejected self-serving efforts to define away competition with proffered market definitions that resemble the proverbial “strange red-haired, bearded, one-eyed man-with-a-limp.” *U.S. v. Grinnell Corp.*, 384 U.S. 563, 590-91 (1966) (Fortas, J., dissenting) (relevant market must reflect “commercial realities” and include alternative sources of and substitutes for product).

In one case, for example, the plaintiffs claimed that the New York Times possessed monopoly power in the market for “general interest daily newspapers

directed primarily to upscale readers[.]”⁹ *Belfiore v. N.Y. Times Co.*, 654 F. Supp. 842, 846 (D. Conn. 1986), *aff’d*, 826 F.2d 177 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988). The plaintiffs defined “‘upscale’ readers as those meeting two or more of the following criteria: total household earnings of \$35,000 or more, a college degree, and/or a professional/managerial type job.” *Id.* The district court rejected, as a matter of law, the “[p]laintiffs’ attempt to define the relevant market ‘from the product out[.]’” *Id.* On appeal, the Second Circuit reached the same result, noting that “[p]laintiffs’ narrow definition is an awkward attempt to conform their theory to the facts they allege; this market definition does not reflect any relevant market evidenced in the record.” *Belfiore*, 826 F.2d at 180.

Appellees’ attempt to define the relevant product market narrowly in this case fails for the same reasons. Like the market in *Belfiore*, the alleged “elite Quarter Horse” submarket is just an awkward attempt to conform Appellees’ theory to the facts presented. Appellees’ motivation for narrowly defining the relevant product market is obvious: AQHA’s decision not to register horses produced by the SCNT cloning process—a process that costs upward of \$200,000 [ROA.2856]—does not affect most consumers in the larger Quarter Horse market and, therefore, does not involve a substantial amount of commerce in that market:

⁹ These market principles apply equally to claims under Section 1 and Section 2 of the Sherman Act. *See PepsiCo, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243, 249-59 (S.D.N.Y. 2000).

Q. So why is it important that we're focusing only on the elite Quarter Horses as a part of this market?

A. Well, *because cloning's expensive*, and someone, let's say, who's breeding ranch horses or trail-riding horses, probably is not going to clone one of their mares, because they're not going to get enough money from the offspring to pay for cloning and make a profit. *So the market that's relevant to the question here, which is cloning, is these tippy-top horses that sell for a lot of money and where you can clone a mare and make a profit by cloning that mare and then breeding her to top stallions.*

[ROA.3132, 2856 (emphasis added)]. Only within Appellees' alleged "elite" submarket could the Rule even arguably have market effects. This results-oriented method for determining the relevant product market is improper, as a matter of law, because it fails to account for reasonably interchangeable substitutes. *See E.I. du Pont de Nemours & Co.*, 351 U.S. at 394-404; *PepsiCo*, 114 F. Supp. 2d at 249 (rejecting PepsiCo's attempt "to define the elements of the relevant market to suit its desire for a high Coca-Cola market share, rather than letting the market define itself").

Whether products are reasonably interchangeable substitutes for one another is a determination that requires "a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co.*, 504 U.S. at 482. As a matter of commercial reality—and as the evidence conclusively establishes—horses outside of the alleged "elite Quarter Horse" submarket are reasonably interchangeable

substitutes for those within it because they all can be used for the same purposes.¹⁰

Id.; *Apani Sw.*, 300 F.3d at 626.

According to Appellees, “elite” Quarter Horses are used as athletes in top competitions and then as breeding animals. [ROA.3127, 3152]. However, eligibility to compete in top competitions is not restricted to “elite” Quarter Horses, and there is no evidence that horses in the “elite Quarter Horse” submarket perform better in competition or as breeding stock than any other horse. [ROA.2844-45, 3273-74]. To the contrary, the evidence conclusively establishes that Quarter Horse consumers who want to make money in competition—and, by extension, breeding—have options both in and out of Appellees’ narrow “elite Quarter Horse” submarket. [ROA.3436-38, 3562-63, 3771-74].

Butch Wise—a buyers’ consultant and undisputed expert in valuing racehorses—affirmed that “there’s a huge amount of horses” each year that give consumers “a chance of winning the big race.” [ROA.3770-75, 3836]. Because all buyers, regardless of budget, “want the horse that’s going to win the race,” Wise’s job is to “make [his] best guess as to what that horse is”—not to convince buyers to purchase the most expensive horse they can afford. [ROA.3759-65]. Wise’s philosophy that the best horse and the most expensive horse are not one and the

¹⁰ Appellees attempt to avoid this reality by defining “elite” Quarter Horses in terms of their potential (i.e., champion bloodline) rather than their use (i.e., competition and breeding) [ROA.3096, 3132-33], but “[i]nterchangeability and cross-elasticity of demand are driven by whether the consumer would *use* the products interchangeably.” *Bill’s Birds Inc. v. Trademarketing Res. Inc.*, 920 F. Supp. 2d 357, 366 (E.D.N.Y. 2013) (emphasis added).

same is not mere speculation; it has been proven time and time again. In fact, the winner of the 2013 Rainbow Derby and its more than \$1 million purse was a horse named Wicked Courage that sold at auction for \$4,000.¹¹ [ROA.3219-20, 3439-41, 3510; *see also* DX 239 at 7-8 (most of the top earning horses in 2011 and 2012 were purchased at yearling auctions for a modest price)].

Appellees' expert, economist Christopher Pflaum, opined that "non-elite" horses are not substitutes for "elite" horses [ROA.3231] but conceded that he never has bet on a Quarter Horse race, been to a Quarter Horse auction, bought a Quarter Horse, or evaluated a Quarter Horse for conformation. [ROA.3840-41]. Because Pflaum's conclusory opinion does not reflect the "'commercial realities' faced by consumers," it constitutes no evidence that horses outside of the alleged "elite Quarter Horse" submarket are not reasonably interchangeable substitutes for those within it. *Eastman Kodak Co.*, 504 U.S. at 482.

