PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9430

ADMINISTRATIVE LAW JUDGE: **DANIA L. AYOUBI**

IN THE MATTER OF:

W. BRET CALHOUN **APPELLANT**

THE AUTHORITY'S RESPONSE TO APPELLANT'S STATEMENT OF CONTESTED FACTS

PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the Authority's Response is being served on June 3, 2024, via Administrative E-File System and by emailing a copy to:

Hon. Dania L. Ayoubi
Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington DC 20580
via e-mail to Oalj@ftc.gov

Clark O. Brewster
Brewster & De Angelis
2617 East 21st Street
Tulsa, OK 74114
via email to cbrewster@brewsterlaw.com

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Via email: electronicfilings@ftc.gov

Joseph C. De Angelis
Brewster & De Angelis
2617 East 21st Street
Tulsa, OK 74114
via email to jcdeangelis@brewsterlaw.com
Attorney for Appellant

/s/ *Bryan Beauman*
Enforcement Counsel

The Horseracing Integrity and Safety Authority[1] (the "**Authority**") files this Response to Appellant's Statement of Contested Facts.

The Federal Trade Commission (the "**Commission**") approved the Authority's Anti-Doping and Medication Control Program (the "**ADMC**") in May 2023, the dual purpose of which was to improve the integrity of horseracing by discouraging doping practices and to protect the safety and welfare of covered horses. As outlined in the Horseracing Integrity and Safety Act of 2020 (the "**Act**"), which established the Authority, and laid the groundwork for the ADMC Program, before the ADMC Program could go into effect, each rule within it had to be made available for public comment and then approved by the Commission *without exception*.[2] If the Commission disliked a rule, it had (and still has) the authority to abrogate, add to, or modify the rule before approving it.

The Authority can only adhere to and implement the rules that the Commission determined were necessary for protecting the integrity and welfare of horseracing and ensuring a safe path forward for horses involved in the sport. The ADMC Program was established to ensure a *uniform* application of rules and standards. *See* Rule 3010. Thus, the Authority is tasked with safeguarding the interests of all interested parties (e.g., those who competed against or finished behind the Covered Horse at issue). As a result, the Authority does not have to "justify to the Commission" rules that the Commission itself has approved. *See* Appellant's Brief p. 2 FN 1.

[1] Appellant incorrectly identifies the Authority as "a federal administrative agency." It is a self-regulatory, non-profit organization. *See* 15 U.S.C §§ 3051-3060. While the Commission approves the Authority's budget, it does not fund the Authority. It is funded by the Thoroughbred horseracing industry. The Horseracing Integrity & Welfare Unit is the enforcement organization for the Authority's ADMC Program.

[2] *See*, 15 U.S.C. 3051-3060, Sec. 6(a)(1) ("[A]fter notice and an opportunity for public comment in accordance with section 4, the Authority shall establish a horseracing anti-doping and medication control program applicable to all covered horses, covered persons, and covered horseraces in accordance with the registration of covered persons under section 5(d)."); *see also*, *id.* at Sec. 4(a) ("The Authority shall submit to the Commission…any proposed rule . . . of the Authority relating to…a list of permitted and prohibited medications, substances, and methods….a process or procedures for disciplinary hearings…").

The Authority may establish the facts of a violation by "any reliable means" including submission of laboratory documentation packages and accompanying certificates of analysis. *See* Rule 3122. In this instance, the Authority met its burden to the *comfortable satisfaction of the hearing panel*. *See* Rule 3121(a).

It is inaccurate for Appellant to assert that the Agency (1) needs to establish an internal Chain of Custody, (2) needs to establish Laboratory Chain of Custody, or (3) that, *if* the Agency failed to establish either, the AAF would be *automatically* invalidated.

Pursuant to Rule 3112, "Laboratories are presumed to have conducted Sample analysis *and custodial procedures* in accordance with the Laboratory Standards." "Compliance with the Laboratory Standards in effect at the time of Sample analysis…shall be sufficient to conclude that the procedures covered by the Laboratory Standards were performed properly." *See* Rule 6010(c).

Here, Appellant argues that the Kentucky Laboratory was not fit for low level estimations. A Covered Person may overcome this presumption by the balance of probabilities (*See* Rule 3121(b)), by establishing that a departure from the Laboratory Standards could *reasonably* have caused the Adverse Analytical Finding ("**AAF**"). As support for his assertions regarding laboratory failures, Appellant provides "demo" slides presented at the evidentiary hearing which raise propositions and cite to an expert report which the IAP considered and declined to admit. *If* the Covered Person establishes a departure, which was not done in this instance, the Agency then has the burden of showing that such departure did not cause the AAF.

Appellant cites Rule 3342 as a red herring but overlooks the relevant portions of this Rule. The *Agency* conducts this review and makes the relevant determinations. The Agency *may*, but does not have to, communicate with the Responsible Person and Owner during such a review. *See* Rule 3324(a). *If* the review reveals an apparent departure, the Agency shall promptly inform the Responsible Person and each Interested Party. *See* Rule 3342(b). *However*, if the initial review of an Adverse Analytical Finding under Rule 3342(a) does not reveal *an apparent departure that*

caused the Adverse Analytical Finding, the Agency *shall* promptly send an ECM Notice to the Responsible Person and each Interested Party in accordance with Rule 3342. *See* Rule 3342(c).

Appellant does what he accuses the Agency of: picks and chooses the provisions of the ADMC Program, (and individual Rules) he wishes to have applied. The Rules approved by the Commission are not arbitrary or capricious, nor is the Agency's application of them. Appellant would, however, have the Agency, the IAP, or the ALJ apply the Rules in a manner which would benefit only him and would take away the fairness upon which the ADMC Program was founded.

Again, Appellant has failed to identify any new supplemental evidence which the IAP failed to consider, simply restating the arguments and facts presented in his Application for Review and Stay.

The Authority therefore moves the Commission to uphold the Final Decision of the IAP and limit the ALJ's review to briefing or oral argument.

While the Authority contends that the IAP appropriately applied the burden and standard of proof (*see* Rule 3121), the Authority recognizes that this matter is considered *de novo*. Should the ALJ grant Appellant's request for an evidentiary hearing and allow Dr. King to testify, the Authority requests thirty (30) days to retain an independent expert to counter Dr. King's anticipated testimony (and meet its burden of proof, if necessary) and further requests the ability to present additional rebuttal witnesses and documentary evidence. Given the stay, Appellant would not be prejudiced by granting these requests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of June, 2024.

/s/*Bryan H. Beauman*

BRYAN BEAUMAN
REBECCA PRICE
333 W. Vine Street, Suite 1500
Lexington, Kentucky 40507
Telephone: (859) 255-8581

bbeauman@sturgillturner.com
rprice@sturgillturner.com
HISA ENFORCEMENT COUNSEL

MICHELLE C. PUJALS
GENEVA N. GNAM
4801 Main Street, Suite 350
Kansas City, MO 64112
Telephone: (816) 291-1864
mpujals@hiwu.org
ggnam@hiwu.org
HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC