

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

IN RE:

RORY KENNY ROHAN,

Debtor.

Case No. 90-22077-WHB
Chapter 11

NATHAN KELLY and
BARBARA KELLY and
MARIKA TOLZ, Trustee,

Plaintiffs and
Counterdefendants,

v.

Adversary Proceeding
No. 90-0671-BKC-AJC-A

RORY KENNY ROHAN,
Individually and d/b/a
ACE'S WILD PARTNERSHIP, and
ACE'S WILD PARTNERSHIP,

Defendants and
Counterclaimants.

**MEMORANDUM OPINION AND ORDER
ON COMPLAINT FOR TURNOVER, COUNTERCLAIM
FOR DAMAGES AND OTHER RELIEF, AND MOTION TO
DISMISS OR CONVERT OR APPOINT A CASE TRUSTEE, AND
MOTION TO STRIKE TESTIMONY OF DR. WILLIAM DAY**

The undersigned judge, sitting by assignment, began on March 25, 1991, to hear the contested motion filed by Nathan and Barbara Kelly ("Kelly") to dismiss or convert this Chapter 11 case or in the alternative to appoint a Chapter 11 Trustee. During the course of hearings on March 25 and 26, it became obvious that much of the proof being offered would be duplicated in the adversary proceeding. Therefore, by consent of the parties, the Court consolidated proof offered on March 25 and 26 relevant to the adversary proceeding with the trial on the adversary proceeding which was concluded on May 23 and 24, 1991.

In the interval between March 26 and May 23, the case Trustee in the Kelly's Chapter 11 case was allowed to intervene. Counsel for the Chapter 11 Trustee attended each of the four days of hearings, but the Trustee permitted counsel for the Kellys to try the adversary proceeding and contested motion.

As is obvious from the above discussion, the Kellys are in a Chapter 11 case, Case Number 90-22830-BKC-AJC. The defendant Rory Kenny Rohan, ("Rohan") is of course the debtor in possession in this Chapter 11 case, in which this adversary proceeding was filed on November 27, 1990. Rohan has recently obtained confirmation of a plan, after a hearing before Judge A. Jay Cristol. The disclosure statement hearing in the Kellys' case was set in June, 1991.

PROCEDURAL HISTORY OF ADVERSARY PROCEEDING

The Kellys filed their complaint in the Rohan Chapter 11 seeking the relief of turnover, under 11 U.S.C. §542, of possession and control of a race horse called Double the Dosage. The Defendants, Rohan individually and on behalf of a partnership known as Ace's Wild, of which Rohan is a partner, counterclaimed for monetary damages. In the alternative, Ace's Wild, which is not a bankruptcy debtor, sought a determination of the parties' relative interests in Double the Dosage and a partition of the horse under applicable Florida statutes.

At trial on May 23, counsel for Ace's Wild questioned the jurisdiction of this Court over the subject matter, raising the question as to whether this was a core proceeding. During the March hearings, Mr. Rohan had testified that he consented to this Court's jurisdiction to resolve the issues between these parties. See Bankruptcy Rule 7012(b). The Court finds that Mr. Rohan's consent, as a partner, bound the partnership. The Kellys, in their amended complaint, pled that their turnover action was core. 28 U.S.C. §157(b)(2)(E). The Court concludes that this proceeding is not entirely core. See 28 U.S.C. §157(b)(2). The proceeding involves a turnover demand; however, there is a dispute over who owns Double the Dosage. This dispute revolves around a prebankruptcy contract between Ace's Wild and the Kellys, with an issue of whether the Kellys materially breached their contractual obligation. This is not, therefore, merely a complaint for turnover of

property of the Kellys' estate. It is a complaint to determine the parties' rights and obligations under a contract and to determine whether damages must be awarded for any contractual breach. Ordinarily, the Court would conclude that this was a related proceeding on which the Court must enter a recommended decision, subject to review by the United States District Court. 28 U.S.C. §157(c)(1). However, the entire context of the adversary proceeding must be examined, which includes Mr. Rohan's oral consent to this Court's jurisdiction. At that time, there was not separate counsel for Ace's Wild and, as stated, the Court treats Mr. Rohan's consent as being both personal and on behalf of the partnership. The Kellys, in their amended complaint, submitted to this Court's jurisdiction.

