UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9426

ADMINISTRATIVE LAW JUDGE: **D. MICHAEL CHAPPELL**

IN THE MATTER OF:

JONATHAN WONG **APPELLANT**

AUTHORITY'S REPLY TO APPELLANT'S LEGAL BRIEF AND PROPOSED CONCLUSIONS OF LAW

Comes now the Horseracing Integrity and Safety Authority ("**HISA**") pursuant to the briefing schedule of the Administrative Law Judge, dated March 1, 2024, and submits the following Reply to Appellant's Legal Brief and Proposed Conclusions of Law, dated March 15, 2024.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of HISA's Reply is being served on March 25, 2024, via Administrative E-File System and by emailing a copy to:

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I. OVERVIEW

On March 15, 2024, Appellant submitted his Legal Brief and Proposed Conclusions of Law. The Horseracing Integrity and Safety Authority, Inc. ("**HISA**" or the "**Authority**") submits this Reply in response to Appellant's submissions. Defined terms not defined herein have the meaning given to them in HISA's Legal Brief and Proposed Conclusions of Law.

Appellant has not advanced any credible arguments for challenging or impugning the detailed, logical, and evidence-driven decision of Arbitrator Hon. Nancy Holtz (the "**Arbitrator**").

II. SUFFICIENT EVIDENCE ESTABLISHES LIABILITY

There is no merit to any of Appellant's suggestions that either the A Sample analysis conducted by Industrial Laboratories ("**Industria**l") or the B Sample analysis conducted by the University of Illinois at Chicago Analytical Forensic Testing Laboratory ("**UIC**") were invalid, or that there is any ground to establish that Appellant's Adverse Analytical Finding ("**AAF**") was reported by either Laboratory in error.

As previously noted, Appellant's own expert confirmed that Metformin was present in the Covered Horse and her Samples, clearly demonstrating that, even if there were Laboratory errors, these did not cause the AAF. In any event, the alleged errors are inconsequential and of no moment. Each of Appellant's arguments are addressed below.

A. No Basis to Challenge Sample Chain of Custody or Storage

Appellant's focus on the A and B Sample's chain of custody and storage procedures is misguided, and his arguments in this respect were extensively addressed at the hearing and rejected in the Final Decision. Under the ADMC Program it is not sufficient for Appellant to establish a

break in the chain of custody; rather, he must also demonstrate that the departure from a rule regarding chain of custody could have reasonably caused the AAF.[1]

Appellant has failed to establish any departures from the chain of custody standards. First, the A Sample's chain of custody is substantiated via the FedEx airbill provided by Industrial,[2] demonstrating that the A Sample was shipped from the Racetrack to Industrial overnight on June 2, 2023. This occurred only one day after the Sample's collection. There is no indication that Horseracing Integrity & Welfare Unit ("**HIWU**") personnel, who collected the Samples, improperly stored them between June 1 and June 2, 2023, and the Sample Collection Form provides ample means to trace and confirm the authenticity of the Sample shipped to Industrial.[3]

Second and similarly, the B Sample chain of custody is not in issue. Following A Sample testing, Industrial shipped the B Samples to UIC on July 10 and July 18, 2023, as documented in B Sample release forms filled out and signed on the date of shipment, with FedEx tracking number included.[4] Both were sent overnight, and received by UIC on July 11 and July 19, 2023, as reflected in the Laboratory Package and Courier Check-In Sheets.[5] The geographic location of the Samples at any given point is therefore not in dispute.

Third, in regard to the allegations about storage of the Samples, each of the Laboratory directors (Petra Hoffman of Industrial, Brendan Heffron of UIC, and Dr. Benjamin Moeller of Kenneth L. Maddy Equine Analytical Chemistry Lab (the "**UC Davis Lab**")) testified that Samples

[1] ADMC Program Rule 3122(c) for Laboratory chain of custody and Rule 3122(d) for test barn chain of custody.
[2] Industrial A Sample Laboratory Packet, Exhibit E to Hartmann Statement, HAB, Tab 23.11, p. 334.
[3] HIWU Notice Letter, Exhibit A to Lee Statement, HAB, Tab 23.13, p. 433.
[4] DTS Release form for B Urine Sample and B Blood Sample, respectively, Exhibits F and H to Hartmann Statement, HAB, Tab 23.11. As canvassed in the Final Decision, the delay between the shipment of the Blood and Urine Sample was due to an inadvertent oversight which was quickly remedied. *See* Exhibit G to Hartmann Statement, HAB, Tab 23.11.
[5] UIC B Sample Laboratory Packet, Exhibit E to Heffron Statement, HAB, Tab 23.16, pp. 482-483, Courier Logs, Exhibits H and I to Heffron Statement, HAB, Tab 23.16.

were stored in a secure refrigerator while not being tested, in compliance with ADMC Program Rule 5510, and that each Laboratory's respective Standard Operating Procedure ("**SOP**") was complied with in terms of documenting and tracking the Samples' access and storage.