Both "elite" and "non-elite" horses successfully compete in top competitions, and there is no evidence to suggest otherwise. *See supra* at 24-26. Accordingly, the evidence conclusively establishes that horses outside of the alleged "elite Quarter Horse" submarket are reasonably interchangeable substitutes for those within it. *See E.I. DuPont de Nemours & Co.*, 351 U.S. at 395, 400-01

¹¹ Although Appellees' market analysis would have predicted a slightly higher sales price—\$7,301—Wicked Courage would not have been considered "elite." [ROA.3252-55].

(finding market encompasses cellophane, wax paper, and aluminum foil because they are “reasonably interchangeable by consumers for the same purposes”).

The evidence also conclusively establishes high cross-elasticity of demand between horses outside of the alleged “elite Quarter Horse” submarket and those within it. *Id.* at 394-95. Appellees contend that, once the price of “elite” Quarter Horses is lowered, “average guy[s]” from the broader Quarter Horse market will participate in the alleged submarket. [ROA.2682-84, 2363]. In other words, Appellees concede the responsiveness of consumers to price changes within these allegedly distinct markets. *Id.*

Because Appellees failed to define the relevant product market with reference to the rule of reasonable interchangeability—and the evidence conclusively establishes interchangeability and cross-elasticity of demand between “elite” and “non-elite” Quarter Horses—no evidence supports Appellees’ submarket definition, and “elite Quarter Horses” is an improper product market as a matter of law.

b. “Elite Quarter Horses” is not a proper product market because it is based upon price and alleged quality distinctions alone.

“Elite Quarter Horses” is not a proper product market because, as a matter of law, price and alleged quality distinctions alone cannot support a separate product market. *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, No. 88-

15043, 1990 WL 12148, at *3 (9th Cir. Feb. 8, 1990); *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 548-49 (8th Cir. 2007). “Courts have repeatedly rejected efforts to define markets by price variances or product quality variances.” *Haagen-Dazs Co.*, 1990 WL 12148, at *3; *see, e.g., Acme Precision Prods., Inc. v. Am. Alloys Corp.*, 484 F.2d 1237, 1244 (8th Cir. 1973) (rejecting alleged market for high-strength aluminum alloys due to “competitive interchangeability of all alloys marketed”); *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (rejecting product market for “super-premium ice cream”); *U.S. v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 145 (N.D. Cal. 1966) (rejecting product market for “premium” beer).¹²

Submarket division *only* is proper when the “products are not within a price and quality spectrum, [but] rather . . . are so different that they are unsuited for the same purpose.” *Haagen-Dazs Co.*, 1990 WL 12148, at *3. For example, in *Brown Shoe*, the Supreme Court recognized the existence of submarkets for men’s, women’s, and children’s shoes but held that “[i]t would be unrealistic to accept . . .

¹² See also *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 840-41 (2d Cir. 1980), superseded on other grounds, 78 F.3d 84 (2d Cir. 1996) (no separate markets for brand name and private label waffles); *Liggett & Myers, Inc. v. FTC*, 567 F.2d 1273, 1274-75 (4th Cir. 1977) (no alleged market for “premium” canned dog food); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 552-54 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975) (no separate markets for conventional and “pipeless” recirculation systems, despite “[s]ignificant differences in quality,” because functionally interchangeable); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980) (no separate market for more expensive computer equipment); *Schaben v. Samuel Moore & Co.*, 462 F. Supp. 1321, 1334 (S.D. Iowa 1978) (finding single market encompasses rubber wire braid and synthetic hoses because “the two types of hose were interchangeable for all practical purposes”).

that, for example, men’s shoes selling below \$8.99 are in a different product market from those selling above \$9.00” because all men’s shoes are used for the same purpose. 370 U.S. at 325. Here, the evidence conclusively establishes that “elite” and “non-elite” horses are reasonably interchangeable in terms of use. *See supra* at 24-26.

Pflaum’s testimony confirms that price and purported quality distinctions alone support Appellees’ “elite Quarter Horse” submarket. Before expressly conceding that Appellees restricted the market to “tippy-top horses that sell for a lot of money” “because cloning’s expensive” [ROA.3132], Pflaum attempted to distance himself from that fact, claiming that the high price of “elite” Quarter Horses is a manifestation of certain *characteristics* that indicate “elite” status:

Q. Is price alone what we’re looking at when we define what an elite Quarter Horse is, an elite registered Quarter Horse?

A. No. An elite registered Quarter Horse has certain characteristics and, of course, they manifest themselves in price, just like the characteristics of a luxury car. All of the nifty things it has, well, it leads to a pretty big price for that car. So it’s the same in a horse. A horse has certain attributes, primarily hereditary attributes, that manifest itself [sic] in a selling price in the marketplace.

[ROA.3131-32]. As Pflaum later conceded, however, what consumers really care about are *not* the characteristics of an “elite” horse, but “the money and prestige that comes with winning major elite events” and “the economic benefits that comes [sic] with breeding those animals.” [ROA.3226-27]. In other words, according to

Pflaum, consumers purchase “elite” Quarter Horses with their end-use in mind. [ROA.3226-27]. Because the evidence conclusively establishes that “elite” and “non-elite” Quarter Horses are reasonably interchangeable in that regard, *see supra* at 24-26, the only true distinction between “elite” and “non-elite” Quarter Horses—as Appellees have attempted to define those terms—is the price they command.

Price and alleged quality distinctions alone cannot support a separate product market. Accordingly, this Court should reverse and render judgment.

c. “Elite Quarter Horses” is not a proper product market because its boundaries cannot be defined.