The counterclaim against the Kellys caused the Court to inquire whether the automatic stay had been lifted in the Kellys' Chapter 11 case so as to permit a suit against them, including relief for monetary damages. Ace's Wild had filed a proof of claim in the Kellys' case for the estimated amount of \$10,000.00. Counsel for the Kellys' Trustee announced to this Court that Judge A. Jay Cristol had deferred action on the allowance of that claim until the outcome of this proceeding. Therefore, the Court is treating the counterclaim as a part of the claims allowance process in the Kellys' Chapter 11, and that is a core proceeding under 28 U.S.C. §157(b)(2)(B). The outcome of this litigation will prevent relitigation in the Kellys' Chapter 11 on the allowance of Ace's Wild's claim.

The Kellys' claim for an ownership interest in Double the Dosage affects an interest of this debtor in Ace's Wild and amounts to a claim against the debtor Rohan's estate, to which Rohan has counterclaimed. Such a counterclaim is core. 28 U.S.C. §157(b)(2)(C). The Kelly suit as it affects Ace's Wild, exclusive of Rohan's partnership interest, is a related proceeding because Ace's Wild is not a debtor before this Court; however, the Court has found consent to this Court's jurisdiction by Mr. Rohan on behalf of Ace's Wild.

Taken in its total light, this adversary proceeding is a mixture of related and core proceedings, with consent being present to allow the Court to enter a final order subject to appeal to the United States District Court under 28 U.S.C. §158. There is no prejudice to the parties in such a conclusion because the parties' right of review by an Article III Court is preserved in the appeal and, if this Court is in error in its conclusion

that consent is present, the District Court may treat this opinion as proposed findings of fact and conclusions of law under 28 U.S.C. §157(c)(1).

FINDINGS OF FACT

1. Rory Kenny Rohan, a nonpracticing but licensed attorney, is the debtor in this confirmed Chapter 11 case.

2. Nathan and Barbara Kelly are debtors in a separate Chapter 11 case, in which Marika Tolz has been appointed Trustee.

3. Ace's Wild Partnership is a Florida partnership created for the purpose of owning, selling and racing thoroughbred race horses. Tr. Ex. 8.

4. Nathan Kelly has seventeen years experience with horses, having been a licensed owner, trainer and breeder. Mr. Kelly had contracted with Dr. William Day to buy a foal to be born, which was Double the Dosage, for \$40,000.00. Mr. Kelly then entered into the agreement with Mr. Rohan. Tr. Ex. 1.

5. On December 19, 1987, the Kellys and Rohan and/or Rohan's partners and/or its assigns entered into and executed an agreement for the purchase of a weanling colt, later known as Double the Dosage, from Dr. William Day. Tr. Ex. 1.

6. Under this agreement, Rohan and/or his partners and/or its assigns were to provide the \$40,000.00 purchase price to Dr. Day and the Kellys were to provide to the Rohan group its choice of five out of seven specifically agreed upon weanlings sired by the stallion Wayward Ace. A list of seven mares was apparently attached to the agreement. Tr. Ex. 1 and Ex. 3 to Barbara Kelly deposition and Ex. 3 to 3/25/91 hearing.

7. The seven foals were born and weaned at the Kellys' farm.

8. Wayward Ace had been owned by a separate Rohan partnership jointly with the Kellys.

9. Pursuant to the Double the Dosage agreement, the Rohan group paid the \$40,000.00 consideration for the horse to Dr. Day in two installments drawn on a Rohan trust account. Tr. Ex. B.

10. The Agreement between the Rohan group and the Kellys provided that the Kellys would own 52% "controlling interest" of Double the Dosage and the Rohan partnership, now Ace's Wild, would own 48%. Tr. Ex. 1. There is a dispute between the parties as to whether the Kellys materially breached their obligation under the agreement by failure to provide the correct fifth weanling from the agreed upon seven possible choices.

11. The December 19, 1987, agreement between Rohan and the Kellys was the only written agreement between them on Double the Dosage.

12. Mr. Kelly testified that his oral contract with Mr. Rohan was for Kelly to maintain Double the Dosage for the first year, for Ace's Wild to maintain the horse in the second year, and for the horse to then be given back to Kelly to break and train.

13. As stated, a separate partnership involving Mr. Rohan had previously owned 48% along with the Kellys owning 52% in a horse named Wayward Ace. As to that horse there had been an agreement that Mr. Kelly would train, manage and race Wayward Ace. Tr. Ex. 5. Mr. Kelly testified that he had an oral agreement with Mr. Rohan to continue the same management agreement on Double the Dosage, but Mr. Rohan denied such an agreement. See Tr. Ex. 1.

14. Ace's Wild took the position that only if the Kellys fulfilled all of their obligation to deliver five chosen weanlings would the Kellys acquire 52% ownership and control over Double the Dosage. See ¶7 & 10 of Tr. Ex. 8. Mr. Daniel Kopp, a partner in Ace's Wild, testified that because the Kellys surrendered Double the Dosage to him and because the Kellys did not deliver all five chosen weanlings, Double the Dosage belonged 100% to Ace's Wild. Rohan and Ace's Wild took the position that the Kellys had materially breached; therefore, the Kellys either forfeited their 52% ownership or never actually obtained their 52%.

15. At the hearing on March 26, Mr. and Mrs. Kelly testified that they received the foal certificate for Double the Dosage from Dr. Day, which certificate reflects the Kellys' 52% ownership and Ace's Wild 48% ownership. They stated that the original certificate had remained in their possession since

that time. However, between that date and the May 23 trial, the Kellys learned or recalled that the original certificate was given by Dr. Day to Rohan and that the Kellys obtained the certificate from Rohan for the purpose of registering the horse with the Texas Thoroughbred Breeder's Association on December 12, 1988. Tr. Ex. 20. That registration reflected the 52%/48% ownership. The Kellys added language on the back of the original certificate showing the 52%/48% ownership interests and they retained the original certificate.

16. Dr. William C. Day, a veterinarian and horse breeder, had done business with Mr. Kelly since 1986, and the two agreed upon \$40,000.00 to be paid for the next foal as a result of breeding between the mare B Double E and Americo. This foal was Double the Dosage. Dr. Day sent the application for registration of Double the Dosage to The Jockey Club, which sent the registration papers back to Dr. Day. Tr. Ex. 2. Dr. Day then mailed the registration to Rory Rohan. Ex. G to Day deposition. Dr. Day testified that he sold 100% of the horse to Mr. Rohan, although he was aware that there was some agreement between Rohan and the Kellys. Dr. Day signed the back of the registration certificate to indicate a transfer of ownership but he did not complete the portion describing the 52%/48% ownership. Mrs. Kelly testified that she typed in that portion. Tr. Ex. 3.

17. Dr. Day had delivered Double the Dosage to the Kellys' farm, where it remained for approximately one year. On February 19, 1989, Mr. Kopp picked up the horse from the Kelly farm. Tr. Ex. 15.

18. Mr. Kelly denies telling Kopp that he, Kelly, was unable financially to care for Double the Dosage. In February, 1989, the Kellys were having some financial difficulty as a result of other business ventures but still had between 150 and 200 horses being maintained on their farm.

19. The parties dispute the condition of Double the Dosage when it was turned over to Kopp.

20. The horse was moved to Kopp's father-in-law's farm, Main Gate Farm. The horse remained at Main Gate for approximately one year before it was moved to Delaware to race.

21. Dr. Harry Smalley, a veterinarian, examined Double the Dosage on December 19, 1988, for insurance purposes. At that time, the horse was on the Kellys' farm and it was not malnourished. However, Dr. Smalley stated that malnutrition could appear within a month's time.

22. Mr. Kopp had a veterinarian, Dr. Ben S. Shomper, examine Double the Dosage after the horse arrived at Main Gate Farm. Dr. Shomper testified that he first examined the horse on February 18, 1989, after it had arrived at Main Gate Farm. There is an apparent error in the dates of Dr. Shomper's first examination. Compare Tr. Ex. 15 with Exs. A & B to Shomper deposition. He testified that the horse had not been receiving an adequate amount of nutrition. The horse showed a marked improvement on April 25, 1989, when Dr. Shomper next examined it.

