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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. D-9431**

ADMINISTRATIVE LAW JUDGE: D. MICHAEL CHAPPELL

In the matter of

Elanor Martin and Oscar Ceballos,

Appellants

HISA Action No. 2024-00155

**PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW
AND SUPPORTING LEGAL BRIEF**

Aggrieved Appellants, Elanor Martin (“Appellant Martin”) and Oscar Ceballos (“Appellant Ceballos” (together, “Appellants”), provide this brief which contains the proposed findings of fact, proposed conclusions of law and supporting legal brief of the decision of the Horseracing Integrity and Safety Authority (“sometimes referred to as HISA and/or The Authority”) (HISA Action Number 2024-00155) affirming the ruling and civil sanction imposed by a panel of Stewards at Sunland Park on April 16, 2024.

A. *Summary of Case*

This is an appeal by Elanor Martin (“Martin”) and Oscar Ceballos (“Ceballos”) (Appellants”) of the April 26, 2024, decision by the Horseracing Integrity and Safety Authority (“HISA”) Board affirming a ruling and civil sanction imposed by the panel of New Mexico Stewards at “Sunland Park” (the “Stewards”) of April 16, 2024.

The Stewards ruled that during a February 18, 2024, race, known as the Sunland Derby, Ceballos used the crop on the thoroughbred racehorse ALOTALUCK five (5) more times than

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permitted six (6) strikes under HISA Racetrack Safety Rule 2280(b)(1), and disqualified the horse, ALOTALUCK from purse earnings of \$85,000.00, moving his official finish from second to unplaced, fining against jockey Ceballos for \$853.60 and issuing Ceballos a 3 day suspension. HISA affirmed the Stewards' ruling. Appellants timely appealed the HISA decision to the Federal Trade Commission ("FTC").

B. Summary of Applicable Rules:

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051-3060, charges HISA with developing proposed rules on a variety of subjects. *See id.* § 3053(a). At issue in this case are HISA racetrack safety rules 2280(b)-(c) and 2282, effective July 1, 2022. *See* 87 Fed. Reg. 435, 457-58 (FTC Notice of Horseracing Integrity and Safety Authority (HISA) proposed rule; request for public comment, Jan. 5, 2022); Order Approving the Racetrack Safety Rule proposed by the Horseracing Integrity and Safety Authority (March 3, 2022)(available at https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-33_for_publication.pdf) (hereafter, "HISA Rules").

HISA Rule 2280(b) ("Use of Riding Crop") provides that a rider may:

1. Use the crop on the hindquarters to activate and focus the Horse a maximum of 6 times during a race.
2. Tap the Horse on the shoulder with the crop while both hands are holding on to the reins and both hands are touching the neck of the Horse.
3. Show or wave the crop to the Horse without physically contacting the Horse.
4. Use the crop to preserve the safety of Horses and riders.

HISA Rule 2280(c) provides that a rider may not:

1. Raise the crop with the rider's wrist above the rider's helmet when using the crop;

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2. Injure the Horse with the crop or leave any physical marks, such as welts, bruises, or lacerations;
3. Use the crop on any part of the Horse's body other than the shoulders or hindquarters;
4. Use the crop during the post parade or after the finish of the race other than to avoid a dangerous situation or preserve the safety of Horses and riders;
5. Use the crop if the Horse has obtained its maximum placing;
6. Use the crop persistently even though the Horse is showing no response;
7. Use a crop on a 2-year-old Horse in races before April 1 of each year other than to avoid a dangerous situation or preserve the safety of Horses and riders; or
8. Strike another Horse or person with the crop.

HISA Rule 2282 ("Riding Crop Violations and Penalties") provides that:

- a) Violations of Rule 2280 shall be categorized as follows, ***with the exception that use of the crop for the safety of Horse and rider shall not count toward the total crop uses:***
 1. Class 3 Violation – 1 to 3 strikes over the limit.
 2. Class 2 Violation – 4 to 9 strikes over the limit.
 3. Class 1 Violation – 10 or more strikes over the limit.
- b) Unless the stewards determine the merits of an individual case warrant consideration of an aggravating or mitigating factor, the penalties for violations are as follows:
 1. Class 3 Violation –
 - i. \$250 or 10% of Jockey's portion of the purse, whichever is greater;
 - ii. Minimum 1-day suspension for the Jockey; and
 - iii. 3 points;
 2. Class 2 Violation –
 - i. \$500 or 20% of Jockey's portion of the purse, whichever is greater;
 - ii. Horse disqualified from purse earnings,

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- iii. Minimum 3-day suspension for the Jockey; and
 - iv. 5 points;
3. Class 1 Violation –
- i. \$750 fine or 30% of Jockey’s portion of the purse, whichever is greater,
 - ii. Horse disqualified from purse earnings,
 - iii. Minimum 5-day suspension for the Jockey;
 - iv. 10 points.

