PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Chris Allen Hartman, Docket No. D-09432

APPELLANT'S BRIEF IN SUPPORT

Pursuant to 16 CFR 1.146(c)(4)(i)(C) and the ALJ's order dated June 27, 2024, Appellant Chris Allen Hartman states in support of his Proposed Findings of Fact and Conclusions of Law:

I. INTRODUCTION

This case is about numerous violations by the Horseracing Integrity & Welfare Unit ("HIWU") of its own rules.[1] Each violation is fatal to HIWU's case, but the most egregious violation is that the laboratories selected by HIWU to perform A sample ("UK"), B sample ("UIC"), and Further Analysis ("UC Davis") testing failed to confirm separation of hydroxyethylpromazine sulphoxide ("HEPS") from an identically appearing metabolite, hydroxyethylhydroxypromazine ("HEHP"). Due to the many rule violations, HIWU is without any admissible or reliable evidence to prove its charge. The IAP's decision and final civil sanctions must be reversed.

II. ARGUMENT

HIWU cannot prove that Appellant's "acts, practices, or omissions are in violation of" HISA Rule 3312(b) because it cannot show a detection of HEPS above the screening limit. 15 U.S.C. § 3058(b)(2)(A)(ii). The IAP's decision and final civil sanctions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because of the numerous HISA Rule violations that render HIWU's evidence inadmissible and unreliable.

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[1] The rules were promulgated under the Horseracing Integrity and Safety Act, which just last week, a federal appeals court held to be unconstitutional. *Nat'l Horsemen's Benevolent and Protective Ass'n v. Texas*, 23-10520 (5th Cir., Jul. 5, 2024) (https://www.ca5.uscourts.gov/opinions/pub/23/23-10520-CV0.pdf).

A. HIWU cannot carry its burden of proof.

HIWU charged Appellant with violating HISA Rule 3312(b) based upon the presence of Acepromazine in the Covered Horse's sample. Appeal Book ("AB"), Tab 4, 31. To prove the violation,

> [HIWU] shall have the burden of establishing that a violation of the [Anti-Doping and Controlled Medication] Protocol has occurred to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability (i.e., a preponderance of the evidence) but less than clear and convincing evidence or proof beyond a reasonable doubt.

Rule 3121(a). HIWU must prove the detection of HEPS in the Covered Horse's A sample above the 10 ng/ml screening limit and that B sample analysis confirms the presence of HEPS. Rule 3312(b). Thus, this case is not about whether "HEPS was [merely] in the Covered Horse's A and B [s]amples." *See* HIWU Response to Appellant's Application for Review ("HIWU Resp."), 2.

HIWU's case fails the first prong because the laboratories did not use a method validated for separating HEPS and HEHP. AB, Tab 29, 02:10:57, 03:01:32, 5:28:22-5:28:40. Appellant's "highly credentialed and impressive" expert, Dr. Steven Barker, testified that UK's analytical "results bear an uncanny resemblance to the initial data obtained" in a study by M.E. Wieder. *Id.*, Tab 24, 813 ¶ 34, Tab 36, 1364.[2] That study separated two chromatographic peaks thought to be HEPS into three peaks, one of which was HEHP. *Id.*, Tab 24, 826-34. Dr. Barker concluded that UK's failure to use confirm separation of HEPS and HEHP "absolutely" could have caused UK's observation of two identical peaks, which UK "improperly integrated," and the detection of HEPS above 10 ng/ml. *Id.* at 811, n.3-4 (citing studies), 813-14 ¶¶ 35-37; *id.*, Tab 29, 5:54:00. The laboratories' testimony "only made [Dr. Barker] more certain" that his opinions "are correct." *Id.*, Tab 29, 5:53:20-5:53:38.

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[2] HIWU did not object to the IAP's qualification of Dr. Barker as an expert. AB, Tab 29, 05:09:00.

According to Dr. Barker, since UK did not confirm separation of HEPS and HEHP, then "the 18.95 ng/ml of HEPS purportedly detected . . . is only half this value, or 9.47 ng/ml." *Id.*, Tab 24, 814 ¶ 36. This is because HEPS and HEHP "ha[ve] the same molecular weight and formula" and are "indistinguishable" if they are not separated. *Id.* at 811 ¶ 22; *id.*, Tab 29, 5:25:34-5:26:54. This "means that the amount of HEPS purportedly detected by [UK] would not have constituted a violation[.]" *Id.*, Tab 24, 814 ¶ 37.

Dr. Barker's testimony that UK's failure to separate HEPS and HEHP could have caused the Adverse Analytical Result is not reasonably disputed. The laboratories conceded they could not state that the Covered Horse's sample did not contain HEHP. *Id.*, Tab 29, 03:02:56, 03:50:10, 6:42:02-6:42:25. While the laboratories claimed they were not aware of a commercially available reference standard for HEHP, on cross-examination, UIC admitted it is "possible" a reference standard is available. *Id.*, 03:01:54.

In the end, it is meaningless whether the laboratories were aware of a reference standard. *Id.*, 5:46:40 (Dr. Barker: "This excuse that there's no reference standard out there just doesn't wash."). First, the unavailability of a reference standard meant only that the laboratories did not have a reference standard "at hand," *id.*, 03:49:55, which has no bearing on whether HEHP is present in a sample. *Id.*, 5:56:53 (Dr. Barker: "It doesn't change the fact that . . . the horse produces [HEHP]."). Second, Dr. Barker disputed that an adequate reference standard is not available, as evidenced by the Dewey study's identification of HEHP using reference standards. *Id.*, 5:39:24-5:40:21; *see id.*, Tab 24, 836 (listing reference standards). Third, Dr. Barker explained how the Wieder study achieved separation of HEHP and HEPS without a reference standard for HEHP. *Id.*, Tab 29, 5:40:36-5:42:41; *see id.*, Tab 24, 828-29 (listing reference standards). The two studies

demonstrate that available reference standards can be used to separate HEPS and HEHP and that separation is achievable without a reference standard for HEHP.

