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## **“Whoa”-ing Equine Clones’ Registration: Establishing Procompetitive Benefits to Counter the Anticompetitive Argument Against American Quarter Horse Association’s Ban on Clones**

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# “Whoa”-ing Equine Clones’ Registration: Establishing Procompetitive Benefits to Counter the Anticompetitive Argument Against the American Quarter Horse Association’s Ban on Clones.

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## I. INTRODUCTION

*“We have to maintain enough diversity in the breed through crosses . . . . What drives evolution is recombination, getting different combinations of alleles together by chromosomal crossing over, by mating different individuals. That’s part of the way genetic selection occurs.”*<sup>1</sup>

Nena Winand, D.V.M., Cornell University.

Suppose a young colt<sup>2</sup> had the ideal speed and agility to be a prolific champion in the competitive arena.<sup>3</sup> In fact at the prime of his career every time he entered the arena, he won.<sup>4</sup> He even won a coveted World Championship.<sup>5</sup> The more successful and more mature the colt became the more his value increased—experiencing nearly a 10,000% increase in value.<sup>6</sup> Instead

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1. The Journal Staff, *Pure Genetics: Clones Hit the Heart of AQHA’s Mandate to Steward the Breed and the Registry*, THE AM. QUARTER HORSE J. 1, 46 (Feb. 2009), available at <http://www.allaboutcutting.com/images/glo-images/PDFs/Cloning%20pdfs/3-Pure-Genetics-QHJrnl.pdf>.

2. A colt is a “young male horse before the attainment of an arbitrarily designated age (as three, four, or five years).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 450 (3d ed. 1981).

3. Adapted from *Impressive – AQHA Halter Champion*, BRINGING LIGHT TO HYPP, <http://bringinglighttohypp.org/9-inherited-equine-health/8-impressive-aqha-halter-champion> (last visited Jan. 26, 2014).

4. *Id.*

5. *Id.*

6. *Id.*

of selling the colt, his owner decided to offer him as a breeding stallion<sup>7</sup> to interested mare<sup>8</sup> owners. As a breeding stallion he continued to prove himself by passing his winning traits to his more than 2,000 foals,<sup>9</sup> which went on to win more than fifty World and Reserve World championships.<sup>10</sup> Many of these 2,000 foals also went on to be sires<sup>11</sup> and dams<sup>12</sup> of their own foals, which proved equally as talented in the competitive arena.<sup>13</sup> Additionally, after the great stallion passed away, his owner decided to clone him to preserve his greatness for future generations. The stallion’s clone possessed the same genes as the original stallion, including those for agility and speed. The clone, alongside the original stallion’s progeny, continued to breed, further saturating the market with the great stallion’s genetics. Unknown to the breeders, the talented stallion passed on more than his agility and speed—he also passed on a hereditary genetic disease.<sup>14</sup> This disease causes a variety of muscle contraction issues from mere muscle twitches to death due to heart attack or suffocation.<sup>15</sup> Unfortunately, the disease was detected after the stallion’s genetics accelerated through the breed at a heightened pace, which was partly due to his clone.

This story may seem far fetched, but for the American Quarter Horse Association (AQHA or the Association) it could be the new reality given a court mandate to register clones and their offspring after the Association lost a district court case that, among other things, held that AQHA violated section 1 of the Sherman Antitrust Act for its rule that had banned these clones from being registered with the Association.<sup>16</sup> Plaintiffs claimed that the Association’s rule banning clones creates an “unreasonable” horizontal restraint,<sup>17</sup> in that it limits the supply of registered horses, which then drives

7. A stallion is a male horse that has not been castrated. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2221 (3d ed. 1981).

8. A mare is a female horse of breeding age. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1381 (3d ed. 1981).

9. A foal is a young horse, typically under one year of age. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 880 (3d ed. 1981).

10. Adapted from *Impressive – AQHA Halter Champion*, *supra* note 3.

11. A sire is the male parent of a horse. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2127 (3d ed. 1981).

12. A dam is the female parent of a horse. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 571 (3d ed. 1981).

13. Adapted from *Impressive – AQHA Halter Champion*, *supra* note 3.

14. Adapted from *Impressive – AQHA Halter Champion*, *supra* note 3.

15. Adapted from *Bringing Light to HYPP - the Acceptable Disease?*, BRINGING LIGHT TO HYPP, <http://bringinglighttohypp.org/9-inherited-equine-health/24-bringing-light-to-hypp-the-acceptable-disease> (last visited Jan. 26, 2014).

16. *See infra* Part IV.

17. A horizontal restraint is an agreement among two or more independent competitors. Examples of horizontal restraints can include price fixing, market allocations, bid rigging, and group boycotts. E. THOMAS SULLIVAN ET AL., ANTITRUST LAW, POLICY AND

up the supply and injures consumers and the competitive process.<sup>18</sup> On the other hand, the defendants and the court noted that procompetitive benefits existed, justifying the ban's existence.<sup>19</sup> Both sides present plausible effects that, using the proper analysis of a Sherman Antitrust section 1 claim, should have been considered.<sup>20</sup> However at the conclusion of a jury trial, which resulted in a verdict for the plaintiff, there was no indication that anything more than a mere cursory consideration of the restraint's plausible procompetitive benefits was considered.<sup>21</sup> This abridged analysis is not consistent with the Supreme Court's analysis for horizontal restraints in associations like AQHA, which essentially create a "product" by their very existence.<sup>22</sup>

This Note explores the potential procompetitive justifications that AQHA has established for its rule banning clones and the offspring of clones from being registered in the Association. Further, it argues that the district court erred by overlooking the plausibility of these justifications and that the rule of reason analysis should have been utilized. Part II of this Note provides a brief history of section 1 of the Sherman Antitrust Act, describes the varying analyses courts use in considering alleged violations of section 1, and illustrates how different types of restraints and products impact the analysis that the court should perform. More specifically, the three analyses typically used to assess an alleged section 1 violation are discussed, including *per se*, quick-look, and rule of reason. Part III provides background information on the American Quarter Horse Association, its mission, pertinent evolutions in its registration regulations, and genetic diseases that are important when discussing breeding and registration decisions. Part IV details the relevant history of *Abraham & Veneklasen Joint Venture v. American Quarter Horse Association*.<sup>23</sup> Part V argues that neither a *per se* nor a quick-look analysis was sufficient in this case, thus the rule of reason analysis should have been applied. While plaintiffs present a viable argument for anticompetitive effects, AQHA does have plausible procompetitive benefits for its ban on registered clones, namely that clones

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PROCEDURE: CASES, MATERIALS, PROBLEMS 163 (6th ed. 2009). For more discussion on horizontal restraints and how a court assesses their "unreasonableness" see Part II.

18. See *infra* Part V.A.

19. See *infra* Part V.B.

20. See *infra* Part II.B.

21. See *infra* Part IV.C.

22. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1994) ("What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.").

23. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 2:12-cv-103-J, 2013 WL 2297104 (N.D. Tex. May 24, 2013).

will likely negatively impact the genetic variation of the breed and genetic diseases. Finally, this Note concludes that AQHA, like other associations that essentially create the "product" in question, must be afforded the opportunity to present procompetitive benefits and have these benefits considered by the court.

## II. SHERMAN ANTITRUST ACT AND METHODS OF ANALYSIS

### A. THE SHERMAN ANTITRUST ACT SECTION 1: RESTRAINTS ON TRADE

Section 1 of the Sherman Antitrust Act provides, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>24</sup> The purpose of section 1 is to ensure consumers receive the benefits of competition,<sup>25</sup> under the theory that unrestricted competition yields the highest quality product for the lowest price, while maximizing the allocation of our economic resources.<sup>26</sup>

Section 1 can be divided into two elements, which must be met in order to find that the restraint violates the Act: (1) whether there was an agreement and (2) whether this agreement "unreasonably restrained trade in the relevant market."<sup>27</sup> The standard courts apply in assessing the first element is whether the evidence seems to exclude the likelihood of independent action by the parties.<sup>28</sup> Element two can be assessed in two parts: (1) whether there was a restraint on trade and (2) whether that restraint was unreasonable.<sup>29</sup> Establishing an agreement's restraint on trade is rarely a problem, as the Act's reach coincides with Congress's power under the Commerce Clause.<sup>30</sup> Therefore, since the Commerce Clause has historically applied to even local activity that may substantially affect interstate commerce, it follows that nearly every agreement would satisfy the Act's requirement of restraining trade.<sup>31</sup> However, as early as 1911 the Court narrowed the prohibition to preclude only those contracts or combinations that

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24. 15 U.S.C. § 1 (2012).

25. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1500 (3d ed. 2012).

26. *N. Pac. Ry. Corp. v. United States*, 356 U.S. 1, 4 (1958).

27. *Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815, 824 (6th Cir. 2006) (quoting *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 959 (6th Cir. 2004)) (citation omitted).

28. *Monsato Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

29. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985).

30. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980).

31. *Id.*

“unreasonably” restrain competition.<sup>32</sup> Unreasonable restraints have included those that raise price; diminish output; limit choices; or establish, grow, or maintain market power.<sup>33</sup>

B. DETERMINING IF A RESTRAINT IS “UNREASONABLE”: METHODS OF ANALYSIS

A common alleged restraint that leads to section 1 claims is a horizontal restraint,<sup>34</sup> which is a restraint concerning the manner in which competitors will compete with each other.<sup>35</sup> In establishing that a restraint is unreasonable, it is insufficient to merely show the restraint has caused an individual competitor economic injury.<sup>36</sup> Because antitrust laws were created to protect competition, not individual competitors, “a plaintiff must show that the net effect of a challenged restraint is harmful to competition.”<sup>37</sup> The Supreme Court has developed three methods of analysis to determine whether a plaintiff has proved that a horizontal agreement is unreasonable: (1) *per se* analysis, used for restraints that are clearly anticompetitive; (2) quick-look analysis, used for restraints with potential procompetitive justifications; and (3) the full rule of reason analysis, used for restraints when it would be difficult to determine if their net impact was procompetitive.<sup>38</sup> These three methods should be viewed on a continuum, not separated by categorical lines, which allows a court to appropriately analyze the restraint depending on the “amount and range of information needed.”<sup>39</sup> Although

32. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (“The statute . . . [is] not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference, —that is, an undue restraint.”).