C. Procedural History:

The Stewards determined that a Class 2 violation took place during the February 18, 2024, race at Sunland Park based on finding an excess of 5 strikes over the permissible 6 strikes allowed under HISA Rule 2280(b). The Stewards imposed a sanction in accordance with HISA Rule 2282, consisting of a fine in the amount of \$853.60, a 3-day suspension for Ceballos, the imposition of 5 HISA points and disqualified the horse, ALOTALUCK from purse earnings of \$85,000.00, moving his official finish from second to unplaced. (See Tab 2 & 3) On April 26, 2024, The HISA Board heard an appeal of the Stewards’ decision and immediately following the hearing, issued an oral decision affirming the Stewards’ decision, which was reduced to writing on June 26, 2024. (Tab 21)

D. Standard of Review

Pursuant to 15 U.S.C. § 3058(b)(1), a HISA civil sanction is subject to *de novo* review by an Administrative Law Judge of the FTC. The ALJ “shall determine whether – (i) a person has engaged in such acts or practices, or has omitted such acts or practices, as the Authority has found the person to have engaged in or omitted; (ii) such acts, practices, or omissions are in violation of this Act [15 USCS §§ 3051 et seq.] or the anti-doping and medication control or racetrack safety rules approved by the Commission; or (iii) the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 15 U.S.C. § 3058(b)(2).

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND
SUPPORTING EVIDENCE**

Facts:

On February 18, 2024, Martin's horse, ALOTALUCK, participated in the ninth race at Sunland Park in a prestigious race known as the Sunland Derby. (Tab "18"). The Sunland Derby is a prep race for 3-year-old horses to obtain points to qualify for the Kentucky Derby. Ceballos served as the jockey for ALOTOLUCK. Ceballos has been a licensed jockey for more than 40 years and has participated in more than 7,000 races (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 1). Ceballos testified that he understood HISA's rules and was aware that interference with another horse or jockey could result in suspension from the race or being fined.

Almost as soon as the horses left the starting gate, ALOTOLUCK, began "lugging out"¹ (See Tab 18 – Photograph from El Paso Times – See also Tab 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3). Ceballos attempted to try and control the horse by using the reins. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos 3 & 4). There was no dispute among the parties, and it was a finding of fact in the HISA Committee ruling that during the stretch run, ALOTOLUCK drifted significantly from the 4 path and into the 8 path – presenting a safety issue to horse and riders. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3 & 4 – See also Tab 21, HISA Committee's findings on appeal Page 6 of 9). HISA's committee ruling made a finding of fact that the safety of ALOTALUCK occurred during the race:

"The videotape of the race clearly shows that the horse was lugging out and also moving toward the rail at different points during the race."²

¹ "Lugging out" is a term in racing used to describe when a horse is drifting out of its lane of travel.

² See Tab 21, HISA Committee's Decision on Appeal - Page 6 of 9 (emphasis added)

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Despite HISA's unequivocal finding that ALOTALUCK'S "lugging out" presented an immediate safety issue, HISA inexplicably found that Ceballos was required to use the reins for steering *before* resorting to use of the crop to help safely steer the horse. (See Tab 21). Unfortunately, this Court does not have the benefit of listening to the HISA Chairman passionately inject his *personal opinion* that a jockey should never use the crop when a horse is drifting out under any circumstances.³ The personal statement of the Chairman only exacerbated the arbitrary nature of the proceedings and misplaced beliefs of HISA's Committee.

Nevertheless, the finding by HISA's Committee that Ceballos additional strikes were not permitted because he did not attempt to first steer the horse using the reins was arbitrary and contrary to HISA's own rule. HISA Rule 2280(b) (4) specifically allows for a jockey to use the crop when the safety of the horse or rider is at issue. HISA Rule 2282 specifically states that when the rider engages in the use of the crop for the safety of the horse and rider, *those strikes shall not be counted against the permitted six strikes*. Thus, had HISA's Committee followed its own rule, which is black and white, with no ambiguity, then it should have reversed the New Mexico Steward's ruling. However, HISA's Committee committed an arbitrary abuse of its discretion when it found that a jockey must first try to steer the horse using the reins before a jockey can resort to use of the crop to steer the horse.