Nor does it matter that the laboratories were unaware of a method validated for separating HEPS and HEHP. The laboratories were familiar with HEHP and/or the Wieder study. *Id.*, Tab 29, 2:07:59, 3:01:03, 03:44:19. UK's former director, Dr. Scott Stanley, peer reviewed the study for a publication in which he published and testified there have been no addenda to the study. *Id.*, 2:08:10, 2:09:43. He knew or should have known about the import of Wieder's findings that, when separation is not confirmed, HEPS and HEHP can appear identically.

Dr. Barker testified that HEHP is not theoretical, and he disagreed with Dr. Stanley's contention that the Wieder study is "preliminary science." *Id.*, Tab 29, 5:51:38-5:51:53 ("No, I don't [agree]."), 6:01:09 ("No, it's not [theoretical]."). He reiterated, "We know that [HEHP] is formed," because the Dewey study—nearly 45 years go—"found" and "isolated and identified" HEHP "as a metabolite [] in horse urine." *Id.*, 5:51:55; *id.*, Tab 24, 836, 842. The Wieder study later achieved separation of HEPS and HEHP. *Id.* at 826, 834. Notably, one of the Wieder study's "aim[s] was to separate the structural isomers of the ***known*** metabolites [HEPS] and [HEHP]." *Id.* at 827 (emphasis added).

Dr. Barker's testimony that HEHP is present in the Covered Horse's sample does not weigh in HIWU's favor. The screening limit for Acepromazine measures HEPS, not HEHP, which Dr. Stanley confirmed in testifying that UK would only report an Adverse Analytical Finding if it estimated HEPS above 10ng/ml. *Id.*, Tab 29, 2:19:35, 2:22:10 ("By definition, a level below the screening limit would not be pursued for confirmation."). Dr. Barker's conclusion that HEHP is present does not prove HIWU's charge or support a finding of HEPS above 10ng/ml.

Dr. Stanley's testimony to rebut Dr. Barker has no weight. First, HIWU designated Dr. Stanley as a fact witness, not an expert. *Id.*, Tab 28, 1338-40. Second, Dr. Stanley did not submit a "signed [witness] statement." Rule 7170(d). Even if HIWU had sought to qualify Dr. Stanley as an expert, he did not submit a CV or expert opinion. *See id.* Fourth, Dr. Stanley proffered scientific, technical, or specialized opinions regarding Dr. Barker's opinions, the Wieder and Dewey studies, and other matters that exceeded the fact issues for which he was designated. *See* Fed. R. Evid. 701 (limiting opinion testimony by lay witnesses).

Dr. Barker's testimony establishes that UK's failure to confirm separation of HEPS and HEHP "could have caused" the Adverse Analytical Finding. Rule 3122(a). HIWU did not develop any proof that UK's failure to separate HEPS and HEHP "did not cause the Adverse Analytical Finding." *Id.* As Dr. Barker testified, "There's no way to prove that [the HEPS detected by UK] is above the screening limit." AB, Tab 29, 5:54:14. In fact, "[m]ore likely than not, [the HEPS concentration] is either at or below [the screening limit]." *Id.*, 5:54:20. Considering Dr. Barker's expert testimony, the laboratories' admissions they did not confirm separation of HEPS and HEHP, and the lack of weight of Dr. Stanley's testimony, the evidence weighs in Appellant's favor.

B. HIWU's evidence is inadmissible and unreliable.

The IAP's decision and final civil sanctions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" because they are based on evidence that is inadmissible and unreliable due to rule violations. 15 U.S.C. § 3058(b)(2)(A)(iii).

1. Violations by HIWU and the laboratories.

First, there is no evidence the Covered Horse's sample was stored or held in custody as required under Rule 5510(b). Dr. Stanley "did not know when [the Covered Horse's] sample was shipped" and admitted that UK's data packet did not indicate "whether the sample was [received]

intact or sealed" or "if the storage was secure." AB, Tab 36, 1364. Michael Hedge, another HIWU witness HIWU, admitted that UK's results did not address how the Covered Horse's sample was stored or held in custody before arriving at UK. *Id.*, Tab 35, 0:30:45-0:32:12. Kate Mittelstadt's testimony about the Covered Horse's sample collection documentation exceeded her witness designation,[3] but in any event, she did not testify that such documentation contains the information required under Rule 5510(b), did not identify whether or where HIWU produced such information, and did not testify that UK's results include such information. *See id.*, 1:06:29-1:07:30.

Compliance with Rule 5510(b) is essential to effectuating Rule 5510's purpose of ensuring that samples are "store[d] . . . in a manner that protects the integrity, identity, and security, prior to transport to the Laboratory." Rule 5510(b) ensures that samples can be authenticated. It is axiomatic that evidence must be authenticated. *See* Fed. R. Evid. 901(a); Rule 7260(d) ("[T]he Federal Rules of Evidence may be used for guidance[.]"). Authentication "requires accounting for the sample's handling from the time it was first collected until the time it was analyzed." *See* 77 A.L.R.5th 201. "Unless the sample can be authenticated by other means, failure to make this accounting renders inadmissible the sample and any results of analysis of the sample." *Id.*

UK's analytical results are inadmissible because there is no evidence showing that the Covered Horse's samples were, prior to arriving at UK, stored and held in custody as required by Rule 5510(b). This period immediately following collection is a vital, missing link in the overall chain of custody. The absence of Rule 5510(b) evidence is "ultimately a fatal problem." *Rabovsky v. Com.*, 973 S.W.2d 6 (Ky. 1998) (applying FRE 901's equivalent under Kentucky law).

