UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
DOCKET NO. D-9432

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

IN THE MATTER OF:

CHRIS ALLEN HARTMAN **APPELLANT**

AUTHORITY'S REPLY TO APPELLANT'S BRIEF IN SUPPORT OF HIS PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

NOW COMES the Horseracing Integrity and Safety Authority, Inc. (the "**Authority**"), pursuant to 16 CFR 1.146 and the Order entered on June 27, 2024, and submits this Reply to Appellant's brief in support of his Proposed Findings of Facts and Conclusions of Law. Appellant's appeal must be dismissed because (1) HIWU successfully met its burden to establish a Rule 3312 Controlled Medication Rule Violation ("**CMRV**") against Appellant, and (2) none of Appellant's alleged criticisms have any legal merit or negate his CMRV. Appellant's interpretation of the ADMC Program Rules is incorrect and his Proposed Findings of Fact and Conclusions of Law should be rejected wholesale. The Authority will address the Appellant's four main arguments in turn.

First, Appellant's primary argument that HIWU did not meet its burden under Rule 3312 to show that Acepromazine was present in Necker Island's Sample because all three analytical chemistry laboratories did not separate the metabolite HEPS from the *theoretical* metabolite HEHP in their analyses is misplaced. The Prohibited List-Technical Document ("Prohibited List") which sets forth a Screening Limit of 10 ng/mL for 2-1(Hydroxyethyl) Promazine Sulfoxide ("**HEPS**"), a metabolite of Acepromazine, was approved by the Federal Trade Commission (the

"Commission") and is the applicable standard under the ADMC Program. Under Rule 3113, the Authority's determination as to what is included in the Prohibited List and the Commission's approval of it "are final and shall not be subject to any challenge by any Covered Person or other Person on any basis." Therefore, the use of a Screening Limit based upon the detection of HEPS, as opposed to some other metabolite, is not subject to challenge by Appellant.

Further, even if Appellant had standing to challenge the Rules in this forum (which he does not), equine laboratories currently cannot – and do not – engage in the method of analysis advocated for by Dr. Barker because his proposed theory of analysis would be, as IAP Member Weiss correctly held, a novel and an unprecedented departure from long-established scientific precedent and industry standard.[1] Dr. Barker himself testified that no commercially available reference standard exists for HEHP, which renders his methodology impossible to implement.[2] In fact, Dr. Barker further admitted that *he* never even tried to implement his proposed methodology when he directed the Louisiana equine laboratory.[3]

In sum, it is absurd for Appellant to contend that HIWU failed to meet its burden under Rule 3312 to show that Acepromazine was present in Necker Island's Post-Race Sample because the three laboratories used a time-tested and long-approved method for HEPS detection, rather than Dr. Barker's proposed purely theoretical method. Dr. Barker even admitted that he never attempted to create a commercially available reference standard for HEHP and implement his theoretical method in the more than 20 years that he ran an equine laboratory. For these reasons, Appellant's primary argument must be rejected.[4]

[1] HISA's Amended Appeal Book ("AB"), at 1365.
[2] *Id.*
[3] *Id.*
[4] For the Authority's reply to Appellant's criticisms of Dr. Scott Stanley set forth in his primary argument, see Section "Four" below.

Second, after failing to make his case for a novel method of analysis, Appellant's second argument amounts to a "spaghetti argument"[5] assailing the evidence the IAP member relied upon below.

- Chain of Custody of Sample – Appellant attacks the chain of custody of Necker Island's Sample by arguing that the absence of any evidence indicating that the Sample was mishandled is not sufficient to prove it was not mishandled. Appellant's interpretation of Rule 5510(b) is contrary to the credible witness testimony of HIWU's Chief of Operations Kate Mittelstadt and UK Lab Scientist II Michael Hedge, who both testified that Sample mishandling, when it occurs, is always documented in the chain of custody. Dr. Stanley similarly testified that any discrepancies in the chain of custody would have been noted. No mishandling of the Sample was documented here.[6] Thus, the lack of evidence about any "mishandling," coupled with the presumption in Rule 3122(c) that "[l]aboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards," allowed the IAP to correctly conclude no mishandling of the Sample occurred here.
- "Fit For Purpose" analytical method – Appellant again attacks the industry standard method of HEPS analysis by unilaterally declaring it not "Fit For Purpose" as required by Rules 6308(b) and 6309(e). To reiterate, all three equine laboratories used a time-tested method for HEPS detection that complied with all applicable accreditations,

[5] "The 'spaghetti test' throw everything against the wall and see what sticks is an urban legend. Cooked spaghetti does not stick to a wall, as the legend describes. Nonetheless, American courts have seized on the legend in describing litigation when one party splatters allegations in a scattered-barrel fashion into pleadings, hoping that 'something will stick' and guide the Court's analysis." *Tamoutselis v. Tamoutselis*, 2020 NYLJ LEXIS 824 (Sup. Co. N.Y., Apr. 1, 2020).
[6] AB, at 1365.

protocols, and standards. *Zero* equine laboratories (including Dr. Barker's own former laboratory) have used Dr. Barker's proposed methodology which demonstrates[7] that the existing method is undoubtedly "Fit For Purpose."[8] Please also *see* Section "First," *supra*.