Even if the “elite Quarter Horse” submarket encompasses all reasonably interchangeable substitutes and, therefore, rests on more than price and quality distinctions (it does not), Appellees did not satisfy their burden to define its boundaries. *Apani Sw.*, 300 F.3d at 627. Market definition is essential because, otherwise, there is no context within which to determine whether the defendant had the ability to lessen or destroy competition. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

It is impossible to define an “elite” Quarter Horse. As Pflaum conceded, “elite” is just an adjective meaning “high quality,” “best of the best,” “top drawer,” or “aspirational.” [ROA.3224-25]. Yearlings (horses less than one year old) are considered “elite” when they are born to “elite” or “proven” parents—i.e., parents

that have performed well in competition and/or produced money-earning offspring. [ROA.3095-96, 2730-31, 2765-66, 2698-99]. However, an “elite” or “proven” horse can be “disproven” if it fails to produce offspring that perform successfully in competition. [ROA.991-992]. Because “eliteness” is an impermanent status, horses—and entire bloodlines—fall in and out of favor constantly. [ROA.2704-05, 3775]. In other words, the alleged market for “elite Quarter Horses” is fluid and constantly changing. This is precisely the problem with attempting to define an “elite” submarket within the broader Quarter Horse market—it is “impossible to evaluate and too vague to be useful.” *Huhta v. Children’s Hosp. of Phila.*, No. Civ. A. 93-2765, 1994 WL 245454, at *3 (E.D. Penn. May 31, 1994) (rejecting submarkets of pediatric cardiology services for “severely ill patients”).

Assuming that it is possible to define an “elite” Quarter Horse, Appellees still failed to do so. According to Pflaum, there are ten characteristics of an “elite” Quarter Horse.¹³ [PX 92 at 8]. However, Pflaum emphasized that these are not *defining* characteristics, but merely indicators:

Q. Does having these characteristics make the horse elite?

A. Well, it means he has an elite bloodline, but there’s a lot of diversity, randomness in genetics. So even if you put a couple of great horses together, you may not get a great horse out of

¹³ Appellees’ witnesses assign varying weight to these characteristics. For example, David Brown attributes his mare’s “elite” status to genetics. [ROA.3077]. According to Veneklasen, a mare becomes “elite” by producing offspring that command a price higher than \$25,000, and a yearling is “elite” if he comes from an “elite” mare and sells for \$25,000 or more. [ROA.2766].

that, but your probabilities of getting a good horse, given an elite sire and an elite mare, are much higher. So it's like – it's like playing with loaded dice. You're going to get the number you want more if the dice are loaded. And if you have these characteristics, it's kind of like loading the dice in the horse-breeding game.

Q. So if we can say that, once we have determined elite, it will have these characteristics?

A. Almost always. Though, there are exceptions. Sometimes you get a bolt out of the blue, a horse that's not – does great at the track, but it may not have breeding value.

Q. But just because a horse has these characteristics doesn't necessarily make it elite?

A. Correct.

Q. All right.

A. There's the randomness.

[ROA.3133]. Pflaum later acknowledged that, because of this uncertainty, it is not always possible to identify what horses are “elite” and what horses are not:

Q. You understand that it's the Plaintiffs' burden of proof in this case through you, as their economic expert, to establish the boundaries of the relevant product market, correct?

A. I understand that, yes.

Q. Where are the boundaries?

A. The boundaries are somewhere, the top five percent roughly are the elite group.

Q. Somewhere?

A. About five percent, yes.

Q. 35,000?

A. No, sir, that would be seven percent.¹⁴

Q. . . . Where is the – I'm just trying to find out where the boundary is, sir.

A. Well, I think a – you're looking for a bright line. This is not a product market that's going to give you a bright line. These are animals. . . .

* * *

Q. So there's a lot of substitutability at the gray area of your relevant product market that you can't put a bright line on, correct?

A. The correct way to put that is, there isn't substitutability between the top five percent and this bottom group, but, in that gray area, it's the gray area; there's no sharp line there.

Q. What is the range of the gray area? What's the dollar range of the gray area?

A. Without my work papers in front of me, I don't know, but it's somewhere north of 50,000, but the 50,000-45,000 range, I believe.

[ROA.3837-39, 1126 at n.2 (District Court noting that “[t]he meaning of ‘elite’ is hazy.”)]. There is no evidence from which a person reasonably and objectively could infer what horses are “elite,” what horses are “not elite,” and what horses are within the “gray area” Pflaum described.

¹⁴ Abraham testified to a different boundary, claiming the “cheapest horse in [the] elite market” is “probably 30,000 or something maybe as a yearling, as a baby, as a yearling.” [ROA.2704].

There also is no economic or statistical evidence to establish how “elite” mares and stallions factor into the “elite Quarter Horse” submarket. Although some of Pflaum’s “Characteristics of an Elite Registered Quarter Horse”—e.g., stud fees, earnings per offspring, winning percentage in competition, and breeding often done by embryo transfer—apply only to adult horses, Pflaum’s economic and statistical market analysis focuses exclusively on “elite” yearlings sold at auction. [ROA.3146-47, 3156-57, 3275; PX 92 at 8]. Because there is no economic or statistical data to explain if and how “elite” mares or stallions are bought and sold within the market, the evidence is legally insufficient to support a market that encompasses those horses. [ROA.3275]; *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1540 (8th Cir. 1989) (overturning jury verdict where plaintiff failed to offer “market data or similar hard evidence in identifying the relevant market”).¹⁵

No evidence supports a product market for “elite Quarter Horses.” Accordingly, this Court should reverse and render judgment in AQHA’s favor.