23. Rohan applied for a duplicate registration certificate for Double the Dosage from The Jockey Club on August 15, 1990. Tr. Ex. 6. The duplicate certificate form is notarized. At the time the duplicate certificate was applied for and obtained, these parties had not sought a judicial determination of their disputes.

24. When Rohan sought the duplicate certificate, he did not reveal to The Jockey Club the Kellys' claimed 52% interest. Mr. Rohan took the position in his testimony that he did not know then that the Kellys were still claiming an ownership interest in the horse.

25. The 1989 partnership return of Ace's Wild reflects a depreciation of only 48% of Double the Dosage with a basis of \$20,000.00 and 100% of the five weanlings with a total basis of \$20,000.00. Tr. Ex. 9.

26. Mr. Rohan testified that at the time he applied for the duplicate certificate, he thought either he or Mr. Kopp had had the original and that it had been misplaced.

27. Edward Bishop, the registrar of The Jockey Club, testified that he functioned to maintain the registry of all thoroughbreds born in the United States, Canada and Puerto Rico. From his records, he testified that the request for a duplicate certificate for Double the Dosage, signed by Rohan on behalf of Ace's Wild, was received by The Jockey Club on September 12, 1990. Tr. Ex. 7 and Ex. 4 to Bishop deposition. A duplicate certificate, number 45126, was issued on September 13, 1990. On the reverse side, the certificate reflects Ace's Wild Partnership as the owner, which information was taken from the Duplicate Certificate

Form. His file also contained the race record of the horse, with three starts in Philadelphia Park. Mr. Bishop testified that The Jockey Club did not require that all ownership interests be disclosed when a horse is registered with the Club. The request for and issuance of duplicate certificates is not uncommon when original certificates have been lost or destroyed.

28. Mr. Roger Carlton, a partner in Ace's Wild, testified that he understood the parties' intent, when Double the Dosage was turned over to Ace's Wild, was to train the horse to race.

29. Mr. Carlton testified that Double the Dosage was being raced at Philadelphia Park by the trainer Joseph Grande, who probably listed the horse at the track under Roger Carlton as lessee. Carlton testified that he had a written lease from Ace's Wild, executed by Kopp; however, the lease was not produced. There was testimony from Mr. Allen Bork, a witness with some expertise in race horses, that it was common to see horses raced under a lease. The partnership agreement permitted leasing. Tr. Ex. 8, ¶14.

30. The value to either bankruptcy estate of Double the Dosage is questionable. The Kellys believed the horse to be worth at least \$40,000.00. Compare Tr. Ex. 12 (The Kellys scheduled, on their B-2 schedule, the horse at \$10,000.00.) Rohan and Ace's Wild produced an expert who appraised the horse, without seeing it, for \$20,000.00. Tr. Ex. Q. The horse has never won a race, but it has come in second. The horse is a non-sweater; therefore, it can not race in southern climates. The Rohan group insured its "1/2 ownership" in October, 1988, for \$27,500.00. Tr. Ex. 11.

31. Mr. Kopp testified that he learned Double the Dosage was not a sweater from the horse's trainer and that this was the reason the horse was moved to the North to race.

32. The Kellys have had little, if any, contact, except through litigation, with Rohan or other Ace's Wild partners since June 1989, and the Kellys were not kept advised of the horse's location or racing status.

33. Ace's Wild was formed with a written partnership agreement, although a fully executed copy was not introduced. Tr. Ex. 8. The Kellys were not parties to this partnership agreement. The partners functioned as a partnership, filing partnership tax returns. Tr. Ex. 9. However, the partnership also acted

informally as far as records and decision making were concerned. See Deposition of Daniel Kopp, p. 9. The partners often personally paid expenses which were reflected in their capital accounts. Id., p. 10. Mr. Rohan maintained the expense records of the partnership. Id., p. 11.