33. 1 ANTITRUST LAW DEVELOPMENTS 52 (7th ed. 2012). *E.g.*, *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 98 (1994) (holding that restraints that result in raised prices or reduced outputs are typically unreasonable as a matter of law); *Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (restricting consumer choice is an unreasonable restraint); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (exploiting market power of one product by tying it to a potentially inferior product from another market protects the latter from competitive pressures, which is unreasonable), *abrogated by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

34. Horizontal restraints are agreements among competitors at the same level of the market structure. *M & H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 977 (1st Cir. 1984).

35. *Ashley Meadows Farm, Inc. v. Am. Horse Shows Ass’n, Inc.*, 609 F. Supp. 677, 679 (S.D.N.Y. 1985).

36. *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002).

37. *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)).

38. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 780-81 (1999).

39. *Cont’l Airlines, Inc.*, 277 F.3d at 509 (citation omitted) (quoting 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1911a (1st ed. 1998)).

each method requires a different level of analysis from the court, the question always remains, whether the restraint’s impact on competition is unreasonable.<sup>40</sup>

### 1. *Per se Analysis*

The most truncated of the three analyses, the per se analysis, allows courts to make “categorical judgments” that some practices, such as price fixing, horizontal output restraints, and market-allocation agreements, are illegal per se because these practices are void of any plausible procompetitive benefits.<sup>41</sup> Courts have found these practices, as well as others that qualify for the per se analysis, to “be one[s] that would always or almost always tend to restrict competition and decrease output . . . .”<sup>42</sup> Moreover, these practices rarely, if ever, increase economic efficiency or make markets more competitive.<sup>43</sup> Because these restrictions have a predictable anti-competitive effect and nearly no potential for procompetitive benefit, the Court does not require an in-depth study of the markets to determine the actual restraints on competition—they are simply deemed unlawful per se.<sup>44</sup> This permits the court to stop an evidentiary analysis once the court has determined that the conduct, because of its nature, is naturally anticompetitive.<sup>45</sup> In these situations involving “predictable” restraints, courts prefer the per se analysis because a full-scale rule of reason analysis is costly and time consuming.<sup>46</sup>

### 2. *Quick-look Analysis*

Quick-look is an abbreviated analysis used when the anticompetitive impact of a restraint is obvious, as in a per se case, but procompetitive justifications are also presented.<sup>47</sup> Quick-look operates as an analysis between per se and rule of reason when it cannot be easily determined which analysis is appropriate for the restraint.<sup>48</sup> Therefore, a quick-look analysis is typically used by the court when a restraint has obvious anticompetitive effects, such as likely increasing price or lowering output, but the restraint either is not in a category that has previously been established as illegal per se, or

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40. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 104 (1994).

41. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985).

42. Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 19-20 (1979).

43. *Id.*

44. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

45. SULLIVAN ET AL., *supra* note 17, at 164.

46. Arizona v. Maricopa Cnty. Med. Soc’y, 457 U.S. 332, 344 (1982).

47. Cont’l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508 (4th Cir. 2002).

48. *See id.*



possible procompetitive benefits seem to exist that make the per se analysis unsuitable.<sup>49</sup> A quick-look analysis balances the judicial interests to properly determine competitive effects of the restraint in question and to manage the substantial administrative costs associated with a rule of reason analysis.<sup>50</sup> One scenario where quick-look is typically applied is where horizontal restraints on competition “were essential if the [product] is to be available at all”<sup>51</sup> or they plausibly “increase[] economic efficiency and render[] markets more, rather than less, competitive . . . .”<sup>52</sup>

For example, a quick-look analysis was applied in a case involving a sport league, as the league relied upon horizontal restraints on competition in order for the product (the league) to be available at all,<sup>53</sup> therefore a per se analysis could not be applied.<sup>54</sup> Moreover, when restraints are naked restrictions, the rule of reason analysis should not be performed because an elaborate industry analysis is not required to establish the anticompetitive character.<sup>55</sup> While the quick-look analysis is appropriate for naked restrictions, it should not be applied where restraints “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.”<sup>56</sup>

A quick-look analysis does not prevent a court from carefully considering a challenged restriction’s plausible procompetitive justifications.<sup>57</sup> Instead, the quick-look analysis provides a more abbreviated analysis than a traditional rule of reason because quick-look does not assess proof of market power.<sup>58</sup> If a defendant presents plausible procompetitive justifications for the challenged restraint, then the court moves on to a full rule of reason

49. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 64.

50. *Id.*

51. *Id.* at 57 (citations omitted) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-23 (1970)).

52. *Id.* at 54 (citations omitted) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1970)).

53. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 100-01 (1994). “As Judge Bork has noted: ‘[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.’” *Id.* at 101.

54. *Id.*

55. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

56. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 771 (1999) (refusing to apply a quick-look analysis to a professional association’s restraint on advertising because, on its face, the restraint was designed to avoid false or misleading advertising). Some courts refer to the quick-look analysis as the “quick-look” rule-of-reason analysis, but whether or not the court uses the rule of reason label when it refers to the quick look analysis does not impact the court’s inquiry. *Id.* at 776.

57. *Id.* at 770.

58. *Bd. of Regents*, 468 U.S. at 109.

analysis.<sup>59</sup> Once the analysis moves on to a rule of reason analysis, a market analysis may be conducted.<sup>60</sup> But if the defendant is unable to establish justifications to satisfy the court's quick-look analysis, then the restraint is defined as a naked, per se violation.<sup>61</sup> As a per se violation, no market analysis would be necessary because, as a matter of law, the absence of market power would not save a naked restriction.<sup>62</sup>

### 3. Rule of Reason Analysis

On the opposite end of the spectrum from a per se analysis, the rule of reason analysis is used when "a restraint cannot be determined without a thorough analysis of its net effects on competition in the relevant market."<sup>63</sup> A rule of reason analysis is fact intensive where the restraint only violates section 1 if the anticompetitive effects outweigh the procompetitive benefits.<sup>64</sup>

When applying the rule of reason analysis courts generally consider:

[W]hether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>65</sup>

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59. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833 (3d Cir. 2010).

60. *Id.*

61. *Id.*

62. *Bd. of Regents*, 468 U.S. at 109.

63. *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002).

64. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 737 (2010).

65. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

This application of the rule of reason, as established in *Chicago Board of Trade v. United States*, has been criticized as being too vague.<sup>66</sup> While this application is still a prominent explanation of the rule of reason, subsequent cases have created more structure by addressing three questions: (1) has the plaintiff presented anticompetitive effects to meet the initial burden, (2) has the defendant established procompetitive benefits created by the restraint and is the restraint reasonably necessary to create those benefits, and (3) on balance do the anticompetitive effects outweigh the procompetitive benefits.<sup>67</sup>

#### 4. *Conducting the Rule of Reason Analysis*

##### a. *Proving an Anticompetitive Effect*

In all three methods of analysis presented, a plaintiff has a burden of establishing anticompetitive effects.<sup>68</sup> The most obvious anticompetitive effects are when a restraint increases price or lowers output.<sup>69</sup> Generally, establishing anticompetitive effects does require different evidentiary proof depending on which analysis is applied: per se, quick-look, or rule of reason.<sup>70</sup> Because the per se analysis is used for restraints that facially appear to always or almost always restrict competition or reduce output, little evidentiary proof of actual anticompetitive effect is necessary as the unreasonableness of the restraint is presumed.<sup>71</sup> Similarly, since the quick-look analysis applies when anticompetitive effects are obvious, like in per se, a quick-look analysis requires little evidentiary proof of anticompetitive effects.<sup>72</sup>

The rule of reason analysis does require either more direct evidence of the restraint's effect or, in some cases, more consideration of market definition and market power to establish the anticompetitive effects.<sup>73</sup> The most direct way for a plaintiff to establish anticompetitive effects is by "proof of actual detrimental effects, such as a reduction of output."<sup>74</sup> This direct proof

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66. AREEDA & HOVENKAMP, *supra* note 25, at ¶ 1505b.

67. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 63.

68. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967), *overruled on other grounds by* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

69. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 64.

70. See *supra* Part II.B discussing the sharp distinction between the per se analysis and the rule of reason analysis.

71. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455 n.28 (11th Cir. 1991); ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 54-55.

72. See ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 64.

73. *Id.*

74. *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986).

can preclude the need to establish market power even when the activity has not been labeled a naked restraint by the court.<sup>75</sup> Examples of direct evidence have included reduced output, decreased quality of available products or services, impacted prices, and reduced innovation.<sup>76</sup> If direct evidence is not available, a market power analysis is required to show the challenged restraint will probably "create, enhance, maintain, or facilitate the defendant's exercise of market power."<sup>77</sup>

*b. Procompetitive Benefits*

If the plaintiff successfully bears his burden of proving anticompetitive effects, the rule of reason analysis next requires a court to consider plausible, offsetting procompetitive benefits.<sup>78</sup> In most circuits, the defendant bears the burden of establishing procompetitive benefits.<sup>79</sup> Courts have accepted a wide variety of justifications for horizontal restrictions, including "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, widening consumer choice, and other factors."<sup>80</sup> On the other hand, courts have been reluctant to consider factors unrelated to the restraint's anticompetitive effect because "decid[ing] whether a policy favoring competition is in the public interest" is not congruent with the Act's premise that competition will produce lower prices and better goods and services.<sup>81</sup>

When presenting procompetitive benefits, defendants must also establish that the restraint is reasonably necessary for the creation of the benefit.<sup>82</sup> If a court determines that the benefit could be achieved by significantly less restrictive means, then a challenged restraint will not pass the second phase of the rule of reason analysis.<sup>83</sup> The court does not require the re-

75. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 69.

76. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 241 (2d Cir. 2003).

77. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 70. Conducting a market analysis is a detailed and extremely fact-orientated discussion. This Note does not use a market analysis in Part V because it assumes the establishment of anticompetitive effects and a market analysis is not required to balance the procompetitive benefits against the anticompetitive effects because AQHA is a professional association. For these reasons, more detail of the market analysis is beyond the scope of this Note.

78. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 74.

79. *See, e.g., Visa U.S.A., Inc.*, 344 F.3d at 238 (providing procompetitive justifications for the challenged restraint is the defendant's burden); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1021 (10th Cir. 1998) (justifying the restraint as a "reasonable" one is the defendant's burden); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (showing challenged restraint has procompetitive objective is defendant's burden).

80. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 74-75.

81. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

82. *Law*, 134 F.3d at 1012.