3. There is no evidence of an unreasonable restraint of trade.

There is no evidence that the alleged agreement within AQHA effected an unreasonable restraint of trade. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). Courts generally apply the “rule of

¹⁵ See also *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 962-63 (6th Cir. 2004); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004); *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004).

“rule of reason” to determine whether an agreement operates as an unreasonable restraint of competition. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *Tunica Web Adver. v. Tunica Casino Operators Ass’n*, 496 F.3d 403, 411-12 (5th Cir. 2007). Under the rule of reason, courts examine the effect of the alleged restraint of competition, considering all the circumstances.¹⁶ *PSKS*, 551 U.S. at 885. Courts then balance the anticompetitive effects of the restrictive practice against any benefits or justifications within the relevant market. *Benson v. St. Joseph Reg’l Health Ctr.*, 575 F.3d 542, 549 (5th Cir. 2009) (citing *Doctor’s Hosp., Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997)). Because there is no evidence of an unreasonable restraint of trade under the rule of reason, this Court should reverse and render judgment in AQHA’s favor.

a. There is no evidence that the SBRC’s vote to retain the Rule caused actual injury to competition.

The alleged agreement to exclude clones and their offspring from AQHA’s registry cannot be unlawful under the rule of reason because there is no evidence that it had an adverse effect on competition. *Tunica Web Adver.*, 496 F.3d at 413; *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010). A showing of actual injury is essential because “[a]n antitrust policy divorced from market considerations would lack any objective benchmarks.” *Nw.*

¹⁶ Appropriate factors to take into account include “specific information about the relevant business” and “the restraint’s history, nature, and effect.” *PSKS, Inc.*, 551 U.S. at 885.

Power Prods., Inc. v. Omard Indus., Inc., 576 F.2d 83, 89 (5th Cir. 1978) (quoting *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977)). The record contains no evidence that the SBRC's vote to recommend retention of the Rule actually injured competition in the “elite Quarter Horse” market.

i. Without evidence of an “elite Quarter Horse” market, there can be no evidence of an adverse effect on competition within that market.

There is no evidence that the SBRC's vote to recommend retention of the Rule injured competition in the “elite Quarter Horse” market because no evidence supports the existence of an “elite Quarter Horse” market. *See supra* at 19-34; [ROA.3518]. As the evidence conclusively establishes, “elite” and “non-elite” horses are reasonably interchangeable substitutes for one another, *see supra* at 24-26, and so an alleged shortage of “elite” mares is irrelevant. Moreover, there is no way to evaluate the alleged shortage of “elite” mares because it is impossible to define “elite” status with any certainty. *See supra* at 30-34. Because no evidence supports the existence of an “elite Quarter Horse” market, harm within that market cannot be established as a matter of law. *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 320 (5th Cir. 1985).

ii. AQHA's registration decisions do not cause injury to competition as a matter of law.

“A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.” *Consol. Metal Prods., Inc.*

v. Am. Petroleum Inst., 846 F.2d 284, 293 (5th Cir. 1988). Stigma and loss of prestige are insufficient as a matter of law to constitute injury to competition. *Id.* at 293-97; *see also Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1037-38 (3d Cir. 1997) (granting summary judgment on Sherman Act claim involving the denial of ABA accreditation because “loss of prestige resulting from a refusal to approve a product or service does not alone make out an antitrust claim”); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (“[W]hen a trade association provides information ([or] gives a seal of approval) but does not constrain others to follow its recommendations, it does not violate the antitrust laws.”); *Found. for Interior Design Educ. Research v. Savannah College of Art & Design*, 73 F. Supp. 2d 829, 839 (W.D. Mich. 1999) (“It is well settled that stigma or loss of prestige to an entity that is denied accreditation or certification of its service or product does not constitute an injury to competition under the Sherman Act.”). To prove that an unreasonable restraint of trade was caused by the denial of an endorsement, there must be some evidence that consumers are coerced or otherwise constrained to buy only endorsed products. *Consol. Metal Prods.*, 846 F.2d at 295-96.

AQHA’s decision not to register cloned horses and their offspring constitutes the entire basis of Appellees’ Section 1 claim. [ROA.1920]. However, there is no evidence—and Appellees do not contend—that Quarter Horse

consumers have been coerced or constrained to buy only horses registered by AQHA. Instead, Appellees argue that AQHA registration determines whether a Quarter Horse has value and that a non-registered Quarter Horse is “worthless,” even if “[t]hat horse earns a million dollars,” because “there’s a stigma[.]” [ROA.2419-20, 2529-30, 2713-15, 2737-38, 2773, 3094].

As this Court previously has established, the mere fact that an entity has influence over consumer behavior does not render its every decision anti-competitive. *Consol. Metal Prods.*, 846 F.2d at 284, 295-96. In *Consolidated Metal Products*, a plaintiff sued several competitors and the American Petroleum Institute (“API”), a standard-setting organization, alleging that API’s refusal to certify plaintiff’s product, a sucker rod, constituted an unreasonable restraint of trade. *Id.* at 293. The plaintiff alleged, among other things, that “[b]ecause of widespread acceptance of and reliance on the API standards as a measure of quality and fitness for use, certification by the API through the licensing of its monogram is essential for manufacturers of sucker rods and related equipment to compete effectively in the marketplace.” *Id.* at 295 n.41 (alteration in original). The Court concluded that no reasonable jury could find that the API’s actions constituted an unreasonable restraint on trade. Although it acknowledged that API certification was “very important to buyer acceptance of sucker rods,” the Court determined that the plaintiff had failed to show an unreasonable restraint of trade

because it had not adduced evidence that “its customers were coerced by API or otherwise constrained to buy only monogrammed products.” *Id.* at 295-96. API’s influence, the Court reasoned, stemmed principally from its success in evaluating products, and not from coercion or anticompetitive animus. *Id.* at 296-97.