The inexperience of the New Mexico Stewards and HISA Committee as to split second decisions of jockey's contributed to their abuse of discretion in trying to create a new interpretation of HISA Rule 2280. HISA's Committee relied exclusively on Larry Fontenot, a State Steward

³ HISA has admitted that it inexplicably "lost" the entire transcript of this proceeding conducted via Zoom. Pursuant to a recommendation from the court, the parties put together a Joint Stipulation to Testimony at the HISA Board Hearing. However, up and through the last minute that the submission was due, Appellants had to vehemently argue for findings which were made to be included in the Joint Stipulation. The oral findings of HISA as delivered by its Chairman was not presented as a Joint Stipulation, but the crux of the Chairman's speech and personal beliefs is found in Tab 21 as part of its written findings.

PUBLIC

who has no professional jockey experience on being a professional jockey. HISA also called another New Mexico Steward, on rebuttal, Violet “Pinky” Smith, who has not held a professional jockey license in more than 35 years to state that she would have attempted to steer the horse using the reigns before engaging the crop to steer the horse. Yet, as Smith admitted on cross-examination, there is no legal requirement under HISA Rule 2280 that Ceballos was required to *first* steer the horse with the reigns *before* using the crop when safety became an issue with the horse leaving its path throughout the race. It was the job, responsibility and specifically the rule of HISA that the jockey – Ceballos – use whatever means necessary to safely guide the horse without hurting themselves or anyone else. Ceballos did exactly what HISA Rule 2280 allowed him to do when safety became an issue, and that was to use the crop on the shoulder of ALOTALUCK to correct and safely steer the horse. For HISA to rule that *each and every one* of those six (6) additional taps of the crop to the shoulder of ALOTALUCK was a violation of HISA Rule 2280 and 2282 was an abuse of discretion by HISA Committee.

When HISA’s Committee found, as it did here, that a safety issue presented itself to Ceballos and ALOTALUCK, Ceballos was warranted to use whatever means necessary – use of the crop, reigns or both – to safely complete the race and not cause further injury to the horses or riders in that race. Ceballos did exactly as the HISA rule allows. The overwhelming testimony, expert and medical, as well as general horseracing knowledge, showed that ALOTALUCK’S jockey, Ceballos engaged the use of the crop with taps to ALOTALUCK’S shoulder to help steer the horse for the safety of the horses and riders in the race. The finding by the HISA Committee to the contrary was not supported by any competent, persuasive or legal evidence and screams for reversal.

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The New Mexico stewards and HISA's Committee misapplied HISA's rule and ***injected their own opinions in making interpretations*** of the HISA rule 2280 and Rule 2282 (a) that Ceballos ***should have attempted*** to use the reins to control the horse ***before*** engaging the use of the crop to control the horse. HISA's Committee is not allowed to make interpretations of its own rules, but rather to follow them. Here, they did not. The clear and express intent of HISA Rule 2280 (b)(4) and Rule 2282 (a) allows for a jockey to use the crop as many times as necessary when it involves the safety of the riders and horses as it in the instant circumstances. When HISA determined that the safety of the horse was an issue, as it did, Ceballos' additional strikes to ALOTALUCK, according to HISA's own rule, "***shall not***" be counted against him. (See HISA Rule 2282 (a)).

While the HISA Committee might disagree with the way Ceballos engaged the crop, it was not a legal violation of HISA Rule. If HISA wants to change the rule, they can, but what they cannot legally do is make their own interpretation of a clear rule. Thus, this Court must reverse the finding of HISA's Committee for the reasons more set fully below:

Larry Fontenot:

The Authority and/or HISA relied almost exclusively upon testimony from New Mexico Steward Larry Fontenot, who has never held a professional jockey license and only galloped horses when he was younger. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot – 1). Steward Fontenot made his ruling that Ceballos violated the HISA Rule because Ceballos rode the horse differently than Fontenot believed Ceballos should have ridden the horse by attempting to use the reins to steer a horse who has presented a safety issue rather than using the crop to steer the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot – 9). Fontenot admitted in the joint stipulation that his ruling was based on his opinion that a jockey cannot