- The Signature Rule – While Appellant can argue that the data packets from UK and UIC lack two signatures from Certifying Scientists, what Appellant cannot do is establish that the lack of a second signature "reasonably caused" the Adverse Analytical Finding, as required by Rule 3122(c), allowing the IAP Member to correctly reject this argument and rely properly upon the laboratory documentation packages.
- Text of the EAD Charge Letter – Appellant next finds hyper-technical fault with the EAD Charge Letter which, by anyone's reading, puts him on clear notice of the Presence violation being brought against him. The Charge Letter (which expressly references the initial Notice Letter)[9] sets out all the information required under Rule 3348. Again, this argument is meritless.

In short, Appellant's attack on the "reliability" of the above evidence falls flat. The IAP's reliance upon this evidence in the hearing below was proper.

Third, Appellant next attempts to re-package the strands of his specific evidentiary criticisms from Section "First" above into one box that, when relied upon by the IAP, allegedly violated his due process rights. However, Appellant's due process argument is based upon his fundamentally incorrect assertion that the Rules of the Program are "policy."[10] Appellant writes:

[7] *Id.*
[8] Rule 1020 Definitions: "Fit(ness)-for-Purpose means suitable for the intended purpose and in conformity with the ISO/IEC 17025. ILAC-G7, the Laboratory Standards, and relevant Technical Document(s) and Technical Letter(s)."
[9] AB, at 264-274, 312-319.
[10] Appellant's Brief In Support, at 8.

"The HISA Rules are 'policy' that HISA and HIWU chose for themselves," and then cites unrelated and irrelevant federal case law in support.[11]

Appellant's problematic assertion is both factually and legally inaccurate. The ADMC Program Rules are Federal regulations promulgated under the Act as approved by Congress, submitted by the Authority to the Commission, and reviewed and approved by the Commission in its own discretion. *See, e.g.*, 15 USC §3053, which sets forth the process by which regulations are issued by the Commission.

Appellant's due process argument amounts to a thinly disguised collateral attack on the Rules themselves, which is precluded in part by Rule 3113 and in whole by the limited nature of the forum below.[12] For this reason alone, Appellant's due process argument is fundamentally flawed and must fail.

Fourth, the Appellant serves up a second serving of "spaghetti" with a splattering of allegations that the IAP made "errors" below. Again, however, Appellant fails to demonstrate that any of these alleged errors led to the imposition of a civil sanction that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

- DNA Testing of Sample - Appellant argues that the IAP Member unfairly denied his request for DNA analysis of the Sample to confirm it came from Necker Island. Appellant contends that his testimony that Necker Island did not receive Acepromazine within 48 hours of the race or "train" on Acepromazine, coupled with a (later-explained) typographical error on the UK Certificate of Analysis, creates

[11] *Id.*

[12] Arbitrator Bernard Taylor held in the matter of *HIWU v. Dominguez*, JAMS Case No. 1501000577 (emphasis added): "On August 28, 2023 … at the beginning of the hearing the Arbitrator confirmed the ruling denying Mr. Dominguez' objections regarding the Arbitrator's jurisdiction to adjudicate this dispute and that **the arbitration hearing was not the proper forum in which to address the adequacy of the constitutional due process** provided to him before, during, and post this arbitration process."

reasonable doubt over the source of the Sample.[13]

Appellant's request for DNA testing was properly rejected because there was no genuine doubt or reasonable basis to justify such an extraordinary order since Appellant's testimony was undercut by: (1) evidence demonstrating that the unique microchip implanted in Necker Island's neck matched the microchip ID identifying Necker Island as the source of the Sample in the Sample Collection Documentation; (2) medical records revealing that Necker Island was administered Acepromazine on the day of the race that were not properly recorded in the HISA veterinarian portal (as required); (3) the urine Sample tested by all three laboratories was consistently identified as #U100220572; and (4) Dr. Scott Stanley's testimony which fully explained the typographical error on the Certificate of Analysis.[14]