It cannot be disputed that AQHA has some influence over Quarter Horse consumers. AQHA registration is important to consumers for two reasons: “One, papers are what gives some assurance to the buyer of a horse that, in fact, the horse is what the seller says it is. Two, in many venues, you’ve got to be – it has to be an AQHA registered horse or they can’t compete.” [ROA.3173; *see also* ROA.2419-20, 2740]. Like API, however, AQHA achieved its influential status through legitimate means. *Consol. Metal Prods.*, 846 F.2d at 296-97. AQHA began registering horses in 1940 and has registered more than six million Quarter Horses since that time. [ROA.3249]. Currently, AQHA has more than 280,000 members. [ROA.3249].

Although AQHA has some influence in the market, it is not a direct participant in the market and cannot control consumer behavior. To the extent Quarter Horse consumers rely on AQHA registration in buying a horse, they do so freely. Even Pflaum agreed that “AQHA registration provides credibility” because AQHA “has done a good job of building a registry people can rely on.” [ROA.3250]. Because there is no evidence that AQHA coerces or otherwise

constrains Quarter Horse consumers to buy only horses registered by AQHA, any valuation determinations based on AQHA registration status must be attributed to the *voluntary* reliance of individual Quarter Horse consumers. *Consol. Metal Prods.*, 846 F.2d at 296.

Similarly, eligibility to compete in Quarter Horse races is not determined by AQHA, but rather as a matter of state law. Many states require that Quarter Horses be AQHA-registered in order to compete in races.¹⁷ AQHA simply makes registration determinations that, without state action, would not affect eligibility to compete in racing events. Accordingly, to the extent that Appellees' alleged injuries arise from the inability of their cloned horses and clone-offspring to compete in racing events, those injuries are the result of state action and, as such, are immune from antitrust action. *Mass. Sch. of Law at Andover*, 107 F.3d at 1036; *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96, 97 (E.D. Va. 1989) (mem. op.).

Because there is no evidence that AQHA (1) coerces or constrains Quarter Horse consumers to buy only AQHA-registered horses or (2) determines what

¹⁷ See, e.g., Tex. Rev. Civ. Stat. art. 179e, § 9A.001(a) (Texas); Cal. Bus. & Prof. Code § 19413.5 (California); Fla. Stat. Ann. § 550.334(3) (Florida); 230 Ill. Comp. Stat. Ann. 5/3.06(d) (Illinois); Ky. Rev. Stat. Ann. § 231.210(14) (Kentucky); La. Rev. Stat. Ann. § 4:179 (Louisiana); N.M. Stat. Ann. § 60-1A-2(V) (New Mexico); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 429 (New York); Ohio Rev. Code. Ann. § 3769.086(B) (Ohio); Okla. Stat. Ann. tit. 3A, § 200.1 (Oklahoma); Va. Code Ann. § 59.1-402 (Virginia); Wash. Rev. Code. Ann. § 67.16.080 (Washington); Wyo. Stat. Ann. § 11-25-106(a) (Wyoming); Ariz. Admin. Code R19-2-113 (Arizona); 1 Colo. Code Regs. § 208-1:9.110 (Colorado); Idaho Admin. Code § 11.04.10.120.01 (Idaho); 71 Ind. Admin. Code 14.5-1-2 (Indiana); Mich. Admin. Code r. 285.817.1(k)(i) (Michigan); Minn. R. 7895.0350 (Minnesota); Mont. Admin. R. 32.28.202(34) (Montana); N.D. Admin. Code § 69.5-01-01-01(48) (North Dakota); Or. Admin. R. § 462-110-0010(5) (Oregon); S.D. Admin. R. 20:04:24:17 (South Dakota); Utah Admin. Code R52-7-2(26)(E) (Utah).

horses are eligible to compete in Quarter Horse races, there is no evidence that AQHA's Rule caused any adverse effects on competition.

iii. There is no evidence of injury to competition.

It is axiomatic that antitrust laws exist to protect competition—not competitors. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994) (citing *Brown Shoe Co.*, 370 U.S. at 320 & *Cont'l T.V.*, 433 U.S. at 53 n.21); [ROA.3125]. Evidence of an injury suffered only by particular competitors, therefore, is insufficient as a matter of law to prove anticompetitive effect in the market.

Appellees assert, generally, that by voting to recommend retention of the Rule, the SBRC restricted the supply of “elite” mares, which inflated prices and effected “an absolute bar and naked restraint on output” in the “elite Quarter Horse” market. [ROA.3170-72, 3184-85, 3831-32]. But, instead of describing the effects of this alleged restraint on product “output,” Appellees describe how the Rule prevents them and other would-be competitors from making money off of horses they already own. For example, when asked to explain why the Rule unlawfully restrains trade, Abraham explained that the Rule makes it impossible for Blake Russell to parlay his gelding—i.e., his castrated horse—into valuable breeding stock:

Q. Please tell the jury the basis for your claim that excluding horses produced through somatic cell nuclear transfer and their

offspring harms competition in the market for elite regis – elite registered Quarter Horses beyond just the harm that's been done to you and to your companies.

- A. Well, for instance, the – well, I'll give you an example. The Blake Russells of the world, of course, he doesn't have disposable income like – like a lot of people in the horse world does, and he's got this great gelding that is by far a superstar, I mean, the best of the best. And once his race career is over, it's essentially worthless, right? Well, if you – if you allow cloning into the market, now he's got two options. He can either clone it himself and produce an elite stallion, or he can sell the – sell the cloning rights to one of these breeders and get a royalty off of it. So now the average guy, the Blake Russells of the world, can now compete with the big boys with his gelding.

[ROA.2682-83]. Veneklasen similarly described the effects of the alleged restraint in terms of his current inability to breed with Russell's gelding or effectively promote his clone-offspring:

It's all about supply and demand. . . . And if you have more elite horses, obviously, it is going – the price is going to go down, but it allows a guy like me, who can't buy that kind of genetic material, to get into this business. *It allows me to breed to a gelding – okay – that would be – I couldn't afford. I can't afford First Down Dash, one of the greatest horses, but I might be able to afford a clone of his.* It might be reduced. And so what it will do, is, it will allow mid-range breeders – okay – which I am – I consider myself; Blake Russell does – it will allow us to compete, to get into this thing and to have a little fun.

* * *

My opinion is, without papers, *I cannot promote my offspring.* I can show my horses. I can do lots of things, and I guess you guys have heard that, but I – my value is in my offspring. I'm not a guy that can go out and cut and have thirty horses. *I need to promote my offspring. It could actually get me – might get me in the business.*

[ROA.2771-73 (emphasis added)]. Because this testimony addresses only injury to competitors—not injury to competition—it is no evidence that the Rule restrained competition.

Even if there were some attempt to prove a restraint on competition relating to the Rule, there is no evidence that a shortage of “elite” mares was the result. As Appellees’ witness David Brown explained, a shortage of “elite” mares *always* exists because, by definition, “elite” contemplates few:

Q. Based on your experience as a breeder in the market for elite registered Quarter Horses, do you think there is a shortage of elite mares?

A. By definition, there must be.

Q. And why is that, please.

A. Well, if they’re the very top few percent, there can’t be very many of them.

[ROA.3097-98]. If a shortage of “elite” mares would exist with or without the Rule, that shortage—even if proved—is no evidence of a “restraint.”

If anything, by vetting and recommending approval of every advancement in breeding technology that advances and maintains the integrity of the Quarter Horse breed, the SBRC actually has *increased* the supply of “elite” Quarter Horse mares. [ROA.2322-33, 3137 (“elite” stallions bred to 100 more mares each year)]. Because no evidence establishes a restraint on competition within a relevant

product market, an unreasonable restraint of trade cannot be established as a matter of law.

b. There is no evidence that any alleged anticompetitive evils outweigh the procompetitive justifications underlying the SBRC's vote to retain the Rule.

Even if there were some evidence of a restraint, there is no evidence of an *unreasonable* restraint. Under the rule of reason, courts balance the anticompetitive effects of a restrictive practice against any benefits or justifications within the relevant market. *Benson*, 575 F.3d at 549 (citing *Doctor's Hosp.*, 123 F.3d at 307).

The benefits of retaining the Rule outweigh any harm felt by Appellees and other owners of cloned horses and their offspring. Retaining the Rule makes it possible to record pedigrees accurately and with scientific certainty and to protect against the rapid spread of known and unknown genetic diseases. *See supra* at _____. The legitimacy and importance of these factors finds support in the expert testimony of Sharon Spier and George Seidel. [ROA.3615-17, 3622-23, 3669-74, 3678-79].

By comparison, any harm to competition is insignificant. Although the Rule prevents the registration of cloned horses and their offspring, Appellees and other owners remain free to sell cloned horses and their offspring to any willing buyer. *See Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132-35

(3d Cir. 2005). And despite Appellees' claim that unregistered Quarter Horses are "worthless" without AQHA registration papers, *see supra* at 38, the evidence conclusively establishes the existence of a market for unregistered clones and their offspring. Indeed, Abraham, Veneklasen, and Brown all acquired horses produced through SCNT, despite their knowledge of the Rule, because they viewed those acquisitions as an investment. [ROA.2631, 3084, 3091]. As with all investments, the acquisition of a cloned horse or its offspring involves financial risk. However, antitrust laws were not designed to give consumers certainty in their investments or to give sellers certainty in their profits. *Consol. Metal Prods.*, 846 F.2d at 293 ("It is a natural part of a competitive market that products . . . fail."). Moreover, as Pflaum conceded, nothing prevents Appellees from competing in the "elite Quarter Horse" market by buying an "elite" Quarter Horse like every other competitor. [ROA.3842-43].

Because no evidence supports Appellees' claim under Section 1 of the Sherman Act, this Court should reverse and render judgment in AQHA's favor.

B. No Evidence Supports Appellees' Claim Under Section 2 of the Sherman Act.

Appellees also claim that AQHA violated Section 2 of the Sherman Act, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. To prevail on their claim

under Section 2, Appellees were required to prove that (1) a valid antitrust market exists; (2) AQHA possesses monopoly power in that market; (3) AQHA willfully maintains monopoly power in that market by engaging in anticompetitive or exclusionary conduct; (4) AQHA's conduct occurs in or affects interstate commerce; and (5) Appellees have suffered injury in their business or property because of AQHA's conduct. *Grinnell Corp.*, 384 U.S. at 570-571; *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316 (5th Cir. 2000). Because there is no evidence to establish three of these elements, Appellees failed to satisfy their burden.

1. There is no evidence of a valid antitrust market.

Defining the relevant product market is a threshold requirement under Section 2 “because the relevant market provides the framework against which economic power can be measured[.]” *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). For the same reasons that Appellees failed to establish a properly-defined market for their Section 1 claim, Appellees also failed to establish a properly-defined market for purposes of their Section 2 claim. *See supra* at 19-34. Accordingly, this Court should reverse and render judgment in AQHA’s favor.

2. There is no evidence that AQHA possesses monopoly power or has engaged in anti-competitive or exclusionary conduct in the “Elite Quarter Horse” market.