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[3] The Appeal Book omits HIWU's response to Appellant's subpoena request. HIWU's response designates Ms. Mittelstadt to "testify about the decision to cease sending Samples to the UK Lab. Specifically, Ms. Mittelstadt can address questions related to Necker Island's Sample and explain that it was not implicated in any way." The IAP's denial of Appellant's subpoena request states, "HIWU offers to make available . . . Kate Mittelstadt, HIWU's Chief of Operations, who can address the decision behind the cease and desist letter." AB, Tab 34, 1358.

Second, UK violated Rule 6308(b) and UIC and UC violated Rule 6309(e) by failing to use testing procedures that were "fit" for the purpose of separating HEPS and HEHP. The IAP's decision does not address Rules 6308(b) or 6309(e).

Third, the IAP should have found that UIC violated Rule 6315(b). *See* AB, Tab 36, 1364. Like UK, UIC admitted its data packet lacked the two signatures required under Rule 6315(b). *Id.*, Tab 29, 3:13:15-3:13:30.

Fourth, HIWU's charge letter to Appellant violates Rule 3348 because it does not "set out the Controlled Medication Rule Violation(s) that the Covered Person is charged with having committed[.]" The charge letter does not identify the HISA Rule which Appellant is accused of violating, refer to the classification of Acepromazine as a Controlled Medication or the 10 ng/mL screening limit, or identify the amount of HEPS purportedly detected by UK. Regardless of whether this information became known to Appellant later, it was required to be presented in the charge letter.

The many HISA Rule violations render HIWU's evidence inadmissible and unreliable. The Federal Rules of Evidence mandate that "any and all scientific testimony or evidence admitted [be] not only relevant, but reliable." *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). Scientific evidence is only admissible if it is "the 'product of reliable principles and methods' . . . [that] have been 'reliably applied' in the case." *See United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021) (quoting Fed. R. Evid. 702). Reliability "is what matters most." *Id.* HIWU's failures "to follow the appropriate protocols" strip HIWU's evidence of any admissibility or reliability. *See United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996).

The violations also make HIWU's evidence offensive to due process protections, which the IAP's decision fails to consider. The "'established maxim' [is] that agencies must 'adhere to their

own rules.'" *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 82 (D.D.C. 2011) (quoting *Vietnam Veterans v. Sec'y of Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988)). This principle is "deeply rooted" and "elemental." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020); *Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)). Relatedly, "agencies may not violate their own rules and regulations to the prejudice of others." *Solis*, 824 F. Supp. 2d at 82 (quoting *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005)). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

In reviewing "an agency's observance and implementation of its self-prescribed procedures," the ALJ, "to protect due process, must be particularly vigilant and must hold agencies . . . to a strict adherence to both the letter and the spirit of their own rules and regulations." *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986) (reversing and remanding for reinstatement of ALJ's decision in favor of claimant). The HISA Rules are "policy" that HISA and HIWU chose for themselves. *See Amalgamated Transit Union, Int'l v. United States Dep't of Lab.*, 647 F. Supp. 3d 875, 901 (E.D. Cal. 2022) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003)). "Having chosen to promulgate [a policy]," it was "incumbent" upon HIWU to "follow that policy." *Id.*; *Morton*, 415 U.S. at 235. HIWU's "failure to follow its own regulations is fatal." *See Solis*, 824 F. Supp. at 82 (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997)); *see also Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017) ("[W]here, as here, the [agency] ignores its own regulations . . . it has acted arbitrarily and capriciously, no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be.").

HIWU argues the violations are not "meaningful" under Rule 3122(d). HIWU Resp., 3. But Rule 3122(d) does not carry so much force that it nullifies Rule 7250 or Rule 7260(d) or the

Federal Rules of Evidence. Rather, Rule 3122(d) "must be read as a whole" with other HISA Rules. *See United States v. Branson*, 21 F.3d 113, 116 (6th Cir. 1994).

2. Errors by the IAP.

Errors were also committed by the IAP. First, the IAP erred in denying DNA testing. *See* AB, Tab 22, 735-41. There was a "reasonable basis" for DNA testing. *Id.* at 741. Appellant "presented seemingly sincere and adamant testimony," *id.* at 739, that the Covered Horse did not receive Acepromazine on the day of the subject race prior to the race and, in fact, did not receive any medications in the 48 hours before the race. *Id.*, Tab 21, 02:21:52. With respect to the Acepromazine administered on the subject race day, Appellant testified multiple times that the administration occurred after the Covered Horse's samples had already been collected. *Id.*, 0:22:58 ("He received Ace after he ran[.]"), 0:25:13 ("Yes, he had left the test barn[.]"). This makes sense because no trainer would "scope a horse prior to racing." *Id.*, 0:43:58. Though intimated by HIWU, there was no evidence that the Covered Horse received Acepromazine at a time prior to the subject race that could have led to the Adverse Analytical Finding. *See id.*, 0:26:22 ("The horse doesn't train on Ace . . . After a race, he gets a little bit [2ccs] of Ace."), 0:32:07 ("Yeah, immediately I thought there's got to be something wrong because he doesn't get Ace."). DNA testing could have definitively resolved Appellant's reasonable disputes that the samples tested by the laboratories were not collected from the Covered Horse.

