

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

JEREMY ALLEN MAYFIELD and  
MAYFIELD MOTORSPORTS, INC.,

Plaintiffs,

vs.

NATIONAL ASSOCIATION FOR STOCK  
CAR AUTO RACING, INC.; BRIAN  
ZACHARY FRANCE; AEGIS SCIENCES  
CORPORATION; DAVID LEE BLACK,  
Ph.D; and DOUGLAS F. AUKERMAN,  
M.D.,

Defendants.

Hon. Graham C. Mullen  
Case No. 3:09-cv-00220-GCM

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY  
THE PRELIMINARY INJUNCTION PENDING APPEAL**

Defendants National Association for Stock Car Auto Racing, Inc. ("NASCAR"), Brian Z. France, Aegis Sciences Corporation ("Aegis"), David Lee Black, Ph.D, and Dr. Douglas F. Aukerman (collectively "Defendants") submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 62(c) for a stay of the Court's preliminary injunction issued on July 1, 2009, pending appeal from the Court's decision.

**PRELIMINARY STATEMENT**

Defendants respectfully request a stay pending appeal because the Court improperly issued a preliminary injunction lifting NASCAR's suspension of Jeremy Mayfield ("Mayfield"), which prohibited him from participating in NASCAR-sanctioned events. First, the Court failed to apply the appropriate standard applicable to the issuance of preliminary injunctions as set forth by the United States Supreme Court in *Winter v. NRDC, Inc.*, 129 S. Ct. 365 (2008). *Winter* overruled, in

part, the Fourth Circuit’s test announced in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing. Co.*, 550 F.2d 189 (4th Cir. 1977) by requiring that a “plaintiff seeking a preliminary injunction **must** establish that he is likely to succeed on the merits . . . .” *Winter*, 129 S. Ct. at 374 (emphasis added); see *WV Ass’n of Club Owners and Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). The Court’s summary finding of “questions going to the merits, so serious, substantial, difficult and doubtful, as to make them fair ground for litigation . . . ,” July 1, 2009 Hearing Transcript (“Tr. (Doc. 30)”) at 62:16-20 (citing *Blackwelder*, 550 F.2d at 195), was insufficient as a matter of law to grant the injunction.

Second, because the Court failed to apply the correct legal standard, it did not evaluate the likelihood of success of Mayfield’s claims based upon the facts in the record. Specifically, the Court failed to properly consider:

- the reliability of Mayfield’s employees’ assessment that their employer had not ingested methamphetamine;
- the sophistication and sensitivity of Aegis’s drug testing procedures that prevent a false positive result for methamphetamine; and
- the fact that Mayfield’s expert conceded that the level of methamphetamine revealed by Mayfield’s urine test indicates that Mayfield may be a chronic methamphetamine user.

Third, the Court improperly decided without the benefit of *any* evidence in the record that a reliable and accurate same-day test for methamphetamine exists which can ensure Mayfield’s drug-free participation in upcoming NASCAR events. In addition, the Court *sua sponte* took judicial notice of the purported existence of a hair test for methamphetamine. There is no evidence in the record identifying the existence of such test or, if it does exist, whether it can detect a “meth

head” as the Court suggested.<sup>1</sup> NASCAR’s duty to protect the safety of its drivers, teams, and fans cannot be compromised by the Court’s unsubstantiated theories that a same-day test and hair test (1) exist and (2) detect the presence of methamphetamine in a timely manner so as to allow NASCAR sufficient time to ensure that Mayfield is not operating his racecar while under the influence of a drug. Because the record is devoid of evidence of such tests—and because no such reliable and accurate tests exist—the harm to NASCAR’s drivers, teams, and fans cannot be mitigated and therefore outweighs any purported harm to Mayfield. Mayfield continues to pose a threat to public safety, thereby warranting NASCAR’s immediate appeal of this Court’s decision.