There is no requirement in Rule 5510 that each aspect of these procedures must be documented in the Laboratory Package, and no evidence or suggestion that the "integrity, identity, or security" of the Samples was compromised in any manner at any point during the testing process. The Samples' code numbers were authenticated and confirmed throughout, leaving no doubt as to their provenance or validity. The Arbitrator was therefore satisfied that "all of the information necessary to document the chain of custody exists somewhere in the laboratories' documentation."[6] In other words, the documentation provided by Industrial and UIC enables "accounting for the sample's handling from the time it was first collected until the time it was analyzed,"[7] as requested by Appellant.

In addition to the detailed shipping documents provided, bearing dates of shipment, Sample codes, tracking numbers, and testing and reviewing scientists' signatures, three witnesses with knowledge authenticated the Samples through *viva voce* testimony. The cases cited by Appellant do not assist him, and, conversely, support the Agency's position. *Rabovsky v. Com*., 973 S.W.2d 6 (Ky. 1998), for example, reverses a murder conviction where there was a "total failure" to establish a chain of custody for the victim's blood. Leaving aside the asymmetry between these administrative proceedings and criminal murder charges, it cannot be said that there was a "total failure" to trace the Samples' movement.

[6] Final Decision at para. 7.10, HAB Tab 3, page 76.
[7] Appellant's Legal Brief at p. 4.

Moreover, the applicable legal standard, which Appellant attempts to obfuscate, is very different: departure from any provisions of the Program "shall not invalidate analytical results or other evidence of a violation, and shall not constitute a defense to a charge of such violation" unless Appellant can establish that that departure "could reasonably have caused" the AAF.[8] Appellant has not even attempted to show that his chain of custody and storage complaints could have reasonably caused the AAF.

Finally, Appellant's concern with due process is misguided. Appellant raised for the first time his issues with the Samples' chain of custody in his January 4, 2024 Motion to Exclude Evidence. This motion was filed two business days before the hearing, despite being grounded almost exclusively on facts which were known by Appellant weeks, if not months, in advance of the motion's filing. This effort to invalidate and exclude the A and B Sample testing was rightly rejected by the Arbitrator for various reasons, including the lateness of the motion.[9]

In sum, there can be no serious argument over the Samples' integrity, and there is no evidence to remotely suggest that due process, insofar as it is pertinent in this context, was not provided in the collecting, storing, transporting, testing, or reporting of the Samples. In any case, none of the issues raised by Appellant could reasonably have caused his AAF, as required to avoid liability under the ADMC Program.

B. UIC's Results are Valid

Appellant's sole additional assertion regarding UIC's results involves postulating the meaning of "technical" and "independent" review and implies that UIC altered its Laboratory

[8] ADMC Program Rule 3122(c) for Laboratory Standards (including Laboratory chain of custody) and Rule 3122(d) for other Standards (including test barn chain of custody).
[9] Wong's Motion to Dismiss or to Exclude Sample Evidence dated January 4, 2024, HAB, Tab 58; Order denying Motion to Dismiss or to Exclude Sample Evidence dated January 5, 2024, HAB, Tab 16.

Package between August 14 and August 23 with no support for this assertion. This, as well as his other UIC-specific arguments advanced at the hearing, was addressed and rejected by the Arbitrator.

The two Certifying Scientists who signed off on UIC's detailed Laboratory Report, as required under Rule 6315(b), were Brendan Heffron and Marc Benoit. Appellant's attempts to impugn this finding are risible, as 1) "independent" in this context refers to the "review" and not the "reviewer", meaning that the scientists' respective reviews must be independent of each other, rather than the reviewers both being independent of the testing (which would be logistically impossible), 2) the Rule requires "evidence of the review and approval," which is present throughout the UIC Laboratory Package, and 3) there were no substantive changes made to UIC's documentation that would have had any bearing on the scientific analysis or result, and which would have required a re-review following final certification by Mr. Heffron on August 23, 2023.

Appellant's focus on trivialities obscures the overriding legal standard and factual conclusions: that UIC followed its SOPs and relevant ADMC Program Rules and was in compliance with the applicable Laboratory Standards. Any deviations were not material and could not have reasonably caused the AAF. There is reasonable no basis to challenge UIC's substantive finding of Metformin in Heaven and Earth's Samples.

C. UC Davis' Results are Admissible

Appellant's contention that UC Davis' Further Analysis was wrongly permitted ignores the purpose of such analysis, and ignores that fact that, having made a multitude of arguments regarding the validity of Industrial and UIC's testing, Appellant should have welcomed a chance to prove his theory as to the allegedly wrongful finding of Metformin.

As detailed in HISA's Legal Brief, Rule 3138(b) permits the assistance of Further Analysis in order to confirm that a Banned Substance has been properly detected. This is the case under both the existing and proposed definition. Moreover, Appellant has no answer to Rule 6313(b)(2), which allows the Agency to choose which Laboratory will conduct the Further Analysis. The Agency's desire to refine its Rules to provide greater clarity to Covered Persons and other stakeholders does not alter the fundamental meaning of Further Analysis, nor does it provide any reason for challenging the Arbitrator's grant of permission in this regard.