83. *Id.*

straint to be essential in order to find it is reasonably necessary, but there cannot be a practical, less restrictive alternative available to the defendant.<sup>84</sup>

*c. Balancing the Competitive Effects*

If procompetitive benefits are established, the fact finder must weigh those benefits against the challenged restraint's anticompetitive effects.<sup>85</sup> On balance, if the procompetitive benefits are equal to, or outweigh, the anticompetitive effects, then under the rule of reason analysis the restraint is lawful.<sup>86</sup> On the other hand, if plaintiff establishes that the challenged activity is not reasonably necessary to meet the procompetitive benefits or that practical, less restrictive alternatives are available, the harms and benefits of the activity must be weighed against each other to determine if, on balance, the challenged behavior is reasonable.<sup>87</sup> The Supreme Court, or any court for that matter, provides little guidance about how to balance anticompetitive effects and procompetitive benefits of a challenged restraint.<sup>88</sup> The lack of direction and the difficulty of measuring effects and benefits have led several lower courts to question the practicability of balancing.<sup>89</sup> Case law has failed to greatly further understanding of the balancing formula because the majority of rule of reason cases are resolved when the plaintiff fails to meet his burden of establishing an anticompetitive effect, or because the defendant fails to establish the restraint is reasonably necessary for a procompetitive benefit.<sup>90</sup>

### III. AMERICAN QUARTER HORSE ASSOCIATION'S BACKGROUND

#### A. THE ASSOCIATION

The American Quarter Horse Association, a non-profit organization, is the world's largest equine breed registry and membership organization.<sup>91</sup>

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84. *Id.*

85. *See, e.g.,* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977); Geneva Pharms. Tech. Corp. v. Barr Labs., 386 F.3d 485, 507 (2d Cir. 2004).

86. *See, e.g.,* Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1157 (9th Cir. 2003) (holding the restraint did not violate section 1 because the procompetitive justifications "plainly outweighed" the proposed anticompetitive effects).

87. *Law*, 134 F.3d at 1019.

88. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 80.

89. *See, e.g.,* Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (weighing procompetitive effects against anticompetitive effects is not a workable test because it assumes an ability to quantify the effects and benefits presented and then compare the values).

90. ANTITRUST LAW DEVELOPMENTS, *supra* note 33, at 80.

91. AM. QUARTER HORSE ASS'N, AQHA OFFICIAL HANDBOOK OF RULES AND REGULATIONS 57 (61st ed. 2013) [hereinafter AM. QUARTER HORSE ASS'N, RULES 61st].

AQHA has registered more than five million horses since its inception in 1940 and has over 280,000 members worldwide.<sup>92</sup> The Association’s mission is “[t]o record and preserve pedigrees of American quarter horses, while maintaining the integrity of the breed.”<sup>93</sup> Moreover, AQHA encourages membership participation by promoting the breeding, ownership, racing, showing, and recreational riding of the American quarter horse.<sup>94</sup> AQHA defines an American quarter horse as an equine that “possesses acceptable pedigree, color and markings, and has been issued a registration certificate by the American Quarter Horse Association.”<sup>95</sup> Thus, by definition, a horse must be registered with AQHA in order to participate in the Association’s activities.<sup>96</sup>

The record owner of the foal’s<sup>97</sup> dam<sup>98</sup> registers the foal by submitting a completed registration application, breeder’s certificate, and requisite payment.<sup>99</sup> AQHA also requires DNA testing and parentage verification in certain instances.<sup>100</sup> Specifically, DNA typing is required for any stallion<sup>101</sup> that is breeding mares<sup>102</sup> and any mare born after 1989 that is being bred.<sup>103</sup> DNA typing is intended to enable parentage verification of the sire<sup>104</sup> and dam of each foal and to assist in identifying genetic diseases in the breed.<sup>105</sup>

## B. AQHA’S HISTORY OF RESTRICTING REGISTRATION

### 1. *The Restriction of Horses with Excessive White Markings and Hatley v. American Quarter Horse Association*

Historically, the American quarter horse has been distinguishable from other breeds, especially other stock breeds, by its conformation and coloring.<sup>106</sup> The quarter horse is traditionally a solid color, which may have some white on the lower legs and portions of the face.<sup>107</sup> These color traits distin-

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92. *Id.*

93. *Id.* at 1.

94. *Id.*

95. *Id.*

96. AM. QUARTER HORSE ASS’N, RULES 61ST, *supra* note 91, at 62.

97. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 9, at 880.

98. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 12, at 571.

99. AM. QUARTER HORSE ASS’N, RULES 61ST, *supra* note 91, at 54.

100. *Id.*

101. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 7, at 2221.

102. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 8, at 1381.

103. AM. QUARTER HORSE ASS’N, RULES 61ST, *supra* note 91, at 54.

104. WEBSTER’S INTERNATIONAL DICTIONARY, *supra* note 11, at 2127.

105. *DNA and Parentage Verification*, AMERICA’S HORSE DAILY (Feb. 11, 2013), <http://americashorsedaily.com/dna-and-parentage-verification/>.

106. *Hatley v. Am. Quarter Horse Ass’n*, 552 F.2d 646, 649 (5th Cir. 1977).

107. *Id.*

guish the American quarter horse from the American Paint Horse and the Appaloosa, both which have distinctive white characteristics and maintain separate breed registries.<sup>108</sup> Because the white markings were a distinguishing characteristic of the quarter horse, AQHA maintained a “white rule” since the Association’s inception that barred the registration of some horses, even if their sire and dam were registered with AQHA.<sup>109</sup>

In *Hatley v. American Quarter Horse Association*, Mr. Hatley filed a suit challenging a rule under section 1 of the Act, as it restricted one of his horses, a colt, from being registered with the Association, even though the sire and dam were both registered with the Association.<sup>110</sup> The colt had white markings that were outside the areas permitted by AQHA’s white rule, and, therefore, AQHA rejected Mr. Hatley’s application.<sup>111</sup>

The plaintiff argued the refusal to register the colt was a group boycott and therefore, should have been illegal per se.<sup>112</sup> The court rejected that argument, noting that:

In an industry which necessarily requires some interdependence and cooperation, the per se rule should not be applied indiscriminately. In some sporting enterprises a few rules are essential to survival. The definition of a quarter horse is an inquiry which the AQHA, as a sanctioning organization, ought to be able to pursue. If the inquiry is anti-competitive, the rule of reason can be utilized to attack it.<sup>113</sup>

The court applied the rule of reason analysis and found that denial of the colt’s registration did not create a section 1 violation.<sup>114</sup> The court agreed with the district court that the rule created a “legitimate tool in the effort to improve the breed” and a “substantive dividing line between the quarter horse and other breeds.”<sup>115</sup>

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108. *Id.* at 649 n.5.

109. *Id.* at 650 (citing the applicable rule, Rule 92, as it appeared from 1972-1975, the period of time of the alleged restraint).

110. *Id.* at 648.

111. *Hatley*, 552 F.2d at 651.

112. *Id.* at 652.

113. *Id.* at 652-53 (citations omitted).

114. *Id.* at 653.

115. *Id.*

2. *The Relaxation of Registration for Offspring Created by New Breeding Technologies*

Prior to the 1960s, AQHA only permitted foals produced by live cover to be registered.<sup>116</sup> In the 1960s the Association began to allow offspring produced by artificial insemination to be registered.<sup>117</sup> In 1997 the Association began to allow the use of cooled, transported semen.<sup>118</sup> In 2001 frozen semen could be used, and in 2003 the Association permitted frozen semen after the passing of the stallion.<sup>119</sup> These advancements made stallions more accessible geographically and also capable of covering more mares in one breeding season.<sup>120</sup>

Similarly, two important AQHA rule changes increased the opportunity for mares to produce offspring. First, in 1980 AQHA permitted embryo transfer, which is the process of transferring a fertilized egg to a surrogate mother.<sup>121</sup> Second, in 2002 multiple embryos from a single mare that resulted from foals in the same breeding season could be registered.<sup>122</sup>

3. *The Restriction of Foals from Cloning Procedures*

The first horse was cloned in 2003 in Italy.<sup>123</sup> In 2004, the AQHA membership enacted Rule 227(a), stipulating that clones are not eligible for registration.<sup>124</sup> Rule 227 provides a list of horses that are not eligible for

116. *AQHA Cloning Timeline*, AQHA, <http://www.aqha.com/AQHA-Cloning-Lawsuit-Resources/AQHA-Cloning-Timeline.aspx#UojPge1DuSo> (last visited Jan. 26, 2014).

117. *Id.*

118. *Id.*

119. *Id.*

120. See, e.g., *Cooled Semen Transport: Advancements in Equine Artificial Insemination*, AM. ASS'N OF EQUINE PRACTITIONERS (June 18, 2002), [http://64.191.166.36/health\\_articles\\_view.php?print\\_friendly=true&id=148](http://64.191.166.36/health_articles_view.php?print_friendly=true&id=148).

121. *AQHA Cloning Timeline*, *supra* note 116. The gestation period of a mare is 340 days. Embryo transfer is popular among breeders when an equine breed permits it because it allows mares to continue athletic careers while also producing progeny. Rob Foss, *Embryo Transfer*, AMERICAN ASSOCIATION OF EQUINE PRAC. (June 18, 2002), [http://64.191.166.36/health\\_articles\\_view.php?id=143](http://64.191.166.36/health_articles_view.php?id=143).

122. *AQHA Cloning Timeline*, *supra* note 116. Since the gestation period of a mare is 340 days and since twins are rare in horses, mares traditionally could only produce one offspring a year. With the 2002 amendment to its embryo transfer rules AQHA now allows more than one foal per mare, per year.

123. Brief for Appellant, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir. Dec. 26, 2013).

124. *American Quarter Horse Association Position Regarding: Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, AQHA,



registration.<sup>125</sup> Specifically, Rule 227(a) provides:

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.<sup>126</sup>

Before the enactment of this rule, no clones had been registered by AQHA.<sup>127</sup>

In 2008, AQHA representatives and members began discussing cloning and its potential impact on the breed.<sup>128</sup> That same year, the Association was presented with a proposed change to Rule 227(a) that would allow foals produced via somatic cell nuclear transfer (SCNT) to be registered if the foal's DNA matched a registered AQHA horse and/or the offspring of a horse whose DNA matched a registered AQHA horse.<sup>129</sup> The committee responsible for hearing the proposal, the Stud Book and Registration Committee (SBRC), recommended the proposal be postponed, and AQHA's board of directors adopted this recommendation.<sup>130</sup> AQHA stated the decision would be postponed so that further studies of the implication of the rule change could be conducted.<sup>131</sup> In 2009 AQHA held a cloning forum, which over 400 AQHA members attended, that featured experts in cloning technologies.<sup>132</sup> Subsequently, the members and the Association's board of

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<http://www.aqha.com/AQHA-Cloning-Lawsuit-Resources/AQHA-Cloning-Position.aspx>  
(last visited Jan. 26, 2014).

125. AM. QUARTER HORSE ASS'N, AQHA OFFICIAL HANDBOOK OF RULES AND REGULATIONS 62 (59th ed. 2011) [hereinafter AM. QUARTER HORSE ASS'N, RULES 59th]. In 2013 AQHA changed the nomenclature of its official handbook of rules and regulations. Rule 227(a) was renamed to REG106.1, but no meaningful changes were made to the text of the rule. AM. QUARTER HORSE ASS'N, RULES 61st, *supra* note 91, at 57.

126. AM. QUARTER HORSE ASS'N, RULES 59th, *supra* note 125, at 62.

127. *American Quarter Horse Association Position Regarding: Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, *supra* note 124.

128. There is a discrepancy between the facts as presented in the Petitioner's First Amended Complaint and the information presented by AQHA. This Note summarizes the timeline and conflicting facts do not impact the analysis in Part V. Plaintiff's First Amended Complaint, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 2013 WL 2297104 (N.D. Tex. May 24, 2013) (No. 02:12-cv-00103-J), 2013 WL 654908; *AQHA Cloning Timeline*, *supra* note 116.

129. Plaintiff's First Amended Complaint, *supra* note 128, at 4.

130. *AQHA Cloning Timeline*, *supra* note 116.

131. *Id.*

132. *Id.*

directors voted in favor of a second postponement of any changes to Rule 227(a).<sup>133</sup>

In 2010, AQHA developed a task force to understand the science and implications of cloning.<sup>134</sup> Among its research, the task force conducted a survey that went out to 3,000 AQHA members.<sup>135</sup> About 1,000 members responded, and eighty-six percent of those were against cloning.<sup>136</sup> The task force presented its findings at the 2010 convention where the SBRC recommended that the 2008 proposal be denied; this recommendation was adopted by AQHA’s board of directors.<sup>137</sup> Similar proposals were presented in 2011 (proposal for registration of a cloned horse for breeding purposes only), 2012 (proposal for registration of a clone’s offspring), and in 2013 (proposal by plaintiff in the current lawsuit against AQHA).<sup>138</sup> For reasons akin to the rejection of the 2008 proposal, all were denied.<sup>139</sup>

### C. GENETIC DISEASES IN QUARTER HORSES

Most equine breeds have genetic diseases. Selective breeding<sup>140</sup> has led to an increase in these genetic diseases because the diseases originated from breeding lines that were also successful in the competitive arena.<sup>141</sup> Early evidence suggests that the registration of clones would further encourage selective breeding behavior, therefore potentially increasing the rate of genetic diseases.<sup>142</sup> Thus, in analyzing AQHA’s ban on the registration of clones, it is important to consider the current impact of genetic diseases in quarter horses. Two genetic diseases that are significant for the quarter horse industry are hyperkalemic periodic paralysis<sup>143</sup> and hereditary equine regional dermal asthenia.<sup>144</sup>

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133. *Id.*

134. *Id.*

135. *AQHA Cloning Timeline*, *supra* note 116.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

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Selective breeding simply means that the . . . breeder identifies certain desired traits for his or her animals and decides which animals should mate with which other animals with the aim of transmitting their desirable traits to the next generation. Animals with less desirable traits are not permitted to breed.

JACKEY TURNER, ANIMAL BREEDING, WELFARE & SOCIETY 2 (2010).

141. *Infra* Part III.C.1 and Part III.C.2.

142. *See infra* note 246.

143. *Infra* Part III.C.1.

144. *Infra* Part III.C.2.

### 1. *Hyperkalemic Periodic Paralysis (HYPP)*

Over forty years ago, a stallion, aptly named “Impressive,” became arguably the most prolific breeding horse in AQHA’s history.<sup>145</sup> Impressive, an AQHA World Champion, was highly demanded by quarter horse breeders because he possessed the prominent muscling that is highly sought after in the competitive arena.<sup>146</sup> In his time as a breeding horse, Impressive produced 2,250 foals that were registered with AQHA.<sup>147</sup> Unfortunately, while his foals tended to inherit Impressive’s ideal musculature, many also inherited a genetic disease, which is caused by a gene mutation that creates abnormal blood potassium levels in the horse’s muscle cells.<sup>148</sup> HYPP can lead to uncontrolled muscle twitching, profound muscle weakness, collapse, and even death.<sup>149</sup> Because some of Impressive descendants inherited the gene mutation but were asymptomatic, or because their side effects were manageable, these animals were used and retained in breeding programs.<sup>150</sup> As a result, the gene mutation that once originally traced only to Impressive became a serious issue for the health of the entire quarter horse breed.<sup>151</sup> Subsequently, AQHA placed restrictions on descendants of Impressive, including banning any descendant that was homozygous for HYPP.<sup>152</sup>

### 2. *Hereditary Equine Regional Dermal Asthenia (HERDA)*

Similar to HYPP, HERDA can be traced back to a single stallion line, “Poco Bueno.”<sup>153</sup> Poco Bueno was known for exceptional speed and power, but today a recessive gene mutation that causes HERDA can also be linked

145. Cummings Sch. of Veterinary Med., *Hyperkalemic Periodic Paralysis*, TUFTS U., <http://vet.tufts.edu/sports/hypp.html> (last visited Jan. 26, 2014).

146. *Id.*

147. SAGUARO RANCH, <http://www.saguaroranch.com/impressive.htm> (last updated May 10, 2009).

148. Cummings Sch. of Veterinary Med., *supra* note 145. In the case of HYPP the genetic mutation is inherited as a dominant trait, so even if only one parent is affected, the offspring may be affected. *Id.*

149. *Hyperkalemic Periodic Paralysis*, AQHA, [http://www.aqha.com/About/Content-Pages/About-the-Association/Services/~link.aspx?\\_id=222E6490C1B04EDB9618B2CFAB7063E4&\\_z=z](http://www.aqha.com/About/Content-Pages/About-the-Association/Services/~link.aspx?_id=222E6490C1B04EDB9618B2CFAB7063E4&_z=z) (last visited Jan. 26, 2014).

150. *Id.*

151. *Id.*

152. *Id.* A horse is homozygous when a horse has identical alleles at the chromosomal locus, so in the case of HYPP, because it is a dominant trait, if one parent is homozygous there is a 100% chance its offspring will have HYPP. *Id.*

153. *HERDA Traces to Poco Bueno*, BRINGINGLIGHTTOHYPP.ORG, <http://www.bringinglighttohypp.org/herda?showall=1&limitstart=> (last visited Jan. 26, 2014).

to his bloodlines.<sup>154</sup> Unlike HYPP, HERDA is caused by a recessive gene, thus both parents must pass on an affected allele in order for the offspring to be inflicted with the disease.<sup>155</sup> HERDA causes a lack of adhesion in the deep layer of the skin, causing it to separate, or tear completely.<sup>156</sup> There are currently no cures and it is typically life threatening.<sup>157</sup>

IV. *ABRAHAM & VENEKLASEN JOINT VENTURE V. AMERICAN QUARTER HORSE ASSOCIATION*

In April 2012, Abraham & Veneklasen Joint Venture (Joint Venture) initiated a lawsuit against AQHA<sup>158</sup> alleging that the enforcement of Rule 227(a) violated sections 1 and 2 of the Sherman Antitrust Act.<sup>159</sup> The Joint Venture is comprised of Abraham Equine, Inc., a rancher and breeder of American quarter horses, and Gregg Veneklasen, a veterinarian.<sup>160</sup> The Joint Venture owns clones of quarter horses registered with AQHA and offspring of clones of quarter horses registered with AQHA.<sup>161</sup> Plaintiffs have been unable to register their horse because of Rule 227(a).<sup>162</sup>

A. ABRAHAM & VENEKLASEN JOINT VENTURE’S ALLEGATIONS

In establishing their section 1 and 2 claims, plaintiffs alleged: (1) that an agreement was made amongst the committee members of AQHA to exclude plaintiff’s horses, and other members with horses similarly situated, from AQHA registration; (2) that AQHA maintains a monopoly over the relevant market; (3) that AQHA’s conduct had an adverse effect on competition; (4) that this conduct was without reasonable business justification;

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154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Plaintiff’s Original Complaint, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, 2013 WL 2297104 (N.D. Tex. May 24, 2013) (No. 2-12CV-103-J), 2012 WL 1435710.

159. Plaintiff’s First Amended Complaint, *supra* note 128. This Note focuses on the section 1 analysis. While the section 2 claim is beyond the scope of this Note, the analysis of section 1 can apply to plaintiff’s section 2 claim in that section 2 provides the alleged monopolist’s reasonable business justifications related to the conduct in question. This inquiry is strikingly similar to plausible procompetitive benefits, which is the focus of this Note. *See supra* Part II.B.4.b. *See also* *Mid-Texas Commc’ns Sys. v. AT&T*, 615 F.2d 1372 (5th Cir. 1980).

160. Plaintiff’s First Amended Complaint, *supra* note 128, at 4.

161. *Id.* Offspring of clones of registered animals have a second parent who is registered with AQHA.

162. *Id.*

and (5) that plaintiffs have been damaged.<sup>163</sup> This Note's analysis is focused on balancing the anticompetitive effects against the procompetitive benefits ("reasonable business justifications"). Therefore, while plaintiff's allegations of the agreement among committee members, AQHA's monopoly of the relevant market, and plaintiff's damages are summarized here, the adverse effects and procompetitive benefits have been preserved for the analysis section.<sup>164</sup>

First, plaintiffs alleged that the rejection of Rule 227(a) proposals from 2008 through 2012 is circumstantial evidence of a shared plan to ban plaintiffs, and similarly situated members, from registering their horses.<sup>165</sup> The plaintiffs also alleged that certain committee members "repeatedly rallied" the other members by intimidating and threatening remarks.<sup>166</sup> Second, plaintiffs argued the relevant market was registered quarter horses, which they geographically restrained to the United States and Canada.<sup>167</sup> AQHA has registered quarter horses in all fifty states, throughout Canada, Mexico, and in more than eighty countries.<sup>168</sup> Furthermore, quarter horses must be registered with AQHA to participate in the 8,000 sanctioned races each year, with purses that in 2011 totaled \$129,282,575, or to compete in the more than 2,600 sanctioned shows per year.<sup>169</sup> Plaintiffs summarized that:

By controlling registration, AQHA controls the supply of high-quality registered Quarter Horses. Because AQHA dominates the market for Quarter Horse events and lacks any competing sanctioning body, AQHA has sufficient market power to restrict competition and decrease output in the Quarter Horse market. Specifically, Rule 227(a), by excluding from the market any cloned horse and their offspring otherwise eligible for registration, limits the supply of registered horses, thereby driving up the price and injuring consumers and the competitive process. AQHA covers every state in the na-

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163. *Id.* at 5.