PUBLIC

exclusively use the crop to steer a horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot – 9). That admission alone shows the arbitrary nature of the incorrect ruling from the inception by the New Mexico Stewards. The rule does not provide a Steward with discretion to decide how he would have ridden the horse, but whether to determine if a safety issue has presented itself involving the horse. Because there was never any question the horse was in peril, it was the duty and responsibility of Ceballos to use the crop to steer the horse if he felt it necessary. HISA specifically allows this discretion to the rider, not the steward in its ruling. Thus, HISA Committee’s reliance on Fontenot for these facts was an abuse of discretion on their part.

Next, aside from Fontenot’s inexperience and lack of credentials as a jockey, Fontenot was not credible. Specifically, during cross-examination, Fontenot testified that during the initial Steward’s hearing, Ceballos *might have* told him *one time* that he engaged the crop for the safety of the horse. After being played the audiotape of the stewards hearing,⁴ Fontenot was forced to admit that Ceballos *repeatedly* pleaded to Fontenot that he used the crop more than the allowed six (6) times to the hindquarters for the safety of the horses and riders as ALOTALUCK was clearly drifting from his path as the horses raced down the stretch of the race.

No party disputed the fact that during the stretch run to the finish line, ALOTOLUCK had drifted out from his path – around the 4 path and was lugging out into the 8-9 path, presenting a danger for the horse, rider and other horses. **HISA agreed** in its findings of fact that the horse had clearly drifted from its path and presented a safety issue to riders and horses in the race. (Tab 21, HISA Committee’s Decision on Appeal - Page 6 of 9). When such a safety issue presents itself, a jockey is confronted with split second decision on how to safely control the horse to avoid catastrophic and dangerous conditions for all involved. Using the crop with taps to the shoulder

⁴ The audiotape of the New Mexico Stewards hearing is attached and made a copy of this record.

PUBLIC

is well-known throughout the horse racing industry as the best way to steer the horse. (Tab 23 – Findings of Fact from Ty Garrett – 5; Oscar Ceballos – 5; Scott Stevens – 4).

During the HISA Committee hearing, Steward Fontenot initially testified that Ceballos “might have” told him one time that he engaged the crop more than six (6) times for the safety of the horse. Steward Fontenot also disputed that any other testimony was presented to him that ALOTALUCK was lugging out during the race.

On cross-examination, the audiotape of the Stewards hearing was played. After hearing the audiotape of the Stewards hearing, it was confirmed that Ceballos pleaded with Steward Fontenot that he engaged the use of the crop because ALOTALUCK left his lane of travel and was “drifting out” which posed a safety issue for the horse and rider as well as the other horses and riders in the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot – 6). The audiotape also confirmed that another jockey, Alfredo Juarez presented testimony to the New Mexico Stewards that Ceballos’ horse, ALOTALUCK was “getting out” on the backside during the race as well. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot – 5). This testimony from the audiotape rendered Fontenot’s testimony unreliable at best and straight misrepresentations to the HISA Committee at worst.

When Fontenot was confronted with the audiotape of the hearing, he was forced to recant his testimony that Ceballos “might have” told Fontenot that he engaged the use of the crop for the safety of the horse and testified that he disagreed with Ceballos. Furthermore, Fontenot was then forced to admit that jockey Alfredo Juarez testified to the Stewards that ALOTALUCK was “getting out” on the backside during the race – an assertion specifically refuting Fontenot’s testimony that he was not presented with testimony that the horse was lugging out during the race. The audiotape of the Steward’s hearing also revealed that the more Ceballos insisted that he

PUBLIC

properly engaged the crop as allowed to do under HISA rules for the safety of the horse and rider, the more Steward Fontenot spoke over Ceballos and vehemently disagreed with him.

Incredibly, the Stewards audiotape revealed that the New Mexico Stewards made their *ruling before asking any questions of any other witnesses or attempting to learn of ALOTALUCK'S injury*. In ruling prematurely, the Stewards *refused* to hear any testimony from ALOTALUCK'S Trainer, Ty Garrett who was sitting outside of the Steward's Office waiting to provide information on the horse's injury and why the horse was in peril when Ceballos engaged the use of the crop to safely guide the horse. (See Tab 1, where the Stewards issued a Notice of Hearing to Elanor Martin – owner of ALOTALUCK and acknowledged that Ty Garrett would be representing Martin *at the hearing*).