34. The winnings of Double the Dosage have not exceeded, and have been applied to, its expenses. The expenses incurred by Ace's Wild were introduced as Tr. Ex. R, which contains certain compilations prepared by Mr. Rohan for this litigation. Net of winnings, Ace's Wild has paid or incurred expenses for Double the Dosage of \$17,735.56, and has additionally incurred a \$2,500.00 unpaid trainer's bill. There are, of course, continuing expenses for the training and maintenance for Double the Dosage.

35. Pursuant to the December 19, 1987 agreement (Tr. Ex. D), on or about October 5, 1988, Ace's Wild, through a partner Daniel Kopp, received from the Kellys' farm manager five weanlings sired by Wayward Ace. Tr. Ex. 14.

36. Mr. Kopp and a horse trainer, Robert Triola, went to the Kellys' farm and, after being shown by the Kellys' farm manager the seven weanlings from which selection was to be made, chose five weanlings, and Kopp signed a receipt for those five on October 5, 1988. Tr. Ex. 14. The five weanlings were delivered by William McMoneagle, the Kellys' farm manager for eighteen years, to Main Gate Farm.

37. Mr. McMoneagle separated the seven weanlings, born from the seven agreed upon mares, from other young horses. He was not aware that an error had been made in either selection or delivery of the five weanlings until at least a month later, when he was informed by the Kellys of a mistake. Two weanlings looked alike and Mr. McMoneagle apparently mistakenly placed one wrong weanling in with the other six.

38. Four of the selected five weanlings were of the group previously agreed upon by the parties. However, the fifth was sired by Wayward Ace but foaled by the mare I Want To Be Loved, which mare was not among the originally agreed upon mares.

39. The fifth incorrect weanling appeared virtually identical to the correct fifth weanling which was selected by Kopp and Mr. Triola.

40. The fact that Ace's Wild had one incorrect weanling was not discovered until a blood test was performed several months after the delivery of the five weanlings. Each foal must be blood typed as a part of registration with The Jockey Club.

41. The foal that Ace's Wild incorrectly received was registered with The Jockey Club by the Kellys along with all the foals. Tr. Ex. 13. The Kellys then transferred the registration to Mr. Kopp for Ace's Wild on November 7, 1989. Tr. Ex. 12. From that date until the filing of this adversary proceeding, nothing was done by either party, other than an exchange of letters in August, 1989 (Tr. Ex. 18), to force a correction of the mistaken delivery.

42. The incorrect foal remains in the possession of Ace's Wild.

43. The Kellys remain in possession of the original agreed upon foal.

44. Ace's Wild remains in possession of the four correctly chosen foals.

45. The delivery of the wrong fifth foal was a mistake. There is no proof that the Kellys intentionally caused the delivery of the wrong foal. Rather, the Kellys' farm manager, Mr. McMoneagle, simply made a mistake between two foals that looked alike.

46. The values of the mistakenly delivered fifth horse and the correct fifth horse was not established.

47. Mr. Kelly testified that the five weanlings were of a value sufficient to justify his having 52% ownership of Double the Dosage.

48. There was testimony from Mr. Kopp that the mistakenly delivered foal had no ability to race, notwithstanding some training efforts.

49. Ace's Wild makes no claim against the Kellys for expenses relating to the five foals, except for \$925.00 relating to registration of the wrong foal. In fact, Ace's Wild did not seek in this proceeding recovery of the fifth chosen foal, which remains unbroken for riding and untrained on the Kellys' farm. Mr. Kelly originally thought the foal mistakenly delivered to Ace's Wild was more valuable than the chosen foals; however, in this adversary proceeding, the Kellys do not seek return of the mistakenly delivered foal.

MOTION TO DISMISS, CONVERT OR APPOINT A TRUSTEE

The Court began hearing proof on March 25, 1991, on the Kellys' and Brooks Venture Corporation's motions to dismiss or convert or appoint a Trustee, and the Court signed an order on March 28, 1991, denying the relief sought by Brooks Venture Corporation. To the extent that any of the proof offered in the adversary proceeding on May 23 and 24 was offered to show a basis for the same relief sought by the Kellys, such relief is now moot. The Court was advised at trial on May 23 and 24 that Mr. Rohan had obtained confirmation of his Chapter 11 plan, and that confirmation eliminates any further need to consider the request for dismissal or conversion or the appointment of a case trustee. By order dated March 28, 1991, the Court had reserved ruling on the Kellys' motion as it related to the Kellys' allegations concerning misrepresentations to The Jockey Club as to Double the Dosage until the conclusion of the adversary trial. Not only has the confirmation made the relief sought moot, this Court on the merits would deny the requested relief. As will be discussed in this opinion, the Court finds no willful misrepresentation to The Jockey Club nor any acts by Rohan as to Double the Dosage which would justify case dismissal or conversion or the appointment of a trustee.

