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, for his reply in support of his Proposed Findings of Fact and Conclusions of Law and in opposition to the submissions of the Horseracing Integrity & Welfare Unit ("HIWU"), states:

I. ARGUMENT

A. HIWU concedes that multiple HISA Rule violations occurred.

Among other grounds, Appellant sought review due to HIWU's violation of HISA Rules 3348, 5510(b), 6308(b), 6309(e), or 6315(b). Appellant's Application for Review, 1-2. Appellant also raised the argument in his Proposed Findings of Fact and Conclusions of Law and brief in support, asserting that the violations rendered HIWU's evidence inadmissible and unreliable. Appellant's Brief, 5-9. HIWU's submissions do not discuss Rules 3348, 5510(b), 6308(b), or 6309(e). HIWU refers to Rule 6315(b) in passing, HIWU's Brief, 10, but it does not challenge the Independent Arbitral Panelist's ("IAP") ruling that the A sample laboratory ("UK") violated Rule 6315(b) or respond to Appellant's argument that the B sample laboratory ("UIC") admitted it also violated Rule 6315(b). *See* Appeal Book ("AB"), Tab 36, 1364.

HIWU's failure to respond to Appellant's arguments should be deemed a concession that the HISA Rule violations occurred. *See, e.g., Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) "[I]f a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded.") (applying local

rules); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument—as [HIWU has] done here—results in waiver."); *Humphrey v. U.S. Att'y Gen.'s Off.*, 279 F. App'x 328, 331 (6th Cir. 2008) (stating that where plaintiff failed to respond to argument, any opposition was waived). The concession is fatal to HIWU's case because due process and administrative law mandate that HIWU "must 'adhere to [its] 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)). HIWU acts "arbitrarily and capriciously" where it "ignores its own regulations . . . , no matter how well-reasoned and seemingly well-supported its ultimate conclusion might be." *Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017). Neither HIWU's brief nor the IAP's decision address this line of case law.

HIWU's only argument is that none of the violations "could reasonably have caused the [Adverse Analytical Finding]." HIWU's Brief, 17. HIWU has never explained why Rule 3122 overpowers other HISA Rules (like Rules 7250 and 7260(d)) or the due process and administrative law cases cited by Appellant. There is no legal basis for applying Rule 3122 in such a manner. After all, "[i]t is clear beyond cavil that an agency is bound by its own regulations" and "an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations." *Friedler*, 271 F. Supp. 3d at 61 (internal citation and quotation marks omitted). HIWU's ignoration of due process and administrative law does not make the precedents go away.

B. The IAP could not have "evaluated and rejected" Appellant's claim regarding Rule 5510(b).

Without referring specifically to Rule 5510(b), HIWU summarily argues that "it is clear that all storage and chain of custody requirements were evaluated and rejected." HIWU's Brief, 10-11. But it is not "clear" that the IAP determined that Rule 5510(b)'s requirements were met because the IAP's decision—which HIWU characterizes as "comprehensive"—does not even

mention Rule 5510(b). AB, Tab 36, 1364; HIWU's Proposed Order, 6. There can be no evidentiary basis for ruling that Rule 5510(b)'s requirements were satisfied because there was no evidence pertaining to whether the Covered Horse's sample was, ***prior to arriving at UK***, "store[d] . . . in a secure freezer or refrigerator," documentation of the "location and time in and time out" of the sample, or "who ha[d] custody of the Samples or who [was] permitted access to the Sample." Rule 5510(b); *see* AB, Tab 36, 1363-71.

The IAP's findings that Dr. Scott Stanley "does not know when [the Covered Horse's] sample was shipped [to UK]," that "Dr. Stanley testified that any discrepancies would have been noted had there been any," and that "[UK's] data packet does not indicate if the storage of [the Covered Horse's sample] was secure" involved UK's ***internal*** chain of custody. *Id.* at 1364. A laboratory's internal chain of custody is different than, and arises after, the earlier links in the chain of custody starting at the collection barn, where the Covered Horse's post-race sample was initially collected and stored before being transported to UK. *See* Rule 5510(a)-(b) (regulating storage and custody "[a]fter [s]ample collection"). None of the IAP's findings concern Rule 5510(b)'s requirements for storage and custody of the Covered Horse's sample "[p]rior to [a]nalysis" by UK. *See* Rule 5510(b).