Despite making an official ruling, Stewart Fontenot then testified that he asked the New Mexico State Veterinarian to check on ALOTALUCK two (2) days later to confirm that the horse suffered an injury. Why the Stewards would investigate *after* making an official ruling was met with extreme suspicion and skepticism on cross-examination. Fontenot then testified, using hearsay testimony, that the State Veterinarian did not see any swelling of ALOTALUCK'S abscessed foot.⁵ However, at the HISA Committee hearing, HISA did not call the State Veterinarian to testify what she saw, nor did they provide any evidence of her findings. Had HISA called Dr. Brandi O'Sullivan, the statement which HISA provided (attached as Tab "14") shows that Dr. O'Sullivan *admitted* that ALOTALUCK had a painful injury to his foot, when she made the following finding:

⁵ HISA claims to have placed into evidence a written statement from veterinarian Brandi O'Sullivan for the Commission to review. However, this statement was never provided to Appellants. HISA never called O'Sullivan to testify. Therefore, Appellant objects to its being sent – post judgment for this court to review.

PUBLIC

“The trainer was instructed to pick up the right hind foot for further examination which revealed a 5 cm split along the caudal lateral aspect of the heel along the cornet band. The area involved was painful to palpation”⁶

In other words, even Dr. O’Sullivan admitted that there was a painful abscess she noticed on the foot of ALOTALUCK during her exam. Thus, the written admission of Dr. O’Sullivan proved that on no less than three (3) different occasions Fontenot’s testimony to the HISA Committee proved to be false.

During cross-examination, Appellants pressed Fontenot to admit that he had a personal vendetta against Ceballos because this court had overruled Fontenot in another case known as *In Re Peacock* involving a horse named *Sheriff Brown*.⁷ While Fontenot denied same, it was clear that Fontenot had no interest in conducting any investigation into this matter and his mind was made up well prior to the submission of any testimony.

HISA did not call anyone else to support its findings and rested its case solely on the testimony of Fontenot, whose credibility was beyond repair and findings were contrary to law. Plaintiff moved for a directed verdict which the HISA Chairman denied.

Appellants then presented to the HISA Committee the testimony of Fontenot, Appellants presented testimony from Jody Roberts, ALOTALUCK’S farrier, Dr. Kara Theis, ALOTALUCK’S attending veterinarian, Ty Garrett, ALOTALUCK’S trainer, Oscar Ceballos, ALOTALUCK’S jockey and Scott Stevens, an expert in riding who, as a licensed professional jockey won over 5,000 races in his career. Each is explained and broken down in detail:

⁶ See the Written Report of Dr. Brandi O’Sullivan attached as Tab 14

⁷ The findings of *In Re Peacock*, decided by this court are almost identical to the instant case and are discussed more fully below.

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Mr. Garrett is a licensed trainer with a lifetime career training thoroughbred horses and was the trainer of record for ALOTALUCK. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 1 & 2). Mr. Garrett has more than 20 years’ experience and over 1,000 starts as a thoroughbred trainer. He holds licenses in New Mexico, Minnesota, Arizona, Colorado and Illinois. Garrett testified that ALOTALUCK lugged out at the beginning of the race and in the stretch run at the end of the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 15). Garrett testified that Ceballos struck ALOTALUCK on the shoulder to steer the horse and doing so is a safety tactic used by jockeys to control a horse and avoid collisions with other horses. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 6). HISA rule specifically has an exception that a rider may engage unlimited use of the crop when it is being done for the safety of the horse and/or rider. (HISA Rule 2280 (b)(4)). Consequently, none of the additional 5 strikes of the crop to the shoulder of ALOTALUCK should have been counted by the Stewards and HISA Committee’s decision to uphold the decision of the Stewards was wrong.

Garrett testified that an abscess which formed on ALOTALUCK’S right hind foot was the reason the horse “lugged out” during the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 8). Garrett also testified that the Stewards conducted their hearing and ruled on the matter before they even asked for his testimony or evidence that he wanted to provide to the Stewards at the hearing. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 9). Garrett provided testimony that ALOTALUCK’S right foot had abscessed and ALOTALUCK’S leg was swollen. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 10). Garret provided photos that he took of the injury to the horse which were entered

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into evidence at the HISA hearing. (Ex. 23 – Joint Testimony at the HISA Board Meeting Ty Garrett – 14).