Second, the IAP erred by not applying Rule 7260(d) to Dr. Stanley's testimony. Dr. Stanley did not submit a signed statement, testified beyond the matters of his fact witness designation, was not designated or qualified as an expert witness, and lacked credibility due to the various investigations into him and UK's performance issues. There is no support for the IAP's finding that the investigations "do not encompass anything having to do with the [UK's] analysis . . .

during the period in question," AB, Tab 36, 1364, because HIWU's witnesses at the reopened hearing could not, or would not, testify to the scope or time period of the investigations. *Id.*, Tab 35, 0:34:44 (Hedge has no knowledge about the scope of UK's investigation into Dr. Stanley), 0:47:07 (Hedge has no knowledge about HISA/HIWU's investigation into UK), 0:47:14 (Hedge does not know the time period that HISA/HIWU's investigation involves), 1:29:37 (Mittelstadt refused to address the scope of HISA/HIWU's investigation due to its ongoing nature), 1:32:44 (Mittelstadt has no knowledge of the scope or time period of UK's investigation into Dr. Stanley).

Third, the IAP erred by considering UC Davis's HEPS estimate. *See id.*, Tab 36, 1364. UC Davis conducted a "qualitative determination, not a quantitative determination" and did not include its estimate in the certificate of analysis. *Id.*, Tab 29, 3:41:51-3:42:26. UC Davis was not directed to corroborate UK's results because, "when [it] did the analysis [Moeller] did not know what the concentration [detected by UK] was going to be." *Id.*, 3:42:42.

Fourth, the IAP erred in denying Appellant's subpoena request. The IAP allowed HIWU to present two witnesses who admitted they had limited personal knowledge and could not, or refused to, testify regarding issues for which Appellant sought the subpoenas.

Fifth, the IAP erred in drawing an adverse inference against Appellant. Rule 3122(f) permissively provides:

> A hearing panel may draw an inference adverse to a Covered Person who is asserted to have committed a violation of the Protocol based on the Covered Person's refusal to cooperate with the Agency, including any refusal to respond to questions put to him or her as part of an investigation or to appear at the hearing (either in person or remotely) and to answer questions put by the Agency or the hearing panel.

The IAP inferred, "among other things," that Appellant did not provide an explanation for "what he did with" the 300 milliliters of Acepromazine prescribed to him. AB, Tab 36, 1364. The IAP did not specify which "other things" he chose to infer. *See id.*

Appellant did not "refuse[] to cooperate with [HIWU]." Rule 3122(f). He "appear[ed] at" the DNA testing hearing, was subject to cross-examination, and answered questions "put to him." *See id.*; AB, Tab 21, Tab 29, 4:37:41 ("[Appellant] did testify fairly extensively at the DNA motion hearing."). Prior to the DNA testing hearing, Appellant produced a "Patient History" for the Covered Horse. *Id.*, Tab 16, 598 ¶ 13, Tab 26, 1004-22. HIWU cited the "Patient History" in its opposition and asked Appellant about the document at the hearing. *Id.*, Tab 18, 717, Tab 21, 0:49:08. The "Patient History" lists the Acepromazine administrations for the Covered Horse between February and June 2023, ***as well as*** the 300 milliliters of Acepromazine dispensed during that time. *Id.*, Tab 26, 1004-22. HIWU had every opportunity at the DNA testing hearing to ask Appellant "what he did with" the Acepromazine bottles dispensed to him. *See id.*, Tab 36, 1364. HIWU did not "put [those questions] to" Appellant. Rule 3122(f).

Sixth, the IAP erred by not drawing adverse inferences against HIWU. Rule 7250(a) mandates that "[w]itnesses for each party shall also submit to questions from the arbitrator(s) or IAP member(s) and the adverse party." The authority to draw inferences also emanates from federal court cases applying Federal Rule of Evidence 403, which "may be used for guidance." *See* Rule 7260(d); *S.E.C. v. Monterosso,* 746 F. Supp. 2d 1253, 1263 (S.D. Fla. 2010) (imposing adverse inference). Moreover, Court of Arbitration for Sport cases, which "may be considered" under Rule 3070(d), permit a tribunal to "draw adverse inferences from a party's 'procedural behaviour,'" including "a party's refusal to testify or its failure to submit the best evidence available." CAS 2019/A/6416, *Alejandro Gabriel Quintana v. Wydad Athletic Club* & 2019/A/6417 *Wydad Athletic Club v. Alejandro Gabriel Quintana & Club Cafetaleros de Tapachula*, ¶ 100; *see* CAS 2018/A/5945, *Maxim Astafiev v. FC Mordovia & Football Union of Russia (FUR)*, ¶¶ 5, 41 ("It is generally accepted in international arbitration that if a party refuses

to comply with a production order without a reasonable excuse, the Panel may infer that such documents would be adverse to the interests of said party and that the party may have something to hide."); CAS 2018/A/5824, *Adnan Darjal Motar Al-Robiye et al. v. Iraq Football Association (IFA)*, ¶¶ 136-37 ("accord[ing] less evidential weight" because witness did not appear).