D. None of the Issues Raised Could Have Caused the AAF

Appellant's submissions confuse and mischaracterize the import of ADMC Program Rules 3122(c) and (d). There is no merit to the suggestion that HISA's application of these provisions seeks to obviate the Agency's requirement to "present evidence to support its charge" or to provide the requisite level of due process to Covered Persons.

In keeping with the universe of established anti-doping precedent and legislation,[10] Rule 3122(c) presumes laboratory compliance with testing procedures, which can only be defeated where a departure is: 1) proven; and 2) can reasonably be the cause of an AAF. An equivalent provision in Rule 3122(d), which Appellant continues to ignore, covers all other rules and standards in the ADMC Program. Were it not so, then every Covered Person charged with an AAF would be insulated from liability behind a litany of unduly technical and specious defenses, which would undermine the dual purposes of the ADMC Program to protect horse welfare and the integrity of the horseracing industry.

[10] CAS 2021/ A/7833 *Raul Alarcon Garcia v. Union Cycliste Internationale*, at paras. 88, 90; CAS 2020/A/7510 *Daniel Kinyua Wanjiru v. World Athletics,* at paras. 70, 106, 112; CAS 2017/A/4974 *Lei Cao v. International Olympic Committee*, at paras. 78-81.

These Rules codify Appellant's own point, that reliability of result is "what matters most." The cases Appellant cites for the principle that an Agency must follow its own rules are not applicable in that they are not decided under the ADMC Program or the analogous international anti-doping regime. In any event, these decisions involve egregious departures from statutes and, far from assisting Appellant, highlight how innocuous the issues he complains of are,[11] assuming, *arguendo*, that they reflect any departure from the Rules at all.

Indeed, Appellant does not even attempt to argue that any of the issues he raises can be said to reasonably have caused his AAF under either Rule 3122(c) or (d), nor does he acknowledge that his own expert conceded this point. Appellant is consequently forced to rely on mischaracterization in his submissions: he writes that "Appellant's expert testified [that UIC's aliquot procedure] "could have caused [a] false positive."[12] However, the full text of paragraph 2.108 of the Final Decision clarifies that:

> Dr. Sams notes the process followed by Heffron, utilizing pipettes instead of decanting, presumably wearing gloves and using only clean pipettes.[13] Assuming this to be the case, Dr. Sams opines that the risk of contamination is very low. To Dr. Sams, Heffron's inserting of a pipette directly into B sample could have caused false positive if it contaminated the B sample. But while this is possible it is not probable in this case. (Emphasis added).

Moreover, under Rule 3122(c), even if Appellant can establish that the departure could reasonably have caused the AAF (which is denied), HIWU discharged its burden to prove that the departure did not cause the AAF. Dr. Sams admitted that Metformin was present in the Covered

[11] *E.g., Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010), involving an agency which neglected to inform a petitioner of their right to counsel; *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011), involving an agency which failed to ensure compliance with nondiscrimination obligations; *Wilson v. Comm'r of Soc. Sec.,* 378 F.3d 541 (6th Cir. 2004), involving an agency which failed to provide reasons for rejecting a disability claim.
[12] Appellant's Legal Brief at p. 10.
[13] As described in the Agency's Legal Brief, UIC's aliquot and decantation procedure was the only alleged laboratory error that constituted a departure from the Rules. However, there is no evidence that this error could have reasonably caused the AAF, as required under Rule 3122(d).

Horse, such that none of the technical errors alleged by Appellant could not and did not cause the AAF.

The admissibility of the scientific evidence in this case was amply proven by reference to the wealth of documentation available, applicable SOPs, international laboratory standards and audit compliance requirements, and testimony of three experienced scientists with personal knowledge of the testing underpinning Appellant's AAF. In light of this cogent, exhaustive evidence, it is readily apparent that the analytical testing was the "product of reliable principles and methods that have been reliably applied in this case."[14] The strict compliance which Appellant advocates for is taken seriously by the Agency, but it is not reflected in the ADMC Program Rules and does not serve as the benchmark for establishing his liability.

III. SANCTIONS IMPOSED WERE REASONABLE AND IN ACCORDANCE WITH LAW

Appellant provides no real arguments to challenge the period of Ineligibility or quantum of fine imposed, instead relying on the blanket assertion that liability was improperly found and thus no sanction at all is supportable. However, as each Laboratory's analytic testing is valid and admissible and Appellant was unable to establish the source of the Banned Substance,[15] the required sanction under Rule 3223(b) cannot be mitigated. HIWU and HISA followed their own Rules, as must Appellant. There is no basis to challenge Appellant's Anti-Doping Rule Violation and therefore no basis to modify the Consequences imposed. This appeal must be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th day of March, 2024.

[14] *Id*., citing *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021) (quoting Fed. R. Evid. 702).
[15] Appellant has now abandoned his theories of contamination, in essence conceding that if he cannot prove that any of his purported laboratory errors caused the ADRV, both the liability and resulting sanction must stand.

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