Dr. Kara Theis:

Dr. Theis is a licensed veterinarian who was also the attending veterinarian of ALOTALUCK. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 1). Dr. Theis testified that she observed and treated ALOTALUCK for an abscess of his right foot which caused his leg to swell. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 3 & 4). Dr. Theis testified that in her professional medical opinion, the abscessed foot was more likely than not, the reason for ALOTALUCK encountering a safety issue as ALOTALUCK raced in the home stretch of the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Dr. Kara Theis – 7)

As to Jody Roberts:

Jody Roberts is a farrier who possesses decades of experience. Roberts testified that he inspected ALOTALUCK'S right rear hoof after the horse raced and noticed that there was an abscess on the foot. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 3). Roberts testified that pain or sensitivity may precede the presence of an abscess on a horse's hoof which a trainer would not be aware of the problem right away and this was the reason that the horse initially passed a fitness exam on the day of the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 4). Roberts went on to give his professional opinion that the abscess in ALOTALUCK'S foot was more likely than not the reason why the horse drifted in and out during the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Jody Roberts – 5).

PUBLIC

Oscar Ceballos:

Ceballos is a licensed professional jockey with more than 40 years of experience, understands HISA rules and has raced in more than 7,000 races in his well-established career. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 1) Ceballos testified that at the beginning of the race, ALOTALUCK started “lugging out” and he attempted to use the reigns to steer the horse to no avail. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3). In fact, Ceballos testified that ALOTALUCK “lugged out” multiple times during the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 2) Ceballos testified that he did not use the reigns to steer the horse in the stretch because the horse was not responding to the use of the reigns. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 3). For the safety of the horse and riders, Ceballos engaged the use of the crop to ALOTALUCK’S shoulder to correct and steer the horse to run a straight path because the horse did not respond to the reigns earlier in the race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Oscar Ceballos – 4 & 5)

Scott Stevens:

Appellants called Scott Stevens as an expert in their case to testify. Stevens is a licensed professional jockey who has won more than 5,000 races in his storied and illustrious career. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 1). Stevens testified that when a horse, such as ALOTALUCK is injured on an outside leg, a horse may lug out in the direction of the injured foot – which ALOTALUCK did in this race. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 2). Stevens testified that experienced jockeys such as Ceballos are aware of a horse’s soreness or sensitivity and adjust their riding style to accommodate the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 3). Stevens also opined

PUBLIC

that riders use the crop to steer the horse and that taps to the shoulder are done for steering purposes, not to make the horses go faster. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 4). Stevens was set to opine that Ceballos clearly used the crop for safety purposes to steer ALOTALUCK as the horse had drifted from his 4 path and far outside into the 8 path. This action by the horse, presented an immediate safety hazard for the horses and rider in the race. However, upon objection from HISA, the chairman sustained the objection and refused to allow Stevens to provide expert opinion testimony, claiming that Stevens testimony was providing facts, not opinions.⁸ (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6). Stevens testimony was then proffered who then testified that ALOTALUCK drifted out down the stretch and Ceballos correctly engaged the crop for the safety of the horse and riders and in doing so, Ceballos did not violate the Authority’s crop rule with those additional strikes of the whip. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 7).

HISA’s Rebuttal Witness – Violet “Pinky” Smith:

The Authority’s Chairman denied Appellant’s expert Scott Stevens to opine about whether Ceballos engaged the use of the crop for safety purposes. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6). Despite this denial on expert testimony, the Authority’s Chairman allowed HISA to call, in rebuttal, Violet “Pinky” Smith. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 6). Plaintiff objected to Smith being able to provide opinion testimony for the same reasons the Authority’s Chairman denied allowing Stevens to testify. The Chairman overruled the objection. (Ex. 23 – Joint Testimony at the HISA Board Meeting Scott Stevens – 6).

⁸ As will be explained, despite the HISA Chairman not allowing the expert opinion, he then allowed HISA to call a jockey who had not ridden or been licensed to ride a horse, “Pinky” Smith to provide rebuttal testimony to Stevens opinion which was not even allowed.

PUBLIC

Smith testified that she previously held a jockey license. However, on cross-examination, Smith admitted that she had not held a jockey license since the mid 80's. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 1). Smith then testified as to the facts and initially claimed that Ceballos never attempted to steer the horse because he never used the reins. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 2).

On cross-examination, Smith was shown the videotape of the race and contradicted her earlier testimony, agreeing that Ceballos did pull the reins to direct the horse's head to the outside to try and get around another horse running in front of ALOTALUCK. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 4). Smith testified that it was her interpretation of the HISA Rule 2280 (b)(4) that even though the Authority's crop rule allows for unlimited use of the crop if there is a safety issue with the horse and riders, that the rule is, instead designed for the riders to use the reins before using the crop to steer the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Violet Smith – 5). Nothing in HISA Rule 2280 makes any such requirement for a rider to attempt before using the crop when safety is at issue.

Critically, Smith *admitted* that Ceballos was under no obligation to steer the horse using the reins before engaging the use of the crop for the safety of the horse and rider per HISA's rules!⁹ Fontenot agreed that the Stewards followed Smith's opinion in their ruling when they ruled that the Authority's crop rule allows a rider to strike the horse for safety purposes, but not to exclusively use the crop for steering the horse. (Ex. 23 – Joint Testimony at the HISA Board Meeting Larry Fontenot - 9).

⁹ Smith made this statement on cross-examination. Shockingly, however, when the record of this matter was to be submitted to this Court for *de novo* review, HISA claimed to have "lost" all of this critical information and claimed that the Zoom meeting in which this hearing took place and these admissions were made, were lost and could not be provided to this court.

PUBLIC

Smith's testimony confirmed the fact that Ceballos did not commit any violations of HISA 2280(b)(4), as there is no limit to the number of strikes by a crop when engaged for safety. Instead, both Fontenot and Smith provided testimony of their interpretation of HISA 2280(b)(4), rather than simply follow the black and white letter of the rule – HISA 2280 (b)(4) which specifically allows Ceballos to engage unlimited use of the crop when safety was an issue as everyone agreed, including HISA was present in this situation.

APPLICATION OF LAW:

A. *The New Mexico Stewards and HISA's Committee improperly and incorrectly made interpretations and findings of its own rule*

The United States Supreme Court in *Loper Bright Enterprises v. Rainmondo*¹⁰, overturned *Chevron USA v. National Resources Defense Council*¹¹ and the federal judiciary's forty-year-old practice of deferring to agencies reasonable interpretations of ambiguous federal laws. In a 6-3 decision, Chief Justice Roberts wrote that the judiciary has the sole prerogative to “say what the law is”.¹² The Court held that the Administrative Procedure Act (“APA”) judicial review provision states that courts “shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action.” Thus, consistent with the judiciary's traditional interpretive role, the APA requires courts to exercise “independent judgment in determining the meaning of statutory provisions”.¹³

Here, both the New Mexico Stewards and HISA's Committee decision to interpret its own rules and require a jockey to engage in using the reigns to the point of futility, whenever that event

¹⁰ *Loper Bright Enterprises v. Rainmondo* No. 22-451, 603 U.S. __ (2024). The Court's decision was also issued in the Loper's sister case, *Relentless v. Dep't of Commerce*, No. 22-1219.

¹¹ *Chevron USA v. National Resources Defense Council*, 467 U.S. 837 (1984)

¹² *Loper*, slip op. at 7 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

¹³ *Loper* slip op at 16

PUBLIC

occurs, before they can engage the use of the crop to steer a horse who clearly presents a safety issue is in derogation to *Loper*.

Second, there is no such requirement in HISA Rule 2280 which mandates that a jockey must steer a horse with the reigns once a safety issue has presented itself before he can engage the crop and use additional strikes to keep the horse on a safe path of travel. Both the Stewards and HISA made its own interpretation of HISA 2280 (b)(4) and in doing so, expanded the black and white language contained in HISA 2280 (b)(4), which allows for a rider to have unlimited use of the crop, without any penalty when it is being done for the safety of the horse. Such self-serving interpretations are not, as a matter of law, allowed and in doing so, HISA erred in its decision to uphold the decision of the New Mexico Stewards.

B. Use the crop to preserve the safety of Horses and riders.

HISA’s rule specifically states that strikes used for the safety of the horse, rider or both, shall not be counted toward the maximum 6 permitted uses. (HISA Rule 2282 (a)). The evidence established ***and the HISA Committee agreed*** that “the videotape of the race ***clearly shows*** that the horse was lugging out and also moving toward the rail at different points during the race.”¹⁴

When a horse is lugging out, this court has already determined that the use of the crop can be engaged for safety purposes and those strikes do not count against the rider toward the maximum 6 permitted uses. In an almost identical situation, this court was presented with evidence of a safety issue *In the Matter of Joseph Peacock and Oscar Ceballos*, Docket No. 9415, which was decided by the Hon. D. Michael Chappell.