164. *See infra* Part V.

165. Plaintiff's First Amended Complaint, *supra* note 128, at 4-5.

166. *Id.* at 5. These allegations were neither admitted nor denied in the defense's answer. Defendant's Original Answer and Jury Demand at 3, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 2013 WL 2297104 (N.D. Tex. May 24, 2013) (No. 02:12-cv-00103-J), 2012 WL 3281674.

167. Plaintiff's First Amended Complaint, *supra* note 128, at 4-5.

168. *Id.*

169. *Id.* at 5-6.

tion and many other countries and significantly affects interstate commerce.<sup>170</sup>

Finally, plaintiffs allege that, as a result of AQHA's conduct, their business has suffered substantial injury to its business, property, trade, and reputation.<sup>171</sup> They state because a quarter horse's market value is based on the horse's ability to enter events and because AQHA is the sole functioning body for those events, an unregistered quarter horse has basically no value.<sup>172</sup>

B. AQHA'S ATTEMPT TO BYPASS ANTITRUST SCRUTINY THROUGH THE DOCTRINE OF NONINTERVENTION

Defendant originally responded by filing a motion to dismiss for lack of subject matter jurisdiction.<sup>173</sup> AQHA defended this motion using the doctrine of nonintervention (also referred to as the doctrine of non-interference), which establishes that courts will not interfere with the management or business of private associations except in certain circumstances.<sup>174</sup> This doctrine is developed based on the rationale that a voluntary organization, such as AQHA, has the right to make and interpret its own agreements and regulations.<sup>175</sup> Furthermore, AQHA argued that no exceptions to the doctrine applied.<sup>176</sup> AQHA noted that limited exceptions to the doctrine existed, including: if the conduct was illegal, against a public policy, arbitrary, capricious, or involved a valuable right or property interest.<sup>177</sup>

AQHA denied a violation of antitrust laws, stating that Rule 227(a) did not have an anticompetitive intent but instead that it had procompetitive intent of promoting and preserving the integrity of the quarter horse breed in accord with its welfare statement.<sup>178</sup> The Association further purported that Rule 227(a), like other rules defining the quarter horse, was integral to AQHA's internal affairs.<sup>179</sup> Additionally, AQHA alleged that Rule 227(a)

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170. *Id.* at 7.

171. *Id.* at 9.

172. Plaintiff's First Amended Complaint, *supra* note 128, at 9.

173. Defendant's Brief in Support of Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 2013 WL 2297104 (N.D. Texas May 24, 2013) (No. 02:12-cv-00103-J), 2012 WL 1859174.

174. *Id.* at 4 (citing *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 656 (5th Cir. 1997)).

175. *Id.*

176. *Id.*

177. *Id.* at 6.

178. Defendant's Brief in Support of Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 173, at 9.

179. *Id.* at 10 (citing *Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 356 (Tex. App. 1990)).

affected only owners of cloned horses, or owners of the offspring of cloned horses, rather than adversely affecting competition in the industry as a whole; therefore, the Association purported plaintiffs had not established an anticompetitive effect.<sup>180</sup>

C. THE COURT'S REJECTION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND THE JURY'S RULING FOR PLAINTIFFS

AQHA filed a motion for summary judgment, which the Northern District Court of Texas rejected.<sup>181</sup> However, in rejecting the motion, the court noted that evidence existed suggesting that Rule 227(a) created both anti-competitive effects and procompetitive benefits.<sup>182</sup> On one hand, it seems like AQHA would benefit financially by registering more horses, including clones, without Rule 227(a).<sup>183</sup> On the other hand, the court noted that the survey AQHA conducted suggested the Association would lose its "appeal, relevance, and popularity" if Rule 227(a) was eliminated.<sup>184</sup> Even with this perfunctory analysis the court suggests a need to further analyze the anti-competitive effects and procompetitive benefits of permitting the registration of clones in AQHA.<sup>185</sup> Such an analysis would require a rule of reason inquiry to determine whether the procompetitive benefits outweigh the anti-competitive effects.<sup>186</sup>

The trial commenced on July 17, 2013 before a jury in the Northern District Court of Texas.<sup>187</sup> On July 30, 2013 the jury reached a verdict.<sup>188</sup> In pertinent part, the jury found that AQHA: (1) did violate section 1 of the Act; (2) did violate section 2 of the Act; (3) did cause damage to plaintiffs; but (4) awarded no monetary damages to any plaintiff.<sup>189</sup>

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180. *Id.* at 14.

181. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 2:12-cv-103-J, 2013 WL 2297104, at \*3 (N.D. Tex. May 24, 2013).

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.* In denying AQHA's motion for summary judgment, the court merely discussed the facts that would factor into an antitrust analysis, but did not apply a per se, quick-look, or rule of reason analysis. *Abraham & Veneklasen Joint Venture*, 2013 WL 2297104, at \*3.

186. *Id.*

187. *Cloning Lawsuit*, AQHA (July 30, 2013), <http://www.aqha.com/News/News-Articles/2013/July/07302013-Lawsuit-Verdict.aspx#.UolZo-1DuSo>.

188. Verdict of the Jury at 3, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 2013 WL 2297104 (N.D. Tex. May 24, 2013) (No. 2:12-cv-103-J), 2013 WL 2297104.

189. *Id.*

V. ANALYSIS: BALANCING THE ANTICOMPETITIVE EFFECTS AGAINST THE PROCOMPETITIVE BENEFITS

The Supreme Court has established that the rule of reason<sup>190</sup> is the appropriate analysis in most cases involving sports associations' horizontal restraints created through the rules and regulations they establish.<sup>191</sup> Typically, horizontal restraints are considered unreasonable as a matter of law because the probability that restraints, such as price fixing or output limitation, are anticompetitive is high.<sup>192</sup> On the other hand, in sports associations, the industry relies on certain horizontal restraints if the "product," the league, is going to be available at all.<sup>193</sup>

An organization must be able to establish and enforce reasonable rules and regulations to carry out the purpose it was formed for.<sup>194</sup> These reasonable rules and regulations ensure fairness and integrity of the association or league's competitions and continuing public interest in the sport.<sup>195</sup> Without fairness and integrity of the sport and maintaining public interest, the association or league may collapse.<sup>196</sup> These objectives cannot be maintained without some mutual agreement.<sup>197</sup> That said, while a sports association's rules and regulations place restraints on the market, which may lead to anti-competitive effects, they also enable a product to be marketed that is otherwise unavailable.<sup>198</sup> This widens consumer choice, both to competitors and to spectators, thus providing procompetitive benefits.<sup>199</sup> Because these rules and regulations create anticompetitive restraints on how members can compete with each other, but also preserve the integrity and fairness of the product, a "fair evaluation" of the challenged restraint requires considering

190. *See supra* Part II.B.3.

191. *See supra* Part II.C.

192. *Ashley Meadows Farm, Inc. v. Am. Horse Shows Ass'n, Inc.*, 609 F. Supp. 677, 679 (S.D.N.Y. 1985).

193. *Id.*

194. *Cooney v. Am. Horse Shows Ass'n, Inc.*, 495 F. Supp. 424, 430 (S.D.N.Y. 1964).

195. *Id.* The body of rules established by a breed association, such as AQHA, is comparable to the rules in a professional or NCAA league. These institutions market competition itself—that is competition between its members. The Supreme Court has recognized that these institutions would be "completely ineffective" if there were no rules that the competing members agreed upon, such as on-the-field rules like field dimension or off-the-field rules like forbidding payment of NCAA athletes. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1994).

196. *Id.* at 102.

197. *Id.* For example, "[w]hen a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." *Id.* (quoting R. BORK, *THE ANTITRUST PARADOX* 278 (1978)).

198. *Bd. of Regents*, 468 U.S. at 101.

199. *Id.*



the association's procompetitive justifications for the restraint.<sup>200</sup> A "fair evaluation" calls for a rule of reason analysis over either a per se or a quick-look analysis.<sup>201</sup> However, while the method of analysis differs,<sup>202</sup> the ultimate question remains the same: whether a restraint on trade was unreasonable.<sup>203</sup>

Although the rule of reason is a court's common method of analysis for sports associations, a distinction has been drawn between rules and regulations creating restraints inside versus outside the competitive arena.<sup>204</sup> Even though anticompetitive effects are more highly susceptible in restraints outside the competitive arena, this does not eliminate the need for a full-scale rule of reason analysis if the association proffers plausible procompetitive justifications.<sup>205</sup>

In AQHA's case, Rule 227(a), banning cloning, does present a horizontal restraint as it was passed by AQHA's Board of Directors, who can be defined as at the same level of the market structure as they are all members and many competitors or breeders in AQHA.<sup>206</sup> Further, the rule is a restraint on the market as it wholly bars some equines, specifically those created by SCNT, from being registered and able to compete in the product

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200. *Id.*

201. *Id.*

202. *See supra* Part II.B.

203. *Bd. of Regents*, 468 U.S. at 101.

204. McCann, *supra* note 64. The court "typically deem[s] off-field horizontal restraints on competition—such as player movement restrictions, entry drafts, and analogous devices designed to maintain competitive balance as predominately anticompetitive." *Id.* at 740 (citing *Mackey v. Nat'l Football League*, 543 F.2d 606, 619 (8th Cir. 1976)). Therefore, as a general trend, restraints impacting activity within the competitive arena are more likely viewed by the courts as having plausible procompetitive benefits than restraints on activity outside of the arena. *See id.*

205. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 832 (3d Cir. 2010).