There is no evidence that AQHA either possesses monopoly power in the relevant market or maintains that power by engaging in exclusionary conduct. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999) (citing *Grinnell Corp.*, 384 U.S. 563). The possession of monopoly power, without more, is not unlawful. *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004). It is the *abuse* of monopoly power that Section 2 proscribes. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 374 (7th Cir. 1986). Here, the evidence establishes neither.

a. There is no evidence that AQHA possesses monopoly power in the “elite Quarter Horse” market.

“Before a defendant’s market power can be determined, the relevant market must be defined.” *Seidenstein v. Nat’l. Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985). As previously established, Appellees failed to satisfy their burden of defining a relevant product market. *See supra* at 19-34. Because no evidence supports the existence of an “elite Quarter Horse” market, monopoly power within that market cannot be established as a matter of law. *Jayco Sys.*, 777 F.2d at 320.

b. There is no evidence that AQHA possesses monopoly power in any Quarter Horse market.

The Supreme Court long has defined monopoly power as “the power to control prices or exclude competition.” *E.I. du Pont de Nemours & Co.*, 351 U.S. at 391. The abilities to control prices and exclude competition are so intertwined that they should be treated as one. *Id.* (“It is inconceivable that price could be controlled without power over competition or vice versa.”).

AQHA is a voluntary non-profit breed registry; it does not sell horses or manufacture any products. [ROA.471, 3170]. Rather, AQHA decides whether or not to include individual horses in its registry based on certain objective criteria recommended by the SBRC and voted on by the membership and Board. Although AQHA certainly has some *influence* over consumer behavior in the Quarter Horse market, *see supra* at 39-40, there is no evidence that AQHA has the power to *control* prices. To the extent Quarter Horses are sold through a competitive bidding process (the only method of sale described during trial), each Quarter Horse is priced individually according to what individual bidders are willing to pay. [ROA.3519-20, 3543-44]. Indeed, as Pflaum conceded, there is no way to “know how high a price a yearling is going to command at the auction until the gavel goes down . . . and somebody buys it[.]” [ROA.3227-28]. Because the evidence conclusively establishes that consumers control the prices of individual

Quarter Horses, there is no evidence that AQHA possesses monopoly power in any Quarter Horse market.

c. There is no evidence that AQHA engaged in anticompetitive or exclusionary conduct.

Monopolization involves more than extraordinary success; it involves the use of means that make it impossible for others to engage in fair competition. *E.I. du Pont de Nemours & Co.*, 351 U.S. at 390. Section 2 does not proscribe all “unfair conduct”—just “conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.” *Taylor Publ’g Co. v. Jostens, Inc.*, 216 F.3d 465, 475-76 (5th Cir. 2000) (quoting 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 651, at 82 (1996)). Courts refer to this behavior interchangeably as anticompetitive, exclusionary, or predatory. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

To determine whether conduct is exclusionary, courts consider its effect on the purported competitor, its effect on consumers, and whether the conduct has impaired competition in an unnecessarily restrictive way. *Id.* at 605. The key factor courts must consider in making this determination is the proffered business justification for the act. *Id.* at 608-09; *Stearns Airport Equip.*, 170 F.3d at 522. An inference of exclusionary conduct is supported where the conduct has no rational

business purpose other than its adverse effects on competitors. *Stearns Airport Equip.*, 170 F.3d at 522.

The record is replete with evidence of AQHA's rational business justifications for the Rule. As several members of the SBRC explained, their votes to retain the Rule were motivated by the desires to (1) maintain the integrity of the Quarter Horse breed, (2) record Quarter Horse pedigrees accurately and with scientific certainty, (3) respect the overwhelming sentiment of AQHA's members, and (4) prevent the rapid spread of known and unknown genetic diseases within the breed.¹⁸ *See supra* at 4-5, 14-15. Even Veneklasen acknowledged that reasonable people can disagree as to whether clones and their offspring should be registered. [ROA.2495, 3860-61].

There is no evidence, on the other hand, that the Rule restrains competition on the merits or contributes to AQHA's alleged monopoly power. As previously established, there is no evidence that the Rule has restrained competition or created a shortage of "elite" mares, *see supra* at 34-44, and the fact that AQHA approved several breeding techniques before rejecting cloning has no legal or practical significance. If anything, by excluding cloned horses and their offspring from AQHA's registry, AQHA effectively has *reduced* its alleged monopoly power.

¹⁸ The importance of these concerns cannot be overstated in light of AQHA's mission and responsibility to its members. [ROA.471]. Introducing clones into the registry would compromise AQHA's ability to verify the parentage of foals independently and scientifically and thereby reduce the reliability and transparency of AQHA's registry.

Because there is no evidence that AQHA possesses monopoly power or engaged in exclusionary conduct, no evidence supports Appellees' claim under Section 2 of the Sherman Act, and this Court should reverse and render judgment in AQHA's favor.

C. No Evidence Supports Appellees' Claim Under the Texas Free Enterprise and Antitrust Act.

To prevail on their claim under the Texas Free Enterprise and Antitrust Act, Appellees had to prove the same elements required to establish a comparable violation of the Sherman Act. *Alternatives Unlimited, Inc. v. Group Excellence, Ltd.*, No. 3:10-CV-02283-BF, 2012 WL 715970, at *6 (N.D. Tex. March 5, 2012) (citing *Nafrawi v. Hendrick Med. Ctr.*, 676 F. Supp. 770, 774 (N.D. Tex. 1987)). Because no evidence supports Appellees' claims under the Sherman Act, *see supra* at 8-51, no evidence supports their claim under the Texas Free Enterprise and Antitrust Act, and this Court should reverse and render judgment in AQHA's favor.

II. Alternatively, This Court Should Reverse and Remand Because the District Court's Order on Injunctive Relief Violates the Non-Intervention Doctrine and Goes Further Than Necessary to Remedy the Alleged Antitrust Violation.