For these reasons, Defendants respectfully request that this Court stay its preliminary injunction pending appeal.

## **ARGUMENT**

### **I. LEGAL STANDARD**

In determining whether to stay enforcement of a preliminary injunction pending appeal, a court must consider whether (1) the moving party is likely to prevail on the merits of the appeal and will be irreparably injured absent a stay; (2) the stay will substantially injure the other parties interested in the proceeding; and (3) the stay will serve the public interest. *Capacchione v. Charlotte-Mecklenburg Schools*, 190 F.R.D. 170, 173 (W.D.N.C. 1999); *Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2006). In assessing whether to issue the stay, a court is not required to conclude that its determination was erroneous. *St. Agnes Hosp. of the City of Baltimore v. Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990). Rather, the court must simply determine that the movant has demonstrated that the stay is warranted.

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<sup>1</sup> Notably, NASCAR’s Substance Abuse Policy aims to protect its participants from the effects of any prohibited drug use, not chronic use or drug use that has escalated to someone being considered a “meth head.”

## II. NASCAR IS LIKELY TO PREVAIL ON THE MERITS OF THE APPEAL

### A. The Court Failed to Apply The Appropriate Standard of Law.

In granting the Plaintiffs' motion for a preliminary injunction, the Court relied on a prong of the *Blackwelder* test that has been nullified by both the United States Supreme Court and the Fourth Circuit Court of Appeals. See Tr. (Doc. 30) at 65:6–9. While *Blackwelder*'s balance-of-hardship test remains intact, the portion of the *Blackwelder* analysis that reduces the likelihood of success standard to a mere showing of "serious questions" has been overruled by the Supreme Court. See *Winter*, 129 S. Ct. at 374; *WV Ass'n of Club Owners & Fraternal Servs., Inc.*, 553 F.3d at 298 ("In order to receive a preliminary injunction, a plaintiff 'must establish that he is likely to succeed on the merits . . . .'" (citing *Winter*)).

Prior to *Winter*, the Fourth Circuit noted that the *Blackwelder* test was inconsistent with the Supreme Court's precedent:

*Blackwelder*'s emphasis on the balancing of the harms rather than the likelihood of success has been criticized, even within this court, as inconsistent with Supreme Court precedent. . . . Of course, 'a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can do that. . . .' Moreover, because we conclude that the preliminary injunction was improperly issued under the *Blackwelder* formulation, we leave a re-examination of the *Blackwelder* approach for another day.

*Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 n.2 (4th Cir. 2002) (internal citation omitted).

As the Fourth Circuit correctly predicted, the Supreme Court implicitly overruled *Blackwelder* to the extent it dispensed with plaintiff's burden to make a clear showing of likelihood of success, holding that a "plaintiff seeking a preliminary injunction **must establish that he is likely to succeed on the merits.** . . ." *Winter*, 129 S. Ct. at 374 (emphasis added); *Musgrave*, 553 F.3d at 298. Had this Court applied the correct standard to Mayfield's motion for a preliminary injunction, his failure to show a likelihood of success on the merits would have precluded the injunction. The

Court's reliance on the incorrect legal standard is reversible error, which necessitates NASCAR's appeal. *See United States v. Blackwood*, 735 F.2d 142, 146 (4th Cir. 1984) (reversible error for fact finder to use incorrect legal standard).

**B. Under The *Winter* Standard, Mayfield Was Not Entitled To An Injunction.**

Had the Court applied the correct standard of law, the injunction would have been denied because Mayfield cannot demonstrate that he is likely to succeed on the merits of his claims. Mayfield, who based his motion exclusively on his breach of contract and negligence claims (Plaintiffs' Brief ("Pls. Br. (Doc. 20)") at 12), cannot prevail because Aegis and NASCAR had no obligation to test Mayfield's urine samples in accordance with federal guidelines governing federal agencies. Mayfield also derives no rights from a contract to which he is not a party and has not shown, and cannot show, that he was harmed by the manner in which Aegis tested the Mayfield sample.