In *Peacock*, HISA made identical claims that Ceballos engaged use of the crop an additional 5 times to the shoulder of Sheriff Brown was lugging in. The New Mexico Stewards

¹⁴ See Tab 21 Page 6 of 9

PUBLIC

and HISA ruled that the strikes were not for safety purposes. This court *reversed* the New Mexico Stewards and HISA Committee and determined that Steward, Larry Fontenot's¹⁵ testimony that Ceballos did not engage the use of the crop for the safety of the horse, "was not particularly persuasive". This court went on to find that Fontenot does not have professional jockey experience and his opinion that a safety concern did not exist was contradicted by testimony of Ceballos, Williams, a former steward and Todd Fincher, the horse's trainer who had *significantly more experience* than Fontenot in the field.

Here, the evidence is even more compelling than it was in the *Peacock* case. In this case, Appellants presented *objective evidence, testimony and photographs* of the abscessed foot and significant leg swelling ALOTALUCK suffered during the race.¹⁶ Ty Garrett, Dr. Kara Theis, Jody Roberts, Oscar Ceballos and Scott Stevens all present significantly more experience in the field of racing than Fontenot. More compelling was HISA was presented with the professional medical opinion of veterinarian Dr. Theis, farrier Roberts and trainer Garrett, that the abscess was the cause of the immediate safety hazard presented by ALOTALUCK during the race. This testimony was not refuted in any way by HISA at the hearing.

Most compelling, was HISA's ultimate finding that "the videotape of the race *clearly shows* that the horse was lugging out and also moving toward the rail at different points during the race."¹⁷ Thus, HISA *agreed* and made a finding of fact that a safety issue presented itself during the stretch run of ALOTALUCK'S stretch run.

Rather than properly rule as HISA's rules allow for the additional strikes not to count against the permitted six (6) strikes to ALOTALUCK, the New Mexico Stewards and HISA

¹⁵ Steward Larry Fontenot was the same Steward in the Sheriff Brown case as well as the instant case.

¹⁶ See Tab 15, 16 & 17 consisting of the photos of ALOTALUCK'S foot abscess and leg swelling

¹⁷ See Tab 21, Page 6 of 9

PUBLIC

attempted a new approach in this case erroneously and improperly and in derogation to *Loper*, made their own interpretation that a jockey is required to use the reins to steer the horse before engaging the crop. This is not, however, what HISA's rule states. HISA's rule explicitly states and specifically allows ***unlimited strikes*** to the horse when a safety issue presents itself and the horse is leaving its path. Consequently, Ceballos did not violate Rule 2280 and that the HISA ruling was capricious, an abuse of discretion, prejudicial or otherwise not in accordance with law. Therefore, this court must reverse the findings of HISA and New Mexico Stewards and return ALOTALUCK to its rightful position of second place and return the purse money to its owner. Additionally, Ceballos should not be fined, suspended nor have any points assessed to him as he complied with the HISA rule.

C. HISA has been found unconstitutional:

An even larger element looms in this matter which HISA, thus far has refused to consider. On two occasions now, the Fifth Circuit Court of Appeals has ruled that HISA is an unconstitutional entity. On July 5, 2024, in the case of *NHBA v. Black*, No. 23-10520 (5th Cir. 7/5/2024), 107 F.4th Cir. 415, the Fifth Circuit held that "The statute empowers the Authority to investigate, issue subpoenas, conduct searches, levy fines and seek injunctions – all without the FTC's say-so". "That is forbidden by the Constitution. We therefore declare that HISA's enforcement provision are facially unconstitutional on that ground." While HISA claims that they will seek a Writ Application to the United States Supreme Court to try and reverse the appellate court finding, its very existence remains in peril, which if upheld by the Supreme Court would render its rules and findings as moot and dismiss all claims in favor of the Appellants.

PUBLIC

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 12th day of August, 2024 via First Class mail and electronic mail upon the following:

Hon. D. Michael Chappell
Chief Administrative Law Judge
Office of Administrative Law Judges
Federal Trade Commission
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