The IAP did not explain why he declined to draw an adverse inference against HIWU for presenting witnesses who could not, or refused to, answer questions "submit[ted] to them" at the reopened hearing. Rule 7250(a); *see* AB, Tab 35, 0:32:44 (Hedge has "no knowledge of what the [February 13] meeting was about or what was discussed in that meeting"), 0:33:29 (Hedge has no knowledge of UK's concerns about the laboratory's performance), 0:34:06 (Hedge has no knowledge of when UK's concerns arose), 0:34:44 (Hedge has no knowledge of the scope of UK's investigation into Dr. Stanley), 0:47:07 (Hedge has no knowledge of HISA/HIWU's investigation into UK), 0:47:14 (Hedge does not know the time period that HISA/HIWU's investigation involves), 1:21:32 (Mittelstadt has no knowledge of what was discussed at the February 13 meeting), 1:29:37 (Mittelstadt refused to address the scope of HISA/HIWU's investigation due to its ongoing nature), 1:32:44 (Mittelstadt has no knowledge of the scope or time period of UK's investigation into Dr. Stanley).

HIWU failed to produce responsive witnesses who were "peculiarly within [HIWU's] power." *United States v. Dawkins*, 999 F.3d 767, 796-97 (2d Cir. 2021) (drawing inference that "the testimony, if produced, would be unfavorable to that party"). The IAP should have drawn inferences against HIWU that, had Mr. Hedge and Ms. Mittelstadt been able to answer all of Appellant's questions, their testimony would have been unfavorable to HIWU, furthered rendered the UK's results unreliable, and undermined Dr. Stanley's credibility.

The IAP should also have drawn an adverse inference against HIWU for Dr. Stanley's absence at the reopened hearing. Despite making him Dr. Stanley a key part of its case, HIWU opposed Appellant's subpoena request and filed a motion to exclude Dr. Stanley's testimony, even though Dr. Stanley's counsel "had not ruled out" a voluntary appearance. AB, Tab 32, 1350-54, Tab 36, 1364. HIWU's Appeal Book does not contain HIWU's motion to exclude, and the IAP's decision does not discuss HIWU's opposition to Dr. Stanley's reappearance. *See id.* Tab 36, 1364. The IAP should have drawn an inference against HIWU that, had Dr. Stanley appeared, his testimony would have been unfavorable to HIWU, rendered UK's data packet further unreliable, and undermined his own credibility.

The IAP's decision and final civil sanctions arise from processes and proceedings that were replete with HISA Rule violations and other errors. The IAP's reliance on HIWU's inadmissible, unreliable evidence was not harmless because UK's results are the only scientific evidence addressing whether the Covered Horse's sample contained HEPS above the screening limit. *See Cheatham v. Bailey*, No. 2:12-CV-381, 2014 WL 6893672, at *4 (W.D. Mich. Dec. 5, 2014) (final decision should be overturned for "evidentiary errors [that are] not harmless") (citing *Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 409 (6th Cir. 2006).

III. CONCLUSION

HIWU cannot prove that Appellant's alleged "acts, practices, or omissions are in violation of" Rule 3312(b). 15 U.S.C. § 3058(b)(2)(A)(ii). The IAP's decision and final civil sanctions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 3058(b)(2)(A)(iii).

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 16 CFR 1.146(c)(4)(i)(C) and the ALJ's order dated June 27, 2024, Appellant Chris Allen Hartman submits the following Proposed Findings of Fact and Conclusions of Law:

I. Proposed Findings of Fact

1. On June 18, 2023, Appellant was the trainer of the racehorse Necker Island ("Covered Horse").[4]

2. On June 18, 2023, the Covered Horse finished first in a race at Ellis Park in Henderson, Kentucky.[5]

3. Following the race, urine samples were collected from the Covered Horse.[6]

4. The samples were sent to UK-ETRL ("UK") for analysis of the A sample.[7]

5. UK received the samples on June 20, 2023.[8]

6. UK detected 2-1(Hydroxyethyl) Promazine Sulfoxide ("HEPS") in the A sample and estimated its concentration at 18.954 ng/ml.[9]

7. HEPS is a metabolite of Acepromazine, which is a Category B, Schedule 7 Controlled Medication on the Prohibited List.[10]

8. Acepromazine has a Screening Limit of 10 ng/ml of HEPS in urine.[11]

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[4] Appeal Book ("AB"), Tab 26, 994.
[5] *Id.*
[6] *Id.*, Tab 7, 216.
[7] *Id.*, 219-62.
[8] *Id.*, 222.
[9] *Id.*, 249.
[10] HISA Rule 400 Series Prohibited List.
[11] *Id.*

9. Based on the detection of HEPS above the Screening Limit, UK reported an Adverse Analytical Finding and provided a documentation package of its analysis.[12]

10. Appellant requested analysis of the B sample.[13]

11. The B sample was shipped to the University of Illinois-Chicago laboratory ("UIC") for analysis.[14]

12. UIC confirmed the presence of HEPS in the B sample and provided a documentation package of its analysis.[15]

13. On September 8, 2023, HIWU charged Appellant with violating HISA Rule 3312(b). The charge letter does not identify the HISA Rule which Appellant is accused of violating, refer to Acepromazine's classification as a Controlled Medication or the Screening Limit of 10 ng/mL of HEPS in urine, or state the amount of HEPS estimated by UK.[16]

14. Appellant requested a hearing pursuant to HISA Rule 3361. Internal Adjudication Panel ("IAP") proceedings were initiated pursuant to HISA Rule 7020(b).[17]

15. During the proceedings, Appellant identified errors in UIC's documentation package. UIC subsequently issued an amended version of the documentation package.[18]

16. Appellant asserted testing errors by UIC. The Covered Horse's B sample was subsequently shipped to the University of California Davis laboratory ("UC Davis") for Further Analysis.[19]

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[12] AB, Tab 7, 221.
[13] *Id.*, Tab 7, 293-310.
[14] *Id.*
[15] *Id.*
[16] *Id.*, 312-16.
[17] *Id.*, 321.
[18] *Id.*, Tab 7, 293-310.
[19] *Id.*, Tab 4, 131-88; *id.*, Tab 26, 1033, 1035-98.