206. AQHA appealed the lower court's ruling and submitted its Brief for Appellant on December 26, 2013. In its brief, AQHA argued that the requisite elements of a section 1 horizontal restraint have not been met. Brief For Appellant, *supra* note 123. More specifically, AQHA presented three insufficient evidence arguments seeking reversal of the lower court's ruling. *Id.* First, AQHA alleged there was no evidence of a contract, combination, or conspiracy since the committee voting on the rule barring cloning was a single entity and thus incapable of conspiring and there was no evidence that the members did conspire. *Id.* at 8-19. Second, AQHA argued that there was insufficient evidence to establish the requisite product market. *Id.* at 19-33. Third, there was no evidence that the rule unreasonably restrained trade. *Id.* at 34-44. The validity of the single entity defense or the lack of a defined market is beyond the scope of this Note. This Note focuses specifically on the rule of reason analysis, briefly discussed in Appellant's third argument, and more fully analyzes the procompetitive benefits that AQHA has established prior to the lawsuit and during the trial and appellate stages of the case. Therefore, for the purposes of this argument, it is assumed that arguments one and two are insufficient to gain a favorable ruling for AQHA in the Fifth Circuit Court.

that AQHA has created, AQHA shows, races, and breeding market.<sup>207</sup> However, establishing Rule 227(a) as a horizontal restraint is only the first step of the analysis.<sup>208</sup> The Joint Venture, the plaintiff, then has the burden of establishing anticompetitive effects that make this restraint on clones “unreasonable.”<sup>209</sup> Then the burden shifts to the defendant, here AQHA, who has an opportunity to provide procompetitive justifications.<sup>210</sup> If the court accepts the procompetitive justifications, then a full rule of reason analysis must be performed to determine if the net effect of the restraint is anticompetitive, in which case the restraint is unlawful, or if the effect of the restraint is procompetitive or has no competitive effect, in which case the restraint is lawful.<sup>211</sup> If the court finds that this procompetitive justification is not plausible, then the restraint fails the quick-look analysis and the restraint is deemed unlawful.<sup>212</sup>

A. THE ANTICOMPETITIVE EFFECTS ALLEGED IN *ABRAHAM & VENEKLASEN JOINT VENTURE*

Plaintiffs in *Abraham & Veneklasen Joint Venture* and the district court in its slip opinion purport a number of potential anticompetitive effects created by AQHA’s enactment and perpetuation of Rule 227(a).

First, Plaintiffs argue that barring clones and/or their offspring from registration effectively denies the same the ability to compete with registered quarter horses.<sup>213</sup> Further, it also protects registered horses from having to compete with “quality unregistered horses.”<sup>214</sup> As established in Part IV.A, quarter horses must be registered with AQHA in order to compete in AQHA competitions or run in AQHA sanctioned races.<sup>215</sup> Registered quarter horses not only have the opportunity to earn prize money and awards at these events, but they also get exposure to potential buyers—an opportunity not afforded to clones and/or their offspring.<sup>216</sup> Plaintiffs argue that, without that exposure, unregistered quarter horses have virtually no market, which reduces their value by seventy percent to eighty percent.<sup>217</sup>

Second, by depriving clones and/or their offspring of exposure at these events or eligibility to compete in them, the plaintiffs purport that the sup-

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207. See *supra* text accompanying notes 165-69.

208. See *supra* text accompanying note 34.

209. See *supra* Part II.B.4.b.

210. See *supra* Part II.B.4.c.

211. See *supra* Part II.B.4.c.

212. See *supra* Part II.B.2.

213. Plaintiff’s First Amended Complaint, *supra* note 128, at 8.

214. *Id.*

215. See *infra* Part IV.A.

216. See Plaintiff’s First Amended Complaint, *supra* note 128, at 8.

217. See *id.* at 9.

ply of high-quality registered quarter horses is limited, thus prices increase to meet demand of consumers.<sup>218</sup> The increase in prices harms competition and consumers, as some consumers will be unable to afford the high-quality quarter horse and will either buy a horse of lesser quality for a lower price or not buy at all.<sup>219</sup> On the other hand, consumers who currently own and can purchase high-quality registered quarter horses are deprived of the benefits of cloning, which plaintiffs allege includes “the ability to breed around or minimize the chance of genetic disease and the potential improvement of the breed.”<sup>220</sup> Plaintiffs argue that SCNT,<sup>221</sup> a method of reproductive cloning, provides AQHA members with a selective breeding tool for breeding genetically “clean” horses, which in effect would decrease the frequency of genetic diseases, such as HYPP and HERDA.<sup>222</sup>

Third, few, if any, options are available for the reproduction of horses incapable of reproducing.<sup>223</sup> For example, if a horse is gelded,<sup>224</sup> but later in his life his owner wishes to be able to breed him to mares, cloning would be the only option available.<sup>225</sup> Similarly, the Joint Venture purports that cloning would aid owners of mares and stallions that die young or become incapable of breeding.<sup>226</sup>

The first argument can be criticized as focusing on the individual injury to the Joint Venture, which is an insufficient argument to establish that a restraint is “unreasonable.”<sup>227</sup> However, arguments two and three do suggest an economic harm to the market in question, namely AQHA competitors and breeders who show, race, and/or breed registered quarter horses.<sup>228</sup>

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218. *See id.* at 8.

219. *See id.*

220. *See id.* at 17.

221. Somatic Cell Nuclear Transfer (SCNT) is a method of reproductive cloning where the nucleus of a somatic (body) cell is removed from the donor (in this case a registered American quarter horse). Then, the nucleus of an egg cell is removed (in this case of another equine). Third, the nucleus of the donor’s somatic cell is inserted into the enucleated egg cell. *Somatic Cell Nuclear Transfer*, SCI. DAILY, [http://www.sciencedaily.com/articles/s/somatic\\_cell\\_nuclear\\_transfer.htm](http://www.sciencedaily.com/articles/s/somatic_cell_nuclear_transfer.htm) (last visited Jan. 26, 2014).

222. Plaintiff’s First Amended Complaint, *supra* note 128, at 3.

223. *Id.* at 8.

224. A colt or stallion has not been castrated. Gelded refers to the castration of a horse. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 943 (3d ed. 1981).

225. Plaintiff’s First Amended Complaint, *supra* note 128, at 8.

226. *See id.*

227. *See* *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002) (“[B]ecause ‘[t]he antitrust laws were enacted for the protection of competition, not competitors,’ a plaintiff must show that the net effect of a challenged restraint is harmful to competition.” (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)).

228. *See id.*

## B. THE PROCOMPETITIVE BENEFITS

Although not a focus of AQHA's defense at the trial court or in its appellant's brief, AQHA and the members of the SBRC that voted to enact and maintain Rule 227(a) have alluded to plausible procompetitive benefits for the ban on clones that are based on genetic concerns.<sup>229</sup> In 2009, AQHA published an article discussing the potential advantages and disadvantages that cloned, registered quarter horses could have on the Association.<sup>230</sup> A key justification cited for Rule 227(a)'s ban on cloned quarter horses was the potential genetic pitfalls of permitting clones in the breed.<sup>231</sup> Similarly, it was established at trial that several members of the SBRC voted to maintain Rule 227(a) because of parentage verification or genetic concerns.<sup>232</sup> Thus, it can be concluded that AQHA has presented at least two procompetitive justifications to discuss: (1) the genetic implications of allowing clones to be registered and (2) the parentage verification challenges clones present and how these challenges pose a threat to breed integrity and health.

Although Rule 227(a) does present anticompetitive effects, it would be improper for a court to find the rule illegal per se because some procompetitive justifications have been presented.<sup>233</sup> Under the quick-look analysis, it is the defendant's burden, in this case AQHA, to establish either of these arguments as plausible procompetitive justifications in order for a full rule of reason analysis to be warranted.<sup>234</sup>

### 1. Genetic Concerns Clones Present to the Quarter Horse Industry

Genetic diversity is important to a breed's ability to cope with environmental variability—more significantly it is vital for its disease resistance.<sup>235</sup> A breed with a narrowed genetic diversity will have an in-

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229. Defendant's Brief in Support of Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 173; Brief for Appellant, *supra* note 123.

230. The Journal Staff, *supra* note 1, at 46-47.

231. *Id.*

232. At trial it was established that at least three members voted on parentage verification concerns and at least one member voted on genetic concerns. Brief For Appellant, *supra* note 123, at 14-15.

233. See *Cont'l Airlines, Inc.*, 277 F.3d at 509-10 (holding that when there are clear anticompetitive impacts from a restraint, but procompetitive justifications also exist, the quick-look analysis is the appropriate analysis).

234. See *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010) (recognizing that it is the defendant's burden to establish procompetitive benefits); *Cont'l Airlines, Inc.*, 277 F.3d at 509-10 (holding that plausible procompetitive justifications must be established before a full rule of reason analysis is called for).

235. Donald A. Falk, et al., *An Introduction to Restoration Genetics*, SOC'Y OF ECOLOGICAL RESTORATION 3 (Nov. 2009), <http://www.nps.gov/plants/restore/pubs/restgene/restgene.pdf>.

creased vulnerability to diseases, and such narrowing also increases the likelihood that animals will transmit diseases to each other.<sup>236</sup> Genetic narrowing can also lead to increased proliferation of genetic diseases.<sup>237</sup> For example, HYPP is a genetic mutation that has been linked to one stallion, Impressive.<sup>238</sup> However, due to this stallion's success in the competitive arena and ability to pass on his ideal traits he became a popular stallion,<sup>239</sup> and it is estimated that four percent of AQHA's registered horses are affected by HYPP.<sup>240</sup> As the genetic diversity of the breed narrows, it becomes more likely that quarter horses will face increased susceptibility to diseases, higher transmission rates of diseases across the breed, and a higher likelihood of genetic diseases caused from gene mutation. These negative consequences to breed evolution and health, due to a trend of genetic narrowing, are inapposite of AQHA's mission "[t]o record and preserve pedigrees of American quarter horses, while maintaining the integrity of the breed."<sup>241</sup> In sum, slowing or preventing genetic narrowing that leads to these effects is a procompetitive benefit that must allow AQHA certain latitude to enact rules and regulations.

It must be recognized that genetic narrowing also brings advantages to the quarter horse market. Through the use of selective breeding,<sup>242</sup> quarter horse mare owners carefully select a stallion that displays certain physical, athletic, or disposition traits that complement their mare and maximize the future foal's opportunity to be successful in the competitive arena.<sup>243</sup> Both Impressive, as discussed in Part III.C.1, and Poco Bueno, as discussed in Part III.C.2, are excellent examples of how selective breeding operates in reality. Mare owners bred to these stallions to complement the mare's own traits. This narrows the genetic diversity of the breed, because stallions or mares with less desirable traits are not used in breeding programs.<sup>244</sup> This genetic narrowing is even further proliferated by line breeding,<sup>245</sup> because

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236. *Id.* at 4.