The Kellys' motion to dismiss, convert or appoint a trustee is denied.

**MOTION TO STRIKE PORTION OF
DR. DAY'S DEPOSITION TESTIMONY**

At trial on May 23, 1991, Rohan's counsel presented a written Motion in Limine or Alternatively, Motion to Strike Testimony of Dr. William Day, and the Court took that motion under advisement until the Court had read Dr. Day's evidentiary deposition taken on May 2, 1991. The objection to Dr. Day's testimony begins on page 20 of the deposition where Dr. Day was presented with an alleged sworn statement given by him on March 28, 1991, to one of the Kellys' attorneys. The purpose of showing him the sworn statement was to "refresh his recollection" about his hearing Rohan and Kelly discuss their agreement on Double the Dosage.

Federal Rule of Evidence 612 permits the use of a writing to refresh a witness' memory and the use of such a writing seems to depend upon the need for the witness' memory to be refreshed. Russell, BANKRUPTCY EVIDENCE MANUAL, 1990 ed., §612.2. Here, after being shown his prior sworn statement, Dr. Day stated: "I don't remember the exact details, but it was very obvious of their arrangement . . ." p. 24. The Court has read Dr. Day's deposition and the Court is not persuaded that Dr. Day's memory either needed to be refreshed or was refreshed by his prior sworn statement. Rather, Dr. Day simply proceeded to testify, over objections, to his understanding of part of the agreement between Rohan and Kelly. Dr. Day's understanding is founded on hearsay.

The Court grants the Rohan motion to strike from evidentiary consideration that testimony of Dr. Day from page 20, line 20, through page 23, line 23.

DISCUSSION AND CONCLUSIONS

As to the Kellys' complaint for turnover, it is brought under 11 U.S.C. §542(a) which provides:

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Procedurally, the Court questions whether the Kellys filed their turnover complaint in the right case. It would appear, since turnover seeks recovery of property of the debtor's estate, that the Kellys should have filed the adversary proceeding in their own Chapter 11 case. However, that procedural defect will not prevent the Court's reaching the merits of this proceeding.

The more troublesome difficulty with the requested turnover relief is that turnover is not intended as a remedy to determine the disputed rights of parties to property. See, e.g., In re FLR Company, Inc., 58 B.R. 632, 634 (Bankr. W.D. Pa. 1985). Rather, turnover is intended as a remedy to obtain what is acknowledged to be property of a debtor's estate. See 11 U.S.C. §541. "In addition, for a trustee, or debtor-in-possession, to be

entitled to the turnover of property, he must have the rights to use, sell or lease the property under §363." In re Wildlife Center, Inc., 102 B.R. 321, 325 (Bankr. E.D. N.Y. 1989) In the present case, there obviously is a dispute over the ownership interests in Double the Dosage. Assuming the Kellys retain a 52% ownership, they would not enjoy an unlimited right to use, sell or lease the horse without either the consent of the co-owners or, at a minimum, the provision of adequate protection to the co-owners. Id.; 11 U.S.C. §363(e).

The Kellys made no offer of adequate protection of the interest of Ace's Wild, and this Court could not order a turnover to the Kellys' Trustee without adequate protection to Ace's Wild. In the absence of an offer of proof of adequate protection, it is not this Court's responsibility to fashion adequate protection.

Therefore, the Court concludes that turnover is not an appropriate remedy and denies the relief sought by the Kellys and their Trustee.