- Dr. Stanley's Testimony – Appellant attempts to discredit Dr. Stanley's testimony with a variety of criticisms, addressed below.
    - Dr. Stanley was not designated or called as an expert because he was a fact witness. He did not opine about a theoretical analytical method as Dr. Barker did; rather Dr. Stanley testified as to what the UK Lab *actually* did with respect to Necker Island's A Sample. That Dr. Stanley rejected the theoretical method advanced by Dr. Barker was not offered as expert witness rebuttal, but as the factual reason why Dr. Stanley used the industry standard method for HEPS detection that UK (and the other two labs) used. Dr. Stanley had no obligation to comply with expert witness requirements. In addition, Rule 7260(d) (emphasis added) states that the IAP: "shall determine the admissibility, relevance, and

[13] Appellant's Brief in Support, at 9; AB at 738-39.
[14] AB at 738-39.

materiality of the evidence offered, including hearsay evidence, and may exclude evidence deemed cumulative or irrelevant. **Conformity to legal rules of evidence shall not be necessary**, but the Federal Rules of Evidence **may** be used for **guidance**…." The IAP properly relied on the testimony of Dr. Stanley.

- Further, Dr. Stanley's testimony did not lack credibility just because UK and the Authority later opened investigations into certain issues arising out of the UK Lab. As put into evidence during the supplemental hearing, the investigations of which Dr. Stanley is a subject have nothing to do with UK's analysis of Necker Island's sample in July 2023.[15]
- Unlike Appellant, who is a Covered Person as defined by the Protocol, Dr. Stanley is not. The IAP found that, while it was proper to hold an adverse inference against Appellant under Rule 3122(f) because he refused to testify at his hearing on the merits, there was no similar "basis to draw an adverse inference against Dr. Stanley with respect to his testimony and the matters at issue in [Appellant's] case."[16] Dr. Stanley is not a Covered Person and HIWU did not, at the time of the subsequent hearing, have any authority to compel Dr. Stanley's testimony.[17] HIWU offered another appropriate scientific witness who personally handled Appellant's Covered Horse's Sample during the analysis process. The argument that Appellant's testimony during the hearing on the motion for DNA testing is equivalent to his testimony in a merits hearing is meritless; HIWU did not have an opportunity to cross-examine Appellant

[15] AB, at 1365.
[16] *Id.*
[17] *See* Rule 3122(f) (emphasis added): "The Arbitrator(s) or IAP Member(s) adjudicating the case 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) or to answer questions put by the Agency or the Arbitrator(s) or IAP Member(s)."

on all issues relevant to whether he committed a CMRV.

- The overly broad subpoena Appellant sought for the supplemental hearing was likewise appropriately denied. The IAP Member correctly concluded that Appellant did not want to just subpoena Dr. Stanley regarding the case at issue here, but also to examine him on the substance and nature of the investigations into him and the UK Lab, which were well beyond the scope of his case.[18]

- UC Davis' HEPS Estimate – Appellant said it was erroneous for the IAP to hear evidence regarding the third lab, UC Davis', estimation of concentration of HEPS in the third urine Sample it analyzed. There is simply no legal basis to support this contention in the Rules.[19]

In conclusion, despite the litany of meritless grievances asserted by the Appellant against the Authority, the IAP, the laboratory analysts, witnesses, and the Rules themselves, none of them have legal import in the context of Appellant's appeal. The Consequences were properly imposed by the IAP in accordance with Rule 3323 after sufficient proof of a Rule 3312 violation was found in compliance with the requirements of the ADMC Program. Therefore, the civil sanctions imposed on Appellant are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and should be upheld.

The Authority requests that the Court accept its findings of fact and conclusions of law which were filed on July 8, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th day of July, 2024.

[18] AB, at 1359.
[19] AB, at 1365.

/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
ALLISON J. FARRELL
4801 Main Street, Suite 350
Kansas City, MO 64112
Telephone: (816) 291-1864
mpujals@hiwu.org
afarrell@hiwu.org
HORSERACING INTEGRITY & WELFARE UNIT, A DIVISION OF DRUG FREE SPORT LLC

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Reply to Appellant's Brief in Support of his Proposed Findings of Fact and Conclusions of Law is being served on July 18, 2024, via first-class mail and/or 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

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

Joel B. Turner
Frost Brown Todd LLP
400 West Market Street, Suite 3200
Louisville, Kentucky 40202-3363
Via e-mail to jturner@fbtlaw.com

Nolan Jackson
Frost Brown Todd
LLP
20 F Street NW,
Suite 850
Washington DC, 20001
via email to njackson@fbtlaw.com

Attorneys for Appellant

/s/ *Bryan Beauman*

Enforcement Counsel