237. The Journal Staff, *supra* note 1, at 45.

238. *See supra* Part III.C.1.

239. *See supra* Part III.C.1.

240. Lydia Gray, D.V.M., *Hyperkalemic Periodic Paralysis*, SMARTPAK, <http://www.smartpakequine.com/content/hyperkalemic-periodic-paralysis> (last visited Jan. 26, 2014).

241. AM. QUARTER HORSE ASS'N, RULES 61st, *supra* note 91, at 1.

242. TURNER, *supra* note 140 and accompanying text.

243. *See* TURNER, *supra* note 140. It is recognized that not all AQHA breeders breed for the competitive arena. Some breed for ranch use, recreational purposes, or other non-competitive uses. However, the idea of selective breeding for desired traits is still used in these situations and thus this discussion is still relevant to those breeders. *See id.*

244. *See id.* at 13.

245. "Line breeding is that system of breeding in which . . . the matings are usually directed toward keeping the offspring closely related to some highly admired ancestor." M.E. ENSMINGER, D.V.M., *HORSES AND HORSEMANSHIP* 278 (4th ed. 1969).

foals produced from close line breeding are more likely to be homozygous in several genetic traits.<sup>246</sup> Line breeding ensures desirable character traits are produced, thus illustrating how genetic narrowing can also be seen as positive for the breed.

However, due to breeders' motivations to pass along these positive traits and strengthen the breed's competitive abilities, the members of the industry will not simply stop breeding animals that can pass along hereditary diseases.<sup>247</sup> This is illustrated in the proliferation of both the Impressive and Poco Bueno lines through the use of other reproductive techniques, such as artificial insemination, shipped semen, and embryo transfers.<sup>248</sup> Poco Bueno himself only had 400 foals in his lifetime, but when artificial insemination was introduced, subsequent generations of Poco Bueno's lineage easily produced more than 1,000 foals per sire.<sup>249</sup> With both Poco Bueno's and Impressive's genetic diseases, increasing offspring from these hereditary lines likely correlates with an increasing rate of the genetic disease's occurrence.<sup>250</sup> Therefore, even though genetic narrowing has benefits to the breed, AQHA has a responsibility to maintain the integrity of the breed and must be able to enact rules and regulations to protect the genetic well being of the breed, given that breeders have other motivations rather than reducing genetic diseases.

The Joint Venture makes an argument that cloning, unlike artificial insemination, shipped semen, and embryo transfers, will increase genetic diversity and thus reduce the frequency of genetic disease expression.<sup>251</sup> It is true that cloning has the potential to narrow or broaden genetic diversity.<sup>252</sup> As the Joint Venture argues, cloning could broaden genetic diversity by creating a clone of a gelding, which will never be able to reproduce, or a mare or stallion that was injured and/or died at an early age.<sup>253</sup> On the other hand, cloning a successful stallion or dam, either living or deceased, would

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246. *See id.*

247. The Journal Staff, *supra* note 1, at 46. "For HYPP, it has been shown that the gene is associated with a phenotype that has been selected for by halter judges. Because of the success in the show ring, some breeders have not had the incentive to decrease the frequency of that disease by not breeding affected horses." *Id.*

248. *See supra* Part III.B.2; The Journal Staff, *supra* note 1, at 46.

249. The Journal Staff, *supra*, note 1, at 46.

250. *See id.*

251. *See supra* Part V.A; Plaintiff's First Amended Complaint, *supra* note 128, at 4.

252. Robert Wall et al., *Animal Productivity and Genetic Diversity: Cloned and Transgenic Animals*, 43 CAST 1 (2009), <http://www.castscience.org/download.cfm?PublicationID=2948&File=f0307d366b21e81a1d1a11a78592612486143>.

253. *See id.* Note, often times colts are gelded at an early age in life, before it can be determined if they would make good candidates as breeding stallions. The Journal Staff, *supra* note 1, at 45.

be an example of using the technology for genetic narrowing.<sup>254</sup> Ultimately, breeders control which of these outcomes is more likely and the impact that cloning would actually have on genetic diversity. Although there are limited reports of cloning in the quarter horse breed, there are early indications that breeders will be more likely to clone proven stallions and dams versus geldings or unproven sires and dams.<sup>255</sup> Given these early reports of cloned quarter horses and the trends of using other reproductive technologies to enhance a single stallion's or dam's ability to produce more foals, it is likely that permitting clones to be registered would diminish genetic diversity of the breed.

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254. *See id.*

255. Sonny Williams, *Gregg Veneklasen's Cloning Quest*, QUARTER HORSE NEWS (Feb. 25, 2011), <http://www.quarterhorsesnews.com/news/current-issue-of-qhn/features/10200-gregg-veneklasens-genetic-quest>. Comparing reported quarter horse clones produced by Dr. Veneklasen (veterinarian and partner in Abraham & Veneklasen Joint Venture) most seem to be proven and top-producing stallions and dams. *Id.* At trial, Dr. Veneklasen testified that there are currently more than thirty quarter horses that have been cloned. Glory Ann Kurtz, *Interesting Facts that Came out of AQHA Cloning Case*, ALL ABOUT CUTTING (Oct. 1, 2013), <http://allaboutcutting.net/?p=3719>. Dr. Veneklasen has cloned the following dams who have already been high producers of foals: "The Smart Look," currently the third highest producing dam in the history of the National Cutting Horse Association (NCHA), "Lynx Melody" currently the eleventh highest producing dam in the history of NCHA, "Bet Yer Blue Boons," currently the forty-first highest producing dam NCHA history, and "Clays Little Peppy," currently the thirty-seventh highest producing dam in NCHA history. Sonny Williams, *Gregg Veneklasen's Cloning Quest*, QUARTER HORSE NEWS (Feb. 25, 2011), <http://www.quarterhorsesnews.com/news/current-issue-of-qhn/features/10200-gregg-veneklasens-genetic-quest>. *All-Time Leading Dams*, NAT'L CUTTING HORSE ASS'N, [http://www.stats.sallyharrison.com/list\\_dams\\_alltime.php](http://www.stats.sallyharrison.com/list_dams_alltime.php) (last visited Apr. 4, 2014). Moreover, Dr. Veneklasen has cloned at least four prolific stallions: Reminic, a sire of 926 foals; Frenchman's Guy, a sire of more than 1,300 registered quarter horses; High Brow Cat, a sire of more than 1,804 registered quarter horses; and Smart Little Lena, a sire of approximately 2,300 foals. Sonny Williams, *Gregg Veneklasen's Cloning Quest*, QUARTER HORSE NEWS (Feb. 25, 2011), <http://www.quarterhorsesnews.com/news/current-issue-of-qhn/features/10200-gregg-veneklasens-genetic-quest>; *The Foundation 'Nic'*, AMERICA'S HORSE DAILY (Aug. 6, 2010), <http://americashorsedaily.com/the-foundation-nic/#.UslwThxDuSo>; *Time Tested, Frenchman's Guy*, W. HORSEMAN, <http://www.westernhorseman.com/index.php/the-arena/article/683-time-tested-frenchmans-guy.html> (last visited Jan. 26, 2014); *Highbrow Cat Is Equi-Stat's Top Cutting Sire*, QUARTER HORSE NEWS, <http://www.quarterhorsesnews.com/index.php/cutting/cutting-outside-the-pen/9264-high-brow-cat-is-equi-stats-top-cutting-sire-.html> (last visited Jan. 26, 2014); *Smart Little Lena Clones to Sell*, QUARTER HORSE NEWS, <http://www.quarterhorsesnews.com/index.php/cutting/cutting-outside-the-pen/9909-smart-little-lena-clones-to-sell.html#ixzz11nU6D5La> (last visited Jan. 26, 2013).

2. *Clones Challenge AQHA's Ability to Conduct Parentage Verification on Foals*

AQHA's ban on registered clones protects its ability to continue its parentage verification program.<sup>256</sup> AQHA currently requires parentage verification in nine situations, and most of the situations are where there is an increased risk of misidentifying a parent, such as if breeding occurred through embryo/oocyte transfer, cooled shipped-semen, frozen semen, or two stallions covered one mare within thirty days.<sup>257</sup> Another situation, requiring parentage verification is when the horse to be registered is a descendant of Impressive.<sup>258</sup> Parentage verification is an important tool AQHA relies on to carry out its mission of ensuring integrity of the breed, because it helps to confirm if a foal is the result of a breeding between the specific sire and dam indicated on the registration application.<sup>259</sup> It also aids in tracking genetic diseases and in ensuring that a potential buyer of a descendant of stallions like Impressive and Poco Bueno is fully aware of the gene typing of their potential purchase.<sup>260</sup>

The elimination of Rule 227(a) would prevent AQHA's parentage verification process from continuing as it exists today.<sup>261</sup> While there are methods available to distinguish a clone from its original donor (such as age, markings, microchips, and testing of mitochondrial DNA), no genetic tests are currently available to AQHA that would allow it to identify the clone from the original donor or offspring from the clone from offspring of the original donor.<sup>262</sup>

3. *Preventing These Genetic Concerns as a Plausible, Procompetitive Benefit*

At this point in the litigation, in order for AQHA to have the opportunity to receive a full rule of reason analysis of Rule 227(a)'s restraint, the Fifth Circuit must find that the lower court did not properly consider the procompetitive benefits presented by AQHA and vacate that court's original ruling.<sup>263</sup> The Fifth Circuit has previously established that AQHA is

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256. See *supra* notes 100-105 and accompanying text.