17. UC Davis confirmed the presence of HEPS in the B sample and provided a certificate of analysis and, later, a documentation package of its analysis.[20]

18. Appellant raised concerns about the identity and integrity of the Covered Horse's samples. As the IAP ordered he may, Appellant filed a motion for DNA testing. An evidentiary hearing was held December 20, 2023.[21]

19. At the DNA testing hearing, Appellant testified extensively about Acepromazine administrations to the Covered Horse. He submitted a "Patient History" showing four administrations. He testified he ordered for the administration on June 18, the day of the subject race, to be given after the race and that the administration was given after the Covered Horse left the collection barn at Ellis Park. He testified that the Covered Horse does not train on Acepromazine. He testified multiple times, including on cross-examination, that the Covered Horse did not receive Acepromazine on June 18 prior to the race.[22]

20. The IAP denied Appellant's motion for DNA testing.[23]

21. The final hearing was held February 15, 2024.[24]

22. HIWU presented Dr. Scott Stanley, Brendan Heffron, and Dr. Benjamin Moeller as witnesses, who testified regarding their laboratories' analytical results.[25]

23. Appellant presented his expert, Dr. Steven Barker, and the Covered Horse's veterinarian, Dr. Ethan Wilborn, as witnesses.[26]

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[20] *Id.*, Tab 26, 1033, 1035-98.
[21] *Id.*, Tabs 13, 21.
[22] *Id.*, Tab 16, 598; *id.*, Tab 21.
[23] *Id.*, Tab 22.
[24] *Id.*, Tab 29-30.
[25] *Id.*, Tab 29.
[26] *Id.*, Tab 29.

24. HIWU's witnesses admitted their laboratories did not use a method validated for separating HEPS from the metabolite hydroxyethylhydroxypromazine ("HEHP").[27]

25. None of HIWU's witnesses testified about how the Covered Horse's samples were stored or held in custody before being shipped to UK. Dr. Stanley "did not know when [the Covered Horse's] sample was shipped" and admitted that UK's documentation package did not indicate "whether the sample was [received] intact or sealed" or "if the storage was secure."[28]

26. Dr. Stanley and Mr. Heffron admitted their laboratories' documentation packages were not signed by two Certifying Scientists.[29]

27. The IAP qualified Dr. Barker as an expert without objection.

28. Dr. Barker testified to his opinions in the affidavit and supplemental affidavit he submitted on behalf of Appellant.[30] He testified that UK's documentation package shows that UK observed two chromatographic peaks that were "improperly integrated as if they were one compound."[31] According to Dr. Barker, UK's "results bear an uncanny resemblance to the initial data obtained" in a peer-reviewed study by M.E. Wieder.[32] The Wieder study showed the separation of two chromatographic peaks, both initially thought to be HEPS, into three peaks, two of HEPS and one of HEHP.[33]

29. Dr. Barker opined that UK's admitted failure to use a validated method for separating HEPS and HEHP "absolutely" could have caused UK's finding of HEPS above the

[27] *Id.*
[28] *Id.*, Tab 36.
[29] *Id.*, Tab 29.
[30] *Id.*
[31] *Id.*, Tab 24.
[32] *Id.*
[33] *Id.*

Screening Limit. Dr. Stanley testified that the laboratories' testimony at the hearing "only made [him] more certain" that his opinions "are correct."[34]

30. On direct examination and in rebuttal, Dr. Stanley offered opinions regarding the scientific reasonableness of Dr. Barker's opinions and the Wieder and E.A. Dewey studies relied on by Dr. Barker.

31. HIWU designated Dr. Stanley as a fact witness, not as an expert witness.[35]

32. The IAP did not qualify Dr. Stanley as an expert. Dr. Stanley did not submit a signed witness statement or CV prior to the hearing.

33. HIWU's witnesses testified they were familiar with HEHP and/or the Wieder study at the time of their laboratories' analyses. Dr. Stanley peer reviewed the Wieder study for a publication in which Dr. Stanley published in the past. Dr. Stanley, Mr. Heffron, and Dr. Moeller conceded they could not state that HEHP was not present in the Covered Horse's samples.[36]

34. On March 6, 2024, Appellant requested to reopen the final hearing due to public reports that HISA and HIWU officials had met with UK officials on February 13, 2024 (two days before the hearing), about UK's personnel investigation into Dr. Stanley.[37]

35. The reports included HISA/HIWU's joint statement that they had opened an investigation into UK's laboratory performance, and that Dr. Stanley stated he stepped down from his position at UK "due to delayed turnaround times of samples, [and] issues with the chain of custody handling of samples."[38]

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[34] *Id.*, Tab 29.
[35] *See id.*, Tab 28.
[36] *Id.*, Tab 29.
[37] *Id.*, Tab 31.
[38] *Id.*

36. The IAP granted Appellant's request.[39] The reopened hearing was held May 7, 2024.[40]

37. Prior to the hearing, Appellant requested subpoenas to Dr. Stanley for additional testimony and to witnesses designated by UK and HISA/HIWU for testimony regarding their investigations into Dr. Stanley and UK.[41]

38. HIWU opposed Appellant's request but offered to present two witnesses—Michael Hedge and Kate Mittelstadt—to give narrowly designated testimony.[42]