1. *Aegis And NASCAR Owed Mayfield No Duty To Follow The Federal Guidelines For Federal Agencies.*

Mayfield claims that Aegis is obligated, by contract or otherwise, to perform drug testing in conformity with procedures set forth in federal guidelines for federal agencies. *See* Complaint ("Compl. (Doc.1-2)") ¶¶ 84-97. Aegis's random and anonymous testing of Mayfield was conducted in accordance with Aegis's chain-of-custody procedures set forth in the Affidavits of Thomas L. Carter ("Carter Aff. (Doc. 21-6)") ¶¶ 9-18), Mike Roberts ("Roberts Aff. (Doc. 21-7)" ¶¶ 9-13), and Dr. David L. Black ("Black Aff. (Doc. 21-2)") ¶¶ 25-27). Mayfield confirmed the propriety of these procedures and certified that his sample was properly collected and sealed. *See* Carter Aff. (Doc. 21-6) Ex. 2, Mayfield certification stating that "I certify that I provided my urine to the collector . . . ; that *each specimen bottle used was sealed with a tamper-evident seal*

*in my presence* and that the information provided on this form and on the label affixed to each specimen bottle is correct” (emphasis added).

Aegis’s procedures are consistent with the United States Anti-Doping Agency’s and the World Anti-Doping Agency’s procedures, which are followed by the National Football League, Major League Baseball, National Hockey League and other sports groups with testing programs addressing drug use. The Federal Mandatory Guidelines for Federal Workplace Drug Testing Programs (the “Federal Workplace Guidelines”) are inapplicable to the drug testing procedures that Aegis follows on behalf of NASCAR.

NASCAR’s drug testing is conducted by Aegis, a laboratory which is certified by the Substance Abuse and Mental Health Services Administration (hereinafter “SAMHSA”), an agency of the United States Department of Health and Human Services. Aegis’s procedures have been reviewed, inspected, and certified for over eighteen years and meet standard practices for proper forensic analysis. Black Aff. (Doc. 21-2) ¶ 10. SAMHSA certification does not require that a SAMHSA-certified laboratory follow the Federal Workplace Guidelines when performing tests in venues *other than* federal agencies. Affidavit of Kenneth C. Edgell (“Edgell Aff. (Doc. 21-5)”) ¶¶ 6-8. The Federal Workplace Guidelines govern—as the name indicates—*federal* workplaces. See Mandatory Guidelines for Federal Workplace Drug Testing Programs 69 Fed. Reg. 19644, 19654 (Apr. 13, 2004). They “do not . . . govern a laboratory’s duties to private employers.” *Cooper v. Lab. Corp. of Am. Holdings*, 150 F.3d 376, 379 (4th Cir. 1998). NASCAR does not have an obligation to test in accordance with the Federal Workplace Guidelines in its agreements with drivers. The Federal Workplace Guidelines are not mentioned in the Substance Abuse Policy, which states only that testing will be performed at facilities that are “*certified* by the Substance Abuse and Mental Health Services Administration . . . and/or by the College of American

Pathologists Forensic Urine Drug Testing Program.” NASCAR’s Answer and Counterclaims (“NASCAR’s Answer (Doc. 3-1”), Ex. 1 at 4 (emphasis added).

Because a failure to follow the guidelines for federal agencies is insufficient to show a breach of any duty, and because Plaintiffs do not base their claims on any other standard, Plaintiffs failed to clearly show both the existence and a breach of any duty.