HIWU's witnesses' testimony is not Rule 5510 evidence. First, Ms. Mittelstadt's lay opinion testimony that the Covered Horse's sample "had not been compromised," HIWU's Brief, 14, does not fill the gap because Ms. Mittelstadt did not specify which chain of custody documents she reviewed or relied on, and she did not identify any evidence (within or outside UK's data packet) establishing how the Covered Horse's sample was stored or held in custody prior to UK's analysis.

Second, Mr. Hedge's testimony that UK "followed" its "Standard Operating Procedures," *id.*, does not show how the Covered Horse's sample was stored or held at the collection barn. Mr. Hedge admitted that UK's data packet did not address Rule 5510's requirements. AB, Tab 35, 0:30:45-0:32:12. If anything, Mr. Hedge could testify only to the portions of UK's analysis and data packet with which he "was directly involved"—all of which occurred after the Covered Horse's sample was collected, stored at the collection barn, and transported to UK. *See* HIWU's Brief, 14. ("Mr. Hedge was directly involved in the analysis of Necker Island's Sample . . .").

C. HIWU is incorrect about Dr. Steven Barker's testimony.

Dr. Barker did not testify that "no commercially available reference standard for HEHP existed." *Id.*, 11-12. Rather, he testified he "did not find any manufacturing company that currently makes it." AB, Tab 29, 5:37:09. But Dr. Barker emphasized that UK has had the opportunity," in the 12 years since the Wieder study, to have a standard made by the laboratory (Frontier BioPharm)—which is "right there in Kentucky"—that UK has "relied on" "to make standards for reference compounds." *Id.*, 5:37:16-5:38:09. Had UK done this, it could have "ma[de] sure [its] methods could separate and prove the presence of only HEPS in [its] calculation for that 10 ng/ml screening limit." *Id.* Notably, Frontier BioPharm is the same laboratory from which UK acquired the HEPS reference standards used in this case, *id.*, Tab 4, 45, and the same laboratory that supplied the HEPS reference standards for the Wieder study. *Id.*, Tab 10, 542.

Even if a reference standard for HEHP were not commercially available, it would not matter. 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. Together, the Wieder and Dewey 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. Therefore,

confirming separation of HEPS and HEHP is not "impossible to implement," as HIWU incorrectly argues. *See* HIWU's Brief, 12. The Dewey study successfully did it nearly 45 years ago, in 1981. AB, Tab 10, 551. The Wieder study did it 31 years after that. *Id.* at 541.

Dr. Barker was not "guessing when he estimated an HEHP concentration of 50%." HIWU's Brief, 16. He credibly explained why it is scientifically "incorrect" and "inappropriate" to, as Dr. Stanley suggested in his testimony, use a C-Max calculation, which measures the concentration of a compound "right after" an administration, "to predict the ratios [of HEPS and HEHP] in a trace-level [of Acepromazine]." AB, Tab 29, 6:16:25-6:20:30. Dr. Barker testified that the Wieder study was more accurate, and its findings would even support an estimate of HEHP above the 50% concentration that Dr. Barker estimated in this case. *See id.*

Whether Dr. Barker "himself [] pursued the identification and quantification of HEHP" while the director of the Louisiana State University ("LSU") laboratory is irrelevant. *See* HIWU's Brief, 15. First, LSU did not conduct testing in this case and its testing practices under Dr. Barker's charge have no bearing on what the HISA Rules require HIWU's selected laboratories to do. Second, during his tenure, Dr. Barker did not "report out" any Acepromazine positive in urine because Louisiana "regulated Acepromazine use in blood" and HEHP "does not occur" in blood. AB, Tab 29, 5:56:16-5:57:57. The HISA Rules' screening limit for Acepromazine, on the other hand, is based on HEPS in urine. Third, Dr. Barker left LSU before the Horseracing Integrity and Safety Act became law and before the HISA Rules were promulgated, notwithstanding that Louisiana "never has been" under HISA. *Id.*