257. AM. QUARTER HORSE ASS'N, RULES 61st, *supra* note 91, at 54.

258. *Id.*

259. The Journal Staff, *supra* note 1, at 48.

260. See *id.*

261. See *id.*

262. Brief For Appellant, *supra* note 123, at 50.

263. See *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 770 (1999) (vacating the Ninth Circuit's quick-look analysis based on a full evidentiary record because the court rejected the procompetitive justifications due to lack of evidentiary support and failed to scrutinize the anticompetitive effect); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277



permitted some say on what horses can be registered with the Association.<sup>264</sup> *Hatley* suggests that the Fifth Circuit aligns AQHA in the same category as other sports leagues where some sort of horizontal restraint is necessary for the “product” to exist at all, and thus a rule of reason analysis is required if plausible procompetitive benefits are presented.<sup>265</sup> However, there is no indication the district court gave any more than a perfunctory consideration of the procompetitive benefits presented by AQHA.<sup>266</sup>

Admittedly, banning clones is not as clear cut an analysis as a regulation impacting conduct inside the arena, such as the proper height of fences in a jumping class or speed index calculations for race horses.<sup>267</sup> However, a logical argument between the importance of maintaining genetic diversity and Rule 227(a) can be made. Part of AQHA’s mission is to maintain the integrity of the breed.<sup>268</sup> In order to maintain the integrity of the breed, it is vital that breeders balance the advantages achieved through line breeding, which subsequently narrows genetic variation and the advantages of genetic diversity in managing genetic diseases.<sup>269</sup> Throughout AQHA’s history it has been shown that, even once genetic diseases are detected, some breeders will continue to breed for desirable traits, even potentially risking the chance of offspring inheriting a genetic disease.<sup>270</sup> These genetic diseases, like HYPP and HERDA can be life threatening to horses and can have a negative impact on the overall health of the breeder and the value of an affected horse.<sup>271</sup> Early reports of cloning indicate that it is more likely to

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F.3d 499, 508 (4th Cir. 2002) (vacating lower court’s ruling as it rejected procompetitive justifications as implausible due to a lack of evidentiary support).

264. See *Hatley v. Am. Quarter Horse Ass’n*, 552 F.2d 646, 649 (5th Cir. 1977). It is distinguishable that in *Hatley* the plaintiff’s animal possessed characteristics that at that time were contradictory with the definition of a quarter horse, whereas in this case Abraham’s horses have the exact genetic make up of registered quarter horses. Thus, *Hatley* shows that the court has recognized that AQHA’s ability to regulate registration eligibility should be assessed under a rule of reason analysis but is not dispositive in this case. See *id.*

265. See *supra* note 113 and accompanying text. See also *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833832 (3d Cir. 2010) (“Where procompetitive justifications are proffered their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis.”).

266. See *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, No. 2:12-cv-103-J, 2013 WL 2297104 at \*3 (N.D. Tex. May 24, 2013). “‘The application of the quick look analysis is a question of law to be determined by the court,’ and therefore the concept of quick look has no application to jury inquiry.” *Deutscher Tennis Bund*, 610 F.3d at 833 (quoting ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, at A-8 n.2 (2005)).

267. See *supra* notes 204-05 and accompanying text.

268. See *supra* note 93 and accompanying text.

269. See *supra* Part IV.B.1.

270. See *supra* Part IV.B.1.

271. See *supra* Part III.C.

be used in a way that would narrow genetic variation, not diversify it.<sup>272</sup> While many successful procompetitive justifications are economically based, the Supreme Court has recognized justifications that are based on proving the “character” or the “quality of the ‘product.’”<sup>273</sup> Here AQHA’s product, its sanctioned races, competitions, and registration book permitting horses to compete in these events, are improved by preserving genetically healthy quarter horses for generations to come.

C. BALANCING THE ANTICOMPETITIVE AND PROCOMPETITIVE EFFECTS

Once it has been established that procompetitive justifications do exist, the court must perform a full rule of reason analysis.<sup>274</sup> At the quick-look stage competitive harm is presumed, but if a court was to accept AQHA’s procompetitive justifications, then the court must also proceed to weigh the anticompetitive effects versus the procompetitive benefits.<sup>275</sup> In order for Rule 227(a) to be unlawful, the anticompetitive effects alleged in *Abraham & Veneklasen Joint Venture* must outweigh the procompetitive benefits—if not, then the regulation is lawful.<sup>276</sup>

AQHA has the governing authority to maintain the “integrity of the breed.”<sup>277</sup> Maintaining the breed’s integrity also requires AQHA to take steps to ensure the well being of the quarter horse. A key component of well being is promoting the genetic diversity of a breed, which diminishes the likelihood of the proliferation of a genetic disease.<sup>278</sup> Similarly, a second key component to ensuring the integrity and well being of the quarter horse is maintaining a strong parentage verification program.<sup>279</sup> Parentage verification ensures the “integrity of the breed” because it eliminates opportunities to mislabel a sire or dam, which would allow breeders to misrepresent a horse’s pedigree to potential buyers.<sup>280</sup> Second, parentage verification promotes the well being of the quarter horse breed because it enables AQHA and breeders to notify breeders when foals may be a descendant of a sire or dam that was a carrier of a genetic disease, such as Impressive or Poco Bueno.<sup>281</sup> Based on technology available today, cloning would completely destroy AQHA’s ability to conduct parentage verification on every

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272. See *supra* note 255 and accompanying text.

273. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 102 (1994).

274. See *supra* Part II.B.3

275. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999).

276. *Id.*

277. See *supra* note 93 and accompanying text.

278. See *supra* notes 235-37 and accompanying text.

279. See *supra* note 256 and accompanying text.

280. See *supra* notes 257, 259 and accompanying text.

281. See *supra* note 258 and accompanying text.

registered horse.<sup>282</sup> Early cloning decisions by AQHA breeders also suggest that the use of cloning would narrow the genetic diversity of the breed, as many of the equines selected for breeding have been prolific sires and dams prior to being cloned again.<sup>283</sup>

Weighing against these procompetitive benefits of banning clones is the reality that the ban denies clones of registered quarter horses the opportunity to compete at AQHA sanctioned events.<sup>284</sup> This ban from competition or from breeding opportunities has reduced the value of these cloned animals and, arguably, has decreased output and increased the price of existing horses.<sup>285</sup> Additionally, plaintiff did allege that cloning would lead to increasing genetic diversity through the cloning of geldings or horses that have otherwise not proliferated the breeding market, but as established earlier, initial reports do not indicate cloning will conclusively lead to this outcome.<sup>286</sup>

Previously, the Fifth Circuit has recognized that AQHA's authority to ensure the integrity of the breed does allow the Association to pursue the definition of a horse eligible for registration with the Association and to create rules that are a "legitimate tool in an effort to improve the breed."<sup>287</sup> While this ban is preventing some equines from being registered with AQHA, the procompetitive benefits asserted by AQHA are necessary in order for the quarter horse industry to successfully continue at all. The necessity of promoting the integrity of the entire quarter horse population must permit AQHA to create legitimate rules that may exclude some horses from registration in order to preserve the overall health of the breed.<sup>288</sup>

This balancing is aligned with not only the reasoning the court discussed in *Hatley* but also with additional rulings in favor of equine association regulations. In *JES Properties, Inc. v. USA Equestrian, Inc.*, the Eleventh Circuit Court affirmed the lower court's decision that upheld the United States Equestrian Federation's (USEF) rule prohibiting two competitions from taking place within a 250 mile radius on the same date.<sup>289</sup> In that case,

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282. See *supra* notes 261-62 and accompanying text.

283. See *supra* note 255 and accompanying text.

284. See *supra* notes 213-16 and accompanying text.

285. See *supra* note 218-19. The allegation by the plaintiff that the ban has decreased output and increased price of existing registered quarter horses is highly skeptical and, at the time of this Note, without evidentiary proof. Cloning incurs much higher costs than a typical breeding situation, so it cannot be conclusively determined that, if clones were eligible for registration, enough breeders could afford to clone or that the costs of the clones once bred would drive the overall price of quarter horses in the market down.

286. See *supra* note 255 and accompanying text.

287. See *supra* note 113.

288. See *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977).

289. *JES Props., Inc. v. USA Equestrian, Inc.*, 2005 U.S. Dist. LEXIS 43122 (M.D. Fla. May 9, 2005) *aff'd*, 458 F.3d 1224 (11th Cir. 2006).

the court recognized that, despite anticompetitive effects, the "mileage rule" achieved "several pro-competitive functions," including ensuring competition was geographically spread across the country and preventing overuse of horses who may be over shown without the "mileage rule."<sup>290</sup> Similar to the reasoning in *Hatley*, the court in *JES Properties, Inc.*, recognized that the "mileage rule" was aligned with USEF's mission statement to "regulate equestrian competition by ensuring the safety and well-being of the horses."<sup>291</sup>

The reasoning in these analogous cases illustrates that a breed association must be able to use its rulebook as a "legitimate tool" to further the mission of the breed and ensure that the "product" that the association has created is maintained. Like the "white rule" in *Hatley* and the "mileage rule" in *JES Properties, Inc.*, AQHA's ban on registering clones is reasonably necessary to promote its procompetitive benefits and ensure the continuance of the "product" it has created.

## VI. CONCLUSION

The American Quarter Horse Association's trend towards relaxing its registration rules has created an uphill battle for the Association in establishing the procompetitive justifications behind its ban on registering clones and the offspring of clones.<sup>292</sup> However, this does not change the analysis that the court must perform when considering whether the rule creates an "unreasonable" horizontal restraint.<sup>293</sup> Currently, clones and offspring of clones are barred from a "product" that exists solely because AQHA has created it. Courts have recognized that sports leagues and professional associations like AQHA should receive a rule of reason analysis because some rules and regulations must exist so that the product can exist at all.<sup>294</sup>

Here, AQHA presents unique procompetitive justifications, but they are related to both the position of AQHA and also the rule in question. AQHA must not only protect the competitive arena, but it is also its mission to protect the integrity and well being of the horse. Cloning presents a threat to this mission because early uses of cloning indicate that its use will cause further genetic narrowing of the breed by cloning prolific sires and proven dams, permitting them to saturate the market even more than today. Current hereditary diseases indicate that this genetic narrowing, combined with line breeding, could increase the likelihood that serious genetic diseases become

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290. *Id.* at 53-54.

291. *Id.*

292. *See supra* Part III.B.

293. *See* *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985).

294. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 102 (1994).

even more prominent than today. Not only would increased genetic diseases have a negative impact on the value of individual horses, but it would also be inapposite of AQHA's responsibility to maintain the integrity of the breed.

AQHA must be permitted the opportunity to present the procompetitive benefits for its ban on cloning and these benefits must be weighed against the anticompetitive effects that have been established by the Joint Venture. AQHA's rules and regulations are the framework by which the quarter horse industry is created; therefore, similar to other sports or professional associations, it is imperative to carefully balance the Association's procompetitive benefits against the alleged anticompetitive effects. Impeding the Association's ability to use its rulemaking as a "legitimate tool" hinders the Association's capacity to provide the "product" it has created. On the other hand, permitting the Association to maintain reasonably necessary restraints, such as a ban on cloning, actually widens consumer choice because it makes the "product," here the quarter horse industry, available.

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