Even if the NASCAR-Aegis contract obliged Aegis to follow the rules for federal agencies rather than those for sports drug testing laboratories—which the contract does not do—this Court never made a finding as to how Mayfield could have any rights under a contract to which he is not a party. *See Greenacre Props., Inc. v. Rao*, 933 So.2d 19, 23 (Fla. Dist. Ct. App. 2006) (“As a general rule, a person who is not a party to a contract cannot sue for a breach of the contract even if the person receives some incidental benefit from the contract.”). Maintaining a contract action as a third-party beneficiary requires proof of a clear or manifest intent of the parties that the contract “primarily and directly” benefits the third party. *Health Options, Inc. v. Palmetto Pathology Servs.*, 983 So.2d 608, 615 (Fla. Dist. Ct. App. 2008), *review denied*, 994 So.2d 1104 (Fla. 2008). The NASCAR-Aegis agreement expresses no intent to benefit drivers or owners and, instead, expressly provides that Aegis’s services “are intended to assist NASCAR in the application and implementation of the [Substance Abuse] Policy. . . .” Defendants’ Opposition Brief (“Defs. Opp. Br. (Doc. 27)”), Ex. 6 at 2. The NASCAR-Aegis agreement also contains a secrecy clause that even precludes disclosure of its existence to drivers like Mayfield, and is inconsistent with an intention to confer any benefits on Mayfield or the hundreds of other NASCAR drivers or owners. Therefore, Mayfield will be unable to show that he was an intended third-party beneficiary under the NASCAR-Aegis agreement.

2. *Mayfield Cannot Prove That Aegis's Procedures Caused Him Harm.*

Mayfield's contract and negligence claims both require proof of causation. *See Poinsettia Dairy Prods., Inc. v. Wessel Co.*, 166 So. 306, 310 (Fla. 1936) (damages must result from defendant's breach of contract); *Peace River Elec. Coop. v. Ward Transformer Co.*, 449 S.E.2d 202, 214 (N.C. Ct. App. 1994) (negligence requires a cause-in-fact connection, as well as proximate causation, between plaintiff's injury or loss and defendant's breach of a duty of care toward plaintiff). Causation requires, at a minimum, that "the injury would not have occurred but for the defendant's negligence." *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 606 (N.C. Ct. App. 1998).

In order for Mayfield to show that Aegis's testing caused a false positive for methamphetamine, he would have to show that both Sample A and Sample B were false positives. Since the results for Sample B were exactly the same as for Sample A, that inquiry must necessarily focus on Sample A, *not* on Sample B and whether or not it was sealed or used for testing at Mayfield's own request. Mayfield has offered absolutely no evidence—and there is none in the record—that would make adulteration or a mix-up of samples even plausible. Further, Aegis's testing equipment and testing protocols are far too sophisticated to mistake a combination of Claritin-D and Adderall for methamphetamine.<sup>2</sup> Notwithstanding the testing results by Aegis, an independent lab re-confirmed the results which indicated that methamphetamine was present in Mayfield's samples. Affidavit of Mitchell LeBard ("Lebard Aff. (Doc 21-11)") at ¶ 6, pp. 6-7. A

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<sup>2</sup> Mayfield's experts' suggestions that the Sample A results are inconsistent (Affidavit of Harry Plotnick ("Plotnick Aff. (Doc. 20-12)") ¶ 15, Affidavit of Janine Arvizu ("Arvizu Aff. (Doc. 20-7)") ¶ 11) are mistaken. Aegis uses a high test threshold of 100,000 nanograms per milliliter for the Amphetamine Class Assay. This particular test is unlikely to detect the presence of methamphetamine or amphetamine, but will detect the overuse of over-the-counter drugs such as pseudoephedrine. The results of the amphetamine and methamphetamine testing conducted on Mayfield's samples are properly reported in the report. Black Aff. (Doc. 21-2) ¶ 54.

second test at an independent laboratory again confirmed that the positive test result was not the product of a false positive.

