UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
MATTER NO._____

ADMINSTRATIVE LAW JUDGE:_____

IN THE MATTER OF:
DR. SCOTT SHELL, DVM APPELLANT

APPLICATION FOR STAY OF FINAL CIVIL SANCTION

Pursuant to 15 U.S.C. § 3051 *et seq.* and 16 C.F.R. § 1.148, Appellant, Dr. Scott Shell, DVM ("**Appellan**t") hereby applies for a stay of the final civil sanction imposed by Arbitrator Hon. Hugh Fraser as part of his June 11, 2024, decision in JAMS Case No. 1501000708, as amended, finding that Dr. Shell committed an Anti-Doping Medication Control ("**ADMC**") Program violation ("**Decision**"). A stay of the final civil sanction is warranted by the factors in 16 C.F.R. § 1.148(d).

1. Likelihood of Success

Appellant has a strong likelihood of success on *de novo* review.

First, the record demonstrates the Arbitrator wrongly concluded HISA and HIWU met their burden to show a violation of ADMC Program Rule ("**Rule**") 3214(c). There was no evidence that the contents of any Hemo 15 Appellant admittedly administered contained Banned Substances. A lab report lacking in foundation, was the only evidence of the actual contents of any Hemo 15 used by Appellant. The report did not identify any Banned Substances. (Decision, ¶¶ 2.5, 6.2(g)).

Second, the Arbitrator erred in finding Hemo 15 (generally) is a Banned Substance under Rule 4111 (*Id*. at ¶ 8.11). Hemo 15 is not on HISA's Banned Substance list. (*Id*. at ¶ 8.4). Appellant's Hemo 15 is compliant with Rule 4111 as it "is not addressed by Rules 4112 through 4117" (*Id*. at ¶ 8.7), it is a combination of legal nutrients, making no drug claims, and does not require "government" approval, (*Id*. at p. 27), it is widely used as a vitamin supplement (*Id*. at ¶

8.4), and absent drug claims, the Animal Medicinal Drug Use Clarification Act (AMDUCA) and the FDA Guidance for Industry (GFI) #256 (also known as Compounding Animal Drugs from Bulk Drug Substances) are inapplicable. (*Id*. at pp. 27-28).

Third, the Arbitrator erred in concluding Rule 4111 and the charges are not arbitrary and capricious. (*Id*. at ¶ 8.22). If a court is "confident that the decisionmaker overlooked something important or seriously erred in appreciating the significance of the evidence…it may conclude that a decision was arbitrary and capricious." *Erickson v. Metropolitan Life Ins. Co.,* 39 F.Supp.2d 864, 870 (E.D. Mich.1999). The Decision arbitrarily, capriciously, and unreasonably failed to appreciate overwhelming evidence that veterinarians of reasonable intelligence disagree when, how and if Rule 4111 applies to substances making no drug claims, that the rule is vague, incomprehensible, mandates hyper-technical analysis of other rules, needs expert opinion to understand and find guilt, lacks fixed standards, definitions, and results in arbitrary enforcement. (*Id*. ¶ 8.6, pp. 24-25, 27-29). The Decision and final sanction are not based on an understandable rule or substantial evidence.

Fourth, Rule 4111, the charges and Decision violate Dr. Shell's Fifth and Fourteenth Amendment constitutional due process rights to fair notice of the prohibited behavior. (*Id*. ¶ 8.20); *FCC v. Fox TV Stas., Inc*., 567 U.S. 239, 253 (2012). A rule which "forbids…an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr.* Co., 269 U.S. 385, 391 (1926). Rule 4111 is vague, incomprehensible, requires guesswork, lacks definitions, mandates hyper-technical analysis of other rules, encourages arbitrary enforcement, and requires expert opinion to understand and to find guilt. As such, Covered persons of reasonable intelligence do not have notice of prohibited conduct, and Rule 4111 the charges, and Decision are

unconstitutional. (Decision, ¶ 8.6, pp. 24-25, 27-29).

Fourth, *National Horsemen's Benevolent and Protective Association v. State of Texas et al.* No. 23-10520 (5th Cir. July 5, 2024), shows enforcement of HISA rules by HISA and HIWU unconstitutionally violates the private nondelegation doctrine as a private entity, is in charge of enforcing HISA, and not subordinate to the FTC. The Decision should be vacated.

Finally, Dr. Shell should have been found completely faultless under Rules 3224 or 3225 as he had no notice Hemo 15 was a Banned Substance.

2. Whether Appellant Will Suffer Irreparable Harm

Appellant is and will suffer irreparable harm absent a stay, as the final civil sanction, ineligibility, and publication on HIWU's website has harmed his reputation and engendered loss of goodwill of clientele as well as business opportunities on and off the racetrack. Loss of goodwill, and damage to reputation constitutes irreparable harm. *SmartSky Networks, LLC v Gogo Bus. Aviation, LLC*, 2024 U.S. App. LEXIS 2100, at *8 (Fed. Cir. Jan. 31, 2024). There is no doubt that publication and enforcement of the Arbitrator's Decision engenders loss of goodwill, damage to reputation, and lost business on and off the track, and Appellant cannot be compensated by monetary means alone.[1]

3. Injury to Other parties or Third parties

There is no risk of injury to other parties or third parties. Given the constitutional issues raised, "no substantial harm can be shown in the enjoinment of an unconstitutional policy," *Chabad of S. Ohio & Congregation Lubavitch v City of Cincinnati,* 363 F.3d 427, 436 (6th Cir 2004). HISA might argue that a stay would undermine enforcement efforts, but that is not true as they can

[1] Dr. Shell's practice in Ohio is large, and publication and ineligibility engender irreparable harm. (Decision, ¶ 8.23, pp. 37-38).

continue to enforce the Rules, just not the Decision. Moreover, Dr. Shell is currently provisionally suspended in another case, thus HISA cannot claim harm to the public on a HISA controlled track.

4. A stay is in the public interest

"The public interest is served by ensuring that governmental bodies comply with the law . . .," *Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010). "[T]he public interest is served by preventing [a] violation of constitutional rights." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati,* 363 F3d 427, 436 (6th Cir 2004). Here, a stay benefits the public by preventing enforcement of an arbitrary, capricious and unconstitutional Decision. The stay should issue.

Dated: July 15, 2024

Respectfully Submitted,

/s/ Andrew Mollica

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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 15th day of July, 2024, via first-class mail and/or electronic mail upon the following:

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