As to the counterclaim relief sought by the debtor Rohan and Ace's Wild, the Court first must examine the written agreement between the parties. Tr. Ex. 1. The prior agreement concerning ownership and control of Wayward Ace has no effect on this agreement. Moreover, the Court can not consider the alleged oral agreement concerning control over Double the Dosage, to which Mr. Kelly testified, in view of the fact that the written agreement provides at paragraph 5 that it is the "whole agreement" between the parties. The agreement states in the introductory recitals that the Kellys are "interested in owning a controlling interest of 52%," but at paragraph 2 it specifically provides:

In consideration for granting to Nathan and Barbara Kelly a 52% interest in this Colt, Nathan and Barbara Kelly hereby agree to give to Rory K. Rohan and/or his partners and/or his assigns, a choice of 5 weanlings born to various mares impregnated by Stallion Wayward Ace, a horse, formerly owned by Nathan Kelly, No Problem Stables and John Kindley.

It is this contractual provision, along with paragraphs 3 and 4, which is alleged by Rohan and Ace's Wild to have been materially breached. The contract gives the Rohan group the right of choice of five weanlings from a group of seven. After an examination of this contract and the entire circumstances that evolved out of the selection process, the Court has found that the delivery of one incorrect weanling was simply a mistake. The contract speaks of Rohan's right to choose five weanlings, and that choice was made.

It is not clear from the proof whether the weanling was chosen incorrectly by the partnership or whether an incorrect weanling was delivered after a correct choice was made. In either event, there was a mistake rather than a deliberate misrepresentation by the Kellys.

The Court can not find or conclude that the mistake was wilful or the result of gross negligence. The proof established that the two weanlings were virtually identical in appearance. This is emphasized by the fact that Ace's Wild did not know it had received one incorrect weanling until months later when routine blood tests were performed.

At that point in time the parties were capable of rectifying the error by an exchange of horses. An effort was made by Ace's Wild to accomplish this and the demands made in the August 14, 1989 letter from Daniel Kopp to the Kellys do not appear unreasonable. Ace's Wild was insisting upon receiving a healthy colt in exchange for the incorrect one. At that point, communications between the parties had deteriorated. The Court concludes that all parties are at fault for allowing the mistake to linger. Ace's Wild failed to mitigate any damages resulting from the mistaken colt. Ace's Wild, just as the Kellys, had ample opportunity to seek appropriate court action, prior to this adversary proceeding, to accomplish an exchange. Even in this proceeding, neither party sought an exchange of the two horses.

The proof established that no one can know whether a young horse will successfully race until it is trained and attempts to race. There was no attempt by Ace's Wild, other than one letter, to obtain possession of their chosen weanling so that it could be trained. At this point, it is mere speculation that this horse could now be trained to be a winning racehorse. Therefore, any damages to Ace's Wild from the denial of their chosen weanling remain speculative, other than the \$925.00 spent by Ace's Wild in registering the mistakenly delivered colt.

The Court can not conclude, from all the circumstances, that the Kellys' failure to deliver the fifth correct weanling was a material breach of their contractual obligation. There is a failure of Ace's Wild to carry their burden of proof on the materiality of the breach. As stated, the Court finds all parties to be equally responsible for the perpetuation of the mistake which was made.

It follows that the Kellys are entitled to a 52% ownership of Double the Dosage. The Kellys complain that Mr. Rohan obtained a duplicate registration certificate by giving The Jockey Club false information. The Court can not agree. The proof from The Jockey Club's registrar is that The Jockey Club does not require a disclosure of all ownership interests. The Court accepts Mr. Rohan's testimony that, at the time of his application to The Jockey Club, he believed the original certificate had been misplaced. Further, at that time, Mr. Rohan, although mistaken in his conclusion, was of the opinion that the Kellys had forfeited their 52% interest. There was no convincing proof of fraud or willful misrepresentation by Mr. Rohan.

The facts indicate that Mr. Rohan and Ace's Wild made a determination that the Kellys did not have a valid claim to their 52% ownership interest. While it would have been more prudent to seek a judicial determination of that disputed interest, the Court can not conclude that Rohan or Ace's Wild acted negligently with regard to the training or racing of Double the Dosage. The Kellys offered no proof of improper training or racing. Rather, the Kellys seem to only complain that they should have had control over the training and racing. Double the Dosage is, after all, a thoroughbred racehorse, and Ace's Wild has not been shown to have acted improperly in the training and racing, except that Ace's Wild should have either sought a judicial determination of the Kellys' interest or kept the Kellys advised of the locations and activities of Double the Dosage.