Having reversibly erred by submitting Appellees' legally insufficient claims to the jury—who erroneously determined that AQHA had violated the Sherman Act, yet properly determined that Appellees' damages were zero—the District

Court compounded its error by granting injunctive relief that requires AQHA to adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring. [ROA.2129-36]. At the very least, even if this Court affirms the District Court's holding on liability, this Court should reverse and remand the District Court's judgment because the District Court exceeded the permissible scope of injunctive relief and contravened the non-intervention doctrine.

A. The Injunctive Relief the District Court Ordered Goes Further Than Necessary to Remedy the Alleged Antitrust Violation.

Injunctive relief is an “extraordinary remedy” and “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011). When crafting an injunction, a court must ensure that the relief it provides is “narrowly tailored to remedy the specific action which gives rise to it.” *Valley v. Rapides Parish Sch. Bd.*, 646 F.2d 925, 942 (5th Cir. 1981); *John Doe #1 v. Veneman*, 380 F.3d 807, 819 (5th Cir. 2004) (scope of injunctive relief is dictated by extent of the violation established). A district court abuses its discretion by failing to limit the scope of an injunction appropriately. *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 334 (5th Cir. 2008).

The District Court abused its discretion by mandating that AQHA adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring. [ROA.2129-36]. Assuming, *arguendo*, that Appellees' antitrust claims have merit, Appellees are entitled to an injunction prohibiting enforcement of the Rule and nothing more. Because the District Court granted more relief than necessary to remedy Appellees' alleged antitrust injury, the District Court abused its discretion, and its judgment should be reversed and remanded with an instruction to limit the injunctive relief appropriately.

B. The Injunctive Relief Ordered by the District Court Violates the Doctrine of Non-Intervention.

Courts recognize a private association's right to adopt, administer, and interpret its own rules without judicial intervention. *See Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 656 (5th Cir. 1977); *Schulz v. U.S. Boxing Ass'n*, 105 F.3d 127, 132 (3rd Cir. 1997) ("[C]ourts have been understandably reluctant to interfere with the internal affairs of private associations and their reluctance has ordinarily promoted the health of society."). Judicial interference *only* is warranted when enforcement of an association's rules or bylaws would violate the law. *Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 354 (Tex. App.—Amarillo 1990, no writ) ("AQHA . . . has the right to manage, within the legal limits, its own affairs without interference from the courts."). This policy of judicial non-intervention is well established and is a "wise and necessary policy." *Juarez v.*

Tex. Ass'n of Sporting Officials El Paso Chapter, 172 S.W.3d 274, 280 (Tex. App.—El Paso 2005, no pet.). Without such a policy, organizations like AQHA “simply could not function. If the courts were to interfere every time some member, or group of members, had a grievance . . . the non-profit, private organization would be fraught with frustration at every turn and would founder in the waters of impotence and debility.” *Id.*

When it is determined that a rule or bylaw violates the law, a court may prohibit enforcement of that rule, *Hatley*, 552 F.2d at 656, but it may not “rewrite other provisions of the bylaws which are not in themselves [illegal].” *Griffin v. Tall Timbers Dev., Inc.*, 681 So. 2d 546, 554 (Miss. 1996); *Braude v. Auto. Club of S. Cal.*, 144 Cal. Rptr. 169, 171 (Cal. Ct. App. 1978) (noting that to the extent the trial court rewrote “the Club’s by-laws . . . we would express disapproval of such judicial interference in the internal affairs of the corporation”). It is well-established that a private association’s rules and by-laws are contractual in nature, and courts—while endowed with the authority to prohibit enforcement of a contract—are not permitted to rewrite the terms of a contract. *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224, 227 (5th Cir. 1988); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981).

AQHA is a non-profit breed registry with more than 280,000 members who voluntarily subscribe to AQHA’s rules and regulations. [ROA.471, 3249]. By

mandating that AQHA adopt and incorporate specific language into its rules to accomplish the registration of cloned horses and their offspring, the District Court interfered with AQHA's internal affairs and rulemaking authority and impermissibly altered the contractual agreement that binds AQHA's membership. [ROA.2129-36]. Accordingly, this Court should reverse and remand the District Court's judgment with appropriate limiting instructions.

CONCLUSION AND PRAYER

For all of the reasons set forth above, AQHA respectfully requests that the Court reverse and render judgment in its favor. In the alternative, AQHA respectfully requests that the Court reverse and remand the District Court's judgment for appropriate limitation of the injunctive relief.

Respectfully submitted,

/s/ Marianne M. Auld

David E. Keltner
State Bar No. 11249500
david.keltner@kellyhart.com
Marianne M. Auld
State Bar No. 01429910
marianne.auld@kellyhart.com
Mary H. Smith
State Bar No. 24075093
mary.smith@kellyhart.com
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500
(817) 878-9280 (facsimile)

*Attorneys for Appellant,
American Quarter Horse Association*

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Appellant's brief has been sent via certified mail, return receipt requested and via the Court's electronic Notice of Docket Activity on this the 26th day of December, 2013 to:

Nancy J. Stone
320 S. Polk Street
Amarillo, Texas 79101
Counsel for Abraham & Veneklasen Joint Venture

Samuel Lee Stein
Whittenburg, Whittenburg, Stein & Strange
305 S. Grand
P.O. Box 223
Cherokee, Oklahoma 73728
Counsel for Abraham Equine, Incorporated

Ronald D. Nickum
610 S.W. 11th Avenue
Amarillo, Texas 79101
Counsel for Jason Abraham

/s/ Marianne M. Auld
Marianne M. Auld

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 13,933 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type and style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using “Microsoft Word 2003” in fourteen (14) point “Times New Roman” style font.

/s/ Marianne M. Auld

Marianne M. Auld