39. At the reopened hearing, Mr. Hedge testified he had no knowledge of the February 13 meeting, UK's concerns about the UK laboratory's performance, when UK's concerns arose, the scope of UK's investigation into Dr. Stanley, or the scope or time period of HISA/HIWU's investigation into UK.[43]

40. Ms. Mittelstadt, HIWU's Chief of Operations, testified she had no knowledge of what was discussed at the February 13 meeting or the scope or time period of UK's investigation into Dr. Stanley.[44] Based on the confidential and ongoing nature of HISA/HIWU's investigation, Ms. Mittlestadt refused to answer questions about the scope of the investigation.[45]

41. On June 3, 2024, the IAP issued a final ruling.[46] The IAP found that Appellant violated HISA Rule 3312(b) due to the presence of Acepromazine. The IAP imposed final civil sanctions consisting of an ineligibility period of 15 days, a fine of $1,000, assigned of two penalty

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[39] *Id.*, Tab 31-32.
[40] *Id.*, Tab 35.
[41] *Id.*, Tab 34.
[42] *Id.*
[43] *Id.*, Tab 35.
[44] *Id.*
[45] *Id.*
[46] *Id.*, Tab 36.

points, public disclosure pursuant to Rule 3620, and disqualification of the Covered Horse's race result and forfeiture of all purses, prizes, trophies, points, ranking, and repayment or surrender.[47]

42. In reaching his decision, the IAP drew an adverse inference against Appellant for not testifying at the final hearing. The IAP drew an adverse inference that, "among other things, [Appellant] does not have a helpful or at least a neutral or innocuous explanation to provide about what he did with those 300 doses of Acepromazine that he was prescribed for his horses during the four month period immediately prior to the June 18, 2023 race . . ."[48]

43. The IAP did not draw any adverse inference against HIWU or Dr. Stanley.

44. On June 7, 2024, Appellant filed an Application for Review of Final Civil Sanction.

II. Proposed Conclusions of Law

1. The ALJ's determination 15 U.S.C. § 3058(b)(2)(A) must be made *de novo*.

2. HIWU has not proved that Appellant's "acts, practices, or omissions are in violation of" HISA Rule 3312(b).

3. To prove the violation, HIWU must establish the detection of HEPS in the A sample at a concentration above the 10 ng/ml Screening Limit and that analysis of the B sample confirms the presence of HEPS.

4. Dr. Stanley admitted that UK did not use a method validated for separating HEPS and HEHP. Appellant established that UK departed from Rule 6308(b) by failing to use Initial Testing Procedure(s) that were "Fit-for-Purpose."

5. Mr. Heffron and Dr. Moeller admitted that UIC and UC Davis did not use a method validated for separating HEPS and HEHP. Appellant established that UIC and UC David departed from Rule 6309(b) by failing to use Initial Testing Procedure(s) that were "Fit-for-Purpose."

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[47] *Id.*
[48] *Id.*

6. Appellant's qualified expert, Dr. Steven Barker, credibly testified that UK's failure to use a method validated for separating HEPS and HEHP "could reasonably have caused the Adverse Analytical Finding."

7. Dr. Barker was assured in his testimony, stating that UK's failure to use a method validated for separating HEPS and HEHP "absolutely" could have caused the Adverse Analytical Finding. HIWU did not challenge Dr. Barker's qualification as an expert.

8. Based on Dr. Barker's testimony, HIWU must show under Rule 3122(d) that UK's failure to use a method validated for separating HEPS and HEHP "did not cause" the Adverse Analytical Finding.

9. HIWU cannot meet its burden. There is no admissible, reliable evidence disputing Dr. Barker's testimony. In fact, HIWU's laboratories admitted they could not state that HEHP was not present in the Covered Horse's samples.

10. The "admissibility, relevance, and materiality" of UK's documentation package, which the IAP failed to determine under Rule 7260(d), are undermined by UK's departure from Rule 6309(b).

11. The weight of UK's documentation package, if any, is also lessened by the lack of two Certifying Scientists' signatures, which constitutes a departure from the Laboratory Standards in Rule 6315(b), and the absence of chain-of-custody evidence establishing that the Covered Horse's samples were stored and held in custody in accordance with Rule 5510(b).

12. In particular, the departure from Rule 5510(b) is significant because Federal Rule of Evidence 901, which the ALJ may consider as guidance under Rule 7260(d), "requires accounting for [a urine] sample's handling from the time it was first collected until the time it was analyzed." *See* 77 A.L.R.5th 201.

13. On balance, UK's documentation package is not weightier than Dr. Barker's expert testimony.

14. The weight of Dr. Stanley's testimony regarding UK's documentation package and disputing Dr. Barker's expert opinions is also diminished unreliable. In violation of Rule 7170(d), which the IAP failed to apply, Dr. Stanley did not submit a signed witness statement. HIWU did not designate Dr. Stanley as an expert, but rather as a fact witness to testify to the narrow issues identified for him in HIWU's witness list. Even if HIWU had sought to have Dr. Stanley qualified as an expert, he did not submit his CV prior to testifying, which contravenes Rule 7170(d).

15. Dr. Stanley's credibility suffers from the adverse inference that should be drawn against HIWU for opposing Appellant's effort to subpoena him for additional testimony at the reopened hearing. Rule 7250(a) mandates that "[w]itnesses for each party shall also submit to questions from the arbitrator(s) or IAP member(s) and the adverse party." Yet, HIWU objected to Appellant's subpoena request, and the two witnesses it proffered were unable to, or declined to, answer questions submitted to them.

16. Beyond Rule 7250(a), there is ample authority to draw adverse inferences, including from federal case law applying Federal Rule of Evidence 403's relevance standard. *See S.E.C. v. Monterosso,* 746 F. Supp. 2d 1253, 1263 (S.D. Fla. 2010) ("The imposition of adverse inferences in this case also conforms with Rule 403[.]"). Further, the Court of Arbitration for Sport's jurisprudence, which "may be considered" under Rule 3070(d), is instructive in that it permits a tribunal to "draw adverse inferences from a party's 'procedural behaviour,'" including "a party's refusal to testify or its failure to submit the best evidence available." *See* CAS 2019/A/6416, *Alejandro Gabriel Quintana v. Wydad Athletic Club* & CAS 2019/A/6417 *Wydad Athletic Club v. Alejandro Gabriel Quintana & Club Cafetaleros de Tapachula*, ¶ 100; CAS

2018/A/5945, *Maxim Astafiev v. FC Mordovia & Football Union of Russia (FUR)*, ¶¶ 5, 41; CAS 2018/A/5824 *Adnan Darjal Motar Al-Robiye et al. v. Iraq Football Association (IFA)*, ¶¶ 136-37.

17. There is no basis under Rule 3122(f) for an adverse inference against Appellant. He appeared at the DNA testing hearing and answered HIWU's questions "put to him." HIWU had every opportunity at the hearing to ask Appellant about the Acepromazine dispensed to him or "what he did with" it.

18. Due to UK's documentation package and Dr. Stanley's testimony being inadmissible or unreliable, HIWU lacks sufficient evidence to prove that UK's failure to use a method validated for separating HEPS and HEHP "did not cause" the Adverse Analytical Finding. Therefore, HIWU has not proved that Appellant's "acts, practices, or omissions are in violation of" HISA Rule 3312(b).

19. Even if UK's documentation package and Dr. Stanley's testimony were admissible and reliable, or if there were other evidence by which HIWU could carry its burden of proof, Appellant has shown that the IAP's decision and final civil sanctions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 15 U.S.C. § 3058(b)(2)(A)(iii).

20. This is primarily due to the many HISA Rule violations that occurred, including the laboratories' admitted failure to use a method validated for separating HEPS and HEHP.

21. The "'established maxim' [is] that agencies must 'adhere to their own rules.'" *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 82 (D.D.C. 2011) (quoting *Vietnam Veterans v. Sec'y of Navy*, 843 F.2d 528, 536 (D.C. Cir. 1988)). This principle is "deeply rooted" and "elemental." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020); *Gor v. Holder*, 607 F.3d 180, 191 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)). Relatedly, "agencies may not violate their own rules and

regulations to the prejudice of others." *Solis*, 824 F. Supp. 2d at 82 (quoting *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005)). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

22. HIWU failed to follow "[its] own rules and regulations, including Rules 3348, 5510(b), 6308(b), 6309(e), and 6315(b). *See Solis*, 824 F. Supp. 2d at 82. To ignore HIWU's multiple failures to "strict[ly] adhere[] to both the letter and the spirit of [its] own rules and regulations" would deny Appellant "protect[ed] due process." *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986).

23. The HISA Rules are "policy" that HISA and HIWU have chosen for themselves. *See Amalgamated Transit Union, Int'l v. United States Dep't of Lab.*, 647 F. Supp. 3d 875, 901 (E.D. Cal. 2022) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003)). "Having chosen to promulgate [a policy]," it was "incumbent" upon HIWU, and the laboratories it selected, to "follow that policy." *See id.*; *Morton*, 415 U.S. at 235. HIWU's "failure to follow its own regulations is fatal." *See Solis*, 824 F. Supp. at 82 (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997)); *see also Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017).

24. But "[w]here, as here, the [agency] ignores its own regulations . . . it has acted arbitrarily and capriciously, no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be." The IAP's decision and final civil sanctions must be reversed under 15 U.S.C. § 3058(b)(2)(A)(iii).

25. While HIWU argues its departures from the HISA Rules are not "meaningful" and fail Rule 3122(d)'s "could reasonable have caused" standard, Rule 3122(d) does not nullify Rule 7250 and Rule 7260(d)'s requirements that HIWU present admissible, relevant, and material

"evidence to supports its charge." Nor does Rule 3122(d) overwhelm the administrative law and due process principles outlined above.

III. Conclusion

Based on a *de novo* review of the record, the IAP's decision and final civil sanction against Appellant are reversed.

Respectfully submitted,

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PUBLIC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of the forgoing is being served this 8th day of July 2024, via first-class mail and/or electronic mail upon the following:

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PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Chris Allen Hartman, Docket No. D-09432

ORDER

This matter arises from the Application for Review of Final Civil Sanctions filed by Appellant Chris Allen Hartman pursuant to 15 U.S.C. § 3051 *et seq*., 5 U.S.C. § 556 *et seq*., and 16 C.F.R. § 1.145 *et seq*. The undersigned having reviewed the record *de novo* and the parties' proposed findings of fact, proposed conclusions of law, and briefs in support, it is hereby **ORDERED AND ADJUDGED**:

1. Appellant's proposed findings of fact and conclusions of law are adopted;

2. The June 3, 2024, amended decision by the Internal Adjudication Panelist in ECM2023-45 is **REVERSED**; and

3. The Final Civil Sanctions imposed against Appellant are **REVERSED**.

Entered this __ day of ____________, 2024.

____
JUDGE DANIA L. AYOUBI
ADMINISTRATIVE LAW JUDGE