It was clear error for this Court to disregard the testing methods of a SAMHSA-certified laboratory like Aegis—which uses the most sophisticated scientific testing equipment and testing protocols in the United States—and ignore an impeccable chain-of-custody, in favor of self-serving affidavits from Mayfield’s employees opining that Mayfield did not “appear” to be under the influence of methamphetamine the day he was tested. Moreover, Mayfield’s own expert concedes that the level of methamphetamine found in Mayfield’s urine sample may indicate that Mayfield is a chronic methamphetamine user, Affidavit of Harold Schueler (“Schueler Aff. (Doc. 29)”) ¶ 13, further suggesting that the test is accurate, and not a false positive. The evidence in the record demonstrates that Mayfield will be unable to identify a flaw in Aegis’s testing procedure that caused a false positive result and actually caused harm to Mayfield. Thus, Mayfield cannot prove any likelihood of success on his claims. The Court’s failure to make proper factual findings about any flaws in the tests regarding Mayfield’s use of methamphetamine is reversible error. *See McGough v. Nalco Co.*, 203 F. App’x 450, 455-456 (4th Cir. 2006) (reversing the trial court’s decision on a motion for a preliminary injunction for failure to properly make findings of fact).

C. **The Court’s *Sua Sponte* Introduction Of Facts Not In The Record Was Reversible Error.**

This Court unjustifiably minimized the harm that NASCAR is likely to suffer as a result of the injunction based on the Court’s *sua sponte* finding that such harm can be mitigated by determining whether Mayfield is a “meth head” through testing of hair samples. Tr. at 64:5-14. *There is no evidence in the record to support this Court’s finding that a reliable hair test exists to test for methamphetamine.* In addition, the Court stated that NASCAR’s potential harm can be mitigated by conducting tests on Mayfield “before, during, and after the race.” Tr. at 64:7-8.

*There is no evidence in the record to support the Court's finding that a reliable test for methamphetamine can be conducted from collection to result in less than four days. A district court judge cannot take "judicial notice" of facts not in the record by relying on his personal experience. See United States v. Berber-Tinoco, 510 F.3d 1083, 1091 (9th Cir. 2007) ("A trial judge is prohibited from relying on his personal experience to support the taking of judicial notice." (citation omitted), cert. denied, 129 S. Ct. 105 (2008); see also Storm Plastics, Inc. v. United States, 770 F.2d 148, 155 (10th Cir. 1985) (trial court improperly substituted its own independent view rather than basing its decision on evidence in the record); Fed. R. Evid. 201(b) (judicial notice only proper if fact is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").*

Accordingly, the Court based its decision to grant a preliminary injunction on a *sua sponte* factual finding that is contrary to the facts in the record. Such a clear error is grounds for reversal and further demonstrates that NASCAR is likely to succeed on the merits of its appeal. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 815 (4th Cir. 1991) (factual findings are clearly erroneous and merit reversal if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (citation omitted)).

### **III. NASCAR WILL SUFFER IRREPARABLE HARM IF A STAY IS DENIED**

NASCAR has no effective method to protect itself against the safety hazards caused by Mayfield's drug use while participating in NASCAR events, and will therefore be irreparably harmed if a stay is not granted. As a sanctioning body for stock car racing, NASCAR acts in the best interests of the participants in NASCAR events—including millions of spectators annually. NASCAR's ability to test for mind-altering drugs that would make a driver on any road—much

less a racecar driver on a speedway—a lethal danger to himself and others is completely reliant on its Substance Abuse Policy. The immediate reversal of Mayfield’s suspension will have severe consequences for the public’s safety at NASCAR events.

As a result of Mayfield’s presence on the track and what is now publicly known about his drug use, NASCAR faces resistance from other drivers refusing to put their lives at risk with Mayfield on the track. In response to the Court’s ruling, one Sprint Cup Series driver, Jeff Burton, was unequivocal in stressing his safety concerns: “One thing I disagree with the judge on, my safety is important to me. . . . He potentially put my safety in jeopardy by that decision.” David Newton, *Drivers don’t know what to think now*, ESPN.com (updated July 2, 2009, 9:12 pm ET), [http://sports.espn.go.com/rpm/nascar/cup/columns/story?columnist=newton\\_david&id=4303616](http://sports.espn.go.com/rpm/nascar/cup/columns/story?columnist=newton_david&id=4303616). If too many drivers refuse to race out of concern for their safety, which NASCAR cannot now protect, NASCAR’s relationships with the drivers, fans, sponsors, and broadcasters will be irreparably damaged.

#### **IV. OTHER INTERESTED PARTIES WILL ALSO BENEFIT FROM A STAY**

The Court must determine whether the issuance of the stay will substantially injure the other parties interested in the proceeding. *Capacchione*, 190 F.R.D. at 173. The “other parties” to be considered include similarly situated third parties. *Id.* at 173, 175. The interests of other drivers, as well as pit crew members, NASCAR officials, and fans are clearly served with a stay.

Mayfield’s own financial interests cannot outweigh the public’s safety interests.<sup>3</sup> Neither the injunction nor a stay will affect Mayfield’s reputational loss, which he claims (without any evidence) to have suffered prior to initiating this litigation. Compl. (Doc.1-2) ¶¶ 74-76, 98-107.

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<sup>3</sup> It is clear that Mayfield misled the Court about the need for a preliminary injunction to protect his livelihood given that—contrary to his representations to the Court—he failed to seek eligibility for the Fourth of July NASCAR race.

Mayfield has made *no showing* of any loss of sponsorships. Any revenue losses in the form of prize monies are either speculative, or alternatively, may be compensated through a monetary award. *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974) (except in “genuinely extraordinary” circumstances, loss of earnings cannot be a basis for a finding of irreparable injury); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 530 (4th Cir. 2003) (even “an absolute certainty” that plaintiff “will have lost forever its right to compete, and the opportunity to prevail . . . ” against his competitor is insufficient to identify a “present irreparable harm justifying the grant of preliminary injunctive relief” (citation omitted). Accordingly, the balance of others’ interests weighs decidedly in favor of a stay.

## **V. A STAY IS IN THE PUBLIC’S INTEREST**

A stay pending appeal from the preliminary injunction serves the public interest because this Court’s incorrect *sua sponte* scientific determinations fail to mitigate any of the public safety concerns presented in the record. *See, e.g., Snap-N-Pops, Inc. v. Browning*, 432 F. Supp. 360, 364 (E.D. Va. 1977) (holding that the public has an “interest in maintaining the safety of the citizenry”). A drug testing policy like NASCAR’s, which is specifically designed to test those who could endanger the safety of others if their perception and judgment is impaired by drug use, serves to guard against “*substantial*” *possible harm to the public*, who should not have to bear the risk that people are placed in positions where they may act with deadly force. *Nat’l Treasury Empl. Union v. Von Raab*, 489 U.S. 656, 670-671 (1989) (emphasis added); *see Guerra v. Scruggs*, 942 F.2d 270, 275 (4th Cir. 1991) (injunction reversed where harm to discharged service member, who tested positive for cocaine, did not outweigh substantial harm to the military). Because the Court opined that NASCAR could rely upon drug tests which do not exist, NASCAR cannot ensure that Mayfield is not under the influence of methamphetamine

when he participates in NASCAR events. Thus, NASCAR cannot effectively ensure the public's safety. The public interests served by the viability of NASCAR's Substance Abuse Policy favor a stay of this Court's injunction pending appeal.

### CONCLUSION

For the foregoing reasons, Defendants' motion for a stay of the preliminary injunction pending appeal should be granted.

Dated: July 6, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he is an attorney licensed to practice law in the State of North Carolina, is attorney for National Association for Stock Car Auto Racing, Inc., Brian Zachary France, Aegis Sciences Corporation, David Lee Black, Ph.D, and Douglas F. Aukerman, M.D. and is a person of such age and discretion as to be competent to serve process.

That on July 6, 2009, he filed Defendants' Memorandum of Law In Support of Motion to Stay Preliminary Injunction with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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