Having found that the ownership interests remain at 52% and 48%, the question remains what should be done as to the future ownership of this horse. It is obvious that these parties can not communicate nor agree, and the perpetuation of a joint ownership will merely lead to further litigation. The expenses that all parties have incurred in this bankruptcy litigation can not be justified economically in view of the value of the horse. The Court concludes that the only reasonable remedy is that of partition, as sought by Ace's Wild. See e.g., DiMarco v. King, 139 S.2d 750 (Fla. Ct. App. 1962). The applicable procedure is set out in Florida Civil Practice and Procedures (Fla. C.P.P.) §§64.011-64.091, which applies to personalty as well as realty. See Reed v. Fink, 259 So. 2d 729, 730 (Fla. Ct. App. 1972); Occhuzzo v. Perlmutter, 426 So. 2d 1060, 1062 (Fla. Ct. App. 1983). Because Double the Dosage is obviously not susceptible to actual partition, the Court

concludes that Double the Dosage should be sold at a properly advertised public auction, which auction terms and location shall be determined jointly by Mr. Rohan as representative of Ace's Wild and by Marika Tolz, the Kellys' Trustee. Fla. C.P.P. §64.071, 64.091. This auction should be held at the earliest convenient time.

From the auction proceeds, net of any sales' commission and expenses, the net proceeds shall be applied first to reimbursement to Ace's Wild of its expenses of \$20,235.56 incurred through the date of this trial in maintenance and training of Double the Dosage. In addition, Ace's Wild shall be reimbursed for its reasonable and necessary continuing expenses from the May 24 trial until the date of the auction sale.¹ The Court finds that those expenses were of essential benefit to the horse and thus benefitted all parties. As a result the claim of Ace's Wild against the Kellys' estate is allowed and is to be paid out of the partition sale of the horse. After the reimbursement of the \$20,235.56, plus continuing expenses, to Ace's Wild, the remaining proceeds, if any, shall be allocated 52% to the Kellys' Trustee and 48% to Ace's Wild. However, from the Kellys' Trustee's 52% of net proceeds, the Trustee shall pay Ace's Wild \$925.00 in monetary damages incurred by the partnership in registering the mistakenly delivered fifth weanling. If insufficient funds are realized from the sale to pay Ace's Wild's claims in full, those claims shall be satisfied by the net proceeds received.²

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss, Convert or Appoint a Trustee filed by the Kellys is DENIED;
2. The Motion to Strike a Portion of Dr. Day's Testimony filed by Rohan is GRANTED;
3. The Complaint for Turnover filed by the Kellys is DENIED;
4. The Counterclaim filed by Rohan against the Kellys for material breach of contract is DENIED;

¹ The Kellys' Trustee shall be kept advised of those continuing expenses and may move the Court for relief if the Trustee believes any continuing expenses to be unreasonable or unnecessary. Only the Trustee has standing to so move.

² The Court is treating the claims of Ace's Wild to be claims against the Kellys' 52% interest in Double the Dosage rather than a general claim against other assets.

5. The claims of Ace's Wild against the Kelly's estate are allowed in the amount of \$20,235.56 as to Double the Dosage, as will be amended by continuing expenses, and in the amount of \$925.00 as to the incorrect fifth weanling.

6. The subject of this dispute, Double the Dosage, is to be partitioned by virtue of sale at public auction with the net proceeds applied first to reimbursement of Ace's Wild's allowed claim of \$20,235.56, plus reasonable and necessary continuing expenses associated with Double the Dosage, and any remaining proceeds allocated 52% to the Kellys' Trustee from which \$925.00 is to be paid to Ace's Wild for registration of the incorrect weanling, and 48% to Ace's Wild. Should the net sales proceeds be insufficient to pay the claims of Ace's Wild in full, those claims shall nevertheless be satisfied by the net sales proceeds, and Ace's Wild shall have no further claims against the Kellys' estate.

SO ORDERED this 2nd day of July, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE
SITTING BY ASSIGNMENT

cc:

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