D. HIWU is incorrect on other points.

In addition to being inaccurate about Dr. Barker's testimony, HIWU is incorrect on other fronts. First, HIWU's witnesses' testimony at the reopened hearing did not "demonstrate[] that the

ongoing investigation of UK[] . . . did not have anything having (*sic*) to do with the analysis of Necker Island's A sample for HEPS during the period in question[.]" HIWU's Brief, 14. Neither witness testified to the scope of UK's personnel investigation. *See* AB, Tab 35, 0:34:44, 1:32:44. In fact, both witnesses admitted they had no knowledge of the investigation's scope. *Id.*

Second, HIWU's witnesses did not "provide evidence on the topics at issue." HIWU's Brief, 18. Appellant requested to reopen the hearing "so that Dr. Stanley (and possibly other UK officials) can be examined on the matters revealed in [the] reporting and HIWU's joint statement" about UK officials' meeting on February 13, 2024, with HISA and HIWU, UK's personnel investigation into Dr. Stanley, UK's concerns about UK's laboratory's performance, and HISA/HIWU's joint investigation into UK. AB, Tab 31, 1347-48. The IAP granted the request. *Id.* at 1346. However, neither of HIWU's witnesses had knowledge of what was discussed at the February 13 meeting or of the scope or time period of UK's investigation into Dr. Stanley. *Id.*, Tab 35, 0:32:44, 0:33:29, 0:34:06, 0:34:44, 0:47:14, 1:21:32,1:32:44. Only Ms. Mittelstadt claimed to have knowledge about HISA/HIWU's investigation of UK, but she refused to answer questions on that topic. *Id.*, 1:29:37.

E. Dr. Wilborn's testimony does not support an adverse inference.

Dr. Wilborn's testimony does not support an adverse inference against Appellant. Dr. Wilborn testified about the Acepromazine he administered to the Covered Horse following sample collection after the subject race. *Id.*, 3:54:56-4:34:17. He did not dispute the "Patient History" that Appellant produced—two months prior—for the DNA testing hearing. Nothing in Dr. Wilborn's testimony changed the fact HIWU had an adequate opportunity at the DNA testing hearing to ask Appellant "what he did with" the bottles of Acepromazine dispensed to him between February and June 2023. HIWU could have, at that hearing, sought Appellant's "explanation for how, when and

to which horses those doses of Ace were administered was provided (*sic*)." HIWU's Brief, 13. HIWU did not. Moreover, Dr. Wilburn testified that his "practice's recommendation, to be below the HISA-dictated thresholds," is that Acepromazine not be administered less than five days before sample collection, whether administered orally or by injection. *See* AB, Tab 29, 4:06:11-4:06:56. There is no evidence that the Covered Horse received Acepromazine less than five days before the subject race. *See id.*, Tab 16, 598 ¶ 13, Tab 26, 1004-22.

F. HIWU cannot carry its burden, and certainly not by showing presence alone.

Throughout its brief, HIWU intimates that evidence of the mere presence of Acepromazine or HEPS may be "sufficient proof." *See* HIWU's Brief, 4, 7, 10. The "general rule [] that presence of any amount of a Controlled Medication Substance or its Metabolites or Markers . . . constitutes a Controlled Medication Rule Violation" ***does not apply here***. *See* Rule 3312(c). This is because the screening limit of 10 ng/ml of HEPS in urine is a "special criteria for the reporting or evaluation of" an alleged violation based on Acepromazine. Rule 3312(d). The screening limit creates "an exception to the general rule," requiring HIWU to establish the detection of HEPS in the Covered Horse's A sample above the 10 ng/ml screening limit and confirmation of the presence of HEPS in the B sample. *Id.*; Rule 3312(a)-(b). HIWU cannot carry its burden of proof.

II. CONCLUSION

For the reasons stated above and in Appellant's brief, 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 should be reversed as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 3058(b)(2)(A)(iii).

Respectfully submitted,

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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 18th day of July 2024, via first-class mail and/or electronic